

DAVID Y. IGE  
GOVERNOR  
STATE OF HAWAII

JOSH GREEN  
LT. GOVERNOR  
STATE OF HAWAII



WILLIAM J. AILA, JR.  
CHAIRMAN  
HAWAIIAN HOMES COMMISSION

TYLER I. GOMES  
DEPUTY TO THE CHAIRMAN

**STATE OF HAWAII  
DEPARTMENT OF HAWAIIAN HOME LANDS**

P. O. BOX 1879  
HONOLULU, HAWAII 96805

TESTIMONY OF WILLIAM J. AILA, JR, CHAIRMAN  
HAWAIIAN HOMES COMMISSION  
BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE  
HEARING ON FEBRUARY 11, 2021 AT 2:00PM VIA VIDEOCONFERENCE

**HB 1015 HD1 RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD  
OF LAND AND NATURAL RESOURCES**

February 11, 2021

Aloha Chair Johanson, Vice Chair Kitagawa, and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) submits comments on this bill that clarifies the conditions and manner in which the Board of Land and Natural Resources may dispose of water by license. While DHHL appreciates the amendments proposed by the bill to harmonize the language of “licenses” in section 213 of the HHCA and Article XII, section 1 of the State Constitution with provisions of HRS 171-58, these minor aspects of the bill are insufficient to address DHHL’s concerns.

One of the original sources of funding for implementation of the Hawaiian Homes Commission Act of 1920 (HHCA) was 30% of the revenue from water licenses. That provision has survived till this day, in section 213 of the HHCA and Article XII, section 1 of the State Constitution. While this provision has survived, the amount of funding has decreased significantly over time. DHHL believes this is due primarily to a failure to broadly apply the statute, as well as a failure to determine a reliable pricing mechanism for water leases / licenses.

At our request, a bill was introduced (HB 501) that would have addressed the fundamental and inescapable problem of both the current statute and this HD1. That fundamental and inescapable problem is that the statute and this bill utilize reliance on an appraisal to determine a fair market value. However, because water in Hawai‘i is a public trust, there is no trading market in water in Hawai‘i where prices are set and no “fair market value” can be said to exist.

In one regard this HD1 offers the appearance of addressing this problem, but only further obfuscates the issue. By adding language that an appraiser *may* consider a laundry list of items to determine “fair market value,” but providing no meaningful guidance on how those items may affect “fair market value”, an impression is given that consideration of these factors affect whatever price the appraiser determines. Such a

practice would allow the Board of Land and Natural Resources to ostensibly justify the price that is set without making it clear or transparent how that price was chosen.

Absent a market mechanism or a clear and transparent method for setting the price, the setting of the upset price is essentially a policy decision. Indeed, the testimony on these measures (this bill and HB 501) before the House Committee on Water and Land made this clear. Lobbyists advocated for water pricing to support particular industries, illustrating the ingrained interests which seek to benefit from the private use of public trust resources without regard to other policy considerations, including the state's obligations to DHHL.

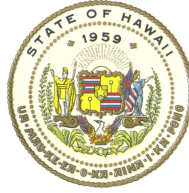
DHHL believes that this committee should ask at this time whether this policy decision on water pricing be made by an appraiser, given an unclear set of guidelines? Should the policy decision be set by a department of land and natural resources staff member? Should it be by the board of land and natural resources, asked to weigh the financial benefit to their own watershed protection efforts against support they may have for agriculture, ranching, or hydropower? Or, as HB 501 suggested by setting a blank percentage of avoided costs, should the policy decision on how to price water leases be set by the Legislature itself?

In another aspect, this bill makes the problem of determining a "fair market" value even worse than under current statute, by allowing the issuance of such dispositions to avoid public auction entirely, instead using direct negotiation. Currently, the only potential market mechanism that might exist for competing bidders to signal their willingness to pay is via a public auction. This would eliminate this possibility, essentially at the sole discretion of the board of land and natural resources.

Absent the provisions in HB 501, this bill would present further, additional challenges to the board of land and natural resources fulfilling their fiduciary duties under the HHCA and State Constitution.

Thank you for your consideration of our testimony.

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  
CONSUMER PROTECTION & COMMERCE**

**Thursday, February 11, 2021  
2:00PM**

**State Capitol, Via Videoconference, Conference Room 329**

**In consideration of  
HOUSE BILL 1015, HOUSE DRAFT 1  
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND  
AND NATURAL RESOURCES**

House Bill 1015, House Draft 1 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 proposes to require consultation with the Commission on Water Resource Management 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 considered in the valuation of water use, providing appraisers guidance and clarity. The intent is to provide a

**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

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.

Additionally, 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.

**HB-1015-HD-1**

Submitted on: 2/10/2021 1:23:04 PM

Testimony for CPC on 2/11/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Russell Tsuji	DLNR	Support	No

Comments:

I am available for questions. Please allow me Zoom access. Thank you.



P.O. Box 253, Kunia, Hawai'i 96759  
Phone: (808) 848-2074; Fax: (808) 848-1921  
e-mail [info@hfbf.org](mailto:info@hfbf.org); [www.hfbf.org](http://www.hfbf.org)

February 11, 2021

HEARING BEFORE THE  
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

**TESTIMONY ON HB 1015, HD1**  
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND AND  
NATURAL RESOURCES

Conference Room 329  
2:00 PM

Aloha Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

I am Brian Miyamoto, Executive Director of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,800 farm family members statewide and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic, and educational interests of our diverse agricultural community.

**The Hawaii Farm Bureau supports HB 1015, HD1**, which would allow water leases to be issued by negotiation rather than requiring a public auction.

Water is an essential element in farming and ranching. Farmers invest heavily in order to provide food and other products to their communities. They take financial risks that no other occupation requires. They are at the mercy of unpredictable weather, market fluctuations, worker availability, energy and transportation costs, pest pressures, and much more. They need stability to keep farming.

HB 1015 would provide a more rational means of allocating water leases by allowing direct negotiation under the stringent, but effective and reasonable provisions outlined in the bill. The current method of public auction, especially for farmers and ranchers already holding leases, is patently unfair and unpredictable especially after the producer has invested years in the land to create a successful business.

Thank you for the opportunity to support HB 1015, HD1.



Testimony Before the House Committee on Consumer Protection & Commerce

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

Thursday, February 11, 2021; 2:00 pm  
Conference Room #329

**House Bill No. 1015 HD1 - Relating to Disposition of Water Licenses by the Board of Land and Natural Resources.**

To the Honorable Rep. Aaron Ling Johanson, Chair, Rep. Lisa Kitagawa, 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 2020, KIUC's energy mix included more than 60% renewable generation, leading the state. Also in 2020, KIUC operated the Kauai electric grid at 100% renewable generation on 280 separate days for a total of 1,497 hours.

Hydro power contributed 14% of our renewable production in 2020. The West Kauai Energy Project, a solar + pumped storage hydro facility currently in development, would meet up to 25% of Kauai's energy demand once operational; bringing us to 80% renewable generation as early as 2024. This project also would fund significant irrigation infrastructure on the west side of Kauai for the life of the project, and would deliver water to farmers at multiple points along the system.

Hydropower is essential to KIUC meeting the State's 100% renewable mandate with the ability to deliver reliable and affordable electricity to our members. However, the development and operation of a hydroelectric facility, which often includes rehabilitation to irrigation infrastructure like diversions, ditches, and reservoirs, is extremely capital intensive. Such development depends on the ability for the electric rate to bear the burden of that up-front capital cost over time. Limiting the amount of time for those capital costs to be recovered will significantly and negatively impact the feasibility of such projects, resulting in a loss for clean energy, lower electric rates, and agricultural infrastructure. These benefits can only be realized with continued access to adequate water resources – that is, long-term (i.e., 60 years or more) water licenses or leases.

KIUC believes that the Board of Land and Natural Resources should retain the ability to determine the appropriate length of a water license depending on the specifics of the application. It is important to note that even with a long-term license, the Commission on Water Resources Management and BLNR can amend the instream flow standard at any time to react to changing environmental conditions.

Should such a restriction on license terms be approved, facilities like the West Kauai Energy Project, which will not only significantly contribute to KIUC's renewable portfolio but will also deliver considerable benefits to the state and the community via rehabilitation of irrigation assets, may not be financially feasible.

We believe the following amendment would resolve the issue:

*(c) Disposition for water may be made by license at public auction or direct negotiations as provided in this chapter ~~for a term of no more than thirty years~~, or by permit for temporary use 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 restrictions under the law;*

**With this amendment, we could support this bill.**

Thank you for your consideration.





# Native Hawaiian LEGAL CORPORATION

1164 Bishop Street, Suite 1205 • Honolulu, Hawai'i 96813  
Phone (808) 521-2302 • Fax (808) 537-4268 • [www.nativehawaiianlegalcorp.org](http://www.nativehawaiianlegalcorp.org)



## HB1015 HD1

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

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

February 11, 2021

2:00 p.m.

Room 329

Aloha e Chair Johanson, Vice Chair Kitagawa, and members of the Committee,

The Native Hawaiian Legal Corporation (NHLC) offers the following **COMMENTS** on HB1015 HD1, which seeks to amend the way in which licenses for the use of public trust water resources are appraised and issued.

While NHLC can appreciate a desire to provide the Board of Land and Natural Resources (BLNR) with greater flexibility and discretion in its ability to appraise and issue water licenses to the extent its decision-making reflects and safeguards the public trust in water, the breadth of that discretion must not come at the expense of sufficient protections over our streams and their public use—from Native Hawaiian farmers and cultural practitioners to prudent stewardship of stream and coastal resources and other constitutionally-protected public trust purposes that we can all agree are worth safeguarding for present and future generations.

NHLC believes that additional provisions and amendments to HB1015 HD1 are necessary to ensure that BLNR's discretion in issuing water licenses is used appropriately and in furtherance of the public trust. In that spirit, **NHLC joins in the comments submitted to this committee by the Office of Hawaiian Affairs for the reasons provided therein.**

Mahalo nui for this opportunity to testify.

Summer L. H. Sylva

Executive Director  
Native Hawaiian Legal Corporation



**HB1015 HD1**  
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND AND  
NATURAL RESOURCES

Ke Kōmike Hale o ka Ho‘omalū Mea Kemu a me ka ‘Oihana Kālepa

Pepeluali 11, 2021

2:00 p.m.

Lumi 329

---

The Administration of the Office of Hawaiian Affairs (OHA) will recommend that the Board of Trustees offer **COMMENTS** on HB1015 HD1, which would authorize the direct negotiation of 30-year water licenses, subject to notice, valuation, and consultation guidelines and requirements, but without the public transparency that might otherwise be provided through the public auction process. **OHA appreciates the guidelines and requirements incorporated into the HD1 version of this bill, and respectfully offers recommended amendments to 1) provide the public with a meaningful opportunity to review and comment on directly negotiated water dispositions which may impact the significant public interest in our water resources for up to 30 years at a time; 2) establish clear Board of Land and Natural Resources (BLNR) approval requirements that can help to safeguard against potentially inappropriate dispositions; and 3) encourage and support the instream, in-watershed use of water for wetland kalo cultivation done in a traditional manner.**

Since time immemorial, water in Hawai‘i has been considered a public trust resource, to be managed and administered for the benefit of present and future generations. Traditional Hawaiian laws and land management practices revolved around the sharing and beneficial use of stream and spring waters, which were treated not as a commodity, but as a community good to be respected and administered to meet a number of social and ecological needs. Today, our constitution and water code reflect this traditional understanding of water, as a fundamental resource that cannot be reduced to ownership, and that must be used and managed to fulfill specific public trust purposes and further the public interest.

While BLNR has a well-established obligation to uphold the public trust in water, a number of court rulings over the last twenty years have demonstrated how it has not consistently upheld these duties – particularly with respect to large-scale water diverters, and notwithstanding significant long-lasting impacts to Native Hawaiian communities, cultural practitioners, and natural and cultural resources and ecosystems protected under the public trust. The BLNR’s continual “holdover” of water revocable permits, which have failed to implement the minimum public trust considerations articulated by the Hawai‘i Supreme Court, further inform continued concerns regarding the BLNR’s inconsistent stewardship of the public trust in water, including with regard to the potential outcomes of any direct negotiation authority it may be granted for long-term water licenses.

Nonetheless, OHA acknowledges and appreciates that the existing valuation and public auction processes currently applicable to the issuance of water licenses may need updating, to reflect the unique character of our water resources, infrastructure, and public trust doctrine; to incorporate new information regarding the sustainability of our water sources as well as the cultural and ecological purposes that they serve, particularly in the era of climate change; and to encourage the greater accountability required of water licenses with respect to the public trust.

Accordingly, in recognition of the potential benefits as well as the significant and well-founded concerns that may arise from the direct negotiation authority and potentially broad discretion this measure would provide to the BLNR, OHA respectfully urges the Committee to consider two additional safeguards; these safeguards will help to ensure that the exercise of the BLNR's discretion to directly negotiate water licenses is appropriate and consistent with the public trust.

First, by providing for a meaningful public notice and input process after a license is negotiated, but before BLNR approval, by adding a new subsection (h) after page 9, line 7, to read as follows:

“(h) Prior to the presentation of a proposed water license for final approval by the board, the department shall provide no less than thirty days’ public notice of the proposed license agreement by posting on the lieutenant governor’s website, in a newspaper of statewide circulation, and in a county newspaper of the county in which the licensed water source is located. The notice shall also be mailed or electronically delivered to all persons who have made a timely written request of the department for notice of water license proposals; all known holders of kuleana, appurtenant, and traditional and customary Native Hawaiian rights, and water use permits associated with the affected water source, such as those who filed declarations of water use within the affected hydrological unit; the department of Hawaiian home lands; and the Office of Hawaiian Affairs. The public notice shall include the identity of the licensee and the location and description of the licensed water source, and shall include information regarding how a copy of the proposed license to be presented to the board can be obtained or inspected. The notice shall also include:

- (1) The length of the license agreement and license rental;
- (2) The amount of water diverted, the proposed use of water allowed under the license, and the amount of water available from the

- diversion source, or a statement that such information is not known;
- (3) The known stream flow of each stream to be affected by the license and the amount of stream flow that will remain in each stream, or a statement that such information is not known;
  - (4) Information regarding how water diversion or extraction and use will be monitored by the department or a third party for compliance with license terms, or a statement that compliance will not be monitored;
  - (5) The avoided cost to the licensee of obtaining the water from practical alternative sources, or a statement that such information is not known;
  - (6) The net economic benefit to the licensee, or a statement that such information is not known;
  - (7) The value contributed by the licensee for watershed management pursuant to subsection (e), or a statement that such information is not known;
  - (8) The public benefit provided from the use of water pursuant to section 174C-2, or a statement that such information is not known;
  - (9) A concise summary of any potential adverse impacts to ecological, cultural, recreational, and aesthetic values of the licensed source, including with respect to each stream that may be affected by the license, or a statement that such information is not known; and
  - (10) A description of how the public can view any hydrologic, ethnographic, environmental review, and any other reports used in the development of the proposed license.

The public notice shall also describe where and how public comment may be submitted on the water license. All public comment must be compiled and submitted to the board to be considered concurrently with the proposed water license."

Second, given the foundational importance of water to our islands, including with respect to our environmental, cultural, and societal integrity, resilience, and sustainability; the numerous examples of historical water dispositions that have failed to uphold the public trust in water, in favor of highly influential corporate interests; and the ever more important need to safeguard the public trust in water during the post-COVID, climate change era, in dispositions that may last a generation or longer; OHA respectfully urges the Committee to also require that any directly-negotiated water license be approved by a supermajority, or five of the seven members of the BLNR, by amending page 2, line 11, to read as follows:

"fair market value as determined by independent appraisal, and provided further that the final license agreement be approved by no less than two-thirds of the membership to which the board is entitled."

Third, in recognition of the cultural significance of kalo cultivation, as well as its importance to subsistence and food security, and in light of the minimal impact of the instream, in-watershed use of water used for wetland kalo cultivation, OHA respectfully urges the Committee to add a new subsection (i), to follow our previously recommended addition of subsection (h), to read as follows:

"(i) 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 nui for the opportunity to testify on this measure.

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE  
ATTN: CHAIR AARON LING JOHANSON & VICE CHAIR LISA KITAGAWA  
Testimony on HB1015, HD1

Relating to Disposition of Water Licenses by the Board of Land and Natural Resources  
February 11, 2021, 2:00 p.m.  
Via Videoconference

Dear Chair Johanson, Vice Chair Kitagawa, and Members of this Honorable Committee,

Mahalo for the opportunity to testify on behalf of the Wai‘oli Valley Taro Hui. 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 farmers, born and raised on Kaua‘i, who continue to care for the same ‘āina that our families have stewarded for more than a century; for some, it has 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 nonprofit 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, the Department of Land and Natural Resources informed us that portions of our centuries-old kalo irrigation system, which predates modern zoning laws and even this water licensing provision, was located on conservation land. So, we are now subject to HRS 171-58, even though our farms have operated in essentially the same way for centuries.

After those 2018 floods, our mānowai (traditional, Native Hawaiian break-away dam), po‘owai (dam at the head of the ‘auwai), and entire ‘auwai (ditch) systems were completely devastated. Our river changed course and some described what we experienced as a thousand year flood event. As stewards of these lands for kalo cultivation and subsistence, we depend on this traditional irrigation system for our livelihood. Almost three years after the 2018 floods, and despite significant kōkua from the State of Hawai‘i, County of Kaua‘i, and University of Hawai‘i at Mānoa’s Richardson School of Law, we are still in basic recovery mode. While the flooding and related damage to our farms is not the topic of today’s hearing, access to water is.

**We share our mana‘o on HB1015, HD1 because its passage will directly impact our farms, families, and livelihoods** — like so many other kalo 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, the Native Hawaiian Legal Corporation, and the

Sierra Club 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 to the overall health of the land, especially when done in a traditional manner.**

In Wai‘oli, we use a traditional mānowai to take some water from Wai‘oli Stream. That water flows through our ‘auwai, into our taro patches, then back to either Wai‘oli Stream or the lower reaches of Hanalei River. Like other kalo farmers, we need throughflow — water flowing through our taro patches — but we do not “consume” water like most offstream users because it returns to the stream. All of our use is within the watershed where our water supply originates. So, any seepage, for example, also goes back to feed our water cycle in the larger Hanalei Bay Watershed.

For these reasons, Hawai‘i’s Constitution (including Article XI sections 1 and 7 and Article XII, section 7), Water Code (HRS 174C-101), and court decisions (*Waiāhole*), grant special protection and respect to traditional instream, in-watershed cultivation of kalo. Our water use is 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, distributed across the island, and never returns to its ahupua‘a of origin.

**Given these important distinctions, if this committee passes out HB1015, HD1, we request the addition of a new section to HRS 171-58 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.”**

**We humbly ask this committee to exempt traditional wetland kalo cultivation from HRS 171.** For the last two years, we have been diligently working on an application for a water lease. We are grateful for the support of free legal clinics at the University of Hawai‘i’s Richardson School of Law and Ian Hirokawa at DLNR. But, we are not even at the point that our application can be submitted. We are family run farms, planting kalo the way our kūpuna taught us. Please, let us continue to live the way we have for hundreds of years, feeding our ‘ohana and the community from our ancestral lo‘i.

Mahalo for your time and consideration.

Reid Yoshida  
President, Wai‘oli Valley Taro Hui  
Kaua‘i, Hawai‘i  
waiolivalleytarohui@gmail.com



# SIERRA CLUB OF HAWAI'I

## HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

February 11, 2021 2:00 PM

### COMMENTS on HB1015 HD1: Relating to Disposition of Water Licenses by DLNR

---

Aloha Chair Johanson, Vice Chair Kitagawa, and members of the committee,

On behalf of our 27,000 members and supporters, the Sierra Club of Hawai'i **provides comments on HB1015 HD1**, 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 the 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 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.

HB1015 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 HB464.

Thank you very much for this opportunity to provide **comments on HB1015 HD1**.



REPRESENTATIVE AARON LING JOHANSON, CHAIR  
REPRESENTATIVE LISA KITAGAWA, VICE CHAIR  
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

COMMENTS ON HOUSE BILL 1015 H.D. 1  
February 11, 2021, 2:00 p.m.  
Room 329, State Capitol  
415 South Beretania Street

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

Earthjustice is a non-profit law firm with decades of experience litigating cases to protect the public trust in Hawai'i's natural resources. One of Earthjustice's primary practice areas is restoring stream water to communities across Hawai'i that have cultural, subsistence, and environmental interests in healthy streams flowing mauka to makai.

Earthjustice supports efforts by the Department of Land and Natural Resources ("DLNR") to improve its decades old water leasing program, which is not consistent with Hawai'i's statutory and constitutional protections regarding disposition of public water for private use. To that end, Earthjustice supports DLNR's proposed amendments to Hawaii Revised Statute ("HRS") section 171-58, clarifying that water permits, leases, or licenses, however named, do not convey any proprietary rights in water.

However, H.B. 1015 H.D. 1 does not go far enough to improve the current water leasing program. Unfortunately, the Board of Land and Natural Resources ("Board") has a long history of making water dispositions that do not comply with its public trust duties to protect instream uses, including the exercise of traditional and customary Native Hawaiian rights.<sup>1</sup> Accordingly, Earthjustice recommends the following amendments to H.B. 1015 H.D. 1 to protect the public trust in water, and to the strengthen the procedural mechanisms in place to ensure that the Board complies with its duties as trustee of our water resources.

1. Public Notice For Disposition By Direct Negotiation Should Meet And Exceed Minimum Transparency Requirements in HRS § 171-16(c)

Other provisions of HRS Chapter 171 governing disposition of public lands and resources currently allow for leasing and licensing through direct negotiation in specific circumstances

---

<sup>1</sup> The legally protected public trust uses of water are: (1) the maintenance of waters in their natural state; (2) domestic water use; (3) the exercise of Native Hawaiian traditional and customary rights; and (4) the Department of Hawaiian Homeland's reservations of water. *Kauai Springs, Inc. v. Planning Comm'n of County of Kauai*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014).

such as for use by charter schools or eleemosynary (charitable) organizations. *See* HRS §§ 171-43.1, -44, -95.5. However, the direct negotiation section of the statute require a minimum 30-day notice to other potentially interested parties. *See* HRS § 171-16(c). Any direct negotiation track for water licenses should provide equal opportunity for public notice to other interested parties, as well as members of the general public who may want to monitor the license process and provide testimony at public hearings on any proposed license presented to the Board for its approval. Accordingly, it should be clear that a **minimum 30-day notice** (from the date of the last notice) should be available to other interested parties (proposed section (c)(1)(D)).

**Additionally**, because other downstream users may have rights and interests affected by any water license, there should be additional notice requirements for those affected parties. Earthjustice supports the proposed language submitted by the Office of Hawaiian Affairs (“OHA”) requiring **direct notice** to OHA, the Department of Hawaiian Homelands, downstream kuleana owners and others with rights to use water from the same stream.

## 2. License Terms Should Be Limited to Ten Years

Earthjustice understands from prior hearings that DLNR’s intent in proposing a 30-year license term is to allow for flexibility under changing climate conditions. Earthjustice supports and echoes DLNR’s expressed concern with how changing climate conditions will affect the availability of water in Hawai’i streams. Recent studies indicate that streamflow levels may already be decreasing. However, a 30-year license term is still too long to allow DLNR to respond to changing climate conditions or other environmental and public trust concerns in a timely manner. Accordingly, Earthjustice supports **ten-year license term** as a more flexible and responsive time frame for responding to a changing water landscape, including alternative water sources that may become available as the State expands its use of recycled water and implements other water conservation measures.

## 3. Water Licenses For Which There is No IFS Should Be Capped at 50% of Streamflow

The primary mechanism established by the State Water Code to protect instream uses of water, including the conservation of native stream life, is the establishment of instream flow standards (“IFS”) by the Commission on Water Resource Management (“Commission”). An IFS is the minimum amount of water that must be left flowing in a specific location at a specified time of year (*e.g.*, dry and wet season flows to be measured at a designated spot). *See* HRS § 174C-3. However, plantation-era diversions were built long before enactment of the Water Code in 1987, and the Board has continued to authorize diversions of water in streams where the Commission has yet to set an IFS. Most often, the Board rubberstamps the previous diversion level without adequately accounting for the adverse effects on protected public trust uses, in part because it expects the Commission to protect instream uses through the IFS process (notwithstanding that

the Board has independent duties to protect the public trust in water under the State Constitution, including for those streams where an IFS or interim IFS has been set).<sup>2</sup>

In order to protect instream water uses including gathering and conservation of stream life pending completion of the IFS-setting process, Earthjustice recommends that any water permit or license allowing off-stream diversions be capped at 50% of median streamflow. This precautionary cap will protect streams that were historically drained dry on islands across the State until CWRM is able to complete the IFS-setting process.

4. Water Licenses Should Be Limited To Streams For Which There Is Accurate Information On Streamflow Levels and Alternative Water Sources

An ongoing problem with water dispositions is that DLNR lacks complete information on existing stream flow and diversion levels, and thus cannot make the required determination under Hawai'i's public trust doctrine that diversion will not adversely affect protected instream water uses. Worse yet, the Board has refused to make accurate water gaging and reporting a condition of year to year revocable permits, even though such water metering is extremely affordable both to install and operate and should be a minimum requirement for being able to use public trust water resources.

Accordingly, water licenses or leases disposing of water for longer than one year should be limited to streams for which a diverter has provided accurate streamflow and diversion information for the previous twelve months. Accurate flow information refers to instream or in-ditch meters registering flow on a daily basis (most often at 15-minute intervals). This information should also be required for alternative water sources that the water diverter may have available to satisfy any reasonable-beneficial water use needs.

5. Exemption For Instream Use Of Water For Taro Cultivation

Finally, Earthjustice respectfully requests that the Committee amend the bill to provide an exemption from lease/license requirements for water diverted to cultivate taro using traditional "instream" growing methods. As the Committee members likely know, traditional taro cultivation does not normally require diversion of water out of the watershed of origin; rather, the 'auwai channel water out of the stream, through lo'i, and then return the water to the stream further downstream. Such water use is a protected instream use under the State Water Code, *see* HRS § 174C-101(c), (d), and should likewise receive protection under the water licensing statute. Accordingly, Earthjustice proposes the following additional language be added to H.B.

---

<sup>2</sup> Specifically, before approving private diversions the Board must "consider the cumulative impact of existing and proposed diversions on trust purposes and [] implement reasonable measures to mitigate this impact, including the use of alternative sources." *In re Waiāhole Ditch Combined Contested Case Proceeding*, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000).

House Committee on Consumer Protection & Commerce

February 11, 2021

Page 4

1015, H.D. 1: "(i) This section shall not apply to any authorization of instream, in-watershed use of water for wetland kalo cultivation done in a traditional manner."

Thank you for the opportunity to present comments on this bill.

Leinā'ala L. Ley



Attorney  
Earthjustice