SB 2013
RELATING TO THE WATER CODE

Senate Committee on
Planning, Land and Water Use Management

Public Hearing - January 22, 1996
1:00 P.M., Room 225 State Capitol

By
John T. Harrison, Environmental Center
Malia Akutagawa, School of Law
Williamson B.C. Chang, School of Law
David Penn, Geography
Suzanne L. Tiapula, School of Law

SB 2013 would amend Chapter 174C, HRS, to increase membership on the Commission for Water Resources Management to nine members, while repealing the automatic membership of the chairperson of the Board of Land and Natural Resources and of the Director of Health. The measure also would include additional provisions for consideration of current and future water needs on formulating or revising county water use and development plans, would provide for discretionary review of water-use permits, would add reasonable conservation practice constraints to uses pursuant to traditional and customary rights of native Hawaiian ahupua‘a tenants, and would require the Commission to adopt rules specifying procedures for validation of legitimate appurtenant rights.

Our statement on this measure is compiled from voluntarily submitted opinions of the listed academic sources, and as such, does not constitute an institutional position of the University of Hawaii.
1. **Augmentation of the membership of the CWRM is advisable.**

The proposed increase is consistent with recommendations included in the final report of the Review Commission on the State Water Code, and we concur with their recommendations.

2. **Proposed provisions for needs assessment should be revised.**

Language proposed as §174C-31(g) (starting on page 10, line 19) fails to include adequate consideration of instream flow requirements for aquatic ecosystems and does not adequately address consideration of Native Hawaiian water use concerns. We prefer the following language suggested by the Review Commission on the State Water Code, §174C-G, on page 42 of their report to the Legislature:

§174C-G  **Planning data. (a) To address the need for an appropriate data base for planning and for decisionmaking in the permit process, the commission shall:**

1. **Inventory the State's existing water resources, along with the best estimate of the reliability of the data in each instance;**
2. **Itemize and study the means and methods of conserving and augmenting water resources in the State;**
3. **Inventory existing water uses, including domestic, municipal, industrial, agricultural and aquacultural uses, and hydropower development, reuse, reclamation, and recharge;**
4. **Quantify the existing and contemplated needs and uses of water of varying quality, such as water for irrigation, power development, geothermal power, and municipal uses, in light of state and county land use plans and policies and the effects on the environment, including procreation of fish and wildlife;**
5. **Identify wild and scenic river systems to be accorded special protection as part of a public trust to preserve rivers or streams, or portions thereof, having high natural quality or unusual scenic value, including those within the system of natural area reserves. The commission shall report its findings under this paragraph to the legislature twenty days before the convening of each regular legislative session;**
6. **Review existing and contemplated programs for conservation and watershed protection;**
7. **Study drainage, reclamation, flood hazards, floodplain zoning, dam safety, selection of reservoir sites, and other matters affecting water quantity or quality or affecting conservation of water; and**
(8) Quantify water for the four types of reserved uses of stream water and the four types of reserved uses of groundwater in the hierarchies in Part B.

(b) To conduct these inventories and analyses, the commission, where appropriate, shall work with the counties and the departments of health, land and natural resources, Hawaiian home lands, and agriculture, under the memoranda of understanding in section 174C-5(1).

(c) The commission shall provide a copy of these studies to the counties and agencies involved in preparing the Hawaii water plan and shall keep a copy of each study available for public inspection.

3. Proposed permit review should be adopted.

Revisions of §174C-56 proposed in Section 4. of this measure are consistent with recommendations of the Review Commission on the State water Code, and we concur with those recommendations.

4. Imposition of “reasonable conservation practices” on traditional and customary practices by persons of Native Hawaiian ancestry is unnecessary and inappropriate.

On this issue, we disagree with the recommendations of the Review Commission. Appurtenant right uses of water assume practices in common usage at the time of the Mahele. Given that sanctions were applied against excessive stream water use at that time, invocation of the proposed conservation limitation on present appurtenant right usage is redundant and unnecessary.

5. Provisional invalidation of appurtenant rights claims must include qualifying language to protect against involuntary extinguishment of legitimate claims.

Although we do not strictly disagree with the Review Commission on this point, we are mindful of self-conceded recognition by both the judicial and legislative branches of government that they are ill-suited to allocate water. We strongly advise that procedures established by the Water Commission for validation of appurtenant rights claims clearly distinguish that water use rights cannot be vested, and that established procedures will not prejudice appurtenant rights water users who, for whatever reason, fail to seek validation through the Water Commission.

We suggest that the best approach to resolving dilemmas posed by the need to verify new appurtenant rights claims lies in conscientious completion of the meticulous inventory requirement referenced above in item 2 [n.b. proposed §174C-G(a)(8)].