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SB 2238

RELATING TO THE STATE WATER CODE

**Senate Committee on Economic Development
Senate Committee on Water, Land and Hawaiian Affairs**

**Joint Public Hearing - February 10, 1998
1:00P.M., Room 229, State Capitol**

By

John T. Harrison, Environmental Center
M. Casey Jarman, Richardson School of Law
David Penn, Geography

SB 2238 would amend the State Water Code (HRS 174C) to provide for development of a state agricultural water use and development plan, to elevate protection of existing agricultural water uses to a priority status, and to limit the discretion of the Commission on Water Resources Management (CWRM) in the setting of instream flow standards.

Our statement on this measure is compiled from voluntarily submitted opinions of the listed academic reviewers and does not constitute an institutional position of the University of Hawaii.

Although a clear need exists for creation of a State agricultural water use and development plan, other provisions of this measure are unwarranted and likely unconstitutional, as noted below:

Page 2, lines 5-8: Interim instream flow standards adopted by the CWRM in 1988 established levels that were current at the time. To date, only one instream flow standard decision has departed from those levels, and that decision is currently under appeal to the Supreme Court. It would seem unwise, in the matter of allocation of a resource as crucial and as diverse in its potential uses as water, to be bound to such an inflexible constraint as provided by this proposed policy. At the very least, to declare such an objective to be "in the public interest" is presumptuous. We suggest that a very large contingent of "the public" may believe otherwise.

Page 4, lines 16-18: This amendment institutes a fundamental revision of the scope and purpose of Section 174C-31(g). The original intent of this section to protect instream uses and to maintain groundwater yields is subverted by the inserted language to a blatant subsidy of consumptive uses. This amounts to a violation of Constitutional provisions for the protection

and enhancement of the State's natural resources, as well as a violation of the State's Public Trust responsibilities under Article XI, Section 9.

Page 8, line 15: It would seem unwise to exclude access to consultation with the U.S. Fish and Wildlife Service, particularly in the light of federal management responsibilities in stream waters pursuant to the federal Endangered Species Act and to the federal Wild and Scenic Rivers Act.

Page 9, lines 4-9; page 11, lines 2-7: A fundamental question raised by this inserted language is, who determines value? This section implies a pecuniary interest assignable to instream qualities that are by nature not readily quantifiable in such terms. Resolution of the issue of balance between economic, consumptive uses and ecologic sustainability is not formulaic, nor is it amenable to analysis following principles of monetary accounting. Ultimately, any process of valuation requires a consensus as to procedure, and the lack of such a consensus is evident.