

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
WATER, LAND & HAWAIIAN AFFAIRS**

**Friday, January 31, 2020
10:30AM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 2357
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND
AND NATURAL RESOURCES**

House Bill 2357 proposes to clarify the conditions and manner in which the Board of Land and Natural Resources (Board) may dispose water by license. **The Department of Land and Natural Resources (Department) strongly supports this Administration measure.**

The purpose of this measure is to implement the water disposition process via Section 171-58, Hawaii Revised Statutes (HRS), in a more feasible and practicable manner. This bill serves to clearly define dispositions for the use of water by the Board as licenses for water rather than conveyance of any property right or interest in water via a lease. The intent is to avoid the potential commodification of an important public trust resource. Additionally, the term "license" is consistent with language contained in the Hawaii State Constitution. The measure also requires consultation with the Commission on Water Resource Management (CWRM) on any proposed license to ensure that the disposition is consistent with water resource management requirements.

This bill would allow for the Board to issue a water license through direct negotiation, provided that reasonable efforts are made to determine whether there is no competition for the water license. The public auction requirement for the disposition of water currently in section 171-58, HRS, has resulted in burdensome constraints to the disposition process, especially in instances where there is a high likelihood that there would only be a single bidder. Additionally, the public auction requirement has created uncertainty for smaller agricultural water users.

Further, section 171-58, HRS, requires that water for disposition be appraised at fair market value in order to determine the upset rent for the public auction. However, water purveyors generally charge for the delivery of water, not water itself, which is a public resource. Therefore, appraisers have no methodology to value water. This bill would establish factors to be

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

considered in the valuation of water use, providing appraisers guidance and clarity. The intent is to provide a framework to determine a fair rent for projects that provide a public benefit. This would assist in furthering the State's sustainability goals such as local food production or renewable energy.

As watershed management plans may have various priorities, the current statute is unclear as to the focus of watershed management plans developed for disposition of water. This bill would provide clarity regarding the development and implementation of a watershed management plan that is required of the licensee. The bill also proposes to focus on preserving the availability of water resources from forested watersheds. This is an appropriate goal as it would serve to offset the impact of the water diverted under the license on the resource.

Thank you for the opportunity to comment on this measure.



HB2357
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND AND
NATURAL RESOURCES

House Committee on Water, Land, & Hawaiian Affairs

January 31, 2020

10:30 a.m.

Room 325

The Beneficiary Advocacy and Empowerment Committee of the Office of Hawaiian Affairs (OHA) will recommend that the Board of Trustees offer the following **COMMENTS** on HB2357, which seeks to amend the way in which licenses for the use of public trust water resources are appraised and issued.

OHA appreciates that the statutorily-required appraisal of water licenses may be difficult or even impractical in certain circumstances, such as where land ownership or geographical restrictions may limit the number of entities willing and able to pay for the use of public trust water and associated infrastructure. Similarly, OHA can appreciate that there may be circumstances where favorable rental rates for certain licenses might be appropriate, such as where prospective licensees would not generate significant revenues from their licensed use of water, but would nonetheless further critical state interests such as the perpetuation of traditional kalo cultivation. OHA also appreciates concerns regarding the inability of certain prospective licensees of water – particularly those whose uses may be more consistent with or beneficial to the public interest – to outbid better-financed entities in a public auction for a water license, as currently required under statute. **Accordingly, OHA appreciates the intent of this measure, to provide the Board of Land and Natural Resources (BLNR) with greater flexibility and discretion in the appraisal and issuance of water licenses that can more appropriately reflect and protect the public trust in our limited water resources.**

OHA does, however, note the potential for such discretion to dismiss or undermine the well-established principles that should otherwise guide the disposition and allocation of our public trust water resources. **OHA notes in particular the long history of water disposition decisions that have perpetuated, for generations, significant and unwarranted harm to Native Hawaiian farmers, cultural practitioners, stream and coastal resources, and other public trust purposes and reasonable beneficial uses of water otherwise protected under our constitution and laws.** OHA therefore expresses significant concern that the breadth of discretion granted under this measure could potentially allow for the intentional or inadvertent perpetuation of harms that have undermined the public trust in our water resources for far too long.

Accordingly, should the Committee choose to move this measure forward, OHA strongly recommends and urges the following amendments, to better ensure transparency, accountability, and the proper consideration of the public trust, in the licensing of our precious and increasingly limited water resources:

First, OHA believes that water licenses should be limited to no more than 15 years, to account for possible variations in climate change and water availability models over time, and to minimize any sense of entitlement or ownership on the part of licensees over public trust water resources. Accordingly, OHA respectfully urges the Committee to amend the language on page 1, line 17 and page 2, line 1 to read as follows:

"provided in this chapter for a term of no more than fifteen years, or by permit for temporary use on a month-to-month basis"

Additionally and alternatively, the Committee may also wish to include periodic reviews during a license term, in which case OHA would recommend amending the language on page 1, line 17 and page 2, line 1 to read as follows:

"provided in this chapter for a term of no more than fifteen years, subject to the authority of the board to revisit the amounts of water disposed of or other terms and conditions as may be required due to changing conditions, and provided that a review of the amounts disposed of and other terms and conditions of any license shall take place no less than once every five years, or by permit for temporary use on a month-to-month basis"

Second, OHA notes that a request for interest in a water license, as described in this measure, should include a preliminary evaluation as to the maximum amount of water that may be appropriately made available to prospective qualified licensees; such information will ensure that such an evaluation actually takes place, enable licensees to more properly gauge their interest in bidding for a water license, and, most importantly, provide a level of public insight and accountability with regards to how much public trust water could be disposed of via a proposed or contemplated license. Accordingly, OHA recommends ensuring that any public notice and request for interest preceding the issuance of a water license specify the maximum amount of water that may be licensed, by amending the language on page 3, line 1, to read as follows:

"(C) The proposed use and maximum amount of water to be"

Third, OHA notes that many of the considerations that the BLNR "may" incorporate in its determination of a license's "fair market value" would, in fact, be critical to upholding its fiduciary obligations and basic responsibilities as a trustee of the public trust. For example, just as a trustee of a "traditional" trust must understand how the trust corpus is administered – including how and how much of the corpus is to be invested, whether such investments are consistent with the trust's purposes, the prospective returns on such investments, and where those returns would flow to – a trustee that is licensing our public trust water resources must know how much water may actually be available in the "corpus," how much of that water would be diverted or licensed, how licensed water would be used, the value realized and costs avoided by the licensee, how much water would remain for competing public trust purposes and reasonable beneficial uses protected by the trust, and whether and how public trust

purposes would be served or compromised by the license. Such knowledge would not only be indispensable to properly determining the “fair market value” for a license, but would also, if explicitly considered, add a level of public transparency and accountability in the BLNR’s administration and licensing of our public trust water resources. However, as this measure is currently drafted, the BLNR may choose to not include these and other critical considerations in its valuation and issuance of a water license. Accordingly, OHA urges requiring, rather than permitting, the BLNR to take such considerations into account, by amending the language on page 3, line 20, to read as follows:

“rental for water, the following factors shall be”

Fourth, OHA notes that clear standards, as well as a framework of analysis, have been well-established in supreme court decisions that have repeatedly reaffirmed the responsibility of all state and county agencies to uphold the public trust in water. Unfortunately, agencies and boards, including the BLNR, continue to apply inconsistent public trust standards, if at all, in their decisionmaking over our water resources. Accordingly, explicit statutory provisions would appear necessary to ensure a minimum and consistent level of consideration and application of the public trust, in the issuance of licenses that may impact water resources for over a decade at a time. Notably, such standards should include a finding of no harm to public trust purposes, or, if harm is found, that the use of water under a license is reasonable and beneficial, and justified in light of such harms.

On a similar note, OHA strongly believes that the long history of inconsistent application of public trust principles particular to both surface and ground water resources counsel the inclusion of more specific statutory guidance in the licensing of such resources, to ensure that the public interests in these public trust resources are adequately upheld.

OHA therefore strongly recommends the inclusion of the following paragraphs before line 4, line 19, to read as follows (with subsequent paragraph numbers appropriately updated):

“(4) Any disposition by license for water shall be consistent with the public trust, and shall be made only after written findings by the board based on sufficient evidence of the same, to include but not be limited to a finding that the license will result in no harm to public trust purposes, or, if there is harm, that the licensed use is reasonable beneficial and justified in light of the harm to public trust purposes and competing reasonable beneficial uses;

(5) Any disposition by license for surface water shall specify the amount of water that may be diverted from any surface water source, shall ensure that no more than half of the natural and undiverted flow of any stream may be diverted at any time, and shall not result in significant adverse impacts to the ecological, cultural, recreational, and aesthetic values of any diverted stream;

(6) Any disposition by license for ground water shall not result in significant adverse impacts to trails, historic sites, cultural sites, Native Hawaiian traditional and customary practices, or natural resources;"

Finally, OHA notes that there may be some ambiguity as to what it may mean for water management plans required for new licenses to "prioritize" the availability of water resources from forested watersheds. Accordingly, to better ensure that watershed management plans associated with new licenses affirmatively contribute to our islands' water availability and security, OHA requests a minor amendment to ensure that such plans actually increase, rather than only prioritize, the availability of water, by amending the language on page 7, line 7, to read as follows:

"increases the availability of water resources from forested"

OHA recognizes and appreciates the intent of this measure, to facilitate the issuance of water licenses that can better reflect and uphold the public trust in our water resources. However, while the added licensing discretion proposed by this measure may provide the BLNR with the flexibility to achieve such a goal, OHA strongly believes that additional provisions and amendments, as described above, are necessary to ensure that such discretion is used appropriately, and in furtherance of the public trust.

Mahalo nui loa for the opportunity to testify on this matter.



Testimony Before the House Committee on Water, Land and Hawaiian Affairs

By David Bissell
President and Chief Executive Officer
Kauai Island Utility Cooperative
4463 Pahee Street, Suite 1, Lihue, Hawaii, 96766-2000

Friday, January 31, 2020; 10:30 am
Conference Room # 325

House Bill No. 2357 – Relating to Disposition of Water Licenses by the Board of Land and Natural Resources

To the Honorable Ryan L. Yamane, Chair; Chris Todd, Vice-Chair, and Members of the Committee:

Kauai Island Utility Cooperative (KIUC) is a not-for-profit utility providing electrical service to more than 33,000 commercial and residential members. Over the past 10 years, KIUC has made great strides in achieving the state mandate of 100% renewable generation by the year 2045. In 2019, KIUC's energy mix included roughly 55% renewable generation.

Hydro power generation represents 11% of KIUC's current energy portfolio: a full 20% of our renewable production in 2019. KIUC is pursuing a water lease/license for the continued operation of its Upper and Lower Waiahi hydropower plants. We are also in the early stages of developing a pumped storage hydro project in west Kauai (a.k.a. West Kauai Energy Project), which will require a water lease/license. When completed, the west side hydro project is expected to bring KIUC to nearly 80% renewable generation

This bill offers clarification to the process of obtaining a water lease/license. However, some amendments to Hawaii Revised Statutes §171-58, as proposed in this measure, could have significant negative impacts on the Waiahi hydro plants and the West Kauai Energy Project.

KIUC identifies the following issues for your consideration:

- Section (c) limits licenses to a term of no more than 30 years, and would significantly impact the West Kauai Energy Project. This important pumped storage hydro project will require tremendous up-front capital investment. Without the ability to extend the project cost over a longer period of time (e.g. 50 years versus 30 years), rate impacts for our members would render the project financially unfeasible. We encourage you to eliminate the license term limit,

and instead allow the Board of Land and Natural Resources to set license terms that are appropriate for the intended use.

- Section (c) (5) is problematic in the following ways:
 - Section (c) (5) is drafted to state a third method by which a license may be granted, namely, in addition to a license by direct negotiation or by public auction, a license may be granted with the prior approval of the governor and the prior authorization of the legislature. If this is the intent of the Committee, then we recommend that this intent be clearly stated in the first sentence of Section (c). We further recommend that an additional Section (c) (6) be added to state: “A license at public auction or by direct negotiation may be granted for disposition of water for consumptive or nonconsumptive purposes.”
 - We suggest that the phrase “and conservation district use application approval” be stricken and instead the specific authorizing chapter be referenced in the following clause as follows: “is in compliance with chapter 183C and 343.” We believe this language conforms to the intent of the Committee to require compliance with Hawaii law without inadvertently imposing additional requirements upon prospective licensees.

We appreciate your attention to these matters and would be happy to respond to any questions you may have.

Mahalo for your consideration.

HOUSE COMMITTEE ON WATER, LAND, & HAWAIIAN AFFAIRS

ATTN: CHAIR RYAN I. YAMANE & VICE-CHAIR CHRIS TODD

Testimony on H.B. 2357:

Relating to Disposition of Water Licenses By the Board of Land and Natural Resources

January 31, 2020, 10:30 a.m.

Conference Room 325

Dear Chair Yamane, Vice-Chair Todd, and Members of this Honorable Committee,

Thank you for the opportunity to testify on behalf of the Wai'oli Valley Taro Hui on this important matter. As kalo farmers, the subject of water use is critical to us, our Hui, and all our 'ohana. Many of us are Native Hawaiian and farmers who were born and raised on Kaua'i and continue to care for the same 'āina that our families have stewarded for more than a century; for some, it's been many centuries.

As a Hui, it is our mission to support and enhance the ma uka to ma kai biocultural resources in the Wai'oli Stream and Hanalei Valley watersheds, protect the natural and cultural resources that enable traditional and customary Native Hawaiian practices, maintain habitat for endangered Hawaiian waterbirds, and engage the greater Kaua'i community through educational outreach programs and initiatives relating to the farming of taro and community-based stewardship of water resources. Although our community has always been close, we did not formally organize as a non-profit until 2019 when devastating floods made it painfully clear that our entire community and way of life was at risk. As a part of the disaster relief effort, we were informed that portions of our centuries-old kalo irrigation system was located on conservation land. So, we will now be subject to HRS 171-58.

After those 2018 floods, our mānowai, po'owai, and entire 'auwai systems were completely devastated. Our river changed course and some have described what we experienced as a thousand year flood event. As you know from our testimony before this Committee on HB 2386, we steward these lands for kalo cultivation. Two years later, we are still recovering from this catastrophic event and some farmers ran out of kalo for the first time in their lives due largely to a lack of water. While the 2018 flooding and related damage to our farms is not the topic of today's hearing, access to water is.

We submit our comments on House Bill 2357 because its passage will impact our farms, families, and livelihoods -- like so many other taro farming communities throughout Hawai'i. We understand that the issue of water licenses is a highly controversial and complex topic, and as relative newcomers to the issue of regulation under HRS 171-58, we defer to the expertise of others such as the Office of Hawaiian Affairs and the Native Hawaiian Legal Corporation on the technical aspects. We do, however, implore this committee to consider the fact that

instream, in-watershed use of water for wetland kalo cultivation is unique and beneficial, especially when done in a traditional manner.

In Wai'oli, we use a mānowai -- a traditional, Native Hawaiian break-away dam, to take some water from Wai'oli Stream. That water flows through our 'auwai (ditch), then into our taro patches, then back to either Wai'oli Stream or the lower reaches of Hanalei River. Like other taro farmers, we need throughflow -- water flowing through our taro patches -- but we don't "consume" water like most offstream users because it goes back to the stream. All of our use is within the watershed where our water supply originates (Wai'oli). So, any seepage, for example, also goes back to feed our water cycle in Wai'oli.

For these reasons, instream, in-watershed cultivation of kalo in a traditional manner has earned special protection and respect under our State Constitution (including Article XI sections 1 and 7 and Article XII, section 7), Water Code (HRS 174C-101), and court decisions (Waiāhole). Also, practically speaking, our uses are fundamentally different than most of the "big users" regulated under HRS 171-58, such as EMI/Mahi Pono's use of East Maui water where water is taken out of the watershed and across the island and never comes back to its ahupua'a of origin.

Given these important distinctions, if this committee passes out this bill, we request the addition of a new section that respects the special legal status of the traditional, Native Hawaiian practice of kalo farming:

"(h) This section shall not apply to any authorization of instream, in-watershed use of water for wetland kalo cultivation done in a traditional manner."

Mahalo for your time and consideration.

Reid Yoshida
President, Wai'oli Valley Taro Hui
Kaua'i, Hawai'i
r-yoshida@hotmail.com



**Hawaiian
Electric**

**TESTIMONY BEFORE THE HOUSE COMMITTEE ON
WATER, LAND AND HAWAIIAN AFFAIRS**

H.B. 2357

**Relating to Disposition of Water Licenses by the
Board of Land and Natural Resources**

Friday, January 31, 2020

10:30 a.m.

State Capitol, Conference Room 325

Dave Nagata
Land Agent
Hawaiian Electric

Dear Chair Yamane, Vice Chair Todd and Committee Members,

My name is Dave Nagata and I am testifying on behalf of Hawaiian Electric Company Inc. in **support** of H.B, 2357, Relating to Disposition of Water Licenses by the Board of Land and Natural Resources.

Generating electricity by using falling water to turn a turbine and then returning it to its source is the oldest renewable energy resource in Hawaii, and one of its least expensive. For more than 100 years, the run-of-the-river operations along the Wailuku River have reliably supplied a portion of Hawai'i Island's energy needs.

Even as new technologies like wind and solar have surpassed hydropower in the effort to reach 100% clean energy, hydro remains an important part of our portfolio of resources. One of the benefits of hydroelectricity is its very low cost, enabling us to pass those savings on to our customers. One of the key goals of the 100% renewable energy mandate is to reduce and stabilize costs by getting off oil.

H.B. 2357 provides the framework for the Board of Land and Natural Resources to execute long-term water leases. It supports hydroelectric projects which is consistent with the State's 100% RPS goal, and will improve our communities' reliability and resiliency. This bill provides clarity, direction and enables the Board of Land and Natural Resources to advance disposition of water licenses.

Accordingly, Hawaiian Electric supports H.B. 2357. Thank you for this opportunity to testify.

HB-2357

Submitted on: 1/30/2020 10:51:17 AM

Testimony for WLH on 1/31/2020 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Michelle Galimba	Mountain House Agricultural Water Co- operative	Support	No

Comments:

Aloha,

I support HB2357 as a practical means to help farmers and ranchers to obtain water for agriculture.

Michelle Galimba

Mountain Hous Agricultural Water Cooperative

Ka'u, Hawai'i Island



SIERRA CLUB OF HAWAI'I

HOUSE COMMITTEE ON WATER, LAND, AND HAWAIIAN AFFAIRS

January 31, 2020

10:30 AM

Room 325

COMMENTS on HB2357: Relating to Disposition of Water Licenses by DLNR

Aloha Chair Yamane, Vice Chair Todd, and members of the committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i **provides comments on HB2357**, which clarifies the conditions and manner in which the Board of Land and Natural Resources (BLNR or the Board) may dispose water by licenses.

This bill proposes the following changes to HRS §171-58:

1. Direct negotiation: allow for the Board to issue a water license through direct negotiation as an alternative to public auction process.
2. Appraisal process: give some guidance to water appraisers to clarify the factors that should be considered in the valuation of water.
3. Watershed management plans: clarify the focus of watershed management plans as it relates to the the disposition of water.

This bill facilitates the conveyance of public water from public streams for private uses. It does so without providing sufficient protection of our streams and the public uses of them. **The Sierra Club, therefore, requests that the bill be amended in the following ways:**

First, given the uncertainty of climate change, no license should last more than 10 years. We know far more about climate change now than we did a decade ago. In ten years, we will know even more – and the State should not lock itself into long-term licenses when changing circumstances may require prompt responses. The bill should be amended to shorten the maximum water license length from 30 to 10 years.

Second, no license should allow more than half of a stream's water to be removed. Previous practices by the Board have allowed 13 streams on Maui to remove **all** the water in a stream 60% of the time. These diversions leave the streams bone-dry more than half the year. That is unacceptable. To help address this issue, the bill should include a restriction on the maximum amount of water to be allowed under water licenses and clarify that it shall not be more than half of the total streamflow.

Third, before issuing an license, BLNR should have a good idea as to how much water flows in a stream and how much is proposed to be diverted. That is common sense – which has not been applied for many of our streams. As a start, installation of stream gauges and proper monitoring are necessary. The bill should also be amended so that the qualification notice requirement for water licenses specify the maximum amount of water that is proposed to be taken and the appraisal process requires evaluation of the amount of water diverted in proportion to the total water available.

Fourth, no license should be granted unless the diverter measures how much water it takes from each stream daily. We cannot give up public trust resources without a proper accounting as to how much water

is actually being diverted from each stream. We can only understand the impact if we know how much water is removed from a stream. Again, stream gauges and proper monitoring should be required prior to issuing water licenses.

Fifth, BLNR should study the impacts and before issuing a license, make an explicit finding that the diversion will not adversely impact the ecological, cultural, recreational, and aesthetic values of the stream. As a result of stream diversions, cultural practices like fishing, and recreational activities like hiking are undermined. Downstream, taro lo'i are fallow and invasive species abound. More importantly, stream diversions interrupt the fundamental functioning of our hydrological cycle and aquatic life cycles. Underground aquifers are not replenished, and native marine life cannot reproduce because too much water is being diverted from the tops of our streams. There should not be adverse impacts to streams as a result of their commodification and diversion.

HB2357 is an opportunity to ensure that the new process for issuing water licenses addresses the historical harms and ongoing concerns of diverting our public trust resources. While this bill requires many technical amendments, it needs to include substantive criteria that protect our streams. We encourage this committee to look at the relevant language in SB 915.

Thank you very much for this opportunity to provide comments on HB2357.

HB-2357

Submitted on: 1/30/2020 7:31:39 AM

Testimony for WLH on 1/31/2020 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments:

As a native Hawaiian and resident of Hawai'i, I am in support of HB2357. This bill clarifies the conditions and manner in which the Board of Land and Natural Resources may dispose water by license. For too long, native Hawaiians have been harmed by recent water decisions by the State of Hawai'i. This bill is a step in the right direction. Please pass HB2357.

Mahalo.

Benton Kealii Pang, Ph.D.

HB-2357

Submitted on: 1/30/2020 1:22:24 PM

Testimony for WLH on 1/31/2020 10:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Kea Kala	Individual	Oppose	No

Comments:

The disposition of water rights should continue through public auction and not circumvented through direct negotiations for a proposed extension for up to 30 years.