
A BILL FOR AN ACT

RELATING TO WATER.

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

1 SECTION 1. The purpose of this Act is to address the
2 findings and conclusions of the state auditor's February 19,
3 2008 financial and management audit of the Moloka'i irrigation
4 system.

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

12 The purpose of the Moloka'i irrigation system was to bring
13 under irrigation an area of 13,650 irrigable acres of land,
14 which was dry farmed, thereby increasing and stabilizing the
15 crop yield and economy of the island of Moloka'i. As originally
16 conceived, the system was designed to serve irrigation water to
17 13,250 acres of pineapple and four hundred acres of diversified



1 crops. With the completion of the tunnel and supply conduit, an
2 additional 3,150 acres of pineapple and six hundred sixty acres
3 of irrigable diversified cropland were added.

4 Although the department of land and natural resources was
5 the designated sponsoring agency for the construction,
6 operation, and maintenance of the Moloka'i irrigation system,
7 the department of Hawaiian home lands and the Moloka'i ranch
8 benefited.

9 In 1989, the department of agriculture assumed its duties
10 as custodian of the State's irrigation systems, including the
11 Moloka'i irrigation system.

12 The state auditor found the department of agriculture to be
13 remiss in its oversight of the Moloka'i irrigation system. The
14 auditor stated, "The Department of Agriculture's flawed
15 management endangers agriculture in Moloka'i." The auditor also
16 found that "[w]hile the department inherited a deteriorating
17 system, it has done little to learn about the system and its
18 contentious history. . . . The department is unable to balance
19 its responsibilities in promoting agriculture, while
20 guaranteeing Hawaiian homesteaders' rights to two-thirds of the
21 water within the MIS . . . it also has an obligation to Hawaiian
22 homesteaders as expressed in the Hawaiian Homes Commission Act,



1 1920. The latter obligation has been set aside to promote
2 agriculture among non-homestead farmers. The growth of
3 agriculture among non-homestead farmers has come at the high
4 cost of exhausting the water resources of the MIS." (emphasis
5 added)

6 On January 31, 2008, the Hawai'i Supreme Court reaffirmed
7 in *OHA v. HCDCH* No. 25570, the State's fiduciary duty as a
8 trustee of the Hawaiian Homes Commission Act. The court stated:
9 "Moreover, we have previously indicated in an analogous case
10 dealing with the Hawaiian Homes Commission Act that the State,
11 as trustee, 'must adhere to high fiduciary duties normally owed
12 by a trustee to its beneficiaries.' *Ahuna*, 64 Haw. at 338, 640
13 P.2d at 1168. In describing the scope of the State's relevant
14 fiduciary duties, this court, in *Ahuna*, analogized such duties
15 to the fiduciary duties of the United States to Native Americans
16 by quoting, with approval, the words of the United States
17 Supreme Court and stated:

18 Under a humane and self imposed policy which has found
19 expression in many acts of Congress and numerous decisions
20 of this Court, [the Government] has charged itself with
21 moral obligations of the highest responsibility and trust.



1 Its conduct, as disclosed in the acts of those who represent
2 it in dealings with the Indians, should therefore be judged
3 by the most exacting fiduciary standards.

4 Id. at 339, 640 P.2d at 1169 (quoting Seminole Nation v. United
5 States, 316 U.S. 286, 296-97 (1942)) (brackets and emphases in
6 original) (format altered). In Ahuna, we held that '[t]he use of
7 the term 'most exacting fiduciary standards' imports the notion
8 that [this] court will strictly scrutinize the actions of the
9 government.' Id. at 339, 640 P.2d at 1169. Moreover, we observed
10 that 'the nature of the trust obligations of the [State] toward
11 beneficiaries . . . may be determined by examining well-settled
12 principles enunciated by the federal courts regarding lands set
13 aside by Congress in trust for the benefit of other native
14 Americans[.]' Id. at 339, 640 P.2d at 1168. In particular, we
15 cited three specific trust duties applicable to the State as
16 trustee: (1) 'the obligation . . . to administer the trust
17 solely in the interest of the beneficiary'; (2) the obligation
18 that the trustee 'deal impartially when there is more than one
19 beneficiary'; and (3) the 'obligation to use reasonable skill
20 and care to make trust property productive[.]' Id. at 340, 604
21 P.2d at 1169-70 (citations omitted)."



1 The State has a fiduciary duty to native Hawaiians under
2 the Hawaiian Homes Commission Act, 1920 and should therefore be
3 judged by the most exacting fiduciary standards. When one of
4 its state departments breaches the State's fiduciary duty, the
5 State as trustee is liable to its beneficiaries. In addressing
6 the State's fiduciary duty to the Hawaiian Moloka'i irrigation
7 system user, the state auditor recommended that the State should
8 "consider adding additional homestead farmer seat(s) and develop
9 procedural guidelines on how seats are filled."

10 The findings of the state auditor confirm that for nineteen
11 years, the department of agriculture has continually breached
12 its fiduciary duty to the native Hawaiians who are the users of
13 the Moloka'i irrigation system. In addition, the deputy
14 administrator of the department of agriculture recently stated
15 in a legislative hearing that the Moloka'i irrigation system is
16 the only state irrigation system that generates a profit. All
17 of the other state irrigation systems operate with deficits.
18 This means that the State depends on the Moloka'i irrigation
19 system to fund the operations of the other state irrigation
20 systems to the Moloka'i irrigation system's detriment.

21 The legislature cannot allow the State to continue to
22 breach its fiduciary duty to the native Hawaiian users of the



1 Moloka'i irrigation system for in doing so the legislature may
2 also be liable for the breach of fiduciary duty. Allowing the
3 Moloka'i irrigation system user revenue funds to continue to be
4 commingled with other non-trust funds and to be used for non-
5 Moloka'i irrigation system operations and maintenance fails to
6 comport with fiduciary standards.

7 Therefore, the intent of this Act is to end the breach of
8 fiduciary duty and to implement the findings, conclusions, and
9 recommendations of the state auditor. The auditor recommends in
10 Section 5(c) and 5(d) of her report: "c. Develop the ability
11 to segregate financial information on a system by system basis,
12 for use as a planning tool and d. Review receivables collection
13 process, and if necessary consider employing more aggressive
14 tactics." (emphasis added) In response to these
15 recommendations, this Act creates a separate subaccount in the
16 irrigation system revolving fund to provide greater transparency
17 and accountability, adds an additional homestead farmer seat to
18 the advisory board, and appropriates funds to further needed
19 repairs and maintenance of the Moloka'i irrigation system.

20 SECTION 2. Section 167-22, Hawaii Revised Statutes, is
21 amended by amending subsection (a) to read as follows:



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

3 (1) All legislative appropriations to the irrigation
4 system revolving fund; and

5 (2) All or any portion of the receipts and revenues
6 collected under this chapter, as determined by the
7 board of agriculture, exclusive of the receipts and
8 revenues deposited into the irrigation water
9 development special fund.

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

14 SECTION 3. Section 167-23, Hawaii Revised Statutes, is
15 amended by amending subsection (a) to read as follows:

16 "(a) There is established a Molokai irrigation system
17 water users advisory board, to be appointed by the governor
18 under section 26-34. The advisory board shall consist of [~~six~~
19 ~~members, as follows:~~] seven members, of whom two-thirds shall be
20 Hawaiian homestead farmers who are Molokai irrigation system
21 users, Molokai residents, and active general excise tax



1 licensees. To the extent possible, the board shall be comprised
2 of the following:

- 3 (1) [A] Two homestead farmer [~~user~~] users on Molokai;
- 4 (2) A nonhomestead farmer user on Molokai;
- 5 (3) The [~~designee (by name rather than office)~~] nominee of
6 the Molokai Farm Bureau;
- 7 (4) The [~~designee (by name rather than office)~~] nominee of
8 Hikiola Cooperative, Inc.;
- 9 (5) The [~~designee (by name rather than office)~~] nominee of
10 the Molokai-Lanai soil and water conservation
11 district; and
- 12 (6) The [~~designee (by name rather than office)~~] nominee of
13 the department of Hawaiian home lands.

14 The members of the advisory board shall serve without
15 compensation, but shall be entitled to reimbursement for
16 necessary expenses while attending meetings and while in the
17 discharge of their duties. For administrative purposes, and
18 pursuant to section 26-35, the advisory board shall be placed
19 within the department of agriculture."

20 SECTION 4. The Molokai irrigation system water users
21 advisory board, in conjunction with the board of agriculture,
22 shall develop a definition of "homestead farmer". The advisory



1 board shall report to the legislature, no later than twenty days
2 prior to the convening of the regular session of 2009, on the
3 progress made toward implementing the objectives outlined in the
4 "Roadmap to Improvement" document generated as a result of
5 meetings between the Board of Agriculture and the Molokai
6 community. The report shall include a timeline for
7 implementation. The advisory board shall also post its report
8 on the appropriate website of the department of agriculture.

9 SECTION 5. There is appropriated out of the general
10 revenues of the State of Hawaii the sum of \$ or so much
11 thereof as may be necessary for fiscal year 2008-2009 to further
12 address the repair and maintenance needs of the Molokai
13 irrigation system.

14 The sum appropriated shall be expended by the department of
15 agriculture for the purposes of this Act.

16 SECTION 6. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 7. This Act shall take effect on July 1, 2050.



Report Title:

Water; Molokai Irrigation System Advisory Board; Appropriation

Description:

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. Appropriates funds. Eff. 7/1/2050. (SD2)

