

S.B. NO. 3132

JAN 26 2022

A BILL FOR AN ACT

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

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

SECTION 1. Section 171-58, Hawaii Revised Statutes, is
amended to read as follows:

"§171-58 Minerals and water rights. (a) Except as
provided in this section the right to any mineral or surface or
ground water shall not be included in any lease, agreement, or
sale, this right being reserved to the State; provided that the
board may make provisions in the lease, agreement, or sale, for
the payment of just compensation to the surface owner for
improvements taken as a condition precedent to the exercise by
the State of any reserved rights to enter, sever, and remove
minerals or to capture, divert, or impound water.

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

(c) Disposition ~~[of]~~ for water ~~[rights]~~ may be made by
~~[lease]~~ license at public auction or direct negotiations as
provided in this chapter or by permit for temporary use on a

1 month-to-month basis under those conditions ~~[which]~~ that will
2 best serve the interests of the State and subject to a maximum
3 term of one year and other restrictions under the law; provided
4 that ~~[any]~~ :

5 (1) A license for water may be disposed of through direct
6 negotiation, without recourse to public auction,
7 provided that the license rental for water shall be at
8 fair market value determined by independent appraisal.
9 Prior to approving a direct license, the board shall
10 publish a request for interest and request for
11 qualifications notice inviting persons to express
12 their interest in the license for water and their
13 qualifications as potential licensees. The notice
14 shall be given at least once statewide and at least
15 once in the county where the land is located and shall
16 contain:

17 (A) The qualifications required of eligible
18 licensees;

19 (B) A general description of the land, water, and any
20 improvements on the land appurtenant to the use
21 of the water;

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1 (C) The proposed use and amount of the water to be
2 allowed under the license;

3 (D) The closing date and manner by which a person
4 shall indicate interest and submit a statement of
5 qualifications; and

6 (E) Notice that a current business plan that shall
7 include the proposed use and amount of the water,
8 is a prerequisite to participate at the time of
9 auction or direct negotiation, if applicable, and
10 shall be made a term of the license.

11 The board shall, in its sole discretion, determine if
12 any persons have qualified under the terms of the
13 request for qualifications and shall notify all
14 persons who expressed interest as to whether they
15 qualified. If the board determines that there is more
16 than one potential qualified bidder, then the board
17 shall dispose of a license for water by public
18 auction. The board may dispose of a license for water
19 by direct negotiation, without recourse to public
20 auction, if the board determines there is no more than
21 one potential qualified bidder or if the board finds

1 that a public auction will be contrary to the public
2 interest;

3 (2) In determining the fair market value for the license
4 rental for water, the following factors may be
5 considered where appropriate:

6 (A) The amount of water diverted or extracted and
7 proposed use of water allowed under the license;

8 (B) The amount of water diverted or extracted in
9 proportion to the amount of water available from
10 the surface or ground water source;

11 (C) The costs of delivery;

12 (D) The avoided cost to the licensee of obtaining the
13 water from practicable alternative sources;

14 (E) The net economic benefit to the licensee;

15 (F) The value contributed by the licensee for
16 watershed management pursuant to subsection (e);
17 and

18 (G) The rent charged for a revocable permit for the
19 disposition that is the subject of the license;

20 (3) If the licensee does not agree with the fair market
21 value, the board shall have sole discretion to resolve

1 the dispute, provided such resolution is consistent
2 with the public trust doctrine;

3 (4) Any disposition by [lease] license for water shall be
4 subject to disapproval by the legislature by two-
5 thirds vote of either the senate or the house of
6 representatives or by majority vote of both in any
7 regular or special session next following the date of
8 disposition; [~~provided further that after~~] and

9 (5) After a certain land or water use has been authorized
10 by the board subsequent to public hearings and
11 conservation district use application approval, and
12 [~~environmental impact statement approvals,~~] is in
13 compliance with chapter 343, water used in
14 nonpolluting ways, for nonconsumptive purposes because
15 it is returned to the same stream or other body of
16 water from which it was drawn, and essentially not
17 affecting the volume and quality of water or biota in
18 the stream or other body of water, may also be
19 [~~leased~~] licensed by the board with the prior approval
20 of the governor and the prior authorization of the
21 legislature by concurrent resolution.

1 (d) Any ~~[lease-of]~~ license for water ~~[rights]~~ shall
2 contain a covenant on the part of the ~~[lessee]~~ licensee that the
3 ~~[lessee]~~ licensee shall provide from waters ~~[leased]~~ licensed
4 from the State under the ~~[lease]~~ license or from any water
5 sources privately owned by the ~~[lessee]~~ licensee to any farmer
6 or rancher engaged in irrigated pasture operations, crop
7 farming, pen feeding operations, or raising of grain and forage
8 crops, or for those public uses and purposes as may be
9 determined by the board, at the same rental price paid under the
10 ~~[lease-]~~ license, plus the proportionate actual costs, as
11 determined by the board, to make these waters available, so much
12 of the waters as are determined by the board to be surplus to
13 the ~~[lessee's]~~ licensee's needs and for that minimum period as
14 the board shall accordingly determine; provided that in lieu of
15 payment for those waters as the State may take for public uses
16 and purposes the board may elect to reduce the rental price
17 under the ~~[lease-of]~~ license for water ~~[rights]~~ in proportion to
18 the value of the waters and the proportionate actual costs of
19 making the waters available. ~~[Subject to the applicable~~
20 ~~provisions of section 171-37(3), the]~~ The board, at any time
21 during the term of the ~~[lease-of]~~ license for water ~~[rights]~~,
22 may withdraw from waters ~~[leased]~~ licensed from the State and

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

10 (e) Any new ~~[lease-of]~~ license for water ~~[rights]~~ shall
11 ~~[contain a covenant that requires]~~ require the ~~[lessee]~~ licensee
12 and the department ~~[of land and natural resources]~~ to jointly
13 develop and implement a watershed management plan~~[-]~~ that
14 prioritizes the availability of water resources from forested
15 watersheds. The board shall not ~~[approve]~~ issue any new ~~[lease~~
16 ~~of]~~ license for water ~~[rights]~~ without ~~[the foregoing covenant~~
17 ~~or]~~ a watershed management plan~~[-]~~ and a commitment from the
18 licensee to assist in implementation of the watershed management
19 plan. The board shall prescribe the minimum content of a
20 watershed management plan~~[-]~~ developed pursuant to this section;
21 provided that the watershed management plan shall require the
22 prevention of the degradation of ~~[surface water and ground water~~

1 ~~quality]~~ water resources from forested watersheds to the extent
2 that degradation can be avoided using reasonable management
3 practices.

4 (f) ~~[Upon renewal, any lease of water rights shall contain~~
5 ~~a covenant that requires the lessee and the department of land~~
6 ~~and natural resources to jointly develop and implement a~~
7 ~~watershed management plan. The board shall not renew any lease~~
8 ~~of water rights without the foregoing covenant or a watershed~~
9 ~~management plan. The board shall prescribe the minimum content~~
10 ~~of a watershed management plan; provided that the watershed~~
11 ~~management plan shall require the prevention of the degradation~~
12 ~~of surface water and ground water quality to the extent that~~
13 ~~degradation can be avoided using reasonable management~~
14 ~~practices.]~~ The board shall consult with the commission on water
15 resource management to determine whether the proposed
16 disposition is consistent with chapter 174C.

17 (g) The department ~~[of land and natural resources]~~ shall
18 notify the department of Hawaiian home lands of its intent to
19 execute any new ~~[lease, or to renew any existing lease of water~~
20 ~~rights.]~~ license for water. After consultation with affected
21 beneficiaries, these departments shall jointly develop a
22 reservation of water rights sufficient to support current and

1 future homestead needs. Any ~~[lease-of]~~ license for water
2 ~~[rights or renewal]~~ shall be subject to the rights of the
3 department of Hawaiian home lands as provided by section 221 of
4 the Hawaiian Homes Commission Act.

5 (h) The initial term for a license for water shall not
6 exceed fifty-five years. The board may extend the term of the
7 license to the extent necessary to qualify the lessee for any
8 state or private lending institution loan, private loan
9 guaranteed by the State, or any loan in which the State and any
10 private lender participates, or to amortize the cost of
11 substantial improvements to the premises benefitting from the
12 license of water that are paid for by the lessee without
13 institutional financing, provided that the aggregate of the
14 initial term and any extension granted shall not exceed sixty-
15 five years and, after consultation with the commission on water
16 resource management, the proposed extension is consistent with
17 chapter 174C. Notwithstanding section 171-22, the board or the
18 chairperson shall not consent to the mortgage of, or the
19 creation of a security interest in, a license of water.

20 (i) A public auction shall not be required for a license
21 for the instream, in-watershed use of water for
22 wetland kalo cultivation done in a traditional manner.

1 (j) Prior to the board's approval of a proposed water
2 license by direct negotiation or public auction, the department
3 shall provide public notice of the proposed license agreement by
4 posting on the websites of the department and the office of the
5 lieutenant governor. The notice shall also be mailed or
6 electronically delivered to all persons who have made a timely
7 written request of the department for notice of water license
8 proposals; the commission on water resource management; the
9 department of Hawaiian home lands; and the office of Hawaiian
10 affairs. The notice shall provide the opportunity to submit
11 comments in writing to the department regarding the proposed
12 water license for a period of no less than thirty days following
13 the date of publication. Comments received shall be submitted
14 to the board with the board's consideration of the proposed
15 water license. The public notice shall include the identity of
16 the licensee, if the license is to be disposed of by direct
17 negotiation, and the location and description of the licensed
18 water source, and shall include information regarding how a copy
19 of the proposed license or draft staff submittal containing the
20 essential terms and conditions of the proposed license to be
21 presented to the board can be obtained or inspected. The notice
22 shall also include:

- 1 (1) The length of the license agreement and license rental
2 for a directly negotiated license, or the upset price
3 if the license is to be disposed of by public auction,
4 as appraised pursuant to paragraph (c)(2) and section
5 171-17;
- 6 (2) The amount of water intended to be diverted or
7 extracted, the proposed use of water allowed under the
8 license, and the amount of water available from the
9 surface or ground water source;
- 10 (3) The known stream flow data of each stream to be
11 affected by the license and the interim or permanent
12 instream flow standard;
- 13 (4) Information regarding how water diversion or
14 extraction and use will be monitored by the department
15 or a third party for compliance with license terms, or
16 a statement that compliance will not be monitored; and
- 17 (5) A description of how the public can view any
18 hydrologic, ethnographic, environmental review, and
19 any other reports used in the development of the
20 proposed license."

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1 SECTION 2. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings pursuant
3 to chapter 91 that were begun before its effective date.

4 SECTION 3. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY: 

9

BY REQUEST

Report Title:

Water License

Description:

Clarifies the conditions and manner in which the Board of Land and Natural Resources may dispose of water by license.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND AND NATURAL RESOURCES.

PURPOSE: To clarify the conditions and manner in which the Board of Land and Natural Resources (Board) may dispose of water by license.

MEANS: Amend section 171-58, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Although section 171-58, HRS, has been in existence for many years, a long-term disposition for water has not been executed pursuant to this section. As the Department is currently working to execute water dispositions, this statute has undergone review and the Department is proposing amendments in order to implement the water disposition process in a more feasible and practicable manner. This bill serves to clearly define allotments of water by the Board by way of licenses for water rather than conveyance of any property right or interest in water via a lease.

The public auction requirement for the disposition of water currently in section 171-58, HRS, has resulted in overly burdensome and unnecessary constraints to the disposition process, especially in instances where there is a high likelihood that there would only be a single bidder. 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.

Further, section 171-58, HRS, requires that water for disposition be appraised at fair

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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 framework to determine a fair rent for water licenses. This would assist in furthering the State's sustainability goals such as local food production or renewable energy.

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

The bill also exempts water licenses for taro cultivation done in a traditional manner from the public auction requirement, which would provide crucial support for the practice. Finally, the bill provides for a more extensive public comment process. This would address concerns raised to provide for greater transparency and public engagement in the water licensing process.

Impact on the public: The bill would support agricultural and renewable energy (hydroelectric) projects, improving the State's food and energy independence and sustainability, while also ensuring responsible stewardship of the public trust

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resource by streamlining and clarifying the water disposition process.

Impact on the department and other agencies:

This bill is an effort to provide greater transparency, efficiency, direction, certainty, and clarity regarding the water disposition process. If this bill does not pass, the Department will be required to expend time and resources to conduct public auctions for long-term water disposition, even if there is only one qualified bidder. Additionally, while some elements of the bill could be adopted by the Board as a policy, having some of these elements contained in statute would provide consistency and security in the future.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: LNR 101.

OTHER AFFECTED
AGENCIES: Department of Hawaiian Home Lands, Office of
Hawaiian Affairs.

EFFECTIVE DATE: Upon approval.