

---

---

# A BILL FOR AN ACT

RELATING TO WATER.

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

**PART I**

1  
2 SECTION 1. House Concurrent Resolution No. 261, H.D. 1  
3 (2006) requested the department of health, with the assistance  
4 of the department of land and natural resources and the  
5 department of facilities maintenance of the city and county of  
6 Honolulu, to report to the legislature on the relationship  
7 between the various Kailua waterways, including the Kaelepulu  
8 pond, and the water quality and natural resources of Kailua  
9 beach and Kailua bay. This system consists of interconnected  
10 brackish estuarine waters, including Kawainui stream, Hamakua  
11 marsh, Kaelepulu canal, Kaelepulu pond, and Kaelepulu wetlands.

12 In the 1960s, the United States Army Corps of Engineers  
13 directed the natural flow to the Kawainui stream to be blocked  
14 by the construction of the flood control levee to reduce the  
15 threat of flooding to Kailua town. The city and county of  
16 Honolulu manages the Kawainui stream and Kaelepulu canal for  
17 drainage and flood control. The Hamakua wetlands are managed  
18 for endangered Hawaiian waterfowl habitat by the department of



1 land and natural resources. The Kaelepulu pond and Kaelepulu  
2 wetland are private property, recognized historically as a  
3 Hawaiian fish pond and a habitat for at least three endangered  
4 native Hawaiian waterfowl. While it is private land, both the  
5 State and the city and county of Honolulu dump runoff into  
6 Kaelepulu pond, as well as other waterways including Kailua  
7 beach, Kailua bay, Hamakua marsh, and Kawainui marsh.

8 The Kailua waterways are listed on the State's Clean Water  
9 Act 303(d) list of impaired waters not meeting water quality  
10 standards for nutrients, turbidity, and bacteria load. As a  
11 result, the Kailua waterways are presently being studied by the  
12 department of health. Since the time of the removal of the  
13 natural water flow from Kawainui marsh, the large majority of  
14 the water entering the Kailua waterways does so through storm  
15 drains under main separate storm sewer system four. Water flows  
16 from the Kailua waterways across the sand berm at Kailua beach  
17 and adversely impacts the quality of the near shore waters. The  
18 near shore waters are predominantly used for resident and  
19 tourist recreation.

20 The department of health's 2008 report to the legislature  
21 lists eleven reasonable approaches that may improve the water



1 quality and natural resources of the estuary system and its  
2 residual impact on the beaches and waters in Kailua bay.

3 The purpose of this part is to appropriate funds to address  
4 water quality and other issues facing Kailua waterways as  
5 follows:

- 6 (1) For the city and county of Honolulu to implement three  
7 of the eleven aforementioned approaches; and  
8 (2) For the department of transportation to plan, design,  
9 and construct measures to address water quality,  
10 siltation, and other waterway problems described in  
11 this part.

12 SECTION 2. The city and county of Honolulu shall:

- 13 (1) Conduct an engineering study and an environmental  
14 assessment for the preliminary design and  
15 specification of measures to restore adequate water  
16 flow from Kawainui marsh to Kawainui stream using  
17 siphons, tunnels, pumps, or other appropriate  
18 measures;  
19 (2) Conduct a study in consultation with the department of  
20 health to maximize the efficiency of the monthly  
21 stream mouth opening procedures, as well as to improve  
22 procedures to respond to threats of flooding due to a



1 blocked canal mouth. This study shall track the  
2 effluent plume from the stream mouth and elucidate the  
3 fate of state standard water quality parameters, such  
4 as turbidity, nutrients, and bacteria, within Kailua  
5 bay recreational waters; and

6 (3) Design and implement measures in consultation with the  
7 department of health to reduce the amount of polluted  
8 runoff delivered to Kaelepulu pond by redesigning and  
9 restoring the function of the Keopu flood basin, which  
10 receives waters from main separate storm sewer system  
11 four, and report to the legislature on those measures.

12 All studies and report directed by this section shall be  
13 transmitted to the legislature no later than twenty days prior  
14 to the convening of the regular session of 2009.

15 SECTION 3. There is appropriated out of the general  
16 revenues of the State of Hawaii the sum of \$ or so  
17 much thereof as may be necessary for fiscal year 2008-2009 for  
18 the city and county of Honolulu to carry out the purposes  
19 described in section 2 of this Act.

20 The sum appropriated shall be expended by the city and  
21 county of Honolulu for the purposes of this Act.



1 SECTION 4. There is appropriated out of the state highway  
2 fund the sum of \$ or so much thereof as may be  
3 necessary for fiscal year 2008-2009 for the department of  
4 transportation to plan, design, and construct measures to  
5 address water quality, siltation, and other waterway problems  
6 mentioned in this Part; provided that the department of  
7 transportation shall:

- 8 (1) Work in consultation with the department of health,  
9 the department of land and natural resources, and the  
10 city and county of Honolulu; and  
11 (2) Request that the city and county of Honolulu match any  
12 funds expended for these purposes considering the city  
13 and county of Honolulu contributes to the road run-off  
14 into the Kailua waterways.

15 The sum appropriated shall be expended by the department of  
16 transportation for the purposes of this part.

17 **PART II**

18 SECTION 5. The purpose of this part is to address the  
19 findings and conclusions of the state auditor's February 19,  
20 2008 financial and management audit of the Moloka'i irrigation  
21 system.



1           The Moloka'i irrigation system was designed to fulfill the  
2 policy of the Hawaiian Homes Commission Act, 1920, which,  
3 pursuant to section 101 of that Act, is "to enable native  
4 Hawaiians to return to their lands in order to fully support  
5 self-sufficiency for native Hawaiians and the self-determination  
6 of native Hawaiians . . . and the preservation of values,  
7 traditions, and culture of native Hawaiians."

8           The purpose of the Moloka'i irrigation system was to bring  
9 under irrigation an area of 13,650 irrigable acres of land,  
10 which was dry farmed, thereby increasing and stabilizing the  
11 crop yield and economy of the island of Moloka'i. As originally  
12 conceived, the system was designed to serve irrigation water to  
13 13,250 acres of pineapple and four hundred acres of diversified  
14 crops. With the completion of the tunnel and supply conduit, an  
15 additional 3,150 acres of pineapple and six hundred sixty acres  
16 of irrigable diversified cropland were added.

17           Although the department of land and natural resources was  
18 the designated sponsoring agency for the construction,  
19 operation, and maintenance of the Moloka'i irrigation system, the  
20 department of Hawaiian home lands and the Moloka'i ranch  
21 benefited.



1 In 1989, the department of agriculture assumed its duties  
2 as custodian of the State's irrigation systems, including the  
3 Moloka'i irrigation system.

4 The state auditor found the department of agriculture to be  
5 remiss in its oversight of the Moloka'i irrigation system. The  
6 auditor stated, "The Department of Agriculture's flawed  
7 management endangers agriculture in Moloka'i." The auditor also  
8 found that "[w]hile the department inherited a deteriorating  
9 system, it has done little to learn about the system and its  
10 contentious history. . . . The department is unable to balance  
11 its responsibilities in promoting agriculture, while  
12 guaranteeing Hawaiian homesteaders' rights to two-thirds of the  
13 water within the MIS . . . it also has an obligation to Hawaiian  
14 homesteaders as expressed in the Hawaiian Homes Commission Act,  
15 1920. The latter obligation has been set aside to promote  
16 agriculture among non-homestead farmers. The growth of  
17 agriculture among non-homestead farmers has come at the high  
18 cost of exhausting the water resources of the MIS." (emphasis  
19 added)

20 On January 31, 2008, the Hawai'i Supreme Court reaffirmed in  
21 *OHA v. HCDCH* No. 25570, the State's fiduciary duty as a trustee  
22 of the Hawaiian Homes Commission Act. The court stated:



1 "Moreover, we have previously indicated in an analogous case  
2 dealing with the Hawaiian Homes Commission Act that the State,  
3 as trustee, must adhere to high fiduciary duties normally owed  
4 by a trustee to its beneficiaries." Ahuna, 64 Haw. at 338, 640  
5 P.2d at 1168. In describing the scope of the State's relevant  
6 fiduciary duties, this court, in Ahuna, analogized such duties  
7 to the fiduciary duties of the United States to Native Americans  
8 by quoting, with approval, the words of the United States  
9 Supreme Court and stated:

10 Under a humane and self imposed policy which has found  
11 expression in many acts of Congress and numerous decisions of  
12 this Court, [the Government] has charged itself with moral  
13 obligations of the highest responsibility and trust. Its  
14 conduct, as disclosed in the acts of those who represent it in  
15 dealings with the Indians, should therefore be judged by the  
16 most exacting fiduciary standards. (emphasis added) Id. at  
17 339, 640 P.2d at 1169 (quoting Seminole Nation v. United States,  
18 316 U.S. 286, 296-97 (1942)) (brackets and emphases in original)  
19 (format altered). In Ahuna, we held that "[t]he use of the term  
20 'most exacting fiduciary standards' imports the notion that  
21 [this] court will strictly scrutinize the actions of the  
22 government." Id. at 339, 640 P.2d at 1169. Moreover, we





1 observed that "the nature of the trust obligations of the  
2 [State] toward beneficiaries . . . may be determined by  
3 examining well-settled principles enunciated by the federal  
4 courts regarding lands set aside by Congress in trust for the  
5 benefit of other native Americans[.]" Id. at 339, 640 P.2d at  
6 1168. In particular, we cited three specific trust duties  
7 applicable to the State as trustee: (1) "the obligation . . .  
8 to administer the trust solely in the interest of the  
9 beneficiary"; (2) the obligation that the trustee "deal  
10 impartially when there is more than one beneficiary"; and (3)  
11 the "obligation to use reasonable skill and care to make trust  
12 property productive[.]" Id. at 340, 604 P.2d at 1169-70  
13 (citations omitted)."

14 The State has a fiduciary duty to native Hawaiians under  
15 the Hawaiian Homes Commission Act, 1920 and should therefore be  
16 judged by the most exacting fiduciary standards. When one of  
17 its state departments breaches the State's fiduciary duty, the  
18 State as trustee is liable to its beneficiaries. In addressing  
19 the State's fiduciary duty to the Hawaiian Moloka'i irrigation  
20 system user, the state auditor recommended that the State should  
21 "consider adding additional homestead farmer seat(s) and develop  
22 procedural guidelines on how seats are filled."



1           The findings of the state auditor confirm that for nineteen  
2 years, the department of agriculture has continually breached  
3 its fiduciary duty to the native Hawaiians who are the users of  
4 the Moloka'i irrigation system. In addition, the deputy  
5 administrator of the department of agriculture recently stated  
6 in a legislative hearing that the Moloka'i irrigation system is  
7 the only state irrigation system that generates a profit. All  
8 of the other state irrigation systems operate with deficits.  
9 This means that the State depends on the Moloka'i irrigation  
10 system to fund the operations of the other state irrigation  
11 systems to the Moloka'i irrigation system's detriment.

12           The legislature cannot allow the State to continue to  
13 breach its fiduciary duty to the native Hawaiian users of the  
14 Moloka'i irrigation system for in doing so the legislature may  
15 also be liable for the breach of fiduciary duty. Allowing the  
16 Moloka'i irrigation system user revenue funds to continue to be  
17 commingled with other non-trust funds and to be used for non-  
18 Moloka'i irrigation system operations and maintenance fails to  
19 comport with fiduciary standards.

20           Therefore, the intent of this part is to end the breach of  
21 fiduciary duty and to implement the findings, conclusions, and



1 recommendations of the state auditor. The auditor recommends in  
2 Section 5(c) and 5(d) of her report: "c. Develop the ability  
3 to segregate financial information on a system by system basis,  
4 for use as a planning tool and d. Review receivables collection  
5 process, and if necessary consider employing more aggressive  
6 tactics." (emphasis added) In response to these  
7 recommendations, this part creates a separate subaccount in the  
8 irrigation system revolving fund to provide greater transparency  
9 and accountability, adds an additional homestead farmer seat to  
10 the advisory board, and appropriates funds to further needed  
11 repairs and maintenance of the Moloka'i irrigation system.

12 SECTION 6. Section 167-22, Hawaii Revised Statutes, is  
13 amended by amending subsection (a) to read as follows:

14 "(a) There is established the irrigation system revolving  
15 fund, into which shall be deposited:

- 16 (1) All legislative appropriations to the irrigation  
17 system revolving fund; and  
18 (2) All or any portion of the receipts and revenues  
19 collected under this chapter, as determined by the  
20 board of agriculture, exclusive of the receipts and  
21 revenues deposited into the irrigation water  
22 development special fund.



1 There shall be created a sub-account within the revolving fund  
2 to facilitate increased transparency to assure the appropriate  
3 operation of the revolving fund as it relates to deposits and  
4 expenditures for the Molokai irrigation system."

5 SECTION 7. Section 167-23, Hawaii Revised Statutes, is  
6 amended by amending subsection (a) to read as follows:

7 "(a) There is established a Molokai irrigation system  
8 water users advisory board, to be appointed by the governor  
9 under section 26-34. The advisory board shall consist of ~~six~~  
10 ~~members, as follows:~~ seven members, of whom two-thirds shall be  
11 Hawaiian homestead farmers who are Molokai irrigation system  
12 users, Molokai residents, and active general excise tax  
13 licensees. To the extent possible, the board shall be comprised  
14 of the following:

- 15 (1) [A] Two homestead farmer ~~user~~ users on Molokai;  
16 (2) A nonhomestead farmer user on Molokai;  
17 (3) The ~~designee (by name rather than office)]~~ nominee of  
18 the Molokai Farm Bureau;  
19 (4) The ~~designee (by name rather than office)]~~ nominee of  
20 Hikiola Cooperative, Inc.;



1 (5) The [~~designee (by name rather than office)~~] nominee of  
2 the Molokai-Lanai soil and water conservation  
3 district; and

4 (6) The [~~designee (by name rather than office)~~] nominee of  
5 the department of Hawaiian home lands.

6 The members of the advisory board shall serve without  
7 compensation, but shall be entitled to reimbursement for  
8 necessary expenses while attending meetings and while in the  
9 discharge of their duties. For administrative purposes, and  
10 pursuant to section 26-35, the advisory board shall be placed  
11 within the department of agriculture."

12 SECTION 8. The Moloka'i irrigation system water users  
13 advisory board, in conjunction with the board of agriculture,  
14 shall develop a definition of "homestead farmer". The advisory  
15 board shall report to the legislature, no later than twenty days  
16 prior to the convening of the regular session of 2009, on the  
17 progress made toward implementing the objectives outlined in the  
18 "Roadmap to Improvement" document generated as a result of  
19 meetings between the board of agriculture and the Moloka'i  
20 community. The report shall include a timeline for  
21 implementation. The advisory board shall also post its report  
22 on the appropriate website of the department of agriculture.



1 SECTION 9. There is appropriated out of the general  
2 revenues of the State of Hawaii the sum of \$ or so  
3 much thereof as may be necessary for fiscal year 2008-2009 to  
4 further address the repair and maintenance needs of the Moloka'i  
5 irrigation system.

6 The sum appropriated shall be expended by the department of  
7 agriculture for the purposes of this part.

8 **PART III**

9 SECTION 10. Statutory material to be repealed is bracketed  
10 and stricken. New statutory material is underscored.

11 SECTION 11. This Act shall take effect on July 1, 2050.



**Report Title:**

Kailua Waterways; Studies; Appropriation

**Description:**

Requires the city and county of Honolulu to conduct, and appropriates funds for, various studies and measures relating to improvements to the Kailua waterways system. Appropriates funds for the department of transportation to plan, design, and construct measures to address water quality, siltation, and other waterway problems in Kailua. Adds a member to the Moloka'i irrigation system water users advisory board. Creates a sub-account in the irrigation system revolving fund to enhance transparency. Requires board to develop definition of "homestead farmer" and report progress of roadmap meetings with homesteaders. (SD1)

