

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, February 7, 2020
9:30AM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 2677
RELATING TO WATER RIGHTS**

House Bill 2677 proposes to clarify the disposition of water rights made by lease. **The Department of Land and Natural Resources (Department) supports this measure.**

This measure would provide clarity regarding the statutory authority for the issuance of revocable permits for water use by the Board of Land and Natural Resources (Board). The Department acknowledges that this issue is the subject of much controversy and competing interests. However, the proposed amendment clarifying the approval of revocable permits for water as pursuant to Section 171-55, Hawaii Revised Statutes (HRS), would provide consistency in the Board's issuance of revocable permits under its jurisdiction.

The measure would also allow for the Board to issue a water lease via direct negotiation. Currently, Section 171-58, HRS, requires leases for water be disposed of by public auction only. This requirement has created great uncertainty for water users. Additionally, the public auction requirement has resulted in burdensome constraints to the disposition process, especially in the likelihood that there would only be a single bidder. The Department notes that if this measure were to pass, any decision to award a water lease through direct negotiation would be subject to approval by the Board in an open public meeting.

Thank you for the opportunity to comment on this measure.

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



HB2677
RELATING TO WATER RIGHTS

House Committee on Water, Land, & Hawaiian Affairs

February 7, 2020

9:30 a.m.

Room 325

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB2677, which would 1) authorize the potentially indefinite continuation of stream diversions under “revocable permits” (RPs) in a manner historically used to evade environmental review and public trust requirements; and 2) authorize the issuance of long-term water leases of up to 65 years¹ via direct negotiation, without public auction or any mechanism to ensure the consistent consideration of the public trust in water.

First, OHA is greatly concerned that this measure would encourage or even legitimize the highly controversial practice of continually re-authorizing the indefinite diversion of streams and other public trust water sources by corporate entities, in a manner that has been historically used to evade the environmental review and public trust scrutiny normally required for the long-term, for-profit use of public trust water.

Specifically, this measure would authorize the issuance of RPs for water under a RP statute typically used for land dispositions, Hawai‘i Revised Statutes (HRS) § 171-55, that expressly allows an RP “to continue on a month-to-month basis for additional one year periods” (emphasis added), without explicit limitation. Notably, this land RP statutory authority has been used by the Board of Land and Natural Resources (BLNR) to issue land RPs that have, in many cases, been continually renewed, without interruption, for decades at a time. **Applying such express, indefinite continuation authority to water RPs would potentially legitimize the BLNR’s and Alexander & Baldwin’s (A&B’s) historical and ongoing use of water RPs to avoid completing a still-pending environmental review of the long-term diversion of East Maui’s waters – a responsibility that has continued, unfulfilled, for 17 years since the review was first ordered by a circuit court.** While the use of “holdover” water RPs to avoid this responsibility was eventually found improper by the circuit court, the court’s subsequent ruling invalidating A&B’s RPs has been stayed pending the resolution of the issues in that case; the statutory amendment proposed here would further undermine the circuit court’s ruling invalidating A&B’s water RPs, by allowing such RPs to be issued under a statute that more explicitly authorizes their indefinite renewal.

While of immediate apparent consequence to the A&B case, OHA notes that **providing such express renewal authority for water RPs could also encourage future corporate entities to seek and obtain water RPs that would ostensibly enable their own long-term uses of public trust water, without complying with the clearer environmental review and other requirements**

¹ HRS § 171-36 establishes the maximum lease term under Chapter 171 as 65 years, with some exceptions.

of a long-term lease, and potentially fostering a sense of private entitlement to water that could lead to the further erosion of the public trust.

In light of concerns raised in previous sessions, **OHA emphasizes that there is currently no court ruling or statutory interpretation that would foreclose the issuance of RPs for water in circumstances other than the currently-stayed circuit court ruling on A&B's RPs, as described above.** Indeed, despite the sunset of Act 126 last year, to OHA's understanding there has been no interruption to other RP permittees' access to and use of public trust water as a result of the circuit court ruling, even when such uses have been continued for years. Moreover, OHA again emphasizes that the aforementioned litigation challenging A&B's continuous diversion of East Maui's streams has consistently avoided impacting the legal access of Maui County to water conveyed by A&B from East Maui. Accordingly, the statutory amendment to allow water RPs to be issued under the land RP statute is demonstrably not necessary for these other users as well as Maui County to maintain their use of public trust water, and is also not even necessary to facilitate A&B's continued diversion of water for its own purposes, pending the resolution of the litigation specific to that case. However, the statutory amendment would, again, potentially, encourage and allow A&B to continue evading its as-yet-unfinished environmental review of the long-term water lease for East Maui that it ostensibly desires; moreover, such a statutory amendment may lead to the future issuance of RPs for the private and potentially highly impactful uses of water, that may be allowed to continue, indefinitely, and that may not result in any environmental review and public trust analysis that the long-term use of public trust water could and should otherwise entail.²

Accordingly, should the Committee choose to move this measure forward, OHA respectfully requests the removal of the water RP authorization amendments proposed on page 1, lines five thru 8.

Second, OHA is also concerned regarding the relatively unlimited language that would allow for the direct negotiation of water leases for streams and other public trust water sources, for up to 65 years at a time, without the transparency of a public auction, and without any explicit statutory mechanisms to otherwise ensure an adequate analysis of the public trust and the public's interests. **Such an analysis would be critical to informing appropriately tailored long-term water lease dispositions, including with regards to the adequacy of conditions protecting the public trust and the public's interests, and to ensure that lease rents are valued appropriately.** While OHA does acknowledge that litigation may be one means to address water leases that are issued without an adequate public trust analysis, such litigation would be costly, extremely time-consuming, and all but inevitable – particularly in light of recent BLNR decision-making that has failed to provide even a basic accounting for public trust water diverted from the 15-plus East Maui streams not subject to the recent Commission on Water Resources Management interim instream flow standard decision. As history has shown, such litigation may also be extremely detrimental to the public trust and the public's interests, as

² OHA does not believe that the issuance of RPs, particularly where they may significantly impact public trust purposes and competing reasonable beneficial uses, would necessarily be legally exempt from these review and analysis responsibilities, even with the proposed statutory change; however, historical practice has demonstrated that the BLNR may not necessarily abide by this legal interpretation, and decades of experience have shown that, after the issuance of an RP, the resolution of such issues through litigation may take a generation or longer, as the RP is “held over” to the detriment of public trust purposes, reasonable beneficial uses, and the overall interests of the state.

water diversions under wrongfully-issued leases could continue throughout the years or decades it takes to resolve the issues presented.

OHA does appreciate that the statutorily-required public auction process for water leases 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 types of leases might be appropriate, such as where prospective lessees 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 lessees 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 lease, as currently required under statute. **However, the proposed statutory authorization allowing for direct leases does not distinguish between such circumstances, and others where politically and financially powerful entities may be able to exert considerable influence over government decisionmakers provided with no explicit statutory guidelines or protections in their direct negotiation of leases.** Again, while litigation may remain a remedy in the latter circumstance, relying on litigation in such cases would be costly, time-consuming, and to the significant potential detriment of the public trust, and the public’s interests.

OHA notes that this latter concern is particularly heightened when combined with the continual RP renewal authority that would be explicitly authorized under this measure. Even where certain government administrations may be more aware of and willing to comply with their public trust obligations, the RP renewal authority would enable powerful and influential entities with an interest in maintaining control over water resources to continually delay the negotiation of a long-term water lease, via RPs that, up to now, have not adequately protected the public interest in water, until an administration is in place that would be willing to provide them with a “sweetheart deal,” 65-year water lease that does not fully reflect the public trust or the public’s interest.

Accordingly, should the Committee choose to move this measure forward, OHA respectfully but strongly urges the following amendments, to better ensure transparency, accountability, and the proper consideration of the public trust and the public’s interest, in any leasing of our precious and increasingly limited water resources:

By inserting the following language beginning on page 2, line 6, to read as follows:

“resolution[-], provided further that any disposition of water rights made by lease shall be considered a water license subject to the Hawaiian Homes Commission Act of 1920, as amended, shall be for a term of no more than fifteen years, and shall be made only after written findings by the board based on sufficient evidence that the lease is consistent with the public trust doctrine, including but not limited to findings that the lease will result in no harm to public trust purposes, or, if there is

harm, that the leased use is reasonable beneficial and justified in light of the harm to public trust purposes and competing reasonable beneficial uses and contains conditions to mitigate or minimize any cumulative impacts on public trust purposes and competing reasonable beneficial uses, provided further that:

- (1) The lease rent for the disposition of water rights made by direct negotiation shall be set only after the following factors are considered in a written statement by the board with sufficient evidence regarding the same:
 - (A) The total amount of water to be leased;
 - (B) The amount of water to be used from any source in proportion to the amount of water available from the source;
 - (C) The costs of delivery;
 - (D) The avoided cost to the lessee of obtaining the water from practicable alternative sources;
 - (E) The net economic benefit to the lessee;
 - (F) The value contributed by the lessee for watershed management pursuant to this section; and
 - (G) The public benefit provided from the use of water pursuant to section 174C-2;
- (2) Any disposition by lease 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; and
- (3) Any disposition by lease for ground water shall specify the amount of water that may be used from any ground water source, and shall not result in significant adverse impacts to trails, historic sites, cultural sites, Native Hawaiian traditional and customary practices, or natural resources."

OHA believes that the above language may be critical to safeguarding the public trust and the public interest in the leasing of our precious and limited water resources, including by 1) limiting lease lengths 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 lessees over public trust water resources; 2) ensuring that any leased water is actually and adequately accounted for, with limits on the maximum amount of water that can be used under a lease; 3) providing clear minimum standards, as well as a framework of analysis as endorsed by the supreme court, to better ensure that the board consistently upholds the public trust in water; 4) providing more specific statutory guidance in the leasing of surface and ground

water resources, to ensure that the public's interests in these public trust resources are adequately and consistently upheld; and 5) requiring a transparent consideration of various market- and non-market factors critical to informing lease rent rates for directly negotiated leases, that can ensure a fair return to the public for a range of potential uses of public trust water.

As a final note, OHA respectfully implores the Committee to reflect on 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's aforementioned concerns are grounded on this history, and on the sheer breadth of discretion that this measure would provide to government decisionmakers in their disposition of our most precious resource. OHA therefore urges the Committee to **HOLD** this measure, or to minimally adopt the above recommended amendments, in order to prevent the intentional or inadvertent perpetuation of harms that have undermined the public trust in our water resources for far too long.

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, February 7, 2020; 9:30 am
Conference Room # 325

House Bill No. 2677 – Relating to Water Rights

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 the Department of Land and Natural Resources the option of utilizing direct negotiation as a means to execute a water lease under Section 171-55.

KIUC supports this measure, as it will provide additional options in lease negotiations for both Waiahi and the West Kauai Energy Project.

We would appreciate your favorable consideration of HB2677.



Friday, February 7, 2020

House Bill 2677
Testifying in Opposition

Aloha Chair Yamane, Vice Chair Todd, and Members of the Committee Water, Land & Hawaiian Affairs,

The Democratic Part of Hawai'i (The Party) **stands in opposition to HB2677** Relating to Water Rights, which clarifies the disposition of water rights made by lease.

While the notion of direct negotiation may have some merit as it could potentially prevent small farmers from not be outbid by large water diverters, like Alexander & Baldwin, at public auction, there seems to be no oversight of the direct negotiation process. If the committee is truly interested in an approach such as this, The Party would suggest the committee take another look at House Bill 2357, which was deferred at a hearing last week.

HB2677 is particularly egregious because it appears to go even further than HB1326 from last session. While that bill sought to simply extend temporary water permits, this bill deletes language in the existing law and instead amends it to allow them to be reissued to the same entity year after year, ad infinitum. The Party strongly objects to this effort.

It must be pointed out that the Hawaii Supreme Court is hearing oral arguments for the appeal of the Carmichael v. BLNR case on March 5 of this year. We would encourage this committee, and the legislature in its entirety, to wait until the Supreme Court has heard the case and made a ruling before moving forward.

For all these reasons, we urge the committee to hold this bill.

Mahalo for the opportunity to testify,

Josh Frost
Co-Chair, Legislation Committee
Democratic Party of Hawai'i

Zahava Zaidoff
Co-Chair, Legislation Committee
Democratic Party of Hawai'i



Chair Ryan Yamane
Vice Chair Chris Todd

House Committee on Water, Land, & Hawaiian Affairs

Friday, February 7, 2020
9:30 AM

TESTIMONY IN OPPOSITION TO HB2677 RELATING TO WATER RIGHTS

Aloha Chair Yamane, Vice Chair Todd, Members of the House Committee on Water, Land, & Hawaiian Affairs,

My name is Jun Shin. I am a Sophomore at the University of Hawai'i at Mānoa. I currently serve as the Environmental Justice Action Committee Chair for the Young Progressives Demanding Action (YPDA). YPDA advocates for public policies that reflect the values of young people throughout the State of Hawai'i. YPDA is in **Opposition** to **HB2677**, Relating to Water Rights which clarifies the disposition of water rights made by lease.

The insertion of direct negotiation for disposition of water rights may be an idea worth discussing. Small farmers who divert less water would be able to be on more fairer footing with larger water diverters. However, we are concerned about accountability, and what oversight will be in place for the direct negotiation process.

YPDA is concerned with the removal of language in Hawai'i Revised Statutes 171-58 regarding the disposition of water rights made by lease **or temporary permits** that makes sure it clear that this is only temporary. A month-to-month basis for a year. Removing that language and replacing it with Section 171-55 would allow for the Board of Land and Natural Resources to **approve of temporary permits continuing on month-to-month for "additional one year periods"**.

This could very well result in a state of permanent "temporary permits". Water is a crucial public trust resource that belongs to all people. Protected by the State of the Hawai'i for the benefit of present and

future generations, most prominently in Article XI of the Hawai'i State Constitution. Both Act 126 in 2016 and HB1326 in 2019 sought out to extend temporary water permits, HB2677 in 2020 wants to make this the law of the land. This cannot happen, there needs to be accountability. Water needs of different communities like kalo farmers and cultural practitioners, as well as the health of our streams have not been considered for far too long.

We would like to close by emphasizing to the committee that the Hawai'i Supreme Court is scheduled to hear oral arguments for the appeal of the Carmichael v. Board of Land and Natural Resources case (the case behind Act 126 in 2016 and HB1326 in 2019) on March 5th, 2020. We hope that this committee, and the rest of the legislature waits until due process takes place before taking any further steps on such an important issue.

Now more than ever in the face of climate change, we as an island society in the Pacific need to take very seriously the protection of our natural resources. Water is life. Young Progressives Demanding Action is in **OPPOSITION** to **HB2677**. Please **HOLD** this bill.

Thank you for the opportunity to testify,

Jun Shin,
Environmental Justice Action Committee Chair
Young Progressives Demanding Action (YPDA)
P.O. Box 11105
Honolulu, HI 96828
Cell: 808-255-6663
Email: junshinbusiness729@gmail.com
CC: action@ypdahawaii.org



Pono Hawai'i Initiative

Josh Frost - President • Patrick Shea - Treasurer • Kristin Hamada
Nelson Ho • Summer Starr

Thursday, February 6, 2020

Relating to Water Rights
Testifying in Opposition

Aloha Chair and members of the committee,

The Pono Hawai'i Initiative (PHI) **Opposes HB2677 Relating to Water Rights**, which allows for direct negotiation but sets up no parameters for how that should be done.

While direct negotiation could be a good alternative, HB2677 fails to set up an oversight of the direct negotiation process. The measure also allows for the issuance of revocable permits under a statute that explicitly allows them to be reissued to the same entity year after year (HRS 171-58).

For all these reasons, we urge you to defer this measure indefinitely.

Mahalo for the opportunity,
Gary Hooser
Executive Director
Pono Hawai'i Initiative



REPRESENTATIVE RYAN I. YAMANE, CHAIR
REPRESENTATIVE CHRIS TODD, VICE CHAIR
HOUSE COMMITTEE ON WATER, LAND, AND HAWAIIAN AFFAIRS

TESTIMONY IN **STRONG OPPOSITION** TO HOUSE BILL 2677

February 7, 2020, 9:30 a.m.

Room 325

State Capitol

415 South Beretania Street

Dear Chair Yamane, Vice-Chair Todd, and Members of the House Committee on Water, Land, and Hawaiian Affairs:

Earthjustice **strongly opposes** House Bill 2677 which would allow private commercial interests to divert water by revocable month to month permit indefinitely without going through the public disclosure and review processes currently required in order to obtain a long-term water lease. The proposed legislation violates both the state constitutional public trust in water and sound resource management principles by eliminating the following safeguards currently provided by the leasing statute:

- Opportunity for the legislature to disapprove any water lease (HRS § 171-58(c));
- The requirement that water diverters complete environmental review and obtain a conservation district use permit prior to obtaining a lease (HRS § 171-58(c));
- The requirement that water diverters develop and implement a watershed protection plan in partnership with the Department of Land and Natural Resources (“DLNR”) in order to help protect and sustain the water resource (HRS § 171-58(e), (f));
- The requirement that DLNR consult with the Department of Hawaiian Homeland (“DHHL”) prior to issuing a water lease in order to allow DHHL to reserve sufficient water to meet its current and future homestead needs (HRS § 171-58(g)).

Earthjustice has decades of experience in Hawai‘i water law, establishing the contours of the public trust doctrine through litigation, and advocating for effective management of Hawai‘i’s water resources through its regulatory agencies. The public trust creates an affirmative duty on the part of the the State and its political subdivisions “to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses¹ whenever feasible.” *Kauai Springs, Inc. v. Planning Comm’n of County of Kauai*, 133 Hawai‘i

¹ Public trust uses include: (1) maintenance of waters in their natural state or resource protection, with its numerous derivative public uses, benefits, and values; (2) domestic water

141, 172, 324 P.3d 951, 982 (2014) (citation omitted). The public trust also “prescribes a ‘higher level’ of scrutiny for private commercial uses” and places the burden on “those seeking or approving such uses to justify them in light of the purposes protected by the trust.” *In re Waiāhole Ditch Combined Contested Case Proceeding*, 94 Hawai‘i 97, 142, 9 P.3d 409, 454 (2000) (“*Waiāhole*”).

By allowing indefinite and unlimited water dispositions to be made through an ad hoc process under HRS § 171-55,² House Bill 2677 would eviscerate DLNR’s ability to implement its constitutional duty to protect public trust uses of the state’s water resources. The existing lease process under HRS § 171-58 provides at least some framework for DLNR to scrutinize new and existing commercial water diversions, and for the public to educate DLNR about public trust uses of affected waters, **before** the State commits itself to a long-term disposition of its valuable water resources. Earthjustice continues to advocate before DLNR to strengthen the lease framework in order to facilitate robust review and oversight of consumptive water uses, consistent with a rational, modern water management regime and the public trust doctrine. House Bill 2677 not only undermines these ongoing agency-level efforts, but also interferes with a case pending before the Hawai‘i Supreme Court case interpreting these exact two provisions of law, *Carmichael et al. v. Board of Land and Natural Resources*, No. SCWC-16-0000071.

Thank you for the opportunity to present this testimony. Because House Bill 2677 does not serve any legitimate public policy goals, and would violate the Hawai‘i Constitution’s public trust mandates, Earthjustice respectfully requests that the Committee reject this bill.

Leinā‘ala L. Ley



Attorney
Earthjustice

use; (3) the exercise of Native Hawaiian traditional and customary rights; and (4) reservations of water by DHHL. *Kauai Springs*, 133 Hawai‘i at 172, 324 P.3d at 982.

² House Bill 2677 would allow diverters to obtain long-term water dispositions pursuant to HRS § 171-55 despite the fact that this statutory provision was explicitly designed to accommodate temporary land dispositions. See HRS § 171-55 (“Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the **temporary** occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction.”) (emphasis added).



**Conservation Council
for Hawai'i**

Hawai'i's voice for wildlife

Kō Hawai'i / leo no nā holoholona lōhiu



**Submitted to the House Committee on Water, Land and Hawaiian Affairs
Hearing: February 7, 2020, 9:30am
Conference Room 325
HB2677: Relating to Water Rights**

The Conservation Council for Hawaii (CCH) opposes HB 2677. Water rights issues have led to the loss of native species, traditional practices, and the destruction of healthy ecosystems due to the lack or loss of natural water flow overtime across our islands. CCH believes that there needs to be more protective measures in place to ensure that public trust is at the forefront of decision making when “permits” or “licenses” are approved. Oversight and accountability measures should be in place prior to approval to ensure that water availability and security is a priority and that land management practices enhance robust watersheds. CCH also believes that the “auction” or “bidding” process should involve public review and comment periods providing more transparency in the process.

Thank you for the opportunity to provide testimony in opposition of HB 2677.

**Telephone/Fax: 808.593.0255 | email: info@conservehi.org | web:
conservationcouncilhawaii.org**

P.O. Box 2923 | Honolulu, HI 96802 | Office: 250 Ward Ave. Suite 215 | Honolulu, HI 96814

President Rachel Sprague | Vice President: Lisa Hinano Rey | Secretary: Julie Leialoha

Treasurer: Sunshine Woodford | Directors: Robin Kaye, Steven Lee Montgomery

National Wildlife Representatives: Les Welsh, Rachel Sprague

Executive Director: Moana Bjur | Operations and Events Director: Jonnetta Peters



HOUSE COMMITTEE ON WATER, LAND, & HAWAIIAN AFFAIRS

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

Testimony on H.B. 2677

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

February 7, 2020, 9:30 a.m.

Conference Room 325

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

Mahalo for the opportunity to testify on behalf of the Wai'oli Valley Taro Hui. As you may know, as kalo farmers, the subject of water use is critical to us, our Hui, and all of 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 after 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 last week, 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 2677 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 leases 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 Hawaiians 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 (ditches), 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



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

**H.B. 2677
Relating to Water Rights**

Friday, February 7, 2020
9:30 a.m., Agenda Item #8
State Capitol, Conference Room 325

Dave Nagata
Land Agent
Hawaiian Electric Company, Inc.

Dear Chair Yamane, Vice Chair Todd, and Members of the Committee,

My name is Dave Nagata and I am testifying on behalf of Hawaiian Electric, Company, Inc. (Hawaiian Electric) in **support** of H.B. 2677, Relating to Water Rights.

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. 2677 allows the Board of Land and Natural Resources to execute long-term water leases by direct negotiation. It supports hydroelectric projects which is consistent with the State's 100% RPS goal, and will improve our communities' resiliency.

Accordingly, Hawaiian Electric supports HB 2677. Thank you for this opportunity to testify.



SIERRA CLUB OF HAWAI'I

LATE

HOUSE COMMITTEE ON WATER, LAND, AND HAWAIIAN AFFAIRS

February 7, 2020 9:15 AM Room 325

In **OPPOSITION** to **HB2677**: Relating to Water Rights

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 **STRONGLY OPPOSES HB2677** to extend the issuance of revocable permits for stream diversions indefinitely and allow the Board of Land and Natural Resources (BLNR) to continue to abdicate its responsibility over public trust water resources. This practice must end.

No Conditions on Direct Negotiation Process

We acknowledge concerns that a public auction process would be unfavorable to smaller water users who are in process of applying for a long-term lease, like the ranchers in Ka'u. We would be open to consider a possible alternative option of direct negotiation between applicants and BLNR. However, this bill provides no criteria on conditions that need to be met to ensure this process is fair, transparent, or in the best interests of our streams and the communities that rely on them. We oppose direct negotiation without explicit conditions to address these issues, as the bill appears to facilitate backroom dealmaking between water lease applicants and the BLNR.

Revocable Permits are Temporary

The original intent of revocable permits was to provide temporary access to public lands on a month-to-month basis for up to one year, while an application for a longer lease of public land is evaluated. Unfortunately, when requesting a revocable permit, there is no requirement that diverters assess their water needs, their impact on the environment or constitutionally-protected cultural practices, or pay a fair rent to the State for use of resources. By allowing these short-term permits to operate on holdover status, water diverters like KIUC (15 years in holdover status) and A&B (17 years) have been allowed to exploit public water resources for their own private profit—to the absolute detriment of Hawai'i's streams and communities that depend on them.

It is never appropriate to allow more than fifty percent of the water flowing in a stream to be taken from it – particularly when that use is in a different ahupua'a. Diversions must be limited in a manner that ensures that native species and their larvae can migrate upstream and

downstream without interference. The holdover approach to stream diversions does not ensure these limitations, and so it should not be extended in any way.

Pending Carmichael Case Appeal at the Hawaii Supreme Court

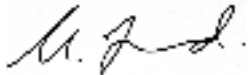
The Legislature should not enact changes to statutes at issue in litigation actively under consideration by the Hawai'i Supreme Court. This issue is confusing enough as it is. The Legislature should wait for the outcome of the Carmichael v. Board of Land and Natural Resources case and then enact changes in response to that decision, if necessary. The Carmichael case is scheduled for oral arguments on March 5, 2020 at the Hawai'i Supreme Court.¹

This decision from the state's highest court will set precedence for interpreting this statute, and help to determine the extent to which BLNR can continue to issue RP's.

There is no rush to rekindle the controversy that dominated the previous legislative session. That is why we strongly urge this committee to hold this bill.

Thank you very much for this opportunity to provide testimony in **opposition to HB2677**.

Mahalo,



Marti Townsend
Chapter Director

¹ https://www.courts.state.hi.us/courts/oral_arguments/oral_arguments_schedule



Board of Directors:

House Committee on Water, Land and Hawaiian Affairs

Hawaii Alliance for Progressive Action (HAPA) OPPOSES HB 2677

Gary L. Hooser
President

Friday, February 7, 2020 9:30 a.m. Conference Room 325

Andrea N. Brower
Ikaika M. Hussey
Co-Vice Presidents

Aloha Chair Yamane, Vice Chair Todd and Members of the Committee,

Kim Coco Iwamoto
Treasurer

On behalf of the Hawai'i Alliance for Progressive Action (HAPA) I strongly urge you to **OPPOSE HB 2677**. HAPA is a statewide environmental, social and economic justice organization HAPA that engages over 10,000 local residents throughout Hawai'i annually.

Bart E. Dame
Secretary

By striking the provision under HRS 171-58 that specifies "on a month-to-month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other

Paul Achitoff

restrictions under the law" HB 2677 would, in effect be authorizing the unlimited hold-over of revocable permits (RP's) with no timeline in place for converting temporary permits to long-term leases, and no annual renewal process.

Laura Harrelson

Kaleikoa Ka'eo

While RP's were intended to temporarily provide time for diverters to prepare their long-term lease applications, the holdover of revocable permits has been utilized as a mechanism to avoid environmental and cultural review and perpetuate the wholesale dewatering of our streams.

Michael Miranda

Walter Ritte Jr.

Pua Rossi-Fukino

We recognize that there are a range of diverters across the state who are currently operating under RP's who may need additional time work with the state to prepare their applications. However, there is no reason why users who are making progress towards acquiring a long-term lease cannot return to the BLNR on an annual basis to update the board on their progress. This annual renewal provides an important public forum for the community raise concerns if a diverter is not complying with the terms of their revocable permit, and for the state to exercise oversight in the protection of our precious water resources.

Karen Shishido

Leslie Malulani Shizue Miki

On Kaua'i, where HAPA is headquartered, KIUC had been diverting 100% of the baseflow of Wai'ale'ale Stream for over 15 years without needing to quantify its water use needs, or appropriately assess the environmental and cultural impacts of 100% base flow diversion. Until

recently they had made little progress on taking the requisite steps towards obtaining a long-term lease.

It was only through the annual review of their RP at the BLNR that information about the de-watering of the stream was able to come to light, and the BLNR ordered some streamflow to be restored while the Commission on Water Resource Management goes through the process of setting instream flow standards. We believe community bringing documentation of dry streambeds played some role in the partial restoration of the stream while the instream flow standards are being set.

As currently drafted, HB 2677, would allow KIUC and others to continue diverting and, in some cases de-water those streams without ever needing to finalize a lease application. The Public Trust Doctrine and the protection of one of our most valuable Public Trust resources, water, would be completely undermined.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "Anne Frederick", written in a cursive style.

Anne Frederick,
Executive Director

HB-2677

Submitted on: 2/6/2020 3:20:12 AM

Testimony for WLH on 2/7/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Robin Kaye	Individual	Oppose	No

Comments:

Bad bill; please do not support it. It diminishes the public trust underpinning of our water systems.