
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 recognizes that the State's
2 responsibility over its natural resources is similar to that of
3 a trustee acting with a fiduciary duty of care and diligence to
4 ensure that the trust's purposes are achieved. In other words,
5 the State must also ensure that traditional and customary
6 Hawaiian rights, wildlife, maintenance of ecological balance and
7 scenic beauty, and the preservation and enhancement of the water
8 for various uses in the public interest, are protected when
9 deciding what constitutes a maximum beneficial use.

10 In January of 2016, the Hawaii first circuit invalidated
11 four revocable permits the board of land and natural resources
12 granted in 2014 to allow continued diversion of water from more
13 than one hundred east Maui streams. The judge ruled that the
14 continuously uninterrupted use of public lands on a holdover
15 basis for the last thirteen years is not temporary and is
16 inconsistent with the public interest and legislative intent of
17 chapter 171, Hawaii Revised Statutes. The legislature then



1 enacted Act 126, Session Laws of Hawaii 2016, which authorized
2 holdover permits to continue for three years and under certain
3 conditions, with the intent that a process for long-term water
4 leases would be established to facilitate completion of the
5 leases during that time period. To date, the department of land
6 and natural resources has yet to provide a meaningful process or
7 clear guidelines regarding long-term water leases, which has led
8 to confusion and misunderstandings amongst permit holders,
9 applicants, and affected water users. Furthermore, the
10 legislature finds that the board of land and natural resources
11 lacks sufficient administrative rules for rendering decisions on
12 dispositions of water.

13 The purpose of this Act is to:

- 14 (1) Extend the authorization for the issuance of holdover
15 permits to a total of ten consecutive one-year
16 holdovers, subject to certain conditions and provided
17 that the holdover or pending lease application does
18 not concern a use or disposition of water rights that
19 is otherwise legally prohibited or invalidated by a
20 court of law;



- 1 (2) Require any holdover authorization that allows the use
2 of over two million gallons of water per day to:
- 3 (A) Be issued pursuant to a final written decision
4 that includes conditions to minimize impacts to
5 the public trust purposes of any affected water
6 source; and
- 7 (B) Limit water use to an applicant's demonstrated
8 reasonable beneficial needs for the holdover
9 period;
- 10 (3) Require a holdover permit to be continued without any
11 action of the board of land and natural resources
12 pending completion of any contested case proceedings;
- 13 (4) Prior to approving any holdover authorization after
14 January 1, 2020, require the department of land and
15 natural resources to prepare a draft submittal for
16 each pending lease application for the disposition of
17 water rights as to the status of each application and
18 further action required for final disposition, and
19 solicit the services of a qualified appraiser pursuant
20 to chapter 103D, Hawaii Revised Statutes, regarding
21 the water valuation process;



- 1 (5) Require the department of land and natural resources
2 to submit for approval to the board of land and
3 natural resources by January 1, 2022, a long-term
4 lease determination for the disposition of water
5 rights for all applications pending prior to
6 January 1, 2019, that authorize the use of less than
7 two million gallons of water per day; provided that
8 issuance of the lease is consistent with the public
9 trust;
- 10 (6) Exempt instream, in-watershed use of water for wetland
11 kalo cultivation done in a traditional manner from
12 statutory provisions regulating the disposition of
13 water rights;
- 14 (7) Require the chairperson of the board of land and
15 natural resources, board of land and natural
16 resources, and commission on water resource management
17 to conduct an analysis of the effectiveness of the
18 State's long-term water disposition laws and the
19 appropriateness of section 171-58, Hawaii Revised
20 Statutes, and recommend specific statutory changes;
21 and



1 (8) Require the board of land and natural resources to
 2 submit a report of the findings and recommendations on
 3 the effectiveness of the State's long-term water
 4 disposition laws and the appropriateness of section
 5 171-58, Hawaii Revised Statutes, including any
 6 proposed legislation, to the legislature no later than
 7 twenty days prior to the convening of the regular
 8 session of 2020.

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

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



1 (b) Disposition of mineral rights shall be in accordance
2 with the laws relating to the disposition of mineral rights
3 enacted or hereafter enacted by the legislature.

4 (c) Disposition of water rights may be made by lease at
5 public auction as provided in this chapter or by permit for
6 temporary use on a month-to-month basis under those conditions
7 which will best serve the interests of the State and subject to
8 a maximum term of one year and other restrictions under the law;
9 provided that:

10 (1) Where an application has been made for a lease under
11 this section to continue a previously authorized
12 disposition of water rights, a holdover may be
13 authorized annually until the pending application for
14 the disposition of water rights is finally resolved or
15 for a total of [~~three~~] ten consecutive one-year
16 holdovers, whichever occurs sooner; provided further
17 that [~~the~~]:

18 (A) The holdover or pending lease application does
19 not concern a use or disposition of water rights
20 that is otherwise legally prohibited or
21 invalidated by a court of law;



- 1 (B) The total period of the holdover for any
2 applicant shall not exceed [~~three~~] ten years;
3 ~~[provided further that the]~~
- 4 (C) The holdover is consistent with the public trust
5 doctrine; and
- 6 (D) Any holdover authorization that allows or has the
7 effect of allowing the use of over two million
8 gallons of water per day shall:
- 9 (i) Be issued pursuant to a final written
10 decision that explicitly considers and
11 includes conditions to minimize any
12 potential impacts to the public trust
13 purposes of any affected water source,
14 including the ecological, natural,
15 recreational, and aesthetic values of
16 affected surface waters in their natural
17 state; and
- 18 (ii) Limit the total aggregate quantity of any
19 surface water allowed to be received under
20 all holdovers issued pursuant to an
21 application to the applicant's demonstrated



1 reasonable beneficial needs for the holdover
2 period;

3 (2) If a contested case pursuant to chapter 91 is
4 requested on a one-year holdover, any provision of law
5 notwithstanding, the holdover shall be continued
6 without any action of the board pending completion of
7 the proceedings;

8 ~~[(2)]~~ (3) Any disposition by lease shall be subject to
9 disapproval by the legislature by two-thirds vote of
10 either the senate or the house of representatives or
11 by majority vote of both in any regular or special
12 session next following the date of disposition; ~~[and~~

13 ~~-(3)]~~ (4) After a certain land or water use has been
14 authorized by the board subsequent to public hearings
15 and conservation district use application and
16 environmental impact statement approvals, water used
17 in nonpolluting ways, for nonconsumptive purposes
18 because it is returned to the same stream or other
19 body of water from which it was drawn, and essentially
20 not affecting the volume and quality of water or biota
21 in the stream or other body of water, may also be



1 leased by the board with the prior approval of the
2 governor and the prior authorization of the
3 legislature by concurrent resolution[?];

4 (5) Notwithstanding any provision to the contrary, prior
5 to approval of any holdover authorization after
6 January 1, 2020, the department shall:

7 (A) Prepare a draft submittal for each pending lease
8 application for the disposition of water rights
9 as to the status of each application and further
10 action required for final disposition; and

11 (B) Solicit the services of a qualified appraiser
12 pursuant to chapter 103D regarding the water
13 valuation process; and

14 (6) No later than January 1, 2022, the department shall
15 submit to the board for approval a long-term lease
16 determination for the disposition of water rights for
17 each application pending prior to January 1, 2019,
18 that authorizes the use of less than two million
19 gallons of water per day; provided that issuance of
20 the lease is consistent with the public trust.



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



1 (1) preserve human life and (2) preserve animal life, in that
2 order of priority; and that from waters leased from the State
3 the board, at any time during the term of the lease of water
4 rights, may also withdraw so much water as it may deem necessary
5 to preserve crops; provided that payment for the waters shall be
6 made in the same manner as provided in this section.

7 (e) Any new lease of water rights shall contain a covenant
8 that requires the lessee and the department of land and natural
9 resources to jointly develop and implement a watershed
10 management plan. The board shall not approve any new lease of
11 water rights without the foregoing covenant or a watershed
12 management plan. The board shall prescribe the minimum content
13 of a watershed management plan; provided that the watershed
14 management plan shall require the prevention of the degradation
15 of surface water and ground water quality to the extent that
16 degradation can be avoided using reasonable management
17 practices.

18 (f) Upon renewal, any lease of water rights shall contain
19 a covenant that requires the lessee and the department of land
20 and natural resources to jointly develop and implement a
21 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.

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

17 (h) This section shall not apply to any authorization of
18 instream, in-watershed use of water for wetland kalo cultivation
19 done in a traditional manner."

20 SECTION 3. Act 126, Session Laws of Hawaii 2016, is
21 amended as follows:



1 1. By amending section 2 to read:

2 "SECTION 2. The department of land and natural resources
3 shall prepare and submit an annual [reports] report to the
4 legislature no later than twenty days before the convening of
5 each [~~of the~~] regular [~~sessions~~] session of [~~2017, 2018, 2019,~~
6 ~~and 2020.~~] the legislature for the years 2017 to 2027. The
7 reports shall include:

8 (1) The status of applications to continue previously-
9 authorized dispositions of water rights;

10 (2) Actions taken on the applications during the [~~fiscal~~
11 ~~period of July 1, 2016, to November 30, 2016, fiscal~~
12 ~~year 2016 2017, fiscal year 2017 2018, and fiscal year~~
13 ~~2018 2019, respectively,~~] immediately preceding fiscal
14 year; and

15 (3) Any relevant recommendations for legislative action or
16 appropriation."

17 2. By amending section 4 to read:

18 "SECTION 4. This Act shall take effect upon its approval,
19 and shall apply to applications for a lease to continue a
20 previously authorized disposition of water rights that are
21 pending before the board of land and natural resources on the



1 effective date of this Act or filed with the board of land and
2 natural resources on or after the effective date of this Act,
3 but prior to June 30, [~~2019;~~] 2026; provided that:

4 (1) This Act shall be repealed on June 30, [~~2019;~~] 2026,
5 and section 171-58(c), Hawaii Revised Statutes, shall
6 be reenacted in the form in which it read on the day
7 prior to the effective date of this Act; and

8 (2) Any holdovers first applied for under this Act prior
9 to June 30, 2019, may be reauthorized, as provided in
10 section 1 of this Act, beyond June 30, 2019."

11 SECTION 4. (a) The chairperson of the board of land and
12 natural resources, board of land and natural resources, and
13 commission on water resource management shall:

14 (1) Conduct an analysis of the effectiveness of the
15 State's long-term water disposition laws and whether
16 section 171-58, Hawaii Revised Statutes, is
17 appropriate to guide the board of land and natural
18 resources on the issuance of long-term leases for the
19 disposition of water rights; and

20 (2) Recommend specific statutory changes or new
21 legislation necessary to enable a clear process by



1 which the board of land and natural resources shall
2 issue long-term leases for the disposition of water
3 rights.

4 (b) The chairperson of the board of land and natural
5 resources may invite other appropriate, interested parties to
6 participate in the analysis pursuant to subsection (a) and
7 development of recommendations regarding the issuance of long-
8 term leases for the disposition of water rights.

9 (c) The board of land and natural resources shall submit a
10 report of its findings and recommendations on the analysis
11 pursuant to subsection (a), including any proposed legislation,
12 to the legislature no later than twenty days prior to the
13 convening of the regular session of 2020.

14 SECTION 5. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 6. This Act shall take effect on June 29, 2019.



Report Title:

DLNR; Water Rights; Extension; Holdover

Description:

Allows for a total of ten consecutive one-year holdovers of water permits under section 171-58(c), HRS. Places conditions on holdovers that authorize the use of over two million gallons of water per day. Requires holdovers to continue without BLNR action while a contested case hearing is pending. Requires the DLNR, prior to authorizing holdovers after 1/1/2020, to prepare a draft submittal for each pending lease application for the disposition of water rights and solicit the services of a qualified appraiser pursuant to chapter 103D, HRS, regarding the water valuation process. Requires the DLNR to submit to BLNR for approval, by 1/1/2022, a long-term lease determination for the disposition of water rights for each application pending prior to 1/1/2019 that authorizes the use of less than two million gallons of water per day. Exempts authorized instream, in-watershed use of water for wetland kalo cultivation done in a traditional manner. Requires BLNR, the chairperson of BLNR, and commission on water resource management to report to the legislature on the effectiveness of section 171-58, HRS. Extends the repeal and reenactment provision for Act 126, SLH 2016, from June 30, 2019, to June 30, 2026. Makes conforming amendments to the reporting requirement in Act 126, SLH 2016. (Proposed SD1)

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