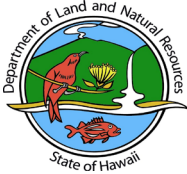


DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
WATER AND LAND**

**Monday, February 8, 2021
1:00PM
State Capitol, Conference Room 229**

**In consideration of
SENATE BILL 1169
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND
AND NATURAL RESOURCES**

Senate Bill 1169 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 and proposes an amendment.**

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 requires consultation with the Commission on Water Resource Management (CWRM) 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.

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

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

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.

Finally, the Department respectfully requests that the bill be amended to address the valuation of water. 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 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. Therefore, the Department requests that Section 171-58(c), HRS, be further revised to add the proposed paragraphs (2) and (3) on page 2, line 19 of the bill:

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

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

(B) The amount of water diverted in proportion to the amount of water available from the diversion source;

(C) The costs of delivery;

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

(E) The net economic benefit to the licensee;

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

(G) The public benefit provided from the use of water pursuant to section 174C-2;

(3) If the licensee does not agree with the fair market value, the board shall have sole discretion to resolve the dispute, provided such resolution is consistent with the public trust doctrine;

The Department is mindful of this issue and initially included the preceding language in the bill. However, the Department opted to remove it in the final draft due to the Department of Hawaiian Home Lands raising concerns about the proposed language and offering their own valuation methodology, with which the Department disagrees. However, as that contrary valuation methodology has now been included in another measure, House Bill 501, the Department believes it is appropriate to pursue the valuation methodology described above it believes is the most appropriate. The House Committee on Water and Land heard both the companion to this measure, House Bill 1015, as well as House Bill 501 on February 4, 2021. The House Committee on Water and Land passed House Bill 1015, amending the measure to include the Department's proposed revision, and deferred House Bill 501. Therefore, the Department respectfully requests this committee pass the bill with the proposed amendment as well, which will maintain consistency between the two Administration measures.

Thank you for the opportunity to comment on this measure.



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February 8, 2021

HEARING BEFORE THE
SENATE COMMITTEE ON WATER AND LAND

TESTIMONY ON SB 1169
RELATING TO DISPOSITION OF WATER LICENSES BY THE BOARD OF LAND AND
NATURAL RESOURCES

Conference Room 229
1:00 PM

Aloha Chair Inouye, Vice Chair Keith-Agaran, 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 SB 1169, 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.

SB 1169 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 SB 1169.



Testimony before the Senate Committee on Water and Land

**S.B. 1169
Relating to Disposition of Water Licenses
by the Board of Land and Natural Resources**

Monday, February 8, 2021
1:00 pm., Agenda Item #6
State Capitol, Conference Room 229

Dave Nagata
Land Agent
Hawaiian Electric Company, Inc.

Aloha Chair Inouye, Vice Chair Keith-Agaran, and Committee Members,

My name is Dave Nagata and I am testifying on behalf of Hawaiian Electric Company in support of S.B. 1169, Relating to Disposition of Water Leases.

Act 126 (2016) gave existing State water rights permittees three (3) years to convert their year-to-year revocable permits to long-term leases. Since that time, Hawaiian Electric Company has been working diligently with the Department of Land and Natural Resources (DLNR) to convert its year-to-year water permit RP S-7463 to a long-term lease in order to continue the non-consumptive water use by our Waiau and Pu'ueo hydroelectric plants along the Wailuku River in Hilo. At this time, we are working with DLNR in securing a long-term water lease and the requirements including on a watershed management plan and how to determine the fair value of a water lease.

Our lease application is unique in that it involves non-consumptive water use and no public lands are involved, both of our plants being located entirely on land owned by us in fee, and our plants do not require the use of any water diversion works or State land.

This bill seeks to eliminate the need for DLNR to expend time and resources to conduct public auctions for long-term water disposition in cases where such action is

not feasible, and to clarify the water disposition process and development and implementation of a watershed management plan that is required of the lessee.

Our hydroelectric plants play an important role in meeting the State of Hawaii's 100% renewable energy goal and are also an important resource in our own renewable energy goals. S.B. 1169 will support these goals by streamlining and clarifying the water disposition process while ensuring responsible stewardship of the public trust resource.

Accordingly, Hawaiian Electric supports S.B. 1169. Thank you for this opportunity to testify.



Testimony Before the Senate Committee on Water & Land

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

Monday, February 8, 2021; 1:00 pm
Conference Room #229

Senate Bill No. 1169 - Relating to Disposition of Water Licenses by the Board of Land and Natural Resources.

To the Honorable Senator Lorraine R. Inouye, Chair, Senator Gilbert S.C. Keith-Agaran, 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.

Hydropower 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, rate stability, 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 Resource Management can amend the instream flow standard at any time to react to changing environmental conditions. Any water license, regardless of term

length, would be subject to amended instream flow standards adopted by the Commission on Water Resource Management throughout the term of the license.

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 and delivery of water to farmers, 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.



SIERRA CLUB OF HAWAI'I

SENATE COMMITTEE ON WATER AND LAND

February 8, 2021 1:00 PM

COMMENTS on SB 1169: Relating to Disposition of Water Licenses by the Board of the
Department of Land and Natural Resources

Aloha Chair Inouye, Vice Chair Keith-Agaran, and members of the committee,

On behalf of our 27,000 members and supporters, the Sierra Club of Hawai'i **provides comments on SB 1169**, 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.

SB 1169 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 HB 464.

Thank you very much for this opportunity to provide **comments on SB 1169**.

SENATE COMMITTEE ON WATER & LAND
ATTN: CHAIR LORRAINE R. INOUE & VICE CHAIR GILBERT S.C. KEITH-AGARAN
Testimony on SB1169

Relating to Disposition of Water Licenses by the Board of Land and Natural Resources
February 8, 2021, 1:00 p.m.
Via Videoconference

Dear Chair Inouye, Vice Chair Keith-Agaran, 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 taro farming 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 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, 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 SB1169 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 on the technical aspects, such as the Sierra Club and the Native Hawaiian Legal Corporation. **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 streams. 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 SB1169, 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:

“(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. 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

LATE



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SB1169

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

SENATE COMMITTEE ON WATER AND LAND

February 8, 2021

1:00 p.m.

Room 229

Aloha e Chair Inouye, Vice Chair Keith-Agaran, and members of the Committee,

The Native Hawaiian Legal Corporation (NHLC) offers the following **COMMENTS** on SB1169, 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.

For that reason, NHLC recommends the following amendments to facilitate much needed transparency, accountability, and meaningful consideration of the public trust in the formulation of good public trust policy.

First and consistent with testimony submitted by Sierra Club, NHLC believes that water licenses should be limited to **a term of no more than 10 years** given climate change realities. We must learn from our Pacific Island neighbors struggling to cope with the effects of climate change—which includes water scarcity, coastal flooding and erosion, and changes in rainfall that affect ecosystems and food production—how to proactively plan for and manage our limited water resources. Dispelling licensees of any sense of long-term entitlement or ownership over public water resources now will better serve the resource and our shared interest in its sustainability going forward.

Additionally and alternatively, the Committee may also consider **subjecting water licenses to periodic reviews (occurring no less than once every five years)** to revisit the amounts of water disposed of or other terms and conditions as may be required due to changing conditions and to protect the public trust in our limited water resources.

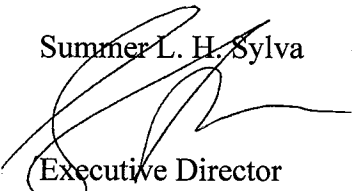
NHLC also recommends that any public notice and request for interest in the issuance of a water license **specify the maximum amount of water that may be licensed** to ensure that licensees and those potentially affected thereby are held accountable for and/or made aware of the amount of public trust water being disposed of via a proposed or contemplated license.

NHLC joins in Sierra Club's and its supporters' recommendation that explicit statutory provisions be included to ensure a minimum and consistent level of consideration and application of the public trust in BLNR's decision-making concerning the issuance of licenses that impact our limited water resources. We reiterate the specific points made by Sierra Club and calling for, among other things:

- Requiring BLNR to ascertain how much water flows in a stream and how much is proposed to be diverted to properly monitor and evaluate the amount of water diverted in proportion to the amount of total water available;
- Requiring licensees to measure how much water is diverted from each stream daily to fully understand their impacts and ensure no harm to public trust purposes, or if harm is found, that the diversion is reasonable and beneficial and justified in light of such harms; and
- Requiring BLNR make explicit findings that the diversion will not result in significant adverse impacts to the ecological, cultural, recreational, and aesthetic values of affected streams and watershed.

For all of the foregoing reasons, NHLC believes that additional provisions and amendments to SB1169 are necessary to ensure that BLNR's discretion in issuing water licenses is used appropriately and in furtherance of the public trust. Mahalo nui for this opportunity to testify.

Summer L. H. Sylva



Executive Director
Native Hawaiian Legal Corporation