Testimony before the
House Water, Land Use Development,
and Hawaiian Affairs Committee
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Relating to the State Water Code

by

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(Note: this testimony does not represent an institutional position of the University of Hawaii. It is based on my work as team leader of a project on Water Rights in Hawaii organized during the summer of 1978 by the Hawaii Institute for Management and Analysis in Government, an agency of the Department of Budget and Finance. Our report was published in January 1979 in the publication Land and Water Resources Management in Hawaii, page 141-331.)

Because this Committee has several drafts before it and must address some central policy issues at this time, this testimony does not examine any of the drafts in detail but is instead offered to help the Committee by commenting on some of the major issues on this topic.

Water is a public resource and must be managed for the public good. This is the law as articulated by the Hawaii Supreme Court in McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 505 P.2d 1330 (1973) and Robinson v. Ariyoshi, 65 Hawaii 641, 658 P.2d 287 (1982) and by the Hawaii Constitution, Article XI, Section 7. See the attached summary of the law entitled "The Water Code and Litigation Over Water Rights."

It is appropriate, therefore, to regulate water use by requiring water users to obtain a permit from a government agency. Regulation of water use by permit is becoming increasingly common in other states, because such regulations allow rational decision-making about how this scarce and valuable resource should be allocated.

Permits Should Not Be of Unlimited Duration

Whatever bill is ultimately enacted by this legislature should set definite time limits for the water permits. Section __-38 of H.B. 35 (page 31) does not, for instance, set any length limit for the duration of these permits, nor does Section __-26 of H.B. 1093 (page 33). Section __-57 of H.B. 1495 (page 35) does impose a maximum 50-year limit on new permits, but apparently imposes no duration limit on the "certification of uses" granted to existing uses in Section __-49 (page 28).

Other states do set such limits by statute. Florida, for instance, issues permits for only 20 years, except that government bodies or public works corporations can receive permits of up to 50 years. New Jersey issues permits limited to 25 years. The situation in these two states is discussed in our report on Water Rights in Hawaii at pages 221-222 of the booklet entitled Land and Water Resource Management in Hawaii (1979).

The advantage of limiting permits to a fixed term of relatively short duration is that it allows future generations to reconsider how this resource should be used in light of their needs and priorities and in light of the future availability of water.

My recommendation would be to grant existing water users permits to use the water they need for a period of 30 years. After that period, they can reapply for additional permits. If water supplies are adequate, they would be granted the renewal. If not, their requests would be evaluated along with the other demands for water. Every effort would of course be made to distribute the water to maximize the economic prosperity of the whole community.

Private entrepreneurs do, of course, need incentives to make the investments to develop water sources, but a 30-year permit (with the assumption that the permit will be renewed if the use remains a reasonable-beneficial one and if water supplies for competing uses remain adequate) is sufficient in economic terms to induce such investments.

Many states have changed from one system of water rights to another, and most such changes have been accomplished without the state having to pay massive compensation to prior water users (see pages 230-237 of Water Rights in Hawaii). As long as persons with interests in water use are given some economically equivalent access to water, no compensation is necessary. Even if compensation is required, it is measured by the difference in the value of the land on which the water has been used rather than by some attempt to establish a market value for the water.

In summary, I do not think the granting of permits or certificates of unlimited duration based on prior use is necessary or desirable. Water is a public commodity that must be regulated by the public for the public good. We should not today bind future generations who may face very different challenges requiring different distributions of water. Our more complete conclusions appear on pages 260-267 of Water Rights in Hawaii.

There is no constitutional need to "grandfather" in all existing uses, as for instance Section __-22 of H.B. 1093 apparently does, and as Section __-48 of H.B. 1495 explicitly does. Existing users would, of course, ordinarily be allowed to continue using the water they have had access to, but in times of shortage or sharply competing uses, the designated public agency should be free to evaluate all requests for water use to ensure the public benefit is furthered.

Permits Should Not Be Transferable

It follows from the idea that water is a public good that it should not be bought and sold like a private commodity. A private developer could of course sell the equipment and installations it has built to develop a water source, but the permit to the water should not be transferable like a market product to someone who wants to use the water for a different purpose. Sections __-50 and __-62 of H.B. 1495 are probably appropriate, allowing transfers of permits and use certificates only if no changes in the use occur.

The Water Resources Agency Should Be Independent

The plain reading of Article XI, Section 7, is that a separate and independent water resources agency should be created. The California approach provides us with an appropriate model. Water should not be controlled by an agency also involved in water development. Water decisions should be made by independent water experts.

Native Hawaiian Rights Must Be Preserved

This point appears to be self-evident, but must never be forgotten. Appurtenant rights must also be "assured," in the language of Article XI, Section 7, and cannot be lost because of a failure to register them.

The Water Code and Litigation Over Water Rights

It is frequently argued that the Hawaii State Legislature should wait before enacting a Water Code until the litigation over private rights in water is concluded. In fact, however, there is no need for the Legislature to wait, and its action now would reduce conflicts and litigation in the future. A brief summary of Hawaii's protracted water rights litigation can help explain why legislative action is appropriate and necessary now.

The principal case of McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 505 P.2d 1330 (1973), involved a battle between two private landowners on Kauai over how the surface water crossing their lands should be divided between them. When the case reached the Hawaii Supreme Court, the Court said that neither private owner had title to the surplus water, because water is part of the public trust and is not susceptible to private ownership in the usual fashion. The Court recognized that landowners had rights to use water as appropriate for their agricultural needs, but questioned whether they could buy and sell it like an ordinary market commodity or transport it freely from one part of the island to another. In rendering its decision, the Court drew upon native Hawaiian practices and laws as well as more recent statutes and decisions. Its decision reached a conclusion that is a reasonable attempt to determine the governing law on a subject that was previously contested and confusing. The Court also recognized, however, that still greater clarity would be useful and urged the Legislature to act:

> It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii, and we are bound to follow it. We invite the legislature to conduct a thorough re-examination of the area. (McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 189 n. 15, 505 P.2d 1330, 1340 n. 15 (1973) (emphasis added).)

After the Hawaii Supreme Court reaffirmed its original judgment and the U.S. Supreme Court denied review (417 U.S. 862), the U.S. District Court for the District of Hawaii (Judge Pence) issued an injunction stating that the State of Hawaii could not enforce the McBryde decision because it constituted a change in the law of Hawaii and deprived the private landowners of vested property rights. Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977)

After the State of Hawaii appealed this decision to the U.S. Court of Appeals for the Ninth Circuit, that court asked the Hawaii Supreme Court to clarify its 1973 decision by posing six specific questions to the Court. The Hawaii Supreme Court answered these questions in detail emphasizing that its 1973 language was designed only to recognize the State's obligation to manage water as part of its public trust obligations and that the State did not own the water in the sense of being able to do with it as it pleases. The Court also said that its 1973 decision had not stated that no water could ever be diverted from one watershed to another, but rather had identified issues that should be addressed in determining whether such diversions are appropriate. Robinson v. Ariyoshi, 65 Hawaii 641, 658 P.2d 287 (1982).

Despite these clarifications, the U.S. Court of Appeals for the Ninth Circuit affirmed Judge Pence's decision that the landowners had vested property rights in the surplus water and that the Hawaii Supreme Court's decision could not be enforced to divest those vested rights. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985).

In the late spring of 1986, the U.S. Supreme Court vacated this Ninth Circuit decision and directed Judge Pence to reconsider his decision in light of Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985). That decision had stated that federal courts should not become involved in property disputes until all possible legal avenues have been pursued through state agencies and courts and until it is crystal clear exactly what the property owner has lost. The U.S. Supreme Court thus indicated that the District Judge and the Ninth Circuit had acted prematurely in addressing the water rights litigation because it is not yet clear whether the private landowners have lost any property interests as a result of the McBryde decision and because it would be very difficult to place a value on that loss now even if one has occurred. Ariyoshi v. Robinson, 106 S. Ct. 3269 (1986).

In fact, of course, the private landowners have the same access to water they had in 1973 and the state has taken no steps to interfere with any private uses of water. The private landowners have nonetheless gone back to the U.S. District Court, arguing once again before Judge Pence that they have suffered a deprivation of property and that he should somehow reaffirm his original decision.

This sequence of events should make clear the need for legislative action now. The 1978 Constitutional Convention and the voters of Hawaii required the Legislature to establish a water resources agency:

WATER RESOURCES

ARTICLE XI, 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.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

Twenty years of litigation on only one case demonstrate the enormous time and costs required to resolve water disputes by judicial review of the traditional common law concepts. Litigation is not the most effective approach to this problem, and legislation is clearly needed. The court can only declare the existing law in disputes brought before it; it may not create new management plans nor establish administrative dispute mechanisms. A Water Code would (1) create a comprehensive rational plan to manage water before problems arise; and (2) establish an administrative framework to resolve disputes clearly and quickly. Because the Water Code is likely to ensure that all existing water users are able to continue to use the water they need, the Code could end the interminable litigation over water, as well as laying down a stable framework for future decisions regarding developments.

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