

# S.B. NO. 2913

JAN 23 2020

## 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 for a term of no more than thirty

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1 years, or by permit for temporary use on a month-to-month basis  
2 under those conditions which will best serve the interests of  
3 the State and subject to a maximum term of one year and other  
4 restrictions under the law; provided 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 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 there is no more  
16       than one potential qualified bidder, then the board  
17       may dispose of a license for water by direct  
18       negotiation, without recourse to public auction;

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

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

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

6        (C) The costs of delivery;

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

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

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

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

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

19       (4) Any disposition by [~~lease~~] license for water shall be  
20       subject to disapproval by the legislature by two-  
21       thirds vote of either the senate or the house of  
22       representatives or by majority vote of both in any

1 regular or special session next following the date of  
2 disposition; [~~provided further that after~~] and  
3 (5) After a certain land or water use has been authorized  
4 by the board subsequent to public hearings and  
5 conservation district use application approval, and  
6 [~~environmental impact statement approvals,~~] is in  
7 compliance with chapter 343, water used in  
8 nonpolluting ways, for nonconsumptive purposes because  
9 it is returned to the same stream or other body of  
10 water from which it was drawn, and essentially not  
11 affecting the volume and quality of water or biota in  
12 the stream or other body of water, may also be  
13 [~~leased~~] licensed by the board with the prior approval  
14 of the governor and the prior authorization of the  
15 legislature by concurrent resolution.

16 (d) Any [~~lease of~~] license for water [~~rights~~] shall  
17 contain a covenant on the part of the [~~lessee~~] licensee that the  
18 [~~lessee~~] licensee shall provide from waters [~~leased~~] licensed  
19 from the State under the [~~lease~~] license or from any water  
20 sources privately owned by the [~~lessee~~] licensee to any farmer  
21 or rancher engaged in irrigated pasture operations, crop  
22 farming, pen feeding operations, or raising of grain and forage

1 crops, or for those public uses and purposes as may be  
2 determined by the board, at the same rental price paid under the  
3 ~~[lease]~~ license, plus the proportionate actual costs, as  
4 determined by the board, to make these waters available, so much  
5 of the waters as are determined by the board to be surplus to  
6 the ~~[lessee's]~~ licensee's needs and for that minimum period as  
7 the board shall accordingly determine; provided that in lieu of  
8 payment for those waters as the State may take for public uses  
9 and purposes the board may elect to reduce the rental price  
10 under the ~~[lease-of]~~ license for water ~~[rights]~~ in proportion to  
11 the value of the waters and the proportionate actual costs of  
12 making the waters available. ~~[Subject to the applicable~~  
13 ~~provisions of section 171-37(3), the]~~ The board, at any time  
14 during the term of the ~~[lease-of]~~ license for water ~~[rights]~~,  
15 may withdraw from waters ~~[leased]~~ licensed from the State and  
16 from sources privately owned by the ~~[lessee]~~ licensee so much  
17 water as it may deem necessary to (1) preserve human life and  
18 (2) preserve animal life, in that order of priority; and that  
19 from waters ~~[leased]~~ licensed from the State, the board, at any  
20 time during the term of the ~~[lease-of]~~ license for water  
21 ~~[rights]~~, may also withdraw so much water as it may deem  
22 necessary to preserve crops; provided that payment for the

1 waters shall be made in the same manner as provided in this  
2 section.

3 (e) Any new ~~[lease of]~~ license for water ~~[rights]~~ shall  
4 ~~[contain a covenant that requires]~~ require the ~~[lessee]~~ licensee  
5 and the department ~~[of land and natural resources]~~ to jointly  
6 develop and implement a watershed management plan~~[=]~~ that  
7 prioritizes the availability of water resources from forested  
8 watersheds. The board shall not ~~[approve]~~ issue any new ~~[lease~~  
9 ~~of]~~ license for water ~~[rights]~~ without ~~[the foregoing covenant~~  
10 ~~or]~~ a watershed management plan~~[=]~~ and a commitment from the  
11 licensee to assist in implementation of the watershed management  
12 plan. The board shall prescribe the minimum content of a  
13 watershed management plan~~[=]~~ developed pursuant to this section;  
14 provided that the watershed management plan shall require the  
15 prevention of the degradation of ~~[surface water and ground water~~  
16 ~~quality]~~ water resources from forested watersheds to the extent  
17 that degradation can be avoided using reasonable management  
18 practices.

19 (f) ~~[Upon renewal, any lease of water rights shall contain~~  
20 ~~a covenant that requires the lessee and the department of land~~  
21 ~~and natural resources to jointly develop and implement a~~  
22 ~~watershed management plan. The board shall not renew any lease~~

1 ~~of water rights without the foregoing covenant or a watershed~~  
2 ~~management plan. The board shall prescribe the minimum content~~  
3 ~~of a watershed management plan; provided that the watershed~~  
4 ~~management plan shall require the prevention of the degradation~~  
5 ~~of surface water and ground water quality to the extent that~~  
6 ~~degradation can be avoided using reasonable management~~  
7 ~~practices.] The board shall consult with the commission on water~~  
8 ~~resource management to determine whether the proposed~~  
9 ~~disposition is consistent with chapter 174C.~~

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

20 SECTION 2. This Act does not affect rights and duties that  
21 matured, penalties that were incurred, and proceedings that were  
22 begun before its effective date.



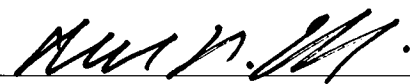
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1       SECTION 3. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

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

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5

INTRODUCED BY: 

6

BY REQUEST

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**Report Title:**

Water License

**Description:**

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

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.

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 resource by streamlining and clarifying the water disposition process.

Impact on the department and other agencies: This bill is an effort to provide 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, regardless of whether such action is feasible.

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Additionally, while some elements of the bill could be adopted by the Board as a policy, it would not have the same level of consistency and security that would be provided through statutory enactment. Additionally, as the bill would clarify the water disposition process, it would obviate the need for administrative rules.

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.