

Hawaii

Water Rights Bill Goes Down The Drain In 'Historic Vote'

The land company Alexander & Baldwin is among the big losers after senators can't agree on a proposal to allow stream diversion to continue.

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By Chad Blair    / April 4, 2019

 Reading time: 6 minutes.



Legislation to allow the land company Alexander & Baldwin, farming and ranching operations and two utility companies to extend their permits to divert stream water died late Thursday.

The deal-breaker was a proposed last-minute amendment to [House Bill 1326](#) that would have removed A&B from the bill. Some senators refused to support it without A&B being granted the extensions along with the other water-users.

The result shocked supporters of the bill, some of whom shouted “no!” and completely stunned opponents, including one environmentalist who called it a “historic vote.”

The Water and Land Committee voted 3-2 in favor of the new draft, but Sen. Donavan Dela Cruz, chair of the Ways and Means Committee, deferred a vote in his committee during the joint meeting.

That effectively kills HB 1326 for this year, barring unprecedented legislative maneuvering and a waiver of internal rules by the Senate. Friday is the deadline for bills to advance out of their final committees for this session, which concludes May 2.

Even if the legislation is somehow resurrected, it is clear that senators are far apart on whether to accept the new draft from Water and Land Chair Kai Kahele, or to revert to a bill that keeps A&B in the game.



Sen. Kai Kahele, right, pushed an amendment to the water rights bill that Ways and Means Chair Donovan Dela Cruz refused to accept.

As Sen. Gil Keith-Agaran, vice chair of both committees, pointed out, the House of Representatives would not likely accept a bill that originated from its chamber but was radically altered by the Senate.

Keith-Agaran represents Maui, where A&B has diverted water on the eastern side of the island for decades. Sen. J. Kalani English, the majority leader whose district includes East Maui, was the only member of either committee not in attendance for the vote.

When the vote finally came, Kahele and Sen. Clarence Nishihara voted in favor of Kahele's draft, which would also have cut the extension of the water permits from seven years to just three. Sen. Gil Riviere voted with reservations, which means "yes." Sens. Kurt Fevella and Keith-Agaran voted no.

Dela Cruz then immediately called for a recess. It was not clear whether the 12-member Ways and Means Committee would have voted for the revised bill, but several of its members — including Kahele and Riviere — are also on the Water and Land Committee.

When Dela Cruz announced WAM's deferral, there was an audible gasp from the audience in Conference Room 211.

Most senators then quickly exited the room.

'This Bill Was Intended To Provide For A&B'

Afterward, Marti Townsend, director of the Sierra Club of Hawaii, called the developments "a historic vote."

She also said it confirmed the view of many opponents that HB 1326 was intended to help A&B all along.

"I feel that this really makes clear that this bill was intended to provide for A&B, and if the amended version didn't provide for A&B, the Senate wasn't going to pass it," she said.

Darren Pai, a spokesman for A&B, issued a statement:

We are extremely disappointed that HB 1326 failed to pass today and especially disheartened that the opposition managed to make this all about A&B, when in fact hundreds of farmers and ranchers on our neighbor islands will be negatively impacted because there is now no legal mechanism to renew essential state water permits beyond the end of this year.

Pai added that “this bill was about Hawaii’s future — not Hawaii’s past.”



Meredith Ching, A&B's executive vice president of external affairs, answered senators' questions at the hearing, but the company did not testify on HB 1326.

The impasse on HB 1326 came following nearly six hours of often heated testimony [on the bill Tuesday](#), most of it in opposition.

HB 1326 was opposed by environmental groups, taro farmers and many Native Hawaiians who believe it favored A&B and violated the public trust on water use. It was supported by ranchers, farmers and utilities who want to divert water for their respective enterprises.

The amended version of the bill introduced by Kahele was emailed before the hearing, which started at 4 p.m. Hard copies were also distributed, and Kahele made a point of reading it word for word to make sure it was “crystal clear,” as he put it.

The new amendment read in part:

Specifies that the authorization for the issuance of holdover permits does not apply to holdovers or pending lease applications that concern a use or

disposition of water rights that is otherwise legally prohibited or invalidated by a court of law.

That language specifically regards A&B because a state Circuit Court ruling in January 2016 prohibited the company from using four revocable permits to authorize permanent diversions of stream water in East Maui. The ruling, which is on appeal, led to legislation that year that allowed the company to use the permits until 2019.

Kahele on Thursday said the amended version of HB 1326 would allow the small ranchers and farmers on Maui, Kauai and the Big Island, as well as Hawaii Electric Light on the Big Island and the Kauai Island Utility Cooperative, to extend their water use until 2022.

The amended bill would have also put the onus on the state Department of Land and Natural Resources to submit by 2022 a plan for approval of long-term water leases. There would also be restrictions on lessees that use less than 2 million gallons of water a day unless their use of the water is “consistent with the public trust.”

The public trust stipulates that water is a public resource.

DLNR and the Commission on Water Resource Management would have also been required under HB 1326 to study whether Hawaii’s long-term water use laws make it “appropriate” for the DLNR to issue the leases.

If not, the agencies would have to make specific recommendations to fix the laws.

Kahele said his draft marked a “new chapter” in how the state manages water, one he described as transparent and accountable.

All that is now moot, however.

A&B Never Testified

Much of Thursday's meeting of the Senate panels involved asking questions of officials from DLNR, the Attorney General's office, the Native Hawaiian Legal Corporation and A&B.

Senators wanted more information on how A&B had come to seek the permit extensions and how HB 1326, in its modified form, might impact the company's sales agreement with Mahi Pono, which bought A&B's former sugarcane lands in Central Maui.

Kahele asked Meredith Ching, the company's executive vice president of external affairs, why it never testified on HB 1326 either in writing or in public.

Ching, who was present at Tuesday long hearing, said she was never asked to testify.

Summary of Amendments to HB 1326 HD2 Proposed SD1:

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- Extends the authorization for the issuance of holdover permits from six to a total of ten consecutive one-year holdovers, subject to certain conditions;
- Specifies that the authorization for the issuance of holdover permits does not apply to holdovers or pending lease applications that concern a use or disposition of water rights that is otherwise legally prohibited or invalidated by a court of law;
- Clarifies that holdover authorizations over two mgd shall be limited to demonstrated reasonable beneficial needs, rather than actual, reasonable beneficial needs;
- Deletes language that would have required the Board of Land and Natural Resources, prior to approving any holdover authorization after January 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;
- Inserts language that requires the Department of Land and Natural Resources, prior to approving any holdover authorization after January 1, 2020, to prepare a draft submittal for each pending lease application for the disposition of water rights as to the status of each application and further action required for final disposition, and solicit the services of a qualified appraiser pursuant to chapter 103D, Hawaii Revised Statutes, regarding the water valuation process;
- Requires the Department of Land and Natural Resources to submit to the Board for approval, by January 1, 2022, a long-term lease determination for the disposition of water rights for all applications pending prior to January 1, 2019 that authorize the use of less than two mgd; provided that issuance of the lease is consistent with the public trust;
- Clarifies that the Chairperson of the Board of Land and Natural Resources, Board of Land and Natural Resources, and Commission on Water Resource Management shall conduct an analysis of the effectiveness of the State's long-term water disposition laws and whether section 171-58 is appropriate to guide the Board of Land and Natural Resources on the issuance of long-term leases for the disposition of water rights, and recommend specific statutory changes or new legislation necessary to enable a clear process;
- Allows the Chairperson of the Board of Land and Natural Resources to invite other appropriate, interested parties to participate in the analysis of and recommendations regarding the effectiveness of section 171-58 and issuance of long-term leases for the disposition of water rights;
- Retains language that specifies that holdovers first applied for under Act 126 prior to 6/30/2019 may be reauthorized beyond 6/30/2019;
- Extends the repeal and reenactment provision for Act 126 by seven years, from June 30, 2019 to June 30, 2026;

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