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## Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i, 324 P.3d 951 (Haw. 2014)

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## STATE COURTS

## HAWAII

**Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i, 324 P.3d 951 (Haw. 2014)** (holding that (i) the Planning Commission did not “approve” the applicant’s permits when it failed to grant or deny the applications by the statutory deadline, because the applicant assented to an extension through its conduct; (ii) under the public trust doctrine, applicants must affirmatively prove that a proposed private use will not affect a protected use; and (iii) the Commission’s inquiry into the applicant’s legal standing and compliance with other agencies’ processes was not “unreasonable, arbitrary, or capricious” because, under the public trust doctrine, the agency had a duty to protect the public water resource for future generations).

Kauai Springs, Inc. (“Kauai Springs”) is a small water bottling and distribution company located in Koloa, Kaua'i (“Property”). Kauai Springs’s water comes from an underground spring several miles from the Property. EAK Knudsen Trust (“Knudsen Trust”) owns the land containing the underground spring. The water reaches the property through a private gravity-fed system owned by Knudsen Trust and operated by Grove Farm Company. In 2006 the County Planning Department of the County of Kaua'i determined that Kauai Springs did not have the proper permits to operate within an agricultural district and issued a cease and desist letter. Kauai Springs then applied for three permits (“Use,” “Special,” and “Class IV Zoning”) to bring the plant into compliance and allow Kauai Springs to expand its water harvesting and bottling operations.

The Planning Commission of Kaua'i (“Planning Commission”) held four public hearings on the matter and solicited comments from the Public Utility Commission (“PUC”) and the Department of Land and Natural Resources Commission on Water Resource Management (“Water Commission”). The Water Commission was concerned that if Kauai Springs modified its water source, additional permits from the Water Commission would be required.

Based on these comments and concerns, the Planning Commission denied Kauai Springs’s applications for all three permits. The Planning Commission stated that since there may be outstanding regulatory processes, it was the applicant’s responsibility to present evidence on the need for any additional required permits. Kauai Springs appealed the Planning Commission’s decision to the Circuit Court of the Fifth Circuit (“trial court”). The trial court reversed in part, vacated in part, and required the Planning Commission to issue the three permits. The Planning Commission then appealed the trial court’s decision to the Intermediate Court of Appeals (“ICA”). On appeal, the ICA vacated the trial court’s decision and remanded the case back to the Planning Commission.

The Supreme Court of Hawai'i (“Court”) granted certiorari review to address two issues Kauai Springs raised: (i) whether the ICA erred when it concluded that Kauai Springs assented to the extension of the deadlines for the Use and Class IV Zoning permits; and (ii) whether the ICA erred in remanding the case to the Planning Commission.

The Court first considered whether Kauai Springs assented to extending the decision deadlines for the Use and Class IV Zoning permits. Hawaii Revised Statutes section 91-13.5 requires counties to set a maximum time for consideration of permits, and states that permits are “deemed approved” if the issuing agency fails to act within the specified time period. The relevant Kauai County ordinances set mandatory time limits, but stated that an application was not deemed approved if the applicant assented to the delay. Kauai Springs argued that it did not explicitly or implicitly consent to an extension of the decision deadline, and further that section 91-13.5 does not permit extensions of deadlines based on an applicant’s consent.

In construing the statute, the Court examined the relevant legislative history and found that the legislature was concerned that certain permits would require more time and consideration than the maximum time period allowed. The Court stated that it would violate public policy if permits were “deemed approved” before counties had an opportunity to thoroughly and accurately consider the permit’s merits. Therefore, the Court held that an issuing agency may take additional time to consider an application if the applicant has consented to the extension and the agency’s need for the extension is justified.

After determining that agencies may seek time extensions, the Court next examined whether Kauai Springs consented to an extension. The Court noted that Kauai Springs needed all three permits to operate its bottling facility, that it submitted one application for all three permits, and that all three permits required similar information. Since the Special permit had the latest review deadline, the Court held that Kauai Springs had implicitly assented to an extended deadline for the Use and Class IV Zoning permits. Accordingly, the Court concluded that since the Planning Commission entered its decision by the latest deadline, it had timely entered a decision on all three permits.

The Court next considered whether the ICA erred in remanding the case to the Planning Commission. The ICA stated in its opinion that the trial court failed to recognize the Planning Commission’s public trust duties, and that the Planning Commission was “required to make ‘appropriate assessments and require reasonable measures to protect the water resources,’ to employ a ‘higher level of scrutiny,’ and to place the burden on Kauai Springs to justify its proposed use of water in light of the public trust purposes.” However, the ICA also found that the Planning Commission’s denial of the permits was not based on the appropriate criteria and remanded the case back to the Planning Commission to consider the application in light of its decision.

Kauai Springs disagreed with the ICA. Kauai Springs asserted that the trial court did recognize the Planning Commission’s public trust duties; however, it was not the trial court’s duty to “define the exact extent” of the Planning Commission’s public trust duties. Rather, Kauai Springs maintained, it was the trial court’s duty to make sure that the Planning Commission had all the necessary information, used reasonable measures, and appropriate assessments. Kauai Springs argued that the Planning Commission’s denial of the permits was “unreasonable, arbitrary, and capricious” because it had all the requisite information. Kauai Springs asserted the ICA’s decision paved the way for agency abuse, because it allowed agencies to issue unreasonable denials and then argue in court that it lacked the requisite information under the “guise of the public trust.”

Alternatively, the Planning Commission argued that the ICA properly remanded the case. It agreed with the ICA that the record lacked evidence on whether Kauai Springs's existing or proposed use might affect water resources subject to the public trust. The Planning Commission maintained that its process was adequate, and that it properly adhered to its public trust duties throughout the deliberation. The Planning Commission asserted that the reason it denied Kauai Springs's permit application was because Kauai Springs failed to prove that its use of water was consistent with the public trust.

The Court began its analysis by considering what principles should guide an agency when reviewing a permit for use of a public resource. Hawaii's Constitution, Article XI section 7, requires the state to "protect, control, and regulate the use of Hawaii's water resources for the benefit of its people." Because the public trust "arises out of a constitutional mandate, the duty and authority of the state and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature."

Relying on *In re Water Use Permits* ("Waiahole I"), the Court announced three principles to guide agencies in preserving Hawaii's waters for future generations. First, the Court affirmed the authority of the state to preclude assertions of vested water rights and to reexamine prior uses; pursuant to the public trust, there are no permanently vested rights to use water. Next, the Court held that the public trust creates an affirmative duty of the State to consider and protect the public trust in the planning and allocation of water resources. Finally, the Court held that under the public trust there is a lack of "absolute priorities"; the State must consider each case independently and weigh competing public and private uses on a case-by-case basis.

The Court then reiterated the four purposes of the water resource public trust doctrine first announced in *Waiahole I*: (i) maintaining water in its natural state; (ii) protecting domestic water use; (iii) protecting Native Hawaiian and traditional and customary rights; and (iv) reservation of water by the State Water Code. The Court further explained that because private commercial use is not protected by the public trust, applications for the private commercial use of the state's water should be examined with a "higher level of scrutiny."

The Court held that this higher level of scrutiny requires state agencies to apply a presumption in favor of public use, enjoyment, and resource protection, and to place an affirmative burden on the applicant to prove that the proposed use is reasonable and beneficial in relation to other public and private uses. To do this, the applicant must demonstrate their actual needs and show that the proposed use will not harm a public use. If the court or agency determines that private use will cause harm to a protected use, the applicant must then demonstrate that the resulting harm will nevertheless be reasonable and beneficial. This requires an affirmative showing that there is no practicable alternative water source. Finally, if the court or agency determines that the harm is reasonable and beneficial, and there is no alternative water source, the applicant must implement appropriate measures to mitigate the harm.

The Court then considered whether, pursuant to these guidelines, the Planning Commission acted arbitrarily when it denied Kauai Springs's permit application. First, the Court rejected Kauai Springs's argument that "the public trust doctrine imposes a duty to assess, but does not empower an agency to deny an

application simply because it claims it lacks information within its power to obtain, thus shifting the burden to the applicant.” The Court stated that this was not only appropriate, but was the exact the reason why an agency should deny a proposed use of a public resource. Accordingly, the Court held that it was reasonable for the Planning Commission to require Kauai Springs to demonstrate its legal standing and authority to extract its water.

The Court agreed with the Planning Commission that Kauai Springs’s legal right to extract its water depended on whether the commercial supplier, Grove Farm Company, had the legal authority to sell the water to Kauai Springs. The Court found that the record was devoid of any water purchase agreement, and contained no evidence of Grove Country Farm’s right to make the public trust resource commercially available. Therefore, as part of the Planning Commission’s public trust duties to protect the water resource, the Planning Commission was authorized to reexamine Grove Farm Company’s prior use.

The Court then considered whether the Planning Commission’s demand that Kauai Springs ensure “the proposed use and sale of the water does not violate any applicable law administered by the [Water Commission], the [PUC], or any other applicable regulatory agency” was “unreasonable, arbitrary, or capricious.” The Water Commission was concerned that the water source may need to be modified to accommodate Kauai Springs’s proposed use, and those modifications would require additional permits from the Water Commission. The Court concluded that because the Water Commission raised concerns about specific requirements that may have been applicable to Kauai Springs it was reasonable for the Planning Commission to demand that Kauai Springs show it had complied with any necessary permits and applicable regulations.

Finally, the Court considered whether it should remand the case to the Planning Commission for further findings. The Court found, contrary to the trial court and ICA’s opinions, that the Planning Commission’s findings of fact and conclusions of law were correct. However, the Court emphasized the necessity of clarity and completeness. The Court stated that “clarity in the agency’s decision is all the more essential . . . where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and statute.” Therefore, the Court remanded the matter back to the Planning Commission for further findings consistent with its opinion.

Accordingly, the Court held that (i) Kauai Springs assented to the extension of the deadlines for the Use and Class IV permits through its conduct; (ii) the Planning Commission did not deny Kauai Springs’s permits for “unreasonable, arbitrary, or capricious reasons”; and (iii) the case should be remanded to the Planning Commission for further clarity. The Court affirmed the ICA’s decision to the extent it vacated the judgment by the trial court and remanded the case to the Planning Commission.

Chief Justice Recktenwald concurred with the majority’s decision to the extent that it affirmed the ICA’s decision. However, Recktenwald also dissented in part because he believed the majority’s approach to the public trust doctrine required permit applicants to prove too much by requiring applicants to prove they were in compliance with all regulatory processes, including processes applicable to third parties outside of the applicant’s control. He stated that “the public trust doctrine is a centerpiece of this state’s efforts to protect its scarce

natural resources. The doctrine imposes significant duties on those who would use water resources, and the government agencies charged with protection of those resources.” Accordingly, Recktenwald argued for a public trust doctrine that starts with an analysis of the statutory or regulatory duties placed on the agency, then examines the additional duties imposed by the public trust doctrine, and finally requires the agency to reasonably assess the applicant’s compliance with processes required by other agencies.

*Kylie Wyse*

## IDAHO

**A&B Irrigation Dist. v. Idaho (*In re* SRBA, Case No. 39576, Subcase 00-91017), 336 P.3d 792 (Idaho 2014)** (holding that (i) the Snake River Basin Association (“SRBA”) court abused its discretion in defining an issue as basin-wide where it did not promote judicial economy, and (ii) the SRBA court did not abuse its discretion by ruling that the director of the Idaho Department of Water Resources may determine when storage water rights are considered “filled”).

This case evolved out of several individual SRBA cases that dealt with whether storage water rights holders may refill reservoirs, under priority, to account for water released for flood control when junior appropriators have not filled their rights for the first time. The State of Idaho and the Bureau of Reclamation argued that a remark was necessary to authorize storage water right holders to refill after releases of floodwater excess. Storage right decrees already existed without a remark for several irrigation districts across the Snake River Basin, and these districts worried that a remark requirement could negatively affect their storage water rights. Because the issue was so pervasive, the SRBA court combined dockets to adjudicate the issues in a basin-wide proceeding. The SRBA court designated Basin-Wide Issue 17 as whether “Idaho law require[s] a remark authorizing storage water rights to ‘refill’ under priority, space vacated for flood control.”

The SRBA court found that Basin-Wide Issue 17 was a question of law and accordingly stated that it would not consider any specific factual scenarios in ruling on the issue, noting that circumstances would differ from reservoir to reservoir. The SRBA court reasoned that it cannot consider specific facts in a basin-wide issue. The SRBA court ultimately found that a remark was unnecessary because a storage water right cannot be refilled until junior appropriators have satisfied their allotments. The SRBA court did not address when a storage water right is considered filled because such a determination would require the development of a factual record.

The Supreme Court of Idaho (the “Court”) addressed two predominant issues on appeal. The Court first considered if the SRBA court correctly designated whether “Idaho law require[s] a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control” as a basin-wide issue. Next, the Court considered whether the SRBA court abused its discretion by declining to define when a storage water right has been filled, leaving that determination to the discretion of the Idaho Department of Water Resources (“IDWR”).