



EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

April 18, 2019

The Honorable Ronald D. Kouchi
President of the Senate
Thirtieth State Legislature
State Capitol, Room 409
Honolulu, HI 96813

The Honorable Scott K. Saiki
Speaker of the House of Representatives
Thirtieth State Legislature
State Capitol, Room 431
Honolulu, HI 96813

Dear Senate President and House Speaker:

Last week, the Senate considered a bill passed over from the House that would allow water to continue to be used for a variety of important State needs, including for agriculture, clean energy production and drinking. The bill is H.B. No. 1326, H.D. 2.

The public hearings last week generated significant activity from the media, special interest groups and others. In this process, misinformation found its way into the public conversation and antagonism among law makers grew to the point that this important legislative measure was tabled. In response, I asked my administrative director to analyze the implications of not enacting H.B. No. 1326, H.D. 2. Please see the attached memo.

The impact of the proposed legislation is widespread. The law must promote fair water distribution throughout the State of Hawai'i. To this end, the proposed legislation sought to ensure that the law applied consistently to all those who have permits to divert water for farming, ranching, drinking, clean energy production and other important uses. H.B. No. 1326, H.D. 2 would extend Act 126 for another limited number of years until further progress is made in obtaining permanent water leases. In the absence of an extension of Act 126, both the Department of Land and Natural Resources and the Department of the Attorney General will have the difficult task of navigating a path forward in a challenging legal framework with limited solutions that work for those relying on water distribution.

In the last few days, I personally met with representatives of the Sierra Club and Earthjustice, as well as many farmers and ranchers who came to the Capitol to talk to me and others. All are concerned about the implications of Act 126, although there are different ideas about who should benefit from any extension of time. While some have made their interests known, there are others who have not been included in the conversation but whose interests we must consider.

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Water is a critically important issue, and for this reason, there is a lot of emotion tied to decisions about water use. However, it is clear that the law cannot be applied in a discriminatory fashion, that all water permittees and applicants must comply with the law and that the law cannot be specially enforced against some permittees and applicants but not others.

Given the timing and circumstances, H.B. No. 1326 addresses these issues for all impacted users in a fair and comprehensive manner. For this reason, I encourage us to continue the conversation and to discuss facts and how we can all move forward to ensure that our State is able to provide the resources needed to support farming, ranching, clean energy production and access to water for drinking and other important public uses.

Thank you for your cooperation in this effort.

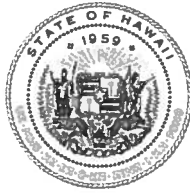
With warmest regards,

A handwritten signature in black ink, appearing to read "David Y. Ige". The signature is fluid and cursive, with a large, stylized "Y" and "I".

David Y. Ige, Governor
State of Hawai'i

Enclosure

c: Members of the Senate
Members of the House of Representatives



EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

April 15, 2019

MEMORANDUM

TO: The Honorable David Y. Ige
Governor

FROM: Ford N. Fuchigami
Administrative Director

RE: H.B. No. 1326, H.D. 2, Relating to Water Rights

I. Introduction

In response to your request that I determine the possible implications of the failure of H.B. No. 1326, H.D. 2 to pass, please find the following analysis. In short, based upon my discussions with the subject matter experts at the Department of Land and Natural Resources ("DLNR") and the Department of the Attorney General, I believe that the absence of a statutory amendment to Act 126 (Session Laws of Hawaii 2016) will have adverse effects upon existing revocable permit holders for the disposition of water rights. Because the potential effects differ based on the circumstances and characteristics of the revocable permit holders, the differences are discussed below.

II. Brief Background

Act 126 was enacted by the Twenty-Eighth Legislature, 2016, following a circuit court order entered by Retired Judge Rhonda Nishimura on January 8, 2016, in the case *Carmichael, et al. v. BLNR, et al.*, Civil no. 15-1-0650-04 (RAN).

In the *Carmichael* case, the Court granted a motion for partial summary judgment filed by Plaintiffs Healoha Carmichael, Lezley Jacintho and Nā Moku Aupuni O Koolau Hui (hereinafter referred to as "Plaintiffs" or "Nā Moku"). In the first part of the order, the Court agreed with Defendants Board of Land & Natural Resources ("Board"), DLNR, Alexander & Baldwin ("A&B"), East Maui Irrigation Co., Ltd ("EMI") and County of Maui, Department of Water Supply ("DWS") that the continuance of the revocable permits in December 2014 did not constitute an "action" subject to the environmental assessment requirements of chapter 343, Hawaii Revised Statutes ("HRS").

However, the Court then concluded that the continuous, uninterrupted use of public lands on a holdover basis was “not the ‘temporary’ use that HRS Chapter 171 envisions” and invalidated the revocable water permits on grounds that had not been raised or briefed by either side. Specifically, the Court made an initial determination that the Board had authorized the holdover status of the revocable permits pursuant to HRS § 171-58(c). The Court then reasoned that HRS §§ 171-10 and 55 authorize only the “temporary” occupation of public lands such that allowing holdover tenants “to occupy public lands almost in perpetuity for continuous, multiple one-year periods ...[was] ... inconsistent with the public interest and legislative intent.” *Carmichael*, at 4.

In response to the Court’s order, DWS appealed and moved to stay the proceedings pending appeal. A&B joined the appeal. The State joined both DWS’s appeal and motion to stay. The Court granted the application for leave to appeal, which applied to all Defendants, but only granted the motion to stay as to DWS. The Court did, however, expressly allow A&B to file a separate motion for a stay. The availability of this judicial relief is important because if A&B obtains the stay, it very likely will not need the protections set forth in Act 126.

While A&B has a judicial remedy, the expansive language used by the Court in the *Carmichael* decision creates uncertainty for all revocable water permit holders, and not just the four revocable permits placed into holdover status by the Board pending the outcome of that requested contested case hearing. Pursuant to the Court’s language and reasoning, water lease applicants with revocable permits issued for an extended period of time likely would be legally prohibited and subject to invalidation because the actual use is not “temporary” as defined by the Court.

Again, the State has appealed what is believed to be an erroneous decision.¹ However, the Court’s order is the current state of the law regarding this critically important issue.

To provide certainty about the ability of the Board to continue to issue temporary water disposition permits, Act 126 was passed to authorize the annual holdover of water permits where an application had been made for a lease to continue a previously authorized disposition of water rights. The legislative authorization allowed for three consecutive one-year holdovers or until final resolution of the pending application for the disposition of water rights.

III. Present Relevant Water Disposition

During the hearings on April 2, 2019 and April 4, 2019, Chair Case attempted to address the disinformation that had pervaded the media and public forum.² She also

¹ The appeal has been pending before the Intermediate Court of Appeals since February 2016.

² Please see attached as Exhibit A to this memorandum a brief summary of some of the important public trust actions that have occurred since 2015.

heard the concerns raised by both Senators and members of the public. Following the hearings, Chair Case and Attorney General Connors, along with Deputy Attorney General Linda Chow and DLNR staff, met with Senators to explain further what has occurred in the last three years as well as to discuss the ramifications of not extending Act 126. I also have met with Senators as well as with the Sierra Club, Earth Justice, farming representatives and others. My discussions have sought to identify who will be affected and in what ways.

As a result of these meetings, it is now evident to many that Act 126 is not a fix aimed to help only A&B, which presently uses only 20 to 25 million gallons a day (including to provide water to Upcountry Maui and for diversified agriculture).³ Rather, it is necessary legislation to address the uncertainty that the law and statutory process (though greatly changed in the last three years) creates for all water permit holders. It also ensures that all interests are addressed, including those that have been expressly brought to our attention as well as those who have not voiced their concerns.

IV. Ramifications of Not Passing H.B. No. 1326, H.D. 2

H.B. No. 1326, H.D. 2, which was introduced this session, sought to extend the provisions of Act 126 for another limited period of time. If the provisions of Act 126 are not extended, the ability of the Board to continue current water disposition permits will be in question when the revocable permits expire at the end of 2019.

Upon reviewing the existing provisions of Act 126, as well as the *Carmichael* order, and discussing both with the subject matter experts, there does not appear to be any provision that would allow for either the continued issuance of water disposition permits or for new permits to be issued to a prior permit holder. Moreover, HRS § 171-55 (related to land) is distinguishable from HRS § 171-58(c) (related to water) because it allows the Board to continue the revocable permits “on a month-to-month basis for additional one year periods.” This language specifically provides that the permits issued under HRS § 171-55 (related to land) can be continued for additional one-year periods. However, this language is missing from HRS § 171-58(c) (related to water), so current users are likely precluded from applying for new water permits because they already have been issued a permit for the same water use. Consequently, there is no clear path forward to ensure continued access to water for a variety of revocable permittees under *Carmichael* and with Act 126 sunseting.

The process for a lease of water rights set forth in HRS § 171-58 and other laws requires the following:

- a. Comply with Chapter 343, HRS;

³ Current usages do not represent the full agricultural use that is anticipated for the central Maui plains.

- b. Work with the Department of Hawaiian Home Lands (DHHL) to develop a water rights reservation sufficient to support current and future homesteads needs;
- c. Work with the DLNR's Division of Forestry and Wildlife to develop and implement a watershed management plan;
- d. Consult with the Office of Conservation and Coastal Lands on whether a conservation district use application is required for the water lease;
- e. Set upset rental through appraisal of fair market value; and;
- f. Disposition of water leases by public auction - including extensive public notice and bidder qualification requirements.

Accordingly, although DLNR has made progress in helping the water lease applicants to complete the required steps, the permittees likely will not be able to complete the water lease process by the end of the year when the current revocable permits expire. The current estimate is that it will take no fewer than three (3) years but more likely will take five (5) years to complete the process, even for the small water users. It is also very important to make clear that while some small water users might be exempt from the chapter 343 requirements, all water users still must go through the application process. The law cannot be specially enforced against some but not others. Moreover, the amendments in H.B. 1326, H.D. 2, S.D. 1 Proposed, voted on by the Committee on April 4, 2019, specifically exempted from the legislative relief holdover or pending lease applicants that were "legally prohibited or invalidated by a court of law." However, as the *Carmichael* order likely applies to all pending lease applicants, they are all "legally prohibited or invalidated by a court of law." Accordingly, this amendment is not necessary.⁴

As noted, the effect on each permit holder differs based on the particular circumstances. The permit holders we believe may be affected are as follows:

1. Ka'ū Users

- 1) Kapāpala Ranch
- 2) Wood Valley Water & Farm Coop
- 3) Kuahiwi Contractors
- 4) Edmund C. Olson Trust

These users consist primarily of ranchers and farmers in Ka'ū on Hawai'i Island. Although their water usage constitutes a small amount overall, these water permits

⁴ Other language in the proposed amendments recite what the law already requires of BLNR and is therefore also unnecessary.

provide a majority of the water source necessary for their farming and ranching operations as well as drinking water.

2. Jeffrey Lindner

Mr. Lindner leases a well site located on state land. Mr. Lindner provides water to the Moloaa Irrigation Cooperative and approximately 8 – 10 domestic water users who are not able to be serviced by the County of Kauai's Department of Water Supply. The Moloaa Irrigation Cooperative is made up of small farmers who rely on this water source for their operations. The County of Kauai does not have sufficient infrastructure to service Mr. Lindner's domestic water users and it is uncertain what measures would have to be taken to provide water to these domestic water users.

3. East Kauai Water Users Cooperative

The East Kauai Water Users Cooperative is made up of small farmers who took over the water system when Amfac went out of business and gave up its agricultural concerns. The water provided under the license is used as a primary source of water to small-scale diversified agricultural users.

4. Hawaii Electric Light Co., Inc. (HELCO)

HELCO uses the water to provide clean, hydroelectric power to its customers. HELCO is a non-consumptive use in that all the water taken in at the hydro plant is returned, in full, to the original source of the water. If it cannot divert water under the permit until it can get a water lease, HELCO will have to find alternative sources to provide the equivalent amount of electricity. This likely would include a switch to fossil fuel consumption. The use of alternative fuel, like fossil fuel, also would likely raise the cost to consumers.

5. Kauai Island Utility Cooperative (KIUC)

KIUC has two permits to divert water to provide clean, hydroelectric power to its customers. If KIUC cannot divert water under the permit until it can get a water lease, KIUC will have to find alternative sources to provide the equivalent amount of electricity. This likely would include a switch to fossil fuel consumption. The use of alternative fuel, like fossil fuel, also would likely raise the cost to consumers.

Currently, KIUC diverts approximately 14 million gallons a day (mgd) from a source with a median stream flow of 103 mgd.

6. EMI/A&B

Following the Court's order, in June 2018, the Commission on Water Resource Management ("Commission") issued its Interim Instream Flow Standards ("IIFS") decision. Regarding specifically the A&B water diversions, the Commission estimated

that the decision provided for about 90% of the irrigation needs for 23,000 acres of A&B land that had been voluntarily designated by A&B as Important Agricultural Lands ("IAL"). The Commission stated:

Yet, we believe it to be reasonable and beneficial to use a portion of East Maui stream water for the development of diversified agriculture on Maui's central plains. Diversified agriculture has and should continue to provide economic benefits and can now make a larger contribution to Hawaii's food sustainability. We are also concerned that leaving these lands in an un-cultivated state will increase wind-blown erosion that will damage Maui's nearshore marine environment, air quality and tourism competitiveness. The Commission's intent in this decision is to ensure that a sufficient amount of offstream water is available to support the cultivation of diversified agricultural crops on the lands designated as IAL in central Maui.

The uncertainty about A&B/EMI's water permits creates a genuine concern that farming of the former A&B land will be adversely affected. Ensuring a sufficient supply of water is critical to supporting the diversified agricultural operations on these IAL designated lands. If farming cannot be sustained, including due to lack of water, the landowner may request to remove the IAL designation. See HRS § 205-50(g). If the IAL designation is removed from the 23,000 acres of land in central Maui dependent on East Maui water, these lands likely will be used for other ventures, including development.

While it was growing sugarcane in the central Maui plain, EMI/A&B had four permits and diverted an average of 160 mgd. After A&B stopped growing sugarcane, its average diversion was significantly reduced to approximately 20-25 mgd. This, *not* more, is its average diversion presently and represents current needs, not full agricultural needs, for 29,000 acres of former sugarcane land. Of this amount, approximately 3.6 mgd is delivered directly to the County's Kamole-Weir Water Treatment Plant. This water is the primary source of water for the entire Upcountry Maui System's 9,865 connections. Additional amounts of water are left untreated and delivered to the Kula Agricultural Park for agricultural use. During dry periods where there is low flow in the ditch system, the County relies on stored water, in reservoirs, that are replenished during heavy flow periods when excess water is available.

The water that may be diverted from streams wholly on EMI land would only produce an average of 12-20 mgd. This amount would be insufficient to provide water for the current central Maui diversified agricultural operations and the County's needs. Importantly, based on its agreement with the County, EMI would not be required to provide water to the County if there is insufficient water.

V. Conclusion

If you believe that the continued holdover of revocable water permits is in the public interest, I recommend that we urge the Legislature to act to avoid the possible adverse ramifications identified above.

EXHIBIT A CWRM Public Trust Actions Since 2015

Interim Instream Flow Standards

- Amended the interim instream flow standards for 27 surface water hydrologic units in East Maui through a contested case final decision, June 2018
 - Ten streams which historically have supported significant kalo cultivation were returned to free flowing water, with no upstream diversions (Honopu, Huelo, Hanehoi, Pi'ina'au, Palauhulu, Ohia (Waiianui), Waiokamilo, Kualani, Wailuanui, Makapipi). The majority of these streams had been diverted for over 100 years.
 - Seven additional streams identified as important habitat for native fish, shrimp, mollusks and insects (Honomanū, Waikamoi, East Wailuaiki, Kopiliula, Punalau/Kōlea, Waiohue, West Wailuaiki) now have limited or no water diversions.
 - Public use streams were specifically identified for public trust offstream uses (Waikamoi, Puohokamoa, Ha'ipua'ena, and Honomanū streams).
 - Other streams are available to support diversified agriculture offstream as long as instream flow standards are met (Waikamoi, East Wailuaiki, Hanawī, Wahinepe'e, Puohokamoa, Haīpua'ena, Nua'ailua, Pua'aka'a, Pa'akea, Waiaaka, Kapaula). The Commission estimated this provided for about 90% of the irrigation needs for 23,000 acres of Important Agricultural Lands.
- Amended the interim instream flow standards for Nā Wai 'Ehā, Island of Maui, through a mediated stipulation in litigation
- Facilitated and approved a mediated agreement to amend instream flow standards and address other issues for the Kōke'e, Kauaikinanā, Kawaikōī, Waiakoali, Koaie Streams and Waimea River on Kaua'i in April 2017. This agreement also provides the opportunity for a renewable energy project, water for Hawaiian homesteading, and farming
- Intermediate Court of Appeals affirmed the Commission's Decision and Order in contested case hearing CCH-HA11-01, effectively setting an instream flow standard for Ainako Stream in Hilo, Hawai'i.
- CWRM staff-initiated amended interim instream flow standards for the surface water hydrologic units of Ukumehame, Olowalu, Launiupoko, and Kaua'ula (March 2018), and Kahoma and Kanahā (November 2018), West Maui

- CWRM staff-initiated commencement of amended interim instream flow standards for the Wailua River, Kaua'i; now in contested case, with a potential for mediation

DHHL Water Reservations

- Reserved water for the Department of Hawaiian Home Lands from the following ground and surface water hydrologic units:

Island	Hydrologic Unit*	Reserved Amounts (million gallons per day)
Kaua'i	Wailua	0.708
	Anahola	1.470
	Kekaha	0.336
	Makaweli	0.405
	Waimea*	6.903
	Wailua*	0.513
Lāna'i	Leeward	0.067
Maui	Honokōwai	0.770
	Kama'ole	2.547
	Ke'anae	0.003
	Kawaipapa	0.118
	Luala'iula	0.063
Hawai'i	Hāwī	0.148
	Māhukona	3.014
	Honoka'a	0.396
	Hakalau	0.083
	Onomea	0.250
	Hilo	0.492
	Kea'au	1.336
	'Ōla'a	0.025
	Nā'ālehu	0.185
	Pāhoa	0.660
Keauhou	3.398	

* Indicates surface water hydrologic unit. All hydrologic units are ground water. (Reservations for O'ahu and Moloka'i ground water hydrologic units were done prior to 2015.)

Other Actions

- Updated the Hawai'i Water Plan, the State's long-range plan for conservation and management of its water resources, by adopting:
 - County of Hawai'i's Water Use and Development Plan (WUDP) for the Keauhou Aquifer System Area
 - City and County of Honolulu's WUDP for the North Shore district

- State Water Projects Plan, focusing on DHHL water needs
- Completed Public Hearings for the adoption of the 2019 Water Resource Protection Plan (WRPP).
- Completed training and technical assistance to all county water supply departments to successfully meet the requirements of Act 169, SLH 2016, for submission of Level 1 validated water audits in order to reduce system losses and conserve water resources.
- Administered a water security grant program under Act 172, SLH 2016, to increase water conservation, reuse, and recharge by awarding over \$600,000 to 11 public-private partnerships.
- Conducted an adaptive management symposium on ground water dependent ecosystems to further investigate the science of coastal freshwater discharge and its impact on future adjustments of ground water sustainable yields.
- Conducted statewide field training for surface water diverters on how to measure open channel flow in an effort to obtain better data on quantities diverted from stream systems.
- Approved 369 wells for individual domestic use.
- Approved 24 wells for municipal use which supplies significant individual domestic use needs.
- Approved 8 water use permits that contained multiple uses that included domestic needs.