THE AUGUST, 2000 HAWAII SUPREME COURT WAIAHOLE DITCH DECISION: COMMENTS AND EXCERPTS REGARDING THE PUBLIC TRUST DOCTRINE

(In re Water Use Permit Applications, 94 Hawaii 97; 9 P.3d 409 (2000))

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Unless otherwise noted, quoted and indented highlighted statements below are taken from the decision. Page references are from 94 Hawaii. Citations are omitted.

I. INTRODUCTION

A. Background

The Waiahole Ditch diverts water from the windward watersheds of the Koolau mountain range on the Island of Oahu, Hawaii for use on Oahu's central plain. On average, about 27 million gallons per day (mgd) are moved through the ditch. As a result, several windward stream flows have been substantially diminished to the detriment of native stream life, and the Kaneohe Bay ecosystem and ocean fisheries which also rely on fresh water flowing into the ocean.

The original ditch system was built by Oahu Sugar Company between 1913-1916 to irrigate sugar cane. By the 1990's, that company shut down, no longer needing the ditch water or the additional water it pumped from the Pearl Harbor aquifer.

Through August, 2000, at the time of the Hawaii Supreme Court's decision, various leeward parties seeking to use Waiahole Ditch water still owned the permits to pump more water than was in the Ditch, but elected not to use that water.

As contemplated by the Hawaii Water Code, in 1992 the Water Commission began a process which required anyone who sought to use Waiahole Ditch water to apply for a permit. Many private and public parties asked for permits to consume, in total, far more water than was in the ditch. Several windward community groups (the "Windward Parties") petitioned for more water to stay in the windward streams.

In December, 1997, after more than 50 days of hearings in 1995 and 1996, the Commission decided to divide the 27 mgd as follows:

> 14.03 mgd to leeward agricultural and non-agricultural uses and "system losses;"
>
> 6.97 mgd as an "agricultural reserve" and "non-permitted ground water buffer" for later use; and
>
> 6 mgd to be released for the windward streams.

Several parties appealed to the Hawaii Supreme Court, and in August, 2000 that Court issued its decision signed by four justices, with one justice dissenting.

Of the more than twenty parties, the Windward Parties and Hawaii's Thousand Friends argued before the Supreme Court that the Water Commission had taken too much water away from the streams. Hawaii's Thousand Friends focused on the grounds that the public trust doctrine was misapplied and misunderstood by the Water Commission.

B. The Court's Decision

The Supreme Court criticized the Water Commission in several ways, and reversed the Commission's decision to establish the buffer, reversed the Commission's decision to award permits to the leeward parties for agricultural uses, and revised its decision to permit 2.1 mgd for "system losses." The Court strongly endorsed the public trust doctrine, and suggested that far more than 6 mgd should be returned to the streams involved.

While complimenting the Commission for its hard work, in the lengthy opinion the Court addressed the Commission's decision, at times using strong language:

> **We are troubled . . . by the Commission's permissive view towards stream diversions . . . .** p. 160
>
> **We have rejected the idea of public streams serving as convenient reservoirs for offstream private use.** p. 155
>
> [t]**he Commission's present disposition largely defeats the purpose of the instream use protection scheme set forth in** [the Hawaii Water Code]. **Every concession to immediate offstream demands made by the Commission increases the risk of unwarranted impairment of instream values, ad hoc planning, and arbitrary distribution.** p. 154
>
> * * *
>
> **Under no circumstances . . . do the constitution or** [Water] **Code allow the Commission to grant permit applications with minimal scrutiny. Here, the Commission declared that "there is adequate water to meet the immediate water use needs," and made liberal allowances for offstream uses based on a mere "prima facie" standard, reasoning that "careful management may defer the need to consider a higher level of scrutiny in analyzing the** [permit applications] **until the time when there is inadequate water for competing demands." In truth, the uncertainty regarding actual instream flow requirements prevented any determination as to the adequacy of the present water supply and did not justify any less rigorous analysis of the permit applications than would be required in any event.** p. 160

Noting the Commission's own conclusion that by the year 2020, ground water resources on Oahu will be exhausted, the Court pointedly reminded the Commission that

> **The constitutional framers and the legislature designed the Commission as an instrument for judicious planning and regulation, rather than crisis management.** p. 189

And with respect to claims of improper influence during Commission hearings by the Governor and the Attorney General (for example, by "summarily dismissing the Commission's attorney" during the hearings, and making public statements critical of the Commission's work while the Commission was deliberating when a majority of the Commission served at the pleasure of the Governor), the Court stated "the conduct of the [Governor and Attorney General] in this case did nothing to improve public confidence in government and the administration of justice in this state." p. 127

II. THE PUBLIC TRUST DOCTRINE

The Court embraced the public trust doctrine, setting forth the doctrine's history and development in Hawaii and its relationship to the Hawaii Water Code. The result is what the Court announced for the first time as "The State Water Resources Trust." The Court described the scope of that trust, its substance, its purposes, the powers and duties of the State as the trustee of all water in the State, and the fundamental principles which will guide the Water Commission and other government agencies in the future regarding water planning and preservation and management.

> [t]**he essential feature of the public trust** [is] **the right of the people to have the waters protected for their use.** [The Water Code] **recognizes the policy of comprehensive resource planning intrinsic to the public trust concept. In line with the dual nature of the state water resources trust,** [the Water Code] **mandates liberal interpretation in favor of maximum beneficial use, but also demands adequate provision for traditional and customary Hawaiian rights, wildlife, maintenance of ecological balance and scenic beauty, and the preservation and enhancement of the waters for various uses in the public interest.** p. 146

The following excerpts from the Decision are illustrative:

A. History and Development

In McBryde Sugar Co. v. Robinson (1973), the Court explained:

> [t]**he right to water was specifically and definitely reserved for the people of Hawaii for their common good** .... [a]**nd the ownership of water in natural watercourses and rivers** [remains] **in the people of Hawaii for their common good.** (emphasis the Court's) p. 129

In Robinson v. Ariyoshi (1982), the Court expanded on McBryde holding that

[a] **public trust was imposed upon all the waters of the kingdom.** (emphasis the Court's) p. 129

In 1978, Hawaii added several provisions to its constitution specifically relating to water resources.

Article XI, section 1

CONSERVATION AND DEVELOPMENT OF RESOURCES

Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect . . . all natural resources including . . . water, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . .

All public natural resources are held in trust by the State for the benefit of the people. (emphasis the Court's)

Article XI, section 7 further provides:

WATER RESOURCES

Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people. (emphasis the Court's) pp. 129, 130

B. Relationship to the State Water Code

The Court made it clear that even though aspects of the public trust doctrine have been included in the Water Code, the Public trust doctrine is independent from the Code and transcends it.

The public trust in the water resources of this state, like the navigable waters trust, has its genesis in the common law. p. 130

The . . . suggestion that [the Water Code] **could extinguish the public trust . . . contradicts the doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate.** [In several cases] **this court has held that the doctrine would invalidate such measures, sanctioned by statute but violative of the public trust . . . .** pp. 130, 131

> **Regarding water resources in particular, history and precedent have established the public trust as an inherent attribute of sovereign authority that the government "ought not, and ergo, . . . cannot surrender."** p. 131
>
> **Most importantly, the people of this state have elevated the public trust doctrine to the level of a constitutional mandate.** p. 131
>
> **The plain reading of** [the above-quoted provisions of the State Constitution] **manifests the framers' intent to incorporate the notion of the public trust into our constitution.** p. 131
>
> **We therefore hold that** [the constitution] **adopt**[s] **the public trust doctrine as a fundamental principle of constitutional law in Hawaii.** pp. 131, 132
>
> **Other state courts, without the benefit of such constitutional provisions, have decided that the public trust doctrine exists independently of any statutory protections supplied by the legislature.** [For example, California, Idaho, Arizona and Washington.] p. 132

C. **The State Water Resources Trust**

As a result, the Court described what it has determined to be "The State Water Resources Trust."

1. **Scope of the Trust**

> [t]**he public trust doctrine applies to all water resources without exception or distinction** [including surface and underground water]. p. 133
>
> **Modern science and technology have discredited the surface-ground dichotomy.** p. 135

The Court rejected arguments that "privately owned" waters were excluded from the public trust:

> [w]**e have maintained that, apart from any private rights that may exist in water, "there is, as there always has been, a superior public interest in this natural bounty."** p. 133, fn. 31

The Court also noted that the scope of the public trust doctrine has expanded in the past and suggested that it will expand in the future:

The public trust by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances. p. 135

2. Substance of the Trust

The public trust is a dual concept of sovereign right and responsibility. Previous decisions have thoroughly reviewed the sovereign authority of the state under the trust. The arguments in the present appeal focus on the state's trust duties. p. 135

a. Purposes of the Trust

In other states, the "purposes" or "uses" of the public trust have evolved with changing public values and needs. The trust traditionally preserved public rights of navigation, commerce, and fishing. Courts have further identified a wide range of recreational uses, including bathing, swimming, boating, and scenic viewing, as protected trust purposes. p. 136

As a logical extension from the increasing number of public trust uses of waters in their natural state, courts have recognized the distinct public interest in resource protection. As explained by the California Supreme Court:

> the preservation of . . . lands in their natural state [is an important public use]. (emphasis the Court's) p. 136

This court has likewise acknowledged resource protection, with its numerous derivative public uses, benefits, and values, as an important underlying purpose of the reserved water resources trust. We thus hold that the maintenance of waters in their natural state constitutes a distinct "use" under the water resources trust. This disposes of any portrayal of retention of waters in their natural state as "waste." pp. 136, 137

Although its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction. p. 138

We thus [reject the view urged by some that] **the "'public interest' is the sum of competing private interests" and the "rhetorical distinction between 'public trust' and 'private gain' is a false dichotomy." To the contrary, if the public trust is to retain any meaning and effect, it must**

recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time. p. 138

b. Powers and Duties of the State under the Trust

This court has described the public trust relating to water resources as the authority and duty "to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses." (emphasis the Court's) p. 138

The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use. p. 139

As commonly understood, the trust protects public waters and submerged lands against irrevocable transfer to private parties, or "substantial impairment," whether for private or public purposes. In this jurisdiction, . . . the state has a comparable duty to ensure the continued availability and existence of its water resources for present and future generations. p. 139

[t]he water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state. Post-Mahele water rights decisions ignored this duty, treating public water resources as a commodity reducible to absolute private ownership . . . . [t]his court subsequently reasserted the dormant public interest in the equitable and maximum beneficial allocation of water resources. p. 139

This state [then] **adopted such principles in its constitution.** p. 139

In short, the object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes "use." p. 140

If one must distinguish the [California Mono Lake case from this Waiahole Ditch decision, the Mono Lake case] **appears to provide less, rather than more, protection** [of stream waters] **than arguably justified in this case.** p. 140

[w]e seek to define the trust's essential parameters in light of this state's legal and practical requirements and its historical and present

circumstances. To this end, we hold that the state water resources trust embodies the following fundamental principles:

[i] **Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state. The continuing authority of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes.** ("[T]he public trust doctrine takes precedent even over vested water rights.") **This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust.**

[ii] **The state also bears an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (Read narrowly, the term "feasible" could mean "capable of achievement," apart from any balancing of benefits and costs.** [We do] **not use "feasible" in this strict sense . . .)** p. 141 and fn. 39

Therefore, apart from the question of historical practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values. "[c]onservation," . . . does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state. In the words of another court, "[t]he result . . . is a controlled development of resources rather than no development." (emphasis the Court's) p. 141

We have indicated a preference for accommodating both instream and offstream uses where feasible. p. 142

[w]**e hold that the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law.** p. 142

Having recognized the necessity of a balancing process, we do not suggest that the state's public trust duties amount to nothing more than a restatement of its prerogatives, nor do we ascribe to the constitutional framers the intent to enact laws devoid of any real substance and effect. Rather, we observe that the constitutional requirements of "protection" and "conservation," the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the "zero-sum" game between competing water uses demand that any

balancing between public and private purposes begin with a presumption in favor of public use, access and enjoyment. Thus, insofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or "default" condition, we affirm the Commission's conclusion that it effectively prescribes a "higher level of scrutiny" for private commercial uses such as those proposed in this case. In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust. p. 142

The Commission . . . must still ensure that all trust purposes are protected to the extent feasible. p. 142, fn. 43

Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources. p. 143

[i]n sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state. p. 143

3. <u>Standard of Review under the Trust</u>

[t]he special public interests in trust resources demand that this court observe certain qualifications of its standard of review. As in other cases, agency decisions affecting public trust resources carry a presumption of validity. p. 143

The public trust, however, is a state constitutional doctrine. As with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawaii rests with the courts of this state. p. 143

Quoting from an Arizona case, the Court observed that

> **Judicial review of public trust dispensations complements the concept of a public trust. <u>"The duties imposed upon the state are the duties of a trustee</u> and not simply the duties of a good business manager. <u>Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust.</u> The beneficiaries of the**

public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res." (emphasis added) p. 143

III. THE "BURDEN OF PROOF" WHEN DECIDING WHO GETS WATER

An important part of the decision is the Court's direction to the Water Commission and other government agencies concerning the burden of proof when water permits are sought.

Because the State (and its agencies) is the trustee of water resources under the public trust, it is the State's duty to do all investigations and analyses necessary to determine whether water can be used as requested by permit applicants. ("The Commission . . . must . . . ensure that all trust purposes are protected . . . .")

As a practical matter, the burden of producing the necessary data and information, and the burden of persuading the decision maker that water use should be permitted, is on the applicant seeking a permit to use water.

This is critical because in difficult or close cases, including cases where there is simply insufficient knowledge or uncertainty about the harm that may be caused by granting the permit, failing to meet this burden should result in denial of the permit.

In effect, this should minimize the burden on those who oppose permit applications.

The Supreme Court defined this burden in various ways:

A. Permit Applicants Have the Burden of Proof

Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. [t]he public trust effectively creates this burden through its inherent presumption in favor of public use, access, and enjoyment. p. 160

[T]he burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking [a permit]. p. 143

HRS § 174C-49(a) (1993) enumerates the conditions for water use permits under the Code. Two of the conditions require the applicant, and the Commission in turn, to address the effect of the requested allocation on public instream values: "reasonable-beneficial use," and "consistent with the public interest." The two conditions overlap; the Code defines "reasonable-beneficial use" as "use of water in such

quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest." (emphasis the Court's) **p. 160**

[p]ermit applicants requesting water diverted from streams must duly take into account the public interest in instream flows. p. 161

[This will include] **consideration of possible harm to society through harm to the water body, and a balancing of any harm caused by the use against methods currently available to reduce or eliminate that harm.** (emphasis the Court's) p. 161

In the instant case, the prior unavailability of proper instream flow standards made the permit applicants' task of justifying their proposed uses more difficult. p. 161

At a very minimum, applicants must prove their own actual water needs. Furthermore, besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of "reasonable-beneficial" use,... permit applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs. p. 162

It is axiomatic that the Commission must also consider alternative sources in permitting existing or new uses in the first instance, as a part of its analysis of the "reasonable-beneficial" and "consistent with the public interest" conditions for a permit. p. 161, fn. 65

B. Private Commercial Applicants Have a Higher Burden

[i]nsofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or "default" condition, we affirm the Commission's conclusion that it effectively prescribes a "higher level of scrutiny" for private commercial uses such as those proposed in this case. In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust. (emphasis added) p. 142

C. The Precautionary Principle

The Commission adopted the science-based notion known as the precautionary principle, and the Supreme Court affirmed the applicability of this principle in water resource decision-making. As the Commission noted in its decision:

> **Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt "precautionary principles" in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation .... In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.** p. 154

As the Supreme Court noted,

> **The "precautionary principle" appears in diverse forms throughout the field of environmental law .... As with any general principle, its meaning must vary according to the situation and can only develop over time. In this case, we believe the Commission describes the principle in its quintessential form: at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest.** pp. 154, 155

The Court also quoted with favor a federal court's discussion of this principle:

> **Regulators such as the** [Commission] **must be accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist.**
>
> **Questions involving the environment are particularly prone to uncertainty .... Yet the statutes--and common sense--demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.**
>
> **Undoubtedly, certainty is the scientific ideal--to the extent that even science can be certain of its truth .... Awaiting certainty [, however,] will often allow for only reactive, not preventative, regulation. Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventative, albeit uncertain, decisions legitimately be so labeled?** (emphasis the Hawaii Court's) p. 154, fn. 59

IV. PRACTICAL MATTERS: WHAT MUST BE INVESTIGATED, ANALYZED AND PROVED IN CONNECTION WITH WATER USE APPLICATIONS?

The decision makes it clear that as the trustee of the State Water Resource Trust the State has affirmative duties to protect the water. The lengthy decision gives some insights as to what those specific duties are. When deciding on applications for water use applications, as a practical matter, the State (the Water Commission or other agency acting on behalf of the State) will expect the applicant to do much of the trustee's work in discharging its duties to the trust. Therefore, the following partial checklist of matters that the decision mandates the Water Commission to perform also should be part of any applicant's checklist in presenting a water use application.

The following duties have been culled from the decision:

A. Duties of the State as Trustee of the State Water Resource Trust

1. Generally:

   a. Take the initiative to plan appropriate instream flows ("take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion"; the Commission must "investigate, consider and protect the public interest in the flow" of streams);

   b. Catalog existing uses but do not automatically "grandfather" them ("We agree with the Commission that existing uses are not automatically "grandfathered" under the constitution and the Code, especially in relation to public trust uses.");

   c. Ensure that all trust purposes are protected to the extent feasible (and "feasible" is meant broadly);

   d. "Preserve the rights of present and future generations in the waters of the State", and "take the public trust into account in the planning and allocation of water resources," using the presumptions and default conditions noted in the Decision.

2. When establishing instream flow standards:

   a. Consider the extent to which there are proper studies and adequate information on specific streams to be able to determine the impact on stream quality, plants, wildlife and other public trust values if diversions are permitted;

   b. Determine if there are sufficient studies and information for the Water Commission to fulfill "the instream use protection framework" required;

c. Consider expert opinion regarding minimum flows necessary to sustain an adequate stream habitat;

d. Revisit prior diversions periodically ("even those made [previously] with due consideration of their effect on the public trust" to "protect public trust uses whenever feasible"). For example, when diversions are already occurring, consider evidence that additional flows to the stream would increase the native biota habitat.

3. When ruling on water use applications:

a. Determine the applicant's need for the water sought;

b. Determine all alternative sources of water available to an applicant. "It is axiomatic that the [Water] Commission must also consider alternative sources in permitting existing or new uses in the first instance," (as part of its analysis in granting or denying a permit);

c. Employ a "higher level of scrutiny" for applications for the private commercial use of water;

d. In balancing public and private purposes, "begin with a presumption in favor of public use, access, and enjoyment" (This is "the norm or 'default' condition");

e. Determine any possible harm to the water body and all alternatives available to reduce or eliminate that harm;

f. "Consider the cumulative impact of existing and proposed diversions . . ., and implement reasonable measures to mitigate this impact, including the use of alternative sources";

g. Permit no "buffers" by any label because any such "use" establishes a working presumption <u>against</u> public instream uses;

h. Grant no vested rights to use water to the detriment of public trust purposes;

i. Weigh competing public and private water uses on a case-by-case basis, according to the applicable standards provided by law, and the mandates noted in this decision.

4. As to all matters:

When deciding these matters, "address" these issues in writing, provide "analysis" in writing, and provide a "reasoned discussion" of its decision in writing.

B. The Water Use Applicant's Duties

In addition to assisting the State by addressing the above listed matters, and providing the other information required by the Water Code, the decision makes it clear that an applicant for a water use permit must "justify their proposed uses" by at a minimum providing the following information:

1. Actual water needs, including proposed uses and quantities;

2. "The absence of practicable mitigating measures, including the use of alternative water sources";

3. "The propriety of draining water from public streams to satisfy" the applicant's needs in light of the public's interest in stream flows "within the constraints of available knowledge";

4. Fundamentally, a justification for the requested uses "in light of the purposes protected by the [public] trust";

5. Address the precautionary principle and whether there is sufficient certainty generally among scientists that the requested water use will not cause harm to the resource.

V. THE RELATIONSHIP BETWEEN THE WATER COMMISSION AND THE COUNTIES

The following excerpts from the decision are instructive regarding the respective responsibilities of the Water Commission and the Counties, and the relationship between them:

Fundamentally, "The [Water] Code's comprehensive planning provisions ... require the Commission to complete its 'water resource, protection and quality plan' before the adoption of the 'water use and development plans' by each county .... p. 148

[o]**ne portion of the Commission's decision states:**

> **As competition for water resources increases, the analysis of both the public interest and of reasonableness must become both more rigorous and affirmative. *The counties will be required to articulate their land use priorities with greater specificity.* For example, even at the present time, there is more land zoned for various uses than available water to supply those proposed uses. Thus, it is not sufficient to merely conclude that a particular parcel of land is properly zoned and that the use is**

> **"beneficial." That minimal conclusion may be inadequate to resolve situations in which competitive demand exceeds supply.** (emphasis the Court's) p. 187

Another portion of the decision states:

> **The Commission concludes that all of the proposed water use permit applicants have or propose uses that are "consistent with county land use plans and policies" except [KSBE] as noted above. While these applications are all "consistent" with such land use plans and policies, *the lack of priority among the county plans and policies only provides a minimal standard by which to judge applications.*** (emphasis the Court's) p. 188

The City and County of Honolulu forcefully objected to these statements, claiming that the Water Commission was unlawfully interfering with the City and County's land use planning authority. The Supreme Court rejected those arguments as follows.

> **The Water Code expressly reserves the counties' authority with respect to land use planning and policy.** p. 188

> **"Nothing in this chapter to the contrary shall restrict the planning or zoning power of any county under [HRS] chapter 46." See also HRS § 46-4(a) (1993) (stating that the counties' powers "shall be liberally construed in favor of the county exercising them").** p. 188

> [However] **we reject the** [City and County of Honolulu's] **suggestion that the Commission will illegally "restrict" the City's land use planning authority unless it accedes to any and all of the City's water demands. Such an expansive view of the counties' powers runs headlong into the express constitutional and statutory designation of the Commission as the final authority over matters of water use planning and regulation. See Haw. Const. art. I, § 7; HRS § 174C-7(a).** p. 188

> [The City and County of Honolulu alleges] **that the Commission imposed a "directive" to prioritize uses on the counties . . . . [T]he Commission has consistently acknowledged . . . that it has neither the authority nor the inclination to force any such action by the City and that its discussion of priorities "is, in fact, a request for [the City's] help." As the Commission observed in its decision, the existing water supply is already insufficient to accommodate the land uses planned and zoned by the City.** p. 188

[t]he City itself must, as a matter of sound planning policy, actively develop integrated water use plans addressing the contingencies arising from the limitations in supply, see, e.g., HRS § 174C-31(d). Such a process, if properly undertaken, will necessarily entail prioritizing among competing uses. p. 188.

The Commission's decision includes an excellent description of this planning process:

> The Commission believes that an integrated water resource plan must be developed in order to prepare for Oahu's water future. This plan must address how we will meet water demand given our dwindling supply and must prioritize competing demands. The plan would construct various planning scenarios to help decision-makers incorporate uncertainties, environmental externalities, and community needs into decision-making. The scenarios would assess ranges of population projections and commensurate water demands. An integrated water resource plan encompasses the concept of least-cost planning and considers all types of resources equally: new supply, conservation, reclaimed water, alternative rate structures, as well as other demand management methods. The planning process would assess and balance competing needs such as urban, agricultural, appurtenant rights, traditional and customary gathering rights, Hawaiian Home Lands rights, and stream protection, and set priorities for allocation decisions.

D&O at 2. p. 188, fn. 105.

The Code contemplates coordination, rather than conflict, between the Commission and the counties. HRS § 174C-49(a)(6), for example, requires that water use permits issued by the Commission be "consistent with county land use plans and policies," ensuring consistency between water and land uses. Both the water use planning and instream use protection provisions mandate cooperation between the Commission and the counties. See HRS § 174C-31(d) ("the commission in coordination with the counties . . . shall formulate an integrated coordinated program for the protection, conservation, and management of the waters in each county"); HRS § 174C-71 ("In carrying out this part, the commission shall cooperate with . . . the county governments and any of their agencies."). The objectives of the Commission and the counties will not always converge. To the extent that their respective functions and duties permit, however, the Commission and counties

should be seeking common ground. In this regard, we agree with the Commission that its prioritizing requirement is not a threat to the City's authority, but, rather, is a call for cooperation and mutual accommodation in keeping with the spirit of the Code. p. 189.

The Commission should . . . take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion. p. 149