HB2164
RELATING TO DISPOSITION OF WATER LICENSES
BY THE BOARD OF LAND AND NATURAL RESOURCES

HOUSE COMMITTEE ON WATER & LAND

February 8, 2022 9:00 a.m. Conference Room 430

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

The Native Hawaiian Legal Corporation OPPOSES HB2164, which would authorize the direct negotiation of up to 55-year water licenses without sufficient protections for the rights of the public as well as the public trust resource itself.

In Hawai‘i, water has always been considered a public trust resource to be managed for the benefit of present and future generations. Traditionally, stream and spring water was treated as a community resource that belonged to everyone; it was respected and shared in such a way to address Native Hawaiians’ social, ecological, and spiritual needs. This traditional view is enshrined in our constitution and water code, which mandate that this fundamental resource be managed and used to fulfill specific public trust purposes—the maintenance of waters in their natural state, domestic water use, the exercise of Native Hawaiian traditional and customary rights, and the Department of Hawaiian Home Land’s (“DHHL’s”) reservations of water. See Kauai Springs, Inc v. Planning Comm’n of the County of Kaua‘i. 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014).

The documented history of mismanagement of water resources is exactly why a critical eye must be given to any measure that further skews the process toward private interests and away from public trust purposes. We have seen in East Maui, for example, how the continued issuance of revocable permits for water through direct negotiation has prolonged a generations-long monopoly of water by a large scale diverter despite significant impacts to Native Hawaiian communities, practitioners, natural and cultural resources, and ecosystems. Indeed, while this practice has served politically influential commercial interests well, resulting harms have invited protracted litigation by affected communities deprived of similar access and opportunity to inform decisionmaking. These history lessons teach that the continued passive management of our State’s scarce and commercially coveted water resource is irresponsible, and negotiations shielded from public scrutiny invite abuses. Public trust duties are best discharged in full view of the public, whose participation is key to advancing the mandate that trustees “must take the initiative in considering, protecting, and advancing

ulu’a – to stand erect, stand upright; ulu – to grow, o’a – support beams, uluo’a – grow the support beams of a hale
public rights in the resource at every stage of the planning and decisionmaking process.” In Re Water Use Permit Applications, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000).

Although NHLC fully supports updating HRS § 171-58 to strengthen procedural mechanisms to ensure the Board of Land and Natural Resources fulfills its kuleana as trustee of this critical public trust resource, the measure before you today misses the mark. Not only does it perpetuate the highly-criticized, multi-generational license term, but it also enables financial and political capital to influence negotiations in ways that result in all the harms discussed previously. If the intent truly is to improve the water license program, maintaining the status quo is not the answer.

Instead, NHLC supports the idea of creating a task force to discuss and develop safeguards to refine the water licensing process, provide transparency, and ensure the public trust is upheld. This task force must necessarily include experts in water rights, stream ecology, hydrology, Native Hawaiian traditional and customary practices, agriculture, engineering, and stream and ocean recreational uses as well as representatives from agencies, including the Commission on Water Resource Management, DHHL, and the Office of Hawaiian Affairs.

With all that is at stake, pressing pause to allow stakeholders to discuss and develop a more pono path forward is a prudent decision and consistent with this State’s duties to the public trust and to restoring trust statewide. For that reason, NHLC urges this Committee to reject water-related measures like these that maintain the now widely-discredited and injurious aspects of the status quo.

Mahalo for the opportunity to testify.

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