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# 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 it is the  
2 State's responsibility as that of a trustee to act with the  
3 diligence and care of a fiduciary in assuring that bona fide  
4 trust purposes, such as traditional and customary Hawaiian  
5 rights, wildlife, maintenance of ecological balance and scenic  
6 beauty, and the preservation and enhancement of the water for  
7 various uses in the public interest, are protected when deciding  
8 what constitutes a maximum beneficial use. In January of 2016,  
9 the Hawaii first circuit invalidated four revocable permits the  
10 board of land and natural resources granted in 2014 to allow  
11 continued diversion of water from more than one hundred east  
12 Maui streams. The judge ruled that the continuously  
13 uninterrupted use of public lands on a holdover basis for the  
14 last thirteen years is not temporary and is inconsistent with  
15 the public interest and legislative intent of chapter 171,  
16 Hawaii Revised Statutes. The legislature then enacted Act 126,  
17 Session Laws of Hawaii 2016, which authorized holdover permits



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

11 The purpose of this Act is to:

- 12 (1) Extend the authorization for the issuance of holdover  
13 permits to a total of six consecutive one-year  
14 holdovers;
- 15 (2) Require any holdover authorization that allows the use  
16 of over two million gallons of water per day to:
- 17 (A) Be issued pursuant to a final written decision  
18 that includes conditions to minimize impacts to  
19 the public trust purposes of any affected water  
20 source; and



- 1 (B) Limit water use to an applicant's demonstrated
- 2 actual, reasonable beneficial needs for the
- 3 holdover period;
- 4 (3) Require a holdover permit to be continued without any
- 5 action of the board of land and natural resources
- 6 pending completion of any contested case proceedings;
- 7 (4) Prior to approving any holdover authorization after
- 8 January 1, 2020, require the board of land and natural
- 9 resources to hold a public hearing on the adoption of
- 10 proposed administrative rules on the disposition of
- 11 water rights by lease at public auction and water
- 12 valuation process and retain a certified appraiser who
- 13 has a sufficient understanding of real property and
- 14 water law in the State;
- 15 (5) Exempt instream, in-watershed use of water for wetland
- 16 kalo cultivation done in a traditional manner from
- 17 statutory provisions regulating the disposition of
- 18 water rights; and
- 19 (6) Require the chairperson of the board of land and
- 20 natural resources, board of land and natural
- 21 resources, and commission on water resource management



1 to submit a report of their findings and  
2 recommendations on the effectiveness of section 171-  
3 58, Hawaii Revised Statutes, including any proposed  
4 legislation, to the legislature no later than twenty  
5 days prior to the convening of the regular session of  
6 2020.

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

9 "§171-58 Minerals and water rights. (a) Except as  
10 provided in this section the right to any mineral or surface or  
11 ground water shall not be included in any lease, agreement, or  
12 sale, this right being reserved to the State; provided that the  
13 board may make provisions in the lease, agreement, or sale, for  
14 the payment of just compensation to the surface owner for  
15 improvements taken as a condition precedent to the exercise by  
16 the State of any reserved rights to enter, sever, and remove  
17 minerals or to capture, divert, or impound water.

18 (b) Disposition of mineral rights shall be in accordance  
19 with the laws relating to the disposition of mineral rights  
20 enacted or hereafter enacted by the legislature.



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

7 (1) Where an application has been made for a lease under  
8 this section to continue a previously authorized  
9 disposition of water rights, a holdover may be  
10 authorized annually until the pending application for  
11 the disposition of water rights is finally resolved or  
12 for a total of [~~three~~] six consecutive one-year  
13 holdovers, whichever occurs sooner; provided that the  
14 total period of the holdover for any applicant shall  
15 not exceed [~~three~~] six years; provided further that  
16 the holdover is consistent with the public trust  
17 doctrine; provided further that any holdover  
18 authorization that allows or has the effect of  
19 allowing the use of over two million gallons of water  
20 per day shall:



1           (A) Be issued pursuant to a final written decision  
2           that explicitly considers and includes conditions  
3           to minimize any potential impacts to the public  
4           trust purposes of any affected water source,  
5           including the ecological, natural, recreational,  
6           and aesthetic values of affected surface waters  
7           in their natural state; and

8           (B) Limit the total aggregate quantity of any surface  
9           water allowed to be received under all holdovers  
10           issued pursuant to an application to the  
11           applicant's demonstrated actual, reasonable  
12           beneficial needs for the holdover period;

13        (2) If a contested case pursuant to chapter 91 is  
14        requested on a one-year holdover, any provision of law  
15        notwithstanding, the holdover shall be continued  
16        without any action of the board pending completion of  
17        the proceedings;

18        ~~[(2)]~~ (3) Any disposition by lease shall be subject to  
19        disapproval by the legislature by two-thirds vote of  
20        either the senate or the house of representatives or



1 by majority vote of both in any regular or special  
2 session next following the date of disposition; [and  
3 ~~(3)]~~ (4) After a certain land or water use has been  
4 authorized by the board subsequent to public hearings  
5 and conservation district use application and  
6 environmental impact statement approvals, water used  
7 in nonpolluting ways, for nonconsumptive purposes  
8 because it is returned to the same stream or other  
9 body of water from which it was drawn, and essentially  
10 not affecting the volume and quality of water or biota  
11 in the stream or other body of water, may also be  
12 leased by the board with the prior approval of the  
13 governor and the prior authorization of the  
14 legislature by concurrent resolution[-]; and  
15 (5) Notwithstanding any provision to the contrary, prior  
16 to approval of any holdover authorization after  
17 January 1, 2020, the board shall:  
18 (A) Hold a public hearing pursuant to chapter 91 on  
19 the adoption of proposed administrative rules on  
20 the disposition of water rights by lease at  
21 public auction and water valuation process; and



1           (B) Retain a certified appraiser who has a sufficient  
2           understanding of real property and water law in  
3           the State.

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





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

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



1           (f) Upon renewal, any lease of water rights shall contain  
2 a covenant that requires the lessee and the department of land  
3 and natural resources to jointly develop and implement a  
4 watershed management plan. The board shall not renew any lease  
5 of water rights without the foregoing covenant or a watershed  
6 management plan. The board shall prescribe the minimum content  
7 of a watershed management plan; provided that the watershed  
8 management plan shall require the prevention of the degradation  
9 of surface water and ground water quality to the extent that  
10 degradation can be avoided using reasonable management  
11 practices.

12           (g) The department of land and natural resources shall  
13 notify the department of Hawaiian home lands of its intent to  
14 execute any new lease, or to renew any existing lease of water  
15 rights. After consultation with affected beneficiaries, these  
16 departments shall jointly develop a reservation of water rights  
17 sufficient to support current and future homestead needs. Any  
18 lease of water rights or renewal shall be subject to the rights  
19 of the department of Hawaiian home lands as provided by section  
20 221 of the Hawaiian Homes Commission Act.



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

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

6        1. By amending section 2 to read:

7        "SECTION 2. The department of land and natural resources  
8 shall prepare and submit an annual [reports] report to the  
9 legislature no later than twenty days before the convening of  
10 each [~~of the~~] regular [~~sessions~~] session of [~~2017, 2018, 2019,~~  
11 ~~and 2020.~~] the legislature for the years 2017 to 2023. The  
12 reports shall include:

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

15        (2) Actions taken on the applications during the [~~fiscal~~  
16 ~~period of July 1, 2016, to November 30, 2016, fiscal~~  
17 ~~year 2016-2017, fiscal year 2017-2018, and fiscal year~~  
18 ~~2018-2019, respectively,~~] immediately preceding fiscal  
19 year; and

20        (3) Any relevant recommendations for legislative action or  
21 appropriation."



1           2. By amending section 4 to read:

2           "SECTION 4. This Act shall take effect upon its approval,  
3 and shall apply to applications for a lease to continue a  
4 previously authorized disposition of water rights that are  
5 pending before the board of land and natural resources on the  
6 effective date of this Act or filed with the board of land and  
7 natural resources on or after the effective date of this Act,  
8 but prior to June 30, [~~2019~~] 2022; provided that:

9           (1) This Act shall be repealed on June 30, [~~2019~~] 2022,  
10 and section 171-58(c), Hawaii Revised Statutes, shall  
11 be reenacted in the form in which it read on the day  
12 prior to the effective date of this Act; and

13           (2) Any holdovers first applied for under this Act prior  
14 to June 30, [~~2019~~] 2022, may be reauthorized, as  
15 provided in section 1 of this Act, beyond June 30,  
16 [~~2019~~] 2022."

17           SECTION 4. The chairperson of the board of land and  
18 natural resources, board of land and natural resources, and  
19 commission on water resource management shall submit a report of  
20 their findings and recommendations on the effectiveness of  
21 section 171-58, Hawaii Revised Statutes, including any proposed



1 legislation, to the legislature no later than twenty days prior  
2 to the convening of the regular session of 2020. The report  
3 shall include an analysis of whether section 171-58, Hawaii  
4 Revised Statutes, is appropriate to guide the board of land and  
5 natural resources on the issuance of long-term leases for the  
6 disposition of water rights and specify statutory changes or new  
7 legislation necessary to enable a clear process by which the  
8 board of land and natural resources shall issue long-term leases  
9 for the disposition of water rights.

10 SECTION 5. Statutory material to be repealed is bracketed  
11 and stricken. New statutory material is underscored.

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



**Report Title:**

DLNR; Water Rights; Extension; Holdover

**Description:**

Allows for a total of six 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. Makes conforming amendments to the reporting requirement in Act 126, SLH 2016. Requires the BLNR, prior to authorizing holdovers after 1/1/2020, to hold a public hearing on the adoption of proposed administrative rules on the disposition of water rights by lease at public auction and water valuation process and retain a certified appraiser who has a sufficient understanding of real property and water law in the State. 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, 2022. (Proposed SD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

