

1-1-2011

In re Water Use Permit Applications, No. 28108, 2010 WL 4113179 (Haw. Oct. 13, 2010)

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Kelly Miller, Court Report, In re Water Use Permit Applications, No. 28108, 2010 WL 4113179 (Haw. Oct. 13, 2010), 14 U. Denv. Water L. Rev. 454 (2011).

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year period when it filed to perfect a portion of its conditional rights to wells 14-17. Cherokee was approximately two years and two months tardy in filing to perfect well 14 after diversion, approximately ten months tardy in filing to perfect wells 15 and 16, and at least two days tardy in filing to perfect well 17. Therefore, the court held that the water court correctly determined that Cherokee abandoned only the portion of its conditional rights to wells 14-17 for which it untimely filed to perfect under the stipulated decree.

Accordingly, the court affirmed the water court's order of abandonment of only the conditional rights to wells 14-17, but reversed the water court's award of attorney's fees because it determined Cherokee's argument that a contract remedy should apply to be rational.

Caroline Powers

HAWAII

In re Water Use Permit Applications, No. 28108, 2010 WL 4113179 (Haw. Oct. 13, 2010) (holding that Hawaii's Commission on Water Resource Management: (1) could prioritize between trust resources and allocate non-potable water over potable water for irrigation; (2) had sufficient findings for Interim Instream Flow Standards; but (3) had erred by failing to consider new evidence regarding a particular application for water use permit).

This is the third appeal of a case hearing before the Hawaii Commission on Water Resource Management ("Water Commission") regarding waters distributed by the Waiahole Ditch System ("Ditch") in Oahu, Hawaii. The Hawaii Supreme Court remanded the first two Waiahole cases for further findings by the Water Commission. This appeal involves the Water Commission's third decision, entitled Findings of Fact, Conclusions of Law, and Decision and Order ("D&O III"). There are three issues on this appeal: (1) the water use permit to the Estate of James Campbell ("Campbell Estate"); (2) the water use permit to Pu'u Makakilo, Inc. ("PMI"); and (3) the Interim Instream Flow Standards ("IFFS").

The Waiahole Ditch collects fresh surface water and dike impounded ground water from windward Oahu and delivers it to leeward Oahu. In 1992, existing users of Ditch water were required to apply for water use permits. In 1993 Oahu Sugar Company ended its operations, making available a large amount of ditch water. Soon after, the Water Commission admitted twenty-five parties and commenced a combined contested case hearing for all applications and petitions.

In D&O III, the Water Commission considered evidence of five groundwater sources from the Waipahu-Waiawa Aquifer ("Aquifer") for construction of a new well to irrigate Campbell Estate's lands as an

alternative to Ditch water. The Commission concluded that the Aquifer was not a practicable alternative to the Ditch water because it was potable and its highest and best use was as drinking water. Conversely, the Ditch water was non-potable, with its best use as agricultural irrigation. With respect to PMI's permit application, the Hakipu'u 'Ohana and Ka Lahui Hawaii ("Windward Parties") filed a motion to deny the application due to new evidence that PMI's golf course was no longer in operation, and therefore did not need as much water as they originally requested in their permit application. The Water Commission refused to consider the merits of the motion and denied it as being outside the scope of the court's remand. To determine the IIFS, the Water Commission found that the United States Geological Surveys ("USGS") supported its finding that the base flows of windward streams had remained stable since the 1960's and then amended the IIFS to higher levels.

Hawaii's Thousand Friends ("HTF") joined the Windward Parties to appeal D&O III. The parties argued that the Water Commission erred in: (1) issuing a water use permit to the Campbell Estate when an alternative ground water source was available; (2) refusing to consider the merits of Windward Parties' motion to deny the water use permit application of PMI; and (3) setting IIFS for the windward streams not supported by sufficient data and failing to include water that remained unpermitted in the IIFS.

The court first considered Campbell Estate's permit and the alternative Aquifer water source. The court concluded that it was not arbitrary, capricious, or an abuse of discretion for the Water Commission to prioritize between trust resources and allocate non-potable Ditch water for agricultural needs instead of potable Aquifer water needed for the public's future drinking needs. The court further stated that the Water Commission made a policy choice consistent with the analytical framework established by the Supreme Court. Additionally, the policies and guidelines set forth by the Water Commission did not constitute rulemaking even though they may affect future cases involving Ditch water. The Water Commission's designation of Aquifer water as fit for domestic use was not a reservation of that water as defined by the State Water Code.

The court next considered the Water Commission's failure to consider new evidence that Windward Parties submitted at the hearing on PMI's behalf. The court held the Water Commission was not precluded from considering the new evidence in the Windward Parties' motion and erred in refusing to consider the motion. On remand, the court's mandate for further findings and conclusions on the practicability of alternative water sources was only one component of the State Water Code's reasonable beneficial use standard and the Water Commission was free to decide issues not covered in the mandate.

Regarding the IIFS, the court concluded that the Water Commission had set forth sufficient findings to quantify the windward

streams' flow in the 1960's and support its conclusion that the current IIFS flow was more than in the 1960's. Additionally, the Water Commission did not err in relying on USGS data or establishing the amended IIFS for the windward streams. The Water Commission also did not err in failing to include the unpermitted water in the amended IIFS because the Water Commission could support its conclusion that the current IIFS flow was greater than in the 1960's.

Accordingly, the court vacated PMI's water use permit and remanded the case for further proceedings consistent with the opinion.

Kelly Miller

IDAHO

SRBA v. City of Oakley, 237 P.3d 1 (Idaho 2010) (holding that the Appellants had not established a right to the City's water through prior appropriation and could not acquire a right by prescription).

Bruce and Jared Bedke ("Appellants") paid the City of Oakley ("City") to use water from its pipes. However, Appellants claimed that they owned two distinct rights to the water. Appellants claimed that the first right had a priority date of 1955 and the second right had a priority date of 1964. Appellants used the water continuously from those appropriation dates until 1991. At that time, the City cut and capped the pipe and proposed a new agreement for the use of the water with Appellants. Appellants did not sign the agreement. Appellants then ceased payment and use of one of the alleged rights but continued use and payment of the other. In 2004, the Idaho Department of Water Resources recommended disallowing both of Appellants' rights. Appellants objected, arguing that they had met all the requirements for establishing water rights. The City responded to the objection, arguing that the basis for Appellants' alleged rights was their act of taking water from the city pipe, which was a claim to rights that actually belonged to the City.

A Special Master heard the dispute and rejected Appellants' argument. The Special Master recommended disallowing Appellants' rights and an award of attorney's fees to the City. Appellants appealed the Special Master's recommendation. On appeal, the District Court for the Fifth Judicial District of Idaho ("district court") rejected the challenge to the Special Master's recommendation as untimely and adopted the Special Master's recommendation of attorney's fees. The district court later rejected Appellants' motion to reconsider. Appellants then appealed to the Idaho Supreme Court ("court").

Appellants raised several issues on appeal. First, Appellants argued that the district court erred when it rejected the challenge to the Special Master's recommendation of disallowing the water rights as