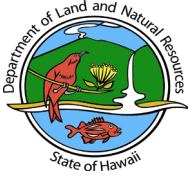


DAVID Y. IGE
GOVERNOR OF HAWAII



**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**

**Thursday, February 4, 2021
9:00AM**

State Capitol, Via Videoconference, Conference Room 430

**In consideration of
HOUSE BILL 501
RELATING TO WATER RIGHTS**

House Bill 501 proposes to require any disposition of water rights by the State to comply with existing mineral and water rights requirements. The measure also proposes to prohibit the disposition of water rights for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose, except for water leases or licenses issued for instream traditional and customary native Hawaiian practices. Finally, the bill proposes to require the Department of Land and Natural Resources, the Commission on Water Resource Management and the Department of Hawaiian Home Lands to report on the application of mineral and water rights and make recommendations for improvement. **The Department of Land and Natural Resources (Department) opposes this bill.**

The Department believes that the valuation methodology proposed by this measure would result in costs for water that are exorbitant and unreasonable, negatively impacting the State's food sustainability and renewable energy goals. Additionally, the Department is concerned that smaller agricultural water users would be disproportionately impacted. For example, for such a user that relies on a groundwater source, to base the value of that water on the significant cost of developing a replacement well would likely price them out of a disposition. Furthermore, the Department believes that this approach is overly restrictive, and would deny an appraiser the ability to utilize their professional expertise in determining the value of water.

As an alternative, the Department proposes the adoption of a multi-factor approach that would provide an appraiser guidance as well as the ability to exercise their judgment¹. Factors that should be considered include:

1. The amount diverted and proposed use of water allowed under the license;

¹ The Department is proposing a formal amendment that includes these factors in its testimony in support of House Bill 1015, an administration measure, that is also being heard by the committee.

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

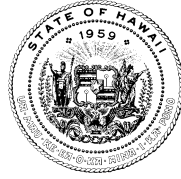
2. The amount of water diverted in proportion to the amount of water available from the diversion source;
3. The costs of delivery;
4. The avoided cost to the licensee of obtaining the water from practicable alternative sources;
5. The net economic benefit to the licensee;
6. The value contributed by the licensee for watershed management pursuant HRS 171-58(e); and
7. The public benefit provided from the use of water pursuant to section 174C-2.

Adopting these criteria would establish factors to be considered in the valuation of water use, providing appraisers guidance and clarity, but allowing discretion to consider the individual circumstances for each proposed disposition. The intent is to provide a framework to determine a fair rent for projects that provide a public benefit. This would assist in furthering the State's sustainability goals such as local food production or renewable energy.

Thank you for the opportunity to comment on this measure.

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 WATER & LAND
HEARING ON FEBRUARY 4, 2021 AT 9:00AM VIA VIDEO CONFERENCE

HB 501 RELATING TO WATER RIGHTS

February 4, 2021

Aloha Chair Tarnas, Vice Chair Branco, and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) strongly supports this bill which requires any disposition of water rights by the State to comply with existing minerals and water rights requirements and prohibits the disposition of water rights for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose, except for water leases or licenses issued for instream traditional and customary native Hawaiian practices. The Hawaiian Homes Commission approved a similar measure, but it was not included in the Governor's administrative package.

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 due primarily to a failure to broadly apply the statute and determine a reliable pricing mechanism for water leases and licenses.

This critical bill will help achieve a fairer application of the statute governing the disposition of water rights by the State through two mechanisms. First, the clarifying language in proposed section 171-58(h) will prohibit the occasional practice of the Board of Land and Natural Resources to dispose of land – such as through the approval of an executive order to the Agribusiness Development Corporation for lands in West Kauai – without expressly also demising the water via a license at the same time. Secondly, it seeks the cooperative work of the Department of Land and Natural Resources, the Commission on Water Resource Management, and DHHL to review whether the provisions of section 171-58, Hawaii Revised Statutes, are being applied in all situations where legally required and what administrative actions, funding, staffing, and legislative changes may enable the consistent application of these provisions, and to report to the 2022 Legislature. No funding is being sought to implement either provision.

The bill also seeks greater transparency in the setting of water lease and license fees. Current statutory leasing provisions require that water leases be priced at fair market value, but this cannot be reliably, consistently, or fairly done since no private market in water rights exists in Hawaii. Giving broad discretion to an appraiser to determine "fair market value" thus maintains an appearance of objectivity, but fails to make sense in light of Hawaii water law.

Finally, we note that due to the complex nature of Hawaii water law, we are aware of an erroneous interpretation of this bill which suggests DHHL is seeking revenue from water leases or licenses in lieu of providing water to homestead lands for existing and future homesteaders. This is not correct. DHHL continues to fully support the implementation of HRS 171-58 which requires that adequate reserves of water from any potentially leased or licenses source of water be FIRST set aside for DHHL's future use, prior to any water being leased or licensed to another party. This bill actually addresses those concerns by not changing that portion of the statute (thereby increasing the number of potential reservations of water for homesteads), and increasing the revenue from any water that may be leased or licensed after these reservation procedures are fulfilled.

Thank you for your consideration of our testimony.



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

February 4, 2021

HEARING BEFORE THE
HOUSE COMMITTEE ON WATER & LAND

TESTIMONY ON HB 501
RELATING TO WATER RIGHTS

Conference Room 430
9:00 AM

Aloha Chair Tarnas, Vice Chair Branco, 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 opposes HB 501 which would prohibit the Board of Land & Natural Resources from disposing of water rights for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality.

Water is an essential element in farming and ranching. When the cost-effective availability of water is threatened, farmers do not have the stability to keep farming. This bill jeopardizes agricultural stability by abolishing the current sound appraisal procedure for setting appropriate water lease fees and instead, substituting a method that requires the use of an arbitrary percentage of an alternative source of water.

The effect of this bill may make surface water unavailable for farming and other agricultural operations. Local farmers are struggling to stay in business as their markets have drastically changed or have been eliminated altogether. This is the last thing Hawaii farmers need during these very difficult times.

We believe that the current rational approach for setting water lease fees should be retained. For the sake of Hawaii farmers' economic stability and continued agricultural production, we request that HB 501 be held.

Thank you for the opportunity to comment on this bill.



LATE

Maui County

February 4, 2021

HOUSE COMMITTEE ON WATER AND LAND

TESTIMONY ON HB 501
RELATING TO WATER RIGHTS

Conference Room 430
9:00 AM

Aloha Chair Tarnas, Vice Chair Branco, and Members of the Committee:

MCFB opposes HB 501, requiring conditions associated with the disposition of water rights.

Upcountry Maui is recognized as the water system most dependent on surface water resources, the subject of this bill. The only other source of water is groundwater, that currently is utilized only when surface water is not available due to cost. Pumping costs can fluctuate greatly due to its dependence on fossil fuel.

This bill creates significant uncertainty on cost of water for farmers and ranchers. No water, no agriculture. Farmers and ranchers depend on this resource for their viability and the cost uncertainty resulting from this bill makes business planning impossible. Predicting the weather, especially during these times of erratic patterns of long droughts followed by extreme storm events make predicting pumping costs problematic.

The bill requires the cost of “the least expensive alternative source of water of similar quality and purpose”. Groundwater does not have the sediment and other impurities associated with surface water. The bill continues to state, “except for water leases or licenses issued for instream traditional and customary native Hawaiian practices”. There are no other water resources, other than groundwater for other resources that are of “similar quality and purpose” making groundwater as the only alternative source.

This measure proposes to replace a working process for one with significant uncertainty. Agriculture is already burdened with significant cost of production challenges. Increased cost unpredictability places this fragile industry at risk.

For these reasons, MCFB respectfully requests your OPPOSITION of this bill. Thank you.



February 2, 2021

Representative David A. Tarnas, Chair
Representative Patrick Pihana Branco, Vice Chair
House Committee on Water & Land

Comments in Opposition to HB 501 (Requires any disposition of water rights by the State to comply with existing minerals and water rights requirements; prohibits the disposition of water rights for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose, except for leases or licenses issued for instream traditional and customary native Hawaiian practices; requires reports and recommendations for improvement.)

Hearing Thursday, February 4, 2021, 9:00 a.m., in Conference Room 430 via Videoconference

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, and utility companies. LURF's mission is to advocate for reasonable, rational, and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to submit comments in **opposition to HB 501**.

HB 501. The overall intent of this bill is to prohibit the Board of Land and Natural Resources from disposing of water rights for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose.

LURF's Position. The proposed bill is premised in part upon findings and conclusions which appear to be partial and unsubstantiated by facts and data. Objective and confirmed findings are required for the passage of legislation, particularly when what is at stake are critical water rights which are vital to public health and safety, the economy, and the community, including lessees and licensees who have relied upon those waters for years and have made substantial investments based on such waters.

LURF's opposition to this measure is further based on the following:

- The approach or methodology proposed by HB 501 to determine the cost of water rights disposed of by the State involves arbitrary and subjective determinations, which lead to inconsistent, unreliable, and inequitable results.
- The existing approach requires the State to undertake an appraisal for each water lease and sets forth parameters and requirements for that appraisal. The present statutory appraisal requirement therefore provides a sound and justifiable basis for setting appropriate fees for the water lease.
- The measure may make it uneconomical, if not unaffordable to use stream water for farming and other agricultural operations.
- The proposed bill unfairly fails to take into consideration the consequences - economic and social – including the potential health and safety concerns for all parties which may be affected by the measure, including the impact upon farmers, ranchers, and agricultural stakeholders.
- There is a need for legislators to understand all sides of any issue or approach – to conduct their review from all perspectives, and then to judiciously consider the effect on all interests, on the health and safety of the public, as well as the overall economy.

For the reasons set forth above, LURF believes the existing, more objective approach to determine the cost of water rights disposed of by the State should be retained instead of utilizing, as a base, an arbitrary percentage of the cost of the least expensive alternative source of water, as proposed by this bill.

LURF therefore opposes SB 501 and respectfully recommends that this bill be held in Committee.

Thank you for the opportunity to present testimony regarding this measure.



SIERRA CLUB OF HAWAI'I

HOUSE COMMITTEE ON WATER AND LAND

February 4, 2021 9:00 AM

COMMENTS on HB 501: Relating to Water Rights

Aloha Chair Tarnas, Vice Chair Branco, and members of the committee,

On behalf of our 27,000 members and supporters, the Sierra Club of Hawai'i provides these **comments in support of the intent of HB501**. This bill seeks to clarify that all water rights, regardless of the means by which they are assigned, comply with Hawai'i Revised Statutes §171-58. The bill also directs the appraiser to base the value charged for the use of water on a percentage of the cost of similar water used in a similar way.

State Disposition of Water Rights Warrant Clarification

We recognize the need to clarify the application of HRS §171-58. State agencies consistently fail to protect the public's interest in the disposition of water and mineral rights. The lack of typical market indicators for the proper value of freshwater held in trust for the people of Hawai'i has left agencies with little guidance on how to set a price for this resource. As a result, agencies have been setting improperly low values for the use of precious water resources and ignoring well-established financial obligations the state has to beneficiaries of these public trust resources.

This practice has dire consequences for public trust water resources and state agency budgets. Artificially cheap water prices encourage private diverters of streams to take more water than they need to meet their needs, to make profitable secondary arrangements with third parties for access and use of the public's water, and to externalize the damage (and resulting costs of repair) stream diversions cause to our watersheds.

At the same time, the failure to properly value water resources at the moment of state disposition means public trust resources are diverted without properly compensating state agencies responsible for the maintenance of watersheds. State agencies must rely on tax-generated general funds to fulfill their missions to the residents of Hawai'i because they fail to properly value for market purposes the public trust resources under their jurisdiction. For example, the Department of Land and Natural Resources should be charging stream diverters for the cost of controlling the invasive species that are spread through the watershed by the private diversion systems on public land.

Directing agencies to charge a specific (though yet-to-be-determined) percentage of the next cheapest alternative source of water that would otherwise be used by the stream diverter. The amendments proposed in this bill appear to ensure this statute is no longer ignored and that public trust water resources are properly valued when made available for private, for-profit use.

Additional Consultation

Consultation with those directly affected by a proposed amendment to a statute is a critical step in effective public policy making. This bill proposes a substantive change to the implementation of HRS §171-58 and thus should be thoroughly vetted with all water users -- which is a wide spectrum of resources users -- before it is adopted into law.

Additional amendments

If, after consultation with beneficiaries of public trust water resources, this committee sees fit to advance this bill, then the Sierra Club highly recommends additional amendments be included to improve the implementation of HRS §171-58.

We urge the committee to adopt additional protections to:

- 1) Limit stream diversions to less than half of the stream baseflow,
- 2) Limit the duration of water licenses to 10 years or less given the uncertainty imposed by climate change,
- 3) Ensure frequent and regular measurement of a stream and the amount of diverted from it,
- 4) Ensure impacts of proposed diversions are properly evaluated and mitigated before any license is issued or renewed.

For specific language, we recommend this committee adopt the relevant provisions of HB 464.

Thank you for the opportunity to provide comments on this important bill.

HOUSE COMMITTEE ON WATER & LAND
ATTN: CHAIR DAVID A. TARNAS & VICE CHAIR PATRICK PIHANA BRANCO
Testimony on HB501
Relating to Water Rights
February 4, 2021, 9:00 a.m.
Via Videoconference

Dear Chair Tarnas, Vice Chair Branco, 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 kalo 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 the 2018 floods, our mānowai (traditional, Native Hawaiian break-away dam), po‘owai (dam at the head of the ditch), 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 some of you may know from our testimony before this Committee on HB2386 during the 2020 session, we steward these lands for kalo cultivation and subsistence. Almost three years after the 2018 floods, and despite significant kōkua from the State of Hawai‘i and County of Kaua‘i, 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 HB501 because its passage will 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 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 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 kalo 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 kalo 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 HB501, we request the addition of a new section to HRS 171 that respects the special legal status of the traditional, Native Hawaiian practice of kalo farming:

“(j) 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. 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
r-yoshida@hotmail.com

HB-501

Submitted on: 2/2/2021 9:55:48 AM

Testimony for WAL on 2/4/2021 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Charlene Schulenburg	Individual	Oppose	No

Comments:

I oppose HB 501.

Mahalo for your consideration.

Charlene Schulenburg