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## A BILL FOR AN ACT

RELATING TO WATER RIGHTS.

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

1           SECTION 1. The legislature finds that when private  
2 property in land was created during the Great Mahele and as  
3 noted by the Hawaii supreme court in *McBryde Sugar Co. v.*  
4 *Robinson*, 54 Haw. 174 (1973), the "right to water was not  
5 intended to be, could not be, and was not transferred to the  
6 awardee, and the ownership of all water in natural watercourses  
7 streams and rivers remained in the people of Hawaii for their  
8 common good." This principle has been reaffirmed by the people  
9 of Hawaii in the state constitution under article XI, sections 1  
10 and 7.

11           The legislature further finds that a primary source of  
12 funding for the implementation of the Hawaiian homes commission  
13 act, since its passage by congress in 1921, was to be from  
14 thirty per cent of the receipts derived from water licenses,  
15 codified in section 213 of the Hawaiian homes commission act,  
16 1920, as amended, and article XII, section 1 of the state  
17 constitution. However, the legislature finds that the statute



1 for issuing and pricing water leases and licenses has not been  
2 clarified to reflect the constitutional provisions that all  
3 water is held by the State in trust.

4 The legislature also finds that because all water is held  
5 by the State in trust, there is significant inequity in the  
6 application of water leasing law, where only water that is  
7 immediately and completely diverted from state owned land  
8 parcels has been required to obtain a lease. While statutory  
9 leasing provisions require that water leases be priced at fair  
10 market value, this cannot be reliably, consistently, or fairly  
11 done since no private market in water rights exists in Hawaii.

12 Instead of seeking to rapidly, consistently, and fairly  
13 apply pricing and the overall applicability of the licensing  
14 process for water resources consistent with the understanding  
15 that water is a public trust resource, the department of land  
16 and natural resources has moved slowly and inconsistently to  
17 implement provisions relating to minerals and water rights. The  
18 slow and inconsistent application of minerals and water rights  
19 has not only caused significant and notable controversy across  
20 the State, but the amount of revenue generated from water leases  
21 and licenses has declined significantly over time, even as the



1 economic value of water for agricultural, renewable energy, and  
2 commercial purposes has risen.

3 The legislature finds that since the revenues from the  
4 licensing of water support programs for watershed management by  
5 the department of land and natural resources, the betterment of  
6 conditions of native Hawaiians and Hawaiians by the office of  
7 Hawaiian affairs, and operation of the native Hawaiian  
8 rehabilitation fund, improvements in the pricing provisions and  
9 overall application of minerals and water rights is in the best  
10 interest of the State.

11 Accordingly, the purpose of this Act is to:

- 12 (1) Require that any disposition of water rights by the  
13 State shall comply with minerals and water rights  
14 requirements;
- 15 (2) Prohibit the disposition of water rights for less than  
16 a certain percentage of the cost of the least  
17 expensive alternative source of water of similar  
18 quality and purpose, except for water leases or  
19 licenses issued for instream traditional and customary  
20 native Hawaiian practices; and



1           (3) Require the department of land and natural resources,  
2                   commission on water resource management, and  
3                   department of Hawaiian home lands to report on the  
4                   application of minerals and water rights and make  
5                   recommendations for improvement.

6           SECTION 2. Section 171-58, Hawaii Revised Statutes, is  
7 amended to read as follows:

8           "**§171-58 Minerals and water rights.** (a) Except as  
9 provided in this section the right to any mineral or surface or  
10 ground water shall not be included in any lease, agreement, or  
11 sale, this right being reserved to the State; provided that the  
12 board may make provisions in the lease, agreement, or sale, for  
13 the payment of just compensation to the surface owner for  
14 improvements taken as a condition precedent to the exercise by  
15 the State of any reserved rights to enter, sever, and remove  
16 minerals or to capture, divert, or impound water.

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

20           (c) Disposition of water rights may be made by lease at  
21 public auction as provided in this chapter or by permit for



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1 temporary use on a month-to-month basis under those conditions  
2 which will best serve the interests of the State and subject to  
3 a maximum term of one year and other restrictions under the law;  
4 provided that any disposition by lease shall be subject to  
5 disapproval by the legislature by two-thirds vote of either the  
6 senate or the house of representatives or by majority vote of  
7 both in any regular or special session next following the date  
8 of disposition; provided further that after a certain land or  
9 water use has been authorized by the board subsequent to public  
10 hearings and conservation district use application and  
11 environmental impact statement approvals, water used in  
12 nonpolluting ways, for nonconsumptive purposes because it is  
13 returned to the same stream or other body of water from which it  
14 was drawn, essentially not affecting the volume and quality of  
15 water or biota in the stream or other body of water, may also be  
16 leased by the board with the prior approval of the governor and  
17 the prior authorization of the legislature by concurrent  
18 resolution.

19 (d) Any lease of water rights shall contain a covenant on  
20 the part of the lessee that the lessee shall provide from waters  
21 leased from the State under the lease or from any water sources



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



1 rights, may also withdraw so much water as it may deem necessary  
2 to preserve crops; provided that payment for the waters shall be  
3 made in the same manner as provided in this section.

4 (e) Any new lease of water rights shall contain a covenant  
5 that requires the lessee and the department of land and natural  
6 resources to jointly develop and implement a watershed  
7 management plan. The board shall not approve any new lease of  
8 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.

15 (f) Upon renewal, any lease of water rights shall contain  
16 a covenant that requires the lessee and the department of land  
17 and natural resources to jointly develop and implement a  
18 watershed management plan. The board shall not renew any lease  
19 of water rights without the foregoing covenant or a watershed  
20 management plan. The board shall prescribe the minimum content  
21 of a watershed management plan; provided that the watershed



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1 management plan shall require the prevention of the degradation  
2 of surface water and ground water quality to the extent that  
3 degradation can be avoided using reasonable management  
4 practices.

5 (g) The department of land and natural resources shall  
6 notify the department of Hawaiian home lands of its intent to  
7 execute any new lease, or to renew any existing lease of water  
8 rights. After consultation with affected beneficiaries, these  
9 departments shall jointly develop a reservation of water rights  
10 sufficient to support current and future homestead needs. Any  
11 lease of water rights or renewal shall be subject to the rights  
12 of the department of Hawaiian home lands as provided by section  
13 221 of the Hawaiian Homes Commission Act.

14 (h) Any disposition of water rights by the State, whether  
15 alone or appurtenant to any land, and whether by lease, license,  
16 permit, or otherwise, shall comply with this section.

17 (i) Except for water leases or licenses issued for  
18 instream traditional and customary native Hawaiian practices,  
19 including lo'i kalo cultivation, no water rights shall be  
20 disposed of for less than \_\_\_\_\_ per cent of the cost of the



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1 least expensive alternative source of water of similar quality  
2 and purpose, as determined by an appraiser."

3 SECTION 3. The department of land and natural resources,  
4 commission on water resource management, and department of  
5 Hawaiian home lands shall review whether the provisions of  
6 section 171-58, Hawaii Revised Statutes, are being applied in  
7 all situations where legally required, and what administrative  
8 actions, funding, staffing, and legislative changes may enable  
9 the consistent application of these provisions. The department  
10 of land and natural resources shall submit a report of its  
11 findings and recommendations, including any proposed  
12 legislation, to the legislature no later than twenty days prior  
13 to the convening of the regular session of 2022.

14 SECTION 4. New statutory material is underscored.

15 SECTION 5. This Act shall take effect upon its approval.

16

INTRODUCED BY:

*Danfianas BR*

JAN 22 2021



# H.B. NO. 501

**Report Title:**

Minerals and Water Rights; Water Leases or Licenses; Water  
Disposition

**Description:**

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 water leases or licenses issued for instream traditional and customary native Hawaiian practices. Requires the DLNR, commission on water resource management, and DHHL to report on the application of minerals and water rights and make recommendations for improvement.

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

