

---

---

# A BILL FOR AN ACT

RELATING TO THE DISPOSITION OF WATER RIGHTS.

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

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

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



1 protected rights of native Hawaiians. The State has an  
2 obligation to ensure that traditional and customary practices of  
3 native Hawaiians continue to be protected.

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

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

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

19 **"§171-58 Minerals and water rights.** (a) Except as  
20 provided in this section, the right to any mineral or surface or  
21 ground water shall not be included in any lease, agreement, or



1 sale, this right being reserved to the State; provided that the  
2 board may make provisions in the lease, agreement, or sale, for  
3 the payment of just compensation to the surface owner for  
4 improvements taken as a condition precedent to the exercise by  
5 the State of any reserved rights to enter, sever, and remove  
6 minerals or to capture, divert, or impound water.

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

10 (c) Disposition of water rights may be made by lease at  
11 public auction as provided in this chapter or by permit for  
12 temporary use on a month-to-month basis under those conditions  
13 [~~which~~] that will best serve the interests of the State and  
14 subject to a maximum term of one year and other restrictions  
15 under the law; provided that any disposition by lease shall be  
16 subject to disapproval by the legislature by two-thirds vote of  
17 either the senate or the house of representatives or by majority  
18 vote of both in any regular or special session next following  
19 the date of disposition; provided further that after a certain  
20 land or water use has been authorized by the board subsequent to  
21 public hearings and conservation district use application and



1 environmental impact statement approvals, water used in  
2 nonpolluting ways, for nonconsumptive purposes because it is  
3 returned to the same stream or other body of water from which it  
4 was drawn, essentially not affecting the volume and quality of  
5 water or biota in the stream or other body of water, may also be  
6 leased by the board with the prior approval of the governor and  
7 the prior authorization of the legislature by concurrent  
8 resolution.

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



1 may take for public uses and purposes the board may elect to  
2 reduce the rental price under the lease of water rights in  
3 proportion to the value of the waters and the proportionate  
4 actual costs of making the waters available. Subject to the  
5 applicable provisions of section 171-37(3), the board, at any  
6 time during the term of the lease of water rights, may withdraw  
7 from waters leased from the State and from sources privately  
8 owned by the lessee so much water as it may deem necessary to  
9 (1) preserve human life and (2) preserve animal life, in that  
10 order of priority; and that from waters leased from the State  
11 the board, at any time during the term of the lease of water  
12 rights, may also withdraw so much water as it may deem necessary  
13 to preserve crops; provided that payment for the waters shall be  
14 made in the same manner as provided in this section.

15 (e) Any new lease of water rights shall contain a covenant  
16 that requires the lessee and the department of land and natural  
17 resources to jointly develop and implement a watershed  
18 management plan. The board shall not approve any new lease of  
19 water rights without the foregoing covenant or a watershed  
20 management plan. The board shall prescribe the minimum content  
21 of a watershed management plan; provided that the watershed



1 management plan shall require the prevention of the degradation  
2 of surface water and ground water quality to the extent that  
3 degradation can be avoided using reasonable management  
4 practices.

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

16 (g) The department of land and natural resources shall  
17 notify the department of Hawaiian home lands of its intent to  
18 execute any new lease, or to renew any existing lease of water  
19 rights. After consultation with affected beneficiaries, these  
20 departments shall jointly develop a reservation of water rights  
21 sufficient to support current and future homestead needs. Any



1 lease of water rights or renewal shall be subject to the rights  
2 of the department of Hawaiian home lands as provided by section  
3 221 of the Hawaiian Homes Commission Act.

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

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

- 9 **"§174C-5 General powers and duties.** The general  
10 administration of the state water code shall rest with the  
11 commission on water resource management. In addition to its  
12 other powers and duties, the commission:
- 13 (1) Shall carry out topographic surveys, research, and  
14 investigations into all aspects of water use and water  
15 quality;
  - 16 (2) Shall designate water management areas for regulation  
17 under this chapter where the commission, after the  
18 research and investigations mentioned in paragraph  
19 (1), shall consult with the appropriate county council  
20 and county water agency, and after public hearing and  
21 published notice, finds that the water resources of



- 1 the areas are being threatened by existing or proposed  
2 withdrawals of water;
- 3 (3) Shall establish an instream use protection program  
4 designed to protect, enhance, and reestablish, where  
5 practicable, beneficial instream uses of water in the  
6 State;
- 7 (4) May contract and cooperate with the various agencies  
8 of the federal government and with state and local  
9 administrative and governmental agencies or private  
10 persons;
- 11 (5) May enter, after obtaining the consent of the property  
12 owner, at all reasonable times upon any property other  
13 than dwelling places for the purposes of conducting  
14 investigations and studies or enforcing any of the  
15 provisions of this code, being liable, however, for  
16 actual damage done. If consent cannot be obtained,  
17 reasonable notice shall be given prior to entry;
- 18 (6) Shall cooperate with federal agencies, other state  
19 agencies, county or other local governmental  
20 organizations, and all other public and private  
21 agencies created for the purpose of utilizing and





1 conserving the waters of the State, and assist these  
2 organizations and agencies in coordinating the use of  
3 their facilities and participate in the exchange of  
4 ideas, knowledge, and data with these organizations  
5 and agencies. For this purpose the commission shall  
6 maintain an advisory staff of experts;

7 (7) Shall prepare, publish, and issue printed pamphlets  
8 and bulletins as the commission deems necessary for  
9 the dissemination of information to the public  
10 concerning its activities;

11 (8) May appoint and remove agents, including hearings  
12 officers and consultants, necessary to carry out the  
13 purposes of this chapter, who may be engaged by the  
14 commission without regard to the requirements of  
15 chapter 76 and section 78-1;

16 (9) May hire employees in accordance with chapter 76;

17 (10) May acquire, lease, and dispose of [~~such~~] real and  
18 personal property as may be necessary in the  
19 performance of its functions, including the  
20 acquisition of real property for the purpose of



1 conserving and protecting water and water related  
2 resources as provided in section 174C-14;

3 (11) Shall identify, by continuing study, those areas of  
4 the State where salt water intrusion is a threat to  
5 fresh water resources and report its findings to the  
6 appropriate county mayor and council and the public;

7 (12) Shall provide coordination, cooperation, or approval  
8 necessary to the effectuation of any plan or project  
9 of the federal government in connection with or  
10 concerning the waters of the State. The commission  
11 shall approve or disapprove any federal plans or  
12 projects on behalf of the State. No other agency or  
13 department of the State shall assume the duties  
14 delegated to the commission under this paragraph;  
15 except that the department of health shall continue to  
16 exercise the powers vested in it with respect to water  
17 quality, and except that the department of business,  
18 economic development, and tourism shall continue to  
19 carry out its duties and responsibilities under  
20 chapter 205A;



1 (13) Shall plan and coordinate programs for the  
2 development, conservation, protection, control, and  
3 regulation of water resources, based upon the best  
4 available information, and in cooperation with federal  
5 agencies, other state agencies, county or other local  
6 governmental organizations, and other public and  
7 private agencies created for the utilization and  
8 conservation of water;

9 (14) Shall catalog and maintain an inventory of all water  
10 uses and water resources; and

11 (15) Shall determine appurtenant water rights, including  
12 but not limited to the quantification of the amount of  
13 water and the specification of the water course or the  
14 means of access and delivery entitled to by that  
15 right, which determination shall be valid for purposes  
16 of this chapter."

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

19 "[+]§174C-63[+] **Appurtenant rights.** Appurtenant rights  
20 are preserved. Nothing in this part shall be construed to deny  
21 the exercise of an appurtenant right [~~by the holder thereof at~~



1 ~~any time.~~], including access by the holder thereof to conduct  
 2 activities necessary to assure the use, delivery, and quality of  
 3 water including temperature and turbidity, that shall not be  
 4 unreasonably withheld. A permit for water use based on an  
 5 existing appurtenant right shall be issued upon application.  
 6 [~~Such~~] The permit shall be subject to sections 174C-26 and 174C-  
 7 27 and 174C-58 to 174C-62."

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

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

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



1 invalid provision or application, and to this end the provisions  
2 of this Act are severable.

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

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



H.B. NO. 1768  
H.D. 2  
S.D. 2  
C.D. 1

**Report Title:**

Water Rights; Kalo Farming; Exemption

**Description:**

Exempts the instream use of water for traditional and customary kalo cultivation practices from the existing process for disposition of water rights. Recognizes, confirms, and protects traditional and customary and kuleana rights to water, including rights of use, access, delivery, and quality of water. (CD1)

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

