

# PROPOSED

THE SENATE  
TWENTY-FOURTH LEGISLATURE, 2007  
STATE OF HAWAII

S.B. NO. 151  
S.D. 1

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## A BILL FOR AN ACT

RELATING TO BIOPROSPECTING.

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

1           SECTION 1. (a) The legislature finds that House  
2 Concurrent Resolution No. 193, House Draft 1 ("H.C.R. 193" or  
3 "the resolution"), adopted by the legislature in its 2006  
4 regular session, declared that Hawaii's biological resources are  
5 assets of the public land trust that are culturally,  
6 spiritually, medicinally, and otherwise significant to Hawaiians  
7 and the general public. The resolution also declared that  
8 Hawaii runs the risk of losing its biological resources as  
9 natural habitat is developed, natural environment is degraded,  
10 and non-sustainable consumptive practices are perpetuated.  
11 Additionally, the resolution stated that Hawaii's unique  
12 biological resources are assets of a public trust established in  
13 Article XI, section 1 of the state constitution, which states:  
14           "For the benefit of present and future generations,  
15           the State and its political subdivisions shall  
16           conserve and protect Hawaii's natural beauty and all  
17           natural resources, including land, water, air,



1 minerals and energy sources, and shall promote the  
2 development and utilization of these resources in a  
3 manner consistent with their conservation and in  
4 furtherance of the self-sufficiency of the State.

5 All public natural resources are held in trust by  
6 the State for the benefit of the people."

7 Furthermore, H.C.R. 193 stated that Hawaii's biological  
8 resources are of great potential economic benefit in the areas  
9 of medicine, scientific research, biotechnology, and commercial  
10 development. The resolution identified a need to develop public  
11 policy to balance development and commercialization with  
12 scientific research and conservation of Hawaii's fragile bio-  
13 resources, and fair and equitable benefit-sharing with the  
14 general public and Hawaiians, who are the beneficiaries of the  
15 public land trust.

16 (b) The legislature also finds that regulations governing  
17 prospecting would assist researchers in understanding the rules  
18 and the process for bioprospecting in Hawaii, thereby making it  
19 easier for researchers to understand all the aspects of pursuing  
20 such a venture. Furthermore, the absence of such regulations  
21 may be depriving the State of what could potentially be large



1 monetary returns or other benefits from the use of its  
2 resources.

3 (c) The resolution asked the governor to establish a  
4 temporary advisory commission on bioprospecting (the  
5 commission), placed it within the office of Hawaiian affairs  
6 (OHA) for administrative purposes, and tasked it with making  
7 recommendations for policy development in the areas of:

- 8 (1) Prior informed consent;
- 9 (2) Equitable benefit sharing;
- 10 (3) Bio-safety protocols;
- 11 (4) A permitting and licensing process; and
- 12 (5) Cultural rights for the use of Hawaii's biodiversity.

13 (d) The governor completed her appointments to the  
14 commission in January 2007 and the commission held its first  
15 meeting on March 16, 2007. On February 5, 2008, the commission  
16 issued a report containing recommendations for legislation  
17 concerning bioprospecting. This Act is intended to implement  
18 these recommendations.

19 The purpose of the Act is to:

- 20 (1) Establish ownership of biological resources;
- 21 (2) Define bioprospecting;



- 1 (3) Establish a permanently funded commission on
- 2 prospecting; and
- 3 (4) Require the department of land and natural resources
- 4 to adopt administrative rules pursuant to chapter 91,
- 5 Hawaii Revised Statutes, establishing requirements for
- 6 obtaining a permit to conduct bioprospecting
- 7 activities.

8 SECTION 2. Chapter 171, Hawaii Revised Statutes, is  
 9 amended by adding a new part to be appropriately designated and  
 10 to read as follows:

11 **"PART . BIODIVERSITY AND BIOPROSPECTING**

12 **§ -1 Definitions.** As used in this part, unless the  
 13 context otherwise requires:

14 "Access to genetic resources" or "access" means to obtain  
 15 samples of biological or genetic materials within the State's  
 16 jurisdiction for purposes of research on conservation,  
 17 management, commercial application, or industrial use.

18 "Benefit sharing" means equitable sharing of benefits, on  
 19 agreed terms, arising from the use of biological or genetic  
 20 materials with the providers of the material.



1 "Biodiversity" means the total variety of life on earth,  
2 including genes, species, and ecosystems and the complex  
3 interactions among them.

4 "Bioprospecting" means any activity undertaken to harvest  
5 or exploit, for any purpose, samples or derivatives, in situ or  
6 ex situ, of genetic or biochemical resources from plants,  
7 animals, or microorganisms; provided that "bioprospecting" does  
8 not include the taking of:

- 9 (1) Biological resources from an area of land or water by  
10 Hawaiians and other peoples who have traditionally  
11 used the area of land or water in accordance with  
12 traditional customary practices;
- 13 (2) Any biological material of living human origin;
- 14 (3) Biological samples that are part of usual practices in  
15 crop cultivation, animal husbandry, and aquaculture;  
16 and
- 17 (4) Biological resources for any commercial or related  
18 noncommercial activity such as fishing for commerce or  
19 recreation, collecting broodstock for, and harvesting  
20 of trees, plants, and flowers.



1 "Commercial use" means any use of biodiversity or genetic  
2 resources, their products, or their derivatives for monetary  
3 gain that includes selling in the market.

4 "Commission" means the commission on bioprospecting  
5 established by this part.

6 "Department" means the department of land and natural  
7 resources.

8 "Hawaiians" means persons defined as "Hawaiian" in section  
9 10-2.

10 "Material transfer agreements" means agreements executed  
11 between the individual who has recovered the biological resource  
12 and another individual who wants to have access to the material  
13 for the access seeking individual's own purposes, which may be  
14 solely for research or commercial purposes.

15 "Prior informed consent" means a set of administrative  
16 procedures for deciding on whether to grant access to genetic  
17 resources on defined terms.

18 "State lands" includes all public and other lands,  
19 including but not limited to submerged lands, owned or in  
20 possession, use, and control of the then Territory of Hawaii or  
21 the State of Hawaii, or any of its agencies.



1           **§ -2 Biodiversity ownership and rights.** (a) Except as  
 2 provided in this part, the ownership of, and right to, any  
 3 biodiversity in, on, or under any lands located in the State of  
 4 Hawaii, regardless of whether the lands are government lands or  
 5 private lands, shall:

- 6           (1) Rest with the State; and
- 7           (2) Not be transferred by any lease, sale, right of entry,  
 8                 or other agreement, the ownership of and right to  
 9                 biodiversity being held by, and reserved to, the  
 10                State.

11           (b) Disposition of biodiversity rights shall be in  
 12 accordance with the laws relating to the disposition of  
 13 biodiversity rights enacted or hereinafter enacted by the  
 14 legislature.

15           (c) Subject to subsection (a), all land patents, leases,  
 16 grants, or other conveyances of any lands located in the State  
 17 of Hawaii, regardless of whether the lands are government lands  
 18 or private lands, shall be subject to, and contain a reservation  
 19 to the State of, all the biodiversity.

20           **§ -3 Authority and responsibility of State.** The State  
 21 shall have the authority and responsibility to regulate  
 22 bioprospecting and the subsequent commercial use of the State's



1 biodiversity and to protect the knowledge, innovations, and  
2 traditional and customary practices of Hawaiians and other  
3 peoples.

4       **§ -4 Establishment of the commission on bioprospecting.**

5 There shall be a commission on bioprospecting, hereinafter  
6 called the commission. The commission shall consist of eleven  
7 members. The membership shall consist of the following:

- 8       (1) The chairperson of the board of trustees of the office  
9           of Hawaiian affairs or a designee;
- 10       (2) The president of the University of Hawaii or a  
11           designee;
- 12       (3) The director of business, economic development, and  
13           tourism or a designee;
- 14       (4) The chairperson of the board of land and natural  
15           resources or a designee;
- 16       (5) Five members of the native Hawaiian community,  
17           residing in the State of Hawaii, who have a  
18           demonstrated background in:
- 19           (A) Traditional and customary use of biological and  
20               genetic resources;
- 21           (B) Indigenous and traditional technologies;





- 1 (C) Scientific and technical uses of native Hawaiian  
2 practices;
- 3 (D) Legal procedures nationally and internationally,  
4 in connection with the protection or  
5 commercialization of biological and genetic  
6 resources; and
- 7 (E) Native Hawaiian cultural rights as contained in  
8 the Hawaii State Constitution and Hawaii Revised  
9 Statutes;
- 10 who are appointed by the governor from lists of  
11 nominees submitted by the president of the senate,  
12 speaker of the house of representatives, and Hawaiian  
13 organizations; and
- 14 (6) Two representatives from the biotechnology industry,  
15 whose principal place of business is in the State of  
16 Hawaii, who are appointed by the governor from lists  
17 of nominees submitted by the president of the senate  
18 and the speaker of the house of representatives, and  
19 members of the biotechnology industry based in Hawaii.
- 20 The commission shall elect its chairperson from among its  
21 own membership. The members shall receive no compensation for



1 their services on the commission, but shall be reimbursed for  
2 actual expenses incurred in the performance of their duties.

3 The commission shall be a part of the department of land  
4 and natural resources for administration purposes, as provided  
5 for in section 26-35.

6 The commission may engage employees necessary to perform  
7 its duties, including administrative personnel and an executive  
8 officer. The executive officer shall be appointed by the  
9 commission and the executive officer's position shall be exempt  
10 from chapter 76. Departments of the state government shall make  
11 available to the commission such data, facilities, and personnel  
12 as are necessary for it to perform its duties. The commission  
13 may receive and utilize donations and any funds from the federal  
14 or other governmental agencies. It shall adopt rules guiding  
15 its conduct, maintain a record of its activities and  
16 accomplishments, and make recommendations to the governor and to  
17 the legislature through the governor.

18 **§ -5 Duties of commission.** The commission's duties  
19 shall include but not be limited to the following:

20 (1) To enter into and enforce access and benefit sharing  
21 agreements related to proposed bioprospecting  
22 ventures; and



- 1           (2) As the initial task after its formation, to establish  
2           procedures governing an access and benefit sharing  
3           agreement process to include identification of  
4           stakeholders, prior informed consent, equitable  
5           benefit sharing, and biosafety encompassing the  
6           following considerations:
- 7           (A) Priority for participation in the process shall  
8           be given to the following stakeholders to be  
9           engaged in the discussion of every aspect of  
10          every component of the agreement: landowners,  
11          Hawaiians, community from where the resources are  
12          sampled, researchers, university, and the  
13          biotechnology industry; provided that the  
14          discussion shall not necessarily be limited to  
15          these priority stakeholders;
- 16          (B) Prior informed consent is given by the requisite  
17          stakeholders, as determined by the regulatory  
18          process, prior to the commencement of a  
19          prospective bioprospecting venture;
- 20          (C) Benefit sharing should provide for the  
21          distribution of monetary and nonmonetary benefits



1 to the aforementioned stakeholders that may  
2 result from the exploration activities;

3 (D) Biosafety protocols as applicable should be  
4 addressed in all access and benefit sharing  
5 agreements; and

6 (E) The knowledge, innovations, traditional and  
7 customary practices of Hawaiians and other  
8 peoples will be protected.

9 **§ -6 Administrative rules.** The department, in  
10 consultation with the commission, shall adopt administrative  
11 rules pursuant to chapter 91 establishing requirements for  
12 obtaining a permit to conduct bioprospecting activities. The  
13 regulations shall include, but not be limited to, provisions:

14 (1) Establishing a two-track system for determining  
15 whether or not to approve the permit and allow a  
16 venture to proceed. Under the two-track system, all  
17 permit applications would be reviewed at the outset to  
18 determine whether the proposed activity (i) involves  
19 any intent to use and sample to produce a commercial  
20 product or process, or (ii) is for the purpose of  
21 conducting academic or scientific research that does  
22 not infringe on the knowledge, innovations,



1 traditional or customary practices of Hawaiians.

2 Applications in (i) above would be referred to the

3 commission for review and recommendation prior to the

4 department deciding whether to issue a permit;

5 applications in (ii) would go directly on a fast track

6 to the department for a decision on whether to issue a

7 permit;

8 (2) Requiring the permittee to submit all proposed

9 material transfer agreements to the commission to

10 ensure that the legal requirements are being observed;

11 (3) Requiring the owners of the ex situ collections to

12 refer any requests for transfer of the specimens in

13 their possession or control to the commission;

14 (4) Requiring all bioprospecting permits to require the

15 permittee to periodically report the use and location

16 of any samples collected under the authority of the

17 permit;

18 (5) Requiring all permittees to obtain the commission's

19 permission before transferring any samples to another

20 party, for any reason;

21 (6) Establishing an efficient tracking system relating to

22 the samples;



- 1           (7)    Requiring all permittees to inform the department and  
2                    the commission when a discovery is made so that the  
3                    commission may negotiate terms of any licensing  
4                    agreements that might follow;
- 5           (8)    Requiring the permit applicant to meet with all  
6                    parties in the community who are interested in the  
7                    project and attempt to arrive at an agreement that  
8                    will allow the project to proceed;
- 9           (9)    Protecting proprietary information that an applicant  
10                   might be required to reveal during the access and  
11                   benefit sharing agreement proceedings;
- 12          (10)   Requiring the commission to establish advisory groups  
13                   to engage in the access and benefit sharing process;
- 14          (11)   Requiring that when and if the commission has  
15                   determined that all stakeholders have signed on to an  
16                   access and benefit sharing agreement, the permit shall  
17                   be referred back to the department for appropriate  
18                   processing within its internal organization; and
- 19          (12)   Requiring that in the event that a permit is granted  
20                   for an exploration that, at the outset, was not  
21                   classified as commercial bioprospecting, for example  
22                   if the application is intended to be for an academic



1 or pure research project, but a subsequent discovery  
2 leads to development of a commercially valuable  
3 product, the permittee shall immediately resubmit an  
4 application for a bioprospecting permit that would be  
5 referred to the commission for its further  
6 processing."

7 SECTION 3. There is appropriated out of the general  
8 revenues of the State of Hawaii the sum of \$ or so  
9 much thereof as may be necessary for fiscal year 2008-2009 for  
10 the establishment of the commission on bioprospecting as set  
11 forth in section 2 of this Act.

12 The sum appropriated shall be expended by the department of  
13 land and natural resources for the purposes of this Act.

14 SECTION 4. This Act shall take effect upon its approval;  
15 provided that section 3 shall take effect on July 1, 2008.



# PROPOSED

S.B. NO. 151  
S.D. 1

**Report Title:**

Bioprospecting Advisory Commission; Appropriation

**Description:**

Establishes a permanent bioprospecting advisory commission to address issues relating to bioprospecting. Appropriates funds for commission to fulfill its mandate. (SD1)

