

JAN 22 2021

A BILL FOR AN ACT

RELATING TO WATER RIGHTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds, as noted by the Hawaii
2 Supreme Court in *McBryde Sugar Co. v. Robinson*, (54 Haw. 174
3 (1973)), that when lands were privately allotted during the
4 Mahele, the "right to water was not intended to be, could not
5 be, and was not transferred to the awardee, and the ownership of
6 all water remained in the people of Hawaii for their common
7 good." This principle has been reaffirmed by the people of
8 Hawaii in the Hawaii Constitution under Article XI, Sections 1
9 and 7. The legislature notes that both Article XII, Section 1
10 of the Hawaii Constitution and section 213 of the Hawaiian Homes
11 Commission Act allocate thirty per cent of the receipts derived
12 from water licenses for the implementation of the Hawaiian Homes
13 Commission Act.

14 The legislature further finds that the statute for issuing
15 and pricing water leases and licenses has not been clarified to
16 reflect the constitutional provisions providing that all water
17 is held by the State in trust. Although, all water is held by



1 the State in trust, there is significant inequity in the
2 application of water leasing law; only the water that is
3 immediately and completely diverted from state-owned land
4 parcels have been required to obtain a lease. Also, while
5 statutory leasing provisions in Chapter 171, Hawaii Revised
6 Statutes, require that leases be priced at "fair market value",
7 this cannot be reliably, consistently, nor fairly done since no
8 private market for water rights exists in Hawaii.

9 The legislature further notes that the department of land
10 and natural resources' processing of water leases and water
11 licenses applications pursuant to 171-58, Hawaii Revised
12 Statutes, relating to the State's mineral and water rights, has
13 been slow and inconsistent. The slow and inconsistent
14 application of this section not only caused a significant and
15 notable controversy across the islands, but also caused the
16 amount of revenue generated from water leases and licenses to
17 decline significantly over time, even as the economic value of
18 water for agricultural, renewable energy, and commercial
19 purposes has risen.

20 As the revenues from the leasing and licensing of water
21 rights support programs for watershed management and the



1 betterment of native Hawaiians, improving the pricing provisions
2 and overall application of 171-58, Hawaii Revised Statutes, is
3 in the best interest of the people of Hawaii. Accordingly, the
4 purpose of this Act is to:

5 (1) Set a minimum price for the disposition of water
6 within the State; and

7 (2) Require the department of land and natural resources,
8 commission on water resources management, and
9 department of Hawaiian home lands to review and report
10 to the legislature on whether the statute on minerals
11 and water rights is being applied as required.

12 SECTION 2. Section 171-58, Hawaii Revised Statutes, is
13 amended to read as follows:

14 **"§171-58 Minerals and water rights.** (a) Except as
15 provided in this section the right to any mineral or surface or
16 ground water shall not be included in any lease, agreement, or
17 sale, this right being reserved to the State; provided that the
18 board may make provisions in the lease, agreement, or sale, for
19 the payment of just compensation to the surface owner for
20 improvements taken as a condition precedent to the exercise by



1 the State of any reserved rights to enter, sever, and remove
2 minerals or to capture, divert, or impound water.

3 (b) Disposition of mineral rights shall be in accordance
4 with the laws relating to the disposition of mineral rights
5 enacted or hereafter enacted by the legislature.

6 (c) Disposition of water rights may be made by lease at
7 public auction as provided in this chapter or by permit for
8 temporary use on a month-to-month basis under those conditions
9 which will best serve the interests of the State and subject to
10 a maximum term of one year and other restrictions under the law;
11 provided that any disposition by lease shall be subject to
12 disapproval by the legislature by two-thirds vote of either the
13 senate or the house of representatives or by majority vote of
14 both in any regular or special session next following the date
15 of disposition; provided further that after a certain land or
16 water use has been authorized by the board subsequent to public
17 hearings and conservation district use application and
18 environmental impact statement approvals, water used in
19 nonpolluting ways, for nonconsumptive purposes because it is
20 returned to the same stream or other body of water from which it
21 was drawn, essentially not affecting the volume and quality of



1 water or biota in the stream or other body of water, may also be
2 leased by the board with the prior approval of the governor and
3 the prior authorization of the legislature by concurrent
4 resolution.

5 (d) Any lease of water rights shall contain a covenant on
6 the part of the lessee that the lessee shall provide from waters
7 leased from the State under the lease or from any water sources
8 privately owned by the lessee to any farmer or rancher engaged
9 in irrigated pasture operations, crop farming, pen feeding
10 operations, or raising of grain and forage crops, or for those
11 public uses and purposes as may be determined by the board, at
12 the same rental price paid under the lease, plus the
13 proportionate actual costs, as determined by the board, to make
14 these waters available, so much of the waters as are determined
15 by the board to be surplus to the lessee's needs and for that
16 minimum period as the board shall accordingly determine;
17 provided that in lieu of payment for those waters as the State
18 may take for public uses and purposes the board may elect to
19 reduce the rental price under the lease of water rights in
20 proportion to the value of the waters and the proportionate
21 actual costs of making the waters available. Subject to the



1 applicable provisions of section 171-37(3), the board, at any
2 time during the term of the lease of water rights, may withdraw
3 from waters leased from the State and from sources privately
4 owned by the lessee so much water as it may deem necessary to
5 (1) preserve human life and (2) preserve animal life, in that
6 order of priority; and that from waters leased from the State
7 the board, at any time during the term of the lease of water
8 rights, may also withdraw so much water as it may deem necessary
9 to preserve crops; provided that payment for the waters shall be
10 made in the same manner as provided in this section.

11 (e) Any new lease of water rights shall contain a covenant
12 that requires the lessee and the department of land and natural
13 resources to jointly develop and implement a watershed
14 management plan. The board shall not approve any new lease of
15 water rights without the foregoing covenant or a watershed
16 management plan. The board shall prescribe the minimum content
17 of a watershed management plan; provided that the watershed
18 management plan shall require the prevention of the degradation
19 of surface water and ground water quality to the extent that
20 degradation can be avoided using reasonable management
21 practices.



1 (f) Upon renewal, any lease of water rights shall contain
2 a covenant that requires the lessee and the department of land
3 and natural resources to jointly develop and implement a
4 watershed management plan. The board shall not renew any lease
5 of water rights without the foregoing covenant or a watershed
6 management plan. The board shall prescribe the minimum content
7 of a watershed management plan; provided that the watershed
8 management plan shall require the prevention of the degradation
9 of surface water and ground water quality to the extent that
10 degradation can be avoided using reasonable management
11 practices.

12 (g) The department of land and natural resources shall
13 notify the department of Hawaiian home lands of its intent to
14 execute any new lease, or to renew any existing lease of water
15 rights. After consultation with affected beneficiaries, these
16 departments shall jointly develop a reservation of water rights
17 sufficient to support current and future homestead needs. Any
18 lease of water rights or renewal shall be subject to the rights
19 of the department of Hawaiian home lands as provided by section
20 221 of the Hawaiian Homes Commission Act.



1 (h) Any disposition of water rights by the State, whether
2 alone or appurtenant to any land, and whether by lease, license,
3 permit, or otherwise, must comply with this section.

4 (i) Except for water leases or licenses issued for
5 instream traditional and customary native Hawaiian practices
6 such as lo'i kalo cultivation, no water rights may be disposed of
7 for less than per cent of the cost of the least expensive
8 alternative source of water of similar quality and purpose, as
9 determined by an appraiser."

10 SECTION 3. The department of land and natural resources,
11 commission on water resources management, and department of
12 Hawaiian home lands shall review whether the provisions of
13 section 171-58, Hawaii Revised Statutes, are being applied in
14 all situations where legally required and what administrative
15 actions, funding, staffing, and legislative changes may enable
16 the consistent application of these provisions. The department
17 of land and natural resources, commission on water resource
18 management, and department of Hawaiian home lands shall submit a
19 report of their findings and recommendations, including any
20 proposed legislation, to the legislature no later than twenty
21 days prior to the convening of the regular session of 2022.




S.B. NO. 874

1 SECTION 4. New statutory material is underscored.

2 SECTION 5. This Act shall take effect upon its approval.

3

INTRODUCED BY:





S.B. NO. 874

Report Title:

Water Licenses; Water Leases; Minimum Price

Description:

Sets a minimum price for the disposition of water within the State. Requires the Department of Land and Natural Resources, Commission on Water Resources Management, and Department of Hawaiian Home Lands to review and report to the Legislature on the application of the State's statute on minerals and water rights.

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