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SB 138
RELATING TO WATER USE CONTROL
and
SB 952
RELATING TO REGULATING WATER USE

Statement for Senate Committee on Economic Development
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SB 138 proposes to amend HRS 177, the Ground Water Use act, so that the regulatory authority it now provides would be extended to surface waters. The title of the act would be amended accordingly to "Water Use Control". SB 952 proposes to replace HRS 177 by a new act, also applying to surface water as well as ground water, entitled "Water Use Control Act". Because the two bills would have much the same general effect, they are reviewed together in this statement. The statement does not reflect an institutional position of the University of Hawaii.

Both bills are long and complicated, and the time available for review since we first obtained copies of them has been insufficient for us to develop more than a very few general comments.

Timing

The findings in SB 952 indicate that it is intended to comply with a constitutional amendment adopted at the recommendation of the last constitutional convention. Bills with the same or a similar intent have been considered in several previous sessions of the legislature. Because a commission has now been appointed to investigate a general water code, such as is also required by the recent constitutional amendments, we suggest, that it may be best to postpone the kind of sweeping change in the statutory authority for water regulation that is proposed in either bill until recommendations have been received from the commission.

Regulation of water development vs water use

A problem with HRS 177 is that it confuses uses of water and water developments.

It is, of course, the protection of water resources so as to assure the future availability of water supplies for beneficial uses that is the intent of regulation. However, the regulation needed is not actually regulation of water use so much as regulation of the development of water from the water resources. The act proposed in SB 952 is superior to HRS 177 in that it refers to concepts such as "available waters supply" and the "sustainable yield" of water resources, terms not used in HRS 177. Like HRS, however, both SB 138 and SB 952 confuse water use and water development, and the title of the acts they propose are as misleading as the title of HRS 177.

Regulatory agency

Under HRS 177 it is the Board of Land and Natural Resources that has the power to regulate water development. However, the Board governs the Department of Land and Natural Resources which is, in part, a water development agency and as such cannot be expected to be entirely impartial in regulating activities that are conducted by itself and by other parties if those activities are competing, as is the case of water developments competing for limited resources. Under the provisions proposed in SB 138, the Board of Land and Natural Resources would retain much of its water regulatory authority, but the Chairman of the Board and head of the Department of Land and Natural Resources would be authorized to issue permits for water developments other than those in critical areas. The act proposed SB 952 would establish the position of a "Water Master" who would make recommendations as to water development permits, but the Master would be a member of the staff of the Chairman of the Board and head of the Department of Land and Natural Resources. Because the water developments of the Department should be subject to regulation equally with the water developments of other parties, the provision as to the regulatory authority in SB 952 seems superior to those in SB 138. However, it would be better if the Water Master had more regulatory authority of his own, and if he were less subject to Departmental policy, than would be provided under SB 952.

"Designated areas"

HRS 177 provides for the establishment of "designated ground-water areas", which are intended to be areas in which special controls of development are needed to ensure against overdraft of and depletion or damage to the water resources. The terminology is poor for two reasons:

- 1) In a particular area there may be, at different levels, more than one ground-water body in only one of which there is likely to be significant risk of overdraft and need for special control of development.
- 2) Most ground-water bodies have been given designations in the sense of names or numbers, and the term designation alone does not suggest that it is designation for special control of development that is intended.

SB 138 would amend the term to read "designated water control area", which at least indicates that it is control of some sort that is the intent. However, it is not the control of water but of water development that is intended, and the problem with the use of the term area is compounded because in an area there may be several surface water resources such as streams as well as several ground-water bodies.

The problem with the terminology would be avoided completely by SB 952 which does not use the concept of "designation".

Differential stringency of control

SB 138 appears superficially to provide for four levels of stringency of control of water use, or rather water development:

- 1) a general level
- 2) a level with designation
- 3) a level in the case of actual water shortage
- 4) an emergency level

The difference in the case of the distinction between "non-designation" and "designation" is simply that it is the Chairman of the Board of Land and Natural Resources who may issue permits for developments in a "non-designated area" whereas it is the Board itself that must issue the permits for developments in a "designated area". It appears that a water shortage can be declared only in a "designated area". In the case of shortage, the bill provides that permits for new developments may be refused. Such a provision is not made explicitly in the case of emergency situations although surely in a emergency all "shortage" provisions should apply.

SB 138 provides for three levels of stringency of control:

- 1) the general level
- 2) the level in the case of actual shortage
- 3) the emergency level

This bill provides appropriately that all controls applicable under shortage conditions apply also in emergencies.

Existing developments and developments not requiring specific permits

Both SB 138 and SB 952 provide for the continuance of use of existing developments except as the supplies they provide may have to be curtailed under shortage or emergency conditions. The continuance is recognized in SB 138 as "preserved uses" and in SB 952 as "certified continued uses". The terminology in both bills is satisfactory except as it appears to relate to the continued uses of water in contrast to the continued uses of water developments.

SB 138 would exempt domestic uses, which would be redefined as "individual household uses" from permit requirements. SB 952 allows for the issuance of general permits without application, which could have essentially the same result.

Transferability of authorizations of water developments

SB 952 provides that certificates of continuing water developments and permits for developments may be transferred providing the method and rate of diversion or draft and the nature of the use of the water use are not changed.

SB 138 makes essentially the same provision in the case of certified "preserved uses". However, this bill contain no specific provision regarding the transferrability of permits except in the case of a permit for development in "designated areas," and in that case it requires that DLNR give it specific permission for the transfer.

Considering that, in general, the market serves as a mechanism for assuring that available water supplies are used for beneficial purposes, we consider that both certified continuing developments and permits should be transferrable as provided in SB 952 except in the case of a water shortage requiring curtailment of draft or diversion, and that in that case the curtailment should affect the authorized draft or diversion regardless of whether the certified continuing development or permit was transferred.

Further later commentary

Our review of SB 138 has proceeded nearly to the point where we might make detailed

comments on problems in HRS 177 that would be reduced or eliminated by the amendments proposed, problems that would not be reduced, and new problems that would be introduced by the amendments. However, our review of SB 952 has not proceeded to the same point. If either of the bills is still being considered for passage, we will provide such detailed comments as seem appropriate when we complete our reviews.