

ACT 27

H.B. NO. 1768

A Bill for an Act Relating to the Disposition of Water Rights.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that native Hawaiians have been farming successfully on lands throughout the State for nearly two thousand years without creating adverse impacts to the land in which they operated. Traditional farming practices of native Hawaiians, and the native Hawaiian culture generally, play a vital role in preserving and advancing the quality of life and cultural vitality of Hawaii. Article XII, section 7, of the Hawaii State Constitution mandates that traditional and customary practices of native Hawaiians be protected.

The legislature additionally finds that it is the State's responsibility as that of a trustee to act with the diligence and care of a fiduciary in ensuring that bona fide trust purposes, including the preservation and enhancement of the water for various uses in the public interest, are protected when deciding what constitutes maximum beneficial use. However, in carrying out this responsibility, the regulatory actions of the State may adversely hamper and impact the constitutionally protected rights of native Hawaiians. The State has an obligation to

ensure that traditional and customary practices of native Hawaiians continue to be protected.

The legislature further finds that appurtenant or kuleana rights to water for traditional and customary uses and domestic farming purposes must also be protected. These rights to water necessarily include the right to use water and the right of access to water, or the means of access and delivery of the water to be used.

Therefore, the purpose of this Act is to exempt the instream use of water for traditional and customary kalo cultivation practices from the existing process for disposition of water rights, and to clarify that traditional and customary and kuleana rights to water include rights of use, access, delivery, and quality of water, which shall be recognized and protected.

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

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

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

(c) Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions [~~which~~] that will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law; provided that any disposition by lease shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposition; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and environmental impact statement approvals, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.

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

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

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

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

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

(h) This section shall not apply to the disposition of water rights for the instream use of water for traditional and customary kalo cultivation practices.”

SECTION 3. Section 174C-5, Hawaii Revised Statutes, is amended to read as follows:

“§174C-5 General powers and duties. The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

- (1) Shall carry out topographic surveys, research, and investigations into all aspects of water use and water quality;
- (2) Shall designate water management areas for regulation under this chapter where the commission, after the research and investigations mentioned in paragraph (1), shall consult with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water;
- (3) Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State;
- (4) May contract and cooperate with the various agencies of the federal government and with state and local administrative and governmental agencies or private persons;

- (5) May enter, after obtaining the consent of the property owner, at all reasonable times upon any property other than dwelling places for the purposes of conducting investigations and studies or enforcing any of the provisions of this code, being liable, however, for actual damage done. If consent cannot be obtained, reasonable notice shall be given prior to entry;
- (6) Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purpose of utilizing and conserving the waters of the State, and assist these organizations and agencies in coordinating the use of their facilities and participate in the exchange of ideas, knowledge, and data with these organizations and agencies. For this purpose the commission shall maintain an advisory staff of experts;
- (7) Shall prepare, publish, and issue printed pamphlets and bulletins as the commission deems necessary for the dissemination of information to the public concerning its activities;
- (8) May appoint and remove agents, including hearings officers and consultants, necessary to carry out the purposes of this chapter, who may be engaged by the commission without regard to the requirements of chapter 76 and section 78-1;
- (9) May hire employees in accordance with chapter 76;
- (10) May acquire, lease, and dispose of [sueh] real and personal property as may be necessary in the performance of its functions, including the acquisition of real property for the purpose of conserving and protecting water and water related resources as provided in section 174C-14;
- (11) Shall identify, by continuing study, those areas of the State where salt water intrusion is a threat to fresh water resources and report its findings to the appropriate county mayor and council and the public;
- (12) Shall provide coordination, cooperation, or approval necessary to the effectuation of any plan or project of the federal government in connection with or concerning the waters of the State. The commission shall approve or disapprove any federal plans or projects on behalf of the State. No other agency or department of the State shall assume the duties delegated to the commission under this paragraph; except that the department of health shall continue to exercise the powers vested in it with respect to water quality, and except that the department of business, economic development, and tourism shall continue to carry out its duties and responsibilities under chapter 205A;
- (13) Shall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources, based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water;
- (14) Shall catalog and maintain an inventory of all water uses and water resources; and
- (15) Shall determine appurtenant water rights, including but not limited to the quantification of the amount of water and the specification of the water course or the means of access and delivery entitled to

by that right, which determination shall be valid for purposes of this chapter.”

SECTION 4. Section 174C-63, Hawaii Revised Statutes, is amended to read as follows:

“~~§174C-63~~ **Appurtenant rights.** Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right ~~[by the holder thereof at any time.]~~, including access by the holder thereof to conduct activities necessary to assure the use, delivery, and quality of water including temperature and turbidity, that shall not be unreasonably withheld. A permit for water use based on an existing appurtenant right shall be issued upon application. ~~[Such]~~ The permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62.”

SECTION 5. Section 174C-101, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

“(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, including access by the holder thereof to conduct activities necessary to assure the use, delivery, and quality of water including temperature and turbidity, that shall not be unreasonably withheld, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.”

SECTION 6. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

(Approved May 25, 2022.)