
A BILL FOR AN ACT

RELATING TO WATER.

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

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

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

12 The purpose of the MIS was to bring under irrigation an
13 area of 13,650 irrigable acres of land, which was dry farmed,
14 thereby increasing and stabilizing the crop yield and economy of
15 the principle farm are on 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 400 acres of diversified crops.



1 With the completion of the tunnel and supply conduit, an
2 additional 3,150 acres of pineapple and 660 acres of irrigable
3 diversified cropland were added.

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

9 In 1989, the department assumed its duties as custodian of
10 the State's irrigation systems, including the MIS.

11 Since 1989, the State auditor found the department to be
12 remiss in its oversight of the MIS. The auditor states, "The
13 Department of Agriculture's flawed management endangers
14 agriculture in Moloka'i." The auditor also found "While the
15 department inherited a deteriorating system, it has done little
16 to learn about the system and its contentious history. . . . The
17 department is unable to balance its responsibilities in
18 promoting agriculture, while guaranteeing Hawaiian homesteaders'
19 rights to two-thirds of the water within the MIS . . . it also
20 has an obligation to Hawaiian homesteaders as expressed in the
21 Hawaiian Homes Commission Act, 1920. The latter obligation has
22 been set aside to promote agriculture among non-homestead



1 farmers. The growth of agriculture among non-homestead farmers
2 has come at the high cost of exhausting the water resources of
3 the MIS." (emphasis added)

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

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

20 Its conduct, as disclosed in the acts of those who represent



1 it in dealings with the Indians, should therefore be judged
2 by the most exacting fiduciary standards.

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

21 The State of Hawaii has a fiduciary duty to native
22 Hawaiians under the Hawaiian Homes Commission Act, 1920 and



1 should therefore be judged by the most exacting fiduciary
2 standards. When one of its state departments breaches State's
3 fiduciary duty, the State as trustee is liable to its
4 beneficiaries. In addressing the State's fiduciary duty to the
5 Hawaiian MIS user, the state auditor recommended that the State
6 should "consider adding additional homestead farmer seat(s) and
7 develop procedural guidelines on how seats are filled."

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

17 The Legislature cannot allow the State to continue to
18 breach its fiduciary duty to the native Hawaiian users of the
19 MIS by the department for in doing so the Legislature may also
20 be liable for breaching the State's fiduciary duty. The
21 Legislature must provide for and guarantee that this breach does
22 not continue. To allow the MIS user revenue funds to continue



1 to be co-mingled with other non-trust funds and to be used for
2 non-MIS operations and maintenance would not withstand the most
3 exacting fiduciary standards.

4 Therefore, this Act stops the breaches of fiduciary duty as
5 it applies to the native Hawaiian MIS users and implements the
6 findings, conclusions and recommendations of the State auditor.
7 The auditor recommends in Section 5(c) and 5(d) of her report to
8 "c. Develop the ability to segregate financial information on a
9 system by system basis, for use as a planning tool and d.
10 Review receivables collection process, and if necessary consider
11 employing more aggressive tactics." (emphasis added) In response
12 to these recommendations, this bill creates a separate fund for
13 the MIS to be administered by a Moloka'i irrigation system board
14 to ensure that all funds collected by MIS users are used solely
15 for the MIS.

16 The Legislature finds pursuant to the state auditor's
17 report that the department of agriculture lacks accounting staff
18 who understand accounting principles, particularly those
19 relative to government entities. Furthermore, the department of
20 agriculture's director and deputy director has allowed the
21 inequity claims by the MIS users in relation to the other state
22 irrigation systems. This bill addresses these findings.



1 SECTION 2. Chapter 167, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 **"PART . MOLOKA`I IRRIGATION SYSTEM**

5 **§167-A Moloka`i irrigation system water users board;**

6 **establishment; meetings.** (a) There is established a Moloka`i
7 irrigation system water users board, to be appointed by the
8 governor under section 26-34. The Moloka`i board shall consist
9 of six members, two-thirds of whom shall be Hawaiian homestead
10 farmers who are MIS users, Moloka`i residents, and active
11 general excise tax licensees. To every extent possible the
12 board shall comprise of the following:

- 13 (1) One homestead farmer user;
- 14 (2) A non-homestead farmer user residing on Moloka`i;
- 15 (3) The nominee of the Moloka`i Farm Bureau;
- 16 (4) The nominee of Hikiola Cooperative, Inc.;
- 17 (5) The nominee Moloka`i-Lana`i soil and water
18 conservation district; and
- 19 (6) The nominee of the department of Hawaiian home lands.

20 The members of the Moloka`i board shall serve without
21 compensation, but shall be entitled to reimbursement for
22 necessary expenses while attending meetings and while in the



1 discharge of their duties. For administrative purposes, and
2 pursuant to section 26-35, the Moloka`i board shall be placed
3 within the department.

4 (b) The Moloka`i board shall meet with the department at
5 least six times each year. The meetings shall be held on
6 Moloka`i, whenever possible.

7 **§167-B Moloka`i board powers and duties.** (a) The

8 Moloka`i board shall have the following powers and duties:

9 (1) To acquire by eminent domain, water and water sources
10 either above or underground, watershed, reservoir
11 sites, rights-of-way over lands and property for
12 paths, trails, roads, and landing sites, ditches,
13 tunnels, flumes, reservoirs, and pipelines necessary
14 or proper for the construction and maintenance of
15 water facilities for conveying, distributing, and
16 transmitting water for irrigation and domestic use and
17 for such other purposes as may properly fall within
18 the scope of its activities in creating, managing,
19 controlling, operating, and maintaining irrigation
20 water facilities, any of which purposes shall be held
21 to be for a public use and purpose;



1 (2) To make and execute contracts and other instruments
2 necessary or convenient to the exercise of the powers
3 of the Moloka`i board, including, without prejudice to
4 the generality of the foregoing, contracts and other
5 instruments for the purchase or sale of water and for
6 the purchase or lease of water facilities for
7 irrigation of the area, including but not limited to
8 the production of agricultural products and the land
9 on which the facilities are situated, and for securing
10 to the owners and occupiers of land already using
11 water in a project a priority right to so much water
12 from those of their sources and facilities which are
13 taken over for the project as is required for the
14 purposes or needs of the land, whether agricultural or
15 nonagricultural in nature, as such purposes or needs
16 exist at the inception of the project or are then
17 contemplated in the immediate future;

18 (3) To make and from time to time amend and repeal bylaws
19 and rules, not inconsistent with this chapter, which
20 upon compliance with chapter 91 shall have the force
21 and effect of law, to carry into effect the powers and
22 purposes of the Moloka`i board;



- 1 (4) To make surveys for the purposes of determining the
2 engineering and economic feasibility of each project;
- 3 (5) To conduct or have prepared comprehensive studies of
4 the crops, livestock, and poultry which may be
5 profitably grown or produced within each project and
6 the probable market for such crops, livestock, and
7 poultry;
- 8 (6) To conduct feasibility studies of the economic
9 potential of the area;
- 10 (7) To determine the probable costs and value of providing
11 water for irrigation in any proposed project;
- 12 (8) To investigate and make surveys of water resources,
13 including the possibility and feasibility of inducing
14 rain by artificial or other means;
- 15 (9) To define and redefine the boundaries of projects and
16 to consolidate or separate projects, existing or
17 proposed pursuant to this chapter, provided that in
18 the event the redefinition of the boundaries or the
19 consolidation or separation previously effected
20 increased the total amount required to be derived from
21 acreage assessments upon lands within the existing
22 project or projects by more than five per cent or will



1 require an increase in the tolls charged for water
2 supplied to the lands or will reduce the amount of
3 water normally available for distribution to the
4 lands, then the redefinition, consolidation, or
5 separation may be accomplished only after notice has
6 been published and a public hearing held as required
7 for the formation of a project upon the initiative of
8 the Moloka`i board. At the hearing, right to protest
9 and the procedure relative to protest shall be the
10 same as specified in section 167-17 concerning the
11 formation of projects, and the proposed redefinition
12 of boundaries, consolidation, or separation of
13 projects shall not be accomplished if protests, such
14 as would be sufficient to prevent the action if it
15 were the formation of a project, are filed by owners
16 and lessees of land within the existing projects or
17 projects affected thereby;

- 18 (10) The Moloka`i board is empowered, upon petition of land
19 occupiers as provided by section 167-13, or upon
20 petition of the Hawaiian homes commission or upon its
21 own initiative, to prepare detailed plans for the
22 acquisition or construction of facilities for



1 irrigation or for economic development, which in its
2 opinion are economically feasible, to prepare
3 estimates of the probable cost of each, and to prepare
4 estimates of the water tolls and acreage assessments
5 required for the cost of operation and the
6 amortization of the investment of each project, so
7 that the project shall be self-supporting;

8 (11) Establish and certify the total amount of acreage
9 assessments to be levied annually and collect the
10 assessments within each project;

11 (12) Set and from time to time revise tolls that it shall
12 charge for the water provided by its facilities,
13 subject to the rate policies established hereunder;

14 (13) Establish priorities between the several lands
15 included in a project according to the use to which
16 the lands are put or other reasonable basis for
17 classification;

18 (14) Govern the furnishing of water in the event of a
19 shortage of supply and to correlate water tolls with
20 these priorities;

21 (15) Charge and collect water tolls, fees, and other
22 charges established in connection herewith;



- 1 (16) Sell, exchange, transfer, assign, or pledge any
2 property, real or personal, or any interest therein,
3 to any person, firm, corporation, or government,
4 except as prohibited by the laws of the State;
- 5 (17) Hold, clear, and improve property;
- 6 (18) Borrow money for any of the purposes hereunder;
- 7 (19) Authorize the investment of any funds held in
8 reserves, or any funds not required for immediate
9 disbursement, in property or securities in which
10 savings banks may legally invest funds subject to the
11 Moloka`i board's control;
- 12 (20) Insure or provide for the insurance of the property or
13 operations of the Moloka`i board against such risks as
14 the Moloka`i board may deem advisable;
- 15 (21) Include in any construction contract executed in
16 connection with a project, stipulations requiring that
17 the contractor and any subcontractors comply with
18 requirements as to minimum wages and maximum hours of
19 labor, and comply with any conditions that the federal
20 government may have attached to its financial aid of
21 the project;



1 (22) Set, charge, and collect interest and a service charge
2 on delinquent payments due on water tolls, acreage
3 assessments, or other related accounts; provided that
4 the rate of interest shall not exceed one per cent per
5 month and the service charge shall not exceed amount
6 to be determined by the Moloka'i board for each
7 delinquent payment;

8 (23) Accept a security interest in real or personal
9 property for a debt restructured under a payment plan
10 for delinquent water tolls, acreage assessments, or
11 other related irrigation project accounts subject to
12 the rate of interest set forth in paragraph (22) and

13 (24) Foreclose upon or otherwise enforce the security
14 interest accepted under paragraph (23) by any method
15 provided for by law and to hold title to, maintain,
16 use, manage, operate, sell, lease, or otherwise
17 dispose of that personal or real property to recover
18 the debt secured.

19 (b) The Moloka'i board shall also have the power to enter
20 into any repayment or other contracts with the United States for
21 the construction, operation, and maintenance of any projects as
22 may be required or provided for by the federal reclamation laws,



1 or acts amendatory thereof or supplementary thereto, or other
 2 federal laws, and further to borrow money or accept grants or
 3 assistance from the federal government, or any department,
 4 bureau, or agency thereof with respect to the engineering,
 5 construction, operation, and financing of any project hereunder.
 6 The Moloka`i board shall make every effort to obtain all federal
 7 aid possible for the purposes of this chapter.

8 (c) In making surveys, studies, and investigations, in
 9 planning and designing, and in constructing projects and
 10 facilities for irrigation, the Moloka`i board shall also have
 11 power to include therein surveys, studies, and investigations
 12 of, plans and designs for, and construction of facilities for
 13 flood control and the utilization of water for the production of
 14 hydroelectric power, where the same may be practicable in
 15 conjunction with the formation and operation of an irrigation
 16 project or projects.

17 **§167-C Moloka`i irrigation system special fund.** (a) There
 18 is established in the department a special fund, to be
 19 designated the Moloka`i irrigation system special fund. The
 20 fund shall be administered by the Moloka`i irrigation system
 21 board. The following shall be deposited into the Moloka`i
 22 irrigation system special fund:



- 1 (1) Appropriations by the legislature;
- 2 (2) All user fees and administrative charges collected for
- 3 the Moloka`i irrigation system;
- 4 (3) Moneys collected as fines or penalties imposed by the
- 5 Moloka`i board;
- 6 (4) Moneys derived from public or private sources to
- 7 benefit Moloka`i irrigation system;
- 8 (5) Any other moneys collected for the Moloka`i irrigation
- 9 system; and
- 10 (6) Moneys derived from interest, dividends, or other
- 11 income from other sources.
- 12 (b) The Moloka`i board may expend moneys from the Moloka`i
- 13 irrigation system special fund for:
- 14 (1) operations and maintenance of the Moloka`i irrigation
- 15 system;
- 16 (2) Conducting investigations, monitoring, and inspection
- 17 programs and activities, and enforcement;
- 18 (3) Preparing and disseminating information to the users
- 19 concerning the Moloka`i irrigation system;
- 20 (4) Training and providing educational activities for the
- 21 Moloka`i irrigation system staff;



1 (5) Other purposes for the administration of the Moloka`i
2 irrigation system.

3 (c) Moneys on balance in the Moloka`i irrigation system
4 special fund at the close of each fiscal year shall remain in
5 that fund and shall not be transferred or lapsed to the credit
6 of the general fund.

7 (d) Moneys in the special fund shall be expended only for
8 purposes relating to the water system.

9 **§167-D Native Hawaiian water rights.** (a) Provisions of
10 this chapter shall not be construed to amend or modify rights or
11 entitlements to water as provided for by the Hawaiian Homes
12 Commission Act, 1920, as amended, and by chapters 168 and 167C,
13 relating to the Moloka`i irrigation system.

14 SECTION 3. Section 167-2, Hawaii Revised Statutes, is
15 amended by adding a new definition to be appropriately inserted
16 and to read as follows:

17 ""Moloka`i board" means the Moloka`i irrigation system
18 water users board."

19 SECTION 4. Section 167-23, Hawaii Revised Statutes, is
20 repealed.

21 [~~§167-23~~] ~~Moloka`i irrigation system water users~~
22 ~~advisory board; establishment; meetings.~~ (a) ~~There is~~



1 ~~established a Moloka'i irrigation system water users advisory~~
2 ~~board, to be appointed by the governor under section 26-34. The~~
3 ~~advisory board shall consist of six members, as follows:~~

4 ~~(1) A homestead farmer user on Moloka'i;~~

5 ~~(2) A nonhomestead farmer user on Moloka'i;~~

6 ~~(3) The designee (by name rather than office) of the~~
7 ~~Moloka'i Farm Bureau;~~

8 ~~(4) The designee (by name rather than office) of Hikiola~~
9 ~~Cooperative, Inc.;~~

10 ~~(5) The designee (by name rather than office) of the~~
11 ~~Moloka'i-Lana'i soil and water conservation district;~~
12 ~~and~~

13 ~~(6) The designee (by name rather than office) of the~~
14 ~~department of Hawaiian home lands.~~

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



1 ~~(b) The advisory board shall meet with the department at~~
2 ~~least six times each year. The meetings shall be held on~~
3 ~~Moloka'i, whenever possible.~~

4 ~~The advisory board's duties and responsibilities shall be~~
5 ~~to advise the department on matters of concern to the users of~~
6 ~~the system, to provide support for improvements to the~~
7 ~~irrigation facilities, to participate in the long-range planning~~
8 ~~of the system, and to act as liaison between the users and the~~
9 ~~department."]~~

10 SECTION 5. When codifying the new part added to chapter
11 167, Hawaii Revised Statutes, the revisor of statutes shall
12 substitute appropriate section numbers for letters.

13 SECTION 6. Statutory material to be repealed is bracketed
14 and stricken. New statutory material is underscored.

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

16



Report Title:

Conservation and Resources; Water; Special Fund

Description:

PROPOSED SD2: Establishes a special fund for the Moloka`i irrigation water system on Moloka`i and creates a water user board to oversee the fund. Eff. 7/1/2050. (SD2)

