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# Nothing Is Dead in the Land of the Zombies: The twisted legislative saga of the "Corporate Water Theft" Bill

APRIL 10, 2019 BY [DEBORAH CAULFIELD RYBAK](#) — 1 COMMENT



The passage of HB1326, the so-called "Corporate Water Theft Bill" that affects the future use of East Maui's water, has morphed from a civics lesson into an episode of "The Walking Dead."

In the past week alone, the bill has been alive, dead, undead, and buried-but-still-moving. It has become so toxic that few lawmakers even want to discuss it anymore. Currently, HB1326 is lurching around the netherworld of the Hawai'i State Legislature while legislators pray for the demise of a monster they created

Here's a look at the debris-strewn path left by HB1326 in its shamble through the Capitol.

## Water Torture

HB1326's turbulent voyage into the realm of the undead began in January. For newbies, the bill extends for seven years a state policy of granting temporary "holdover" permits that allow users to divert water from state-owned land. Twelve companies currently hold permits: four on Kaua'i, seven on the Big Island, and Alexander and Baldwin on Maui.

These permits have become increasingly controversial. Water-diverting companies were given temporary permits to give them time to complete the environmental requirements necessary to acquire permanent water leases. The problem: For years none of the permit holders have completed those requirements and thus continue to divert water without environmental oversight. If HB1326 doesn't pass, the holdover permits will expire this year.

Even though last December A&B sold 41,000 acres of former Maui sugarcane land to mainland investors (who call themselves Mahi Pono locally), it remains a part owner of East Maui Irrigation, which has holdover permits to bring East Maui water to Central Maui land.

According to its \$267 million purchase and sales agreement with Mahi Pono, the two would remain 50-50 partners in EMI while they "secure long-term leases from the State for... collection and transmission of surface water from State-owned lands in East Maui." If no state leases are executed within five years of the December 2018 sale, sale price rebates from A&B to Mahi Pono could range from \$31 to \$62 million. A&B and Mahi Pono need the bill passed; their lobbyists made sure lawmakers knew that.

Originally introduced in the House by pro-A&B legislators, the bill seemed a slam dunk. After all, A&B is one of the most powerful corporations in the state, is a generous donor to legislative coffers, and wanted this bill passed. Legislative leadership quickly complied.

Other bill supporters, like Mayor Michael Victorino, paint apocalyptic visions of a suddenly Saharan Upcountry if the bill fails. Opponents like Sierra Club, the Office of Hawaiian Affairs and the Hawaiian Alliance for Progressive Action call that scenario pure fiction. They argue that

permit extensions have gone on long enough and need to be terminated – especially the East Maui ones belonging to A&B.

HB1326 picked up a pungent stench of unpopularity as the legislative session wore on, though nobody really thought the bill was in danger. However, its progress was being watched closely by Sen. Kaiulani "Kai" Kahele, who knew the bill would eventually end up in his Committee on Water and Land. Kahele, the son of longtime Hawai'i Island senator Gil Kahele, was appointed in February, 2016 to fill the vacant Senate seat left when his father died. He was re-elected that fall by a wide margin. In January, Kahele announced his intention to run for U.S. Representative Tulsi Gabbard's congressional seat in 2020. Ambition like that requires party support and serious fund-raising, yet Kahele has often been a maverick within his own party. He was in the middle of the legislative battle surrounding the controversial Thirty Meter Telescope proposed atop Mauna Kea, and was among a small group of senators who voted against funding the Honolulu rail project in 2017.

However, when it came to chairing the Committee on Water and Land, even Kahele's own staff had urged him to refuse it. "It's a very controversial committee," he acknowledged in a lengthy interview with *MauiTime*. "But I'm not someone who ducks challenges or avoids difficult situations or complex issues. I want to be able to help solve them. I actually thrive in that environment."

Yeah, what are a few land and water issues to a highly decorated combat pilot who currently flies for Hawaiian Airlines? What the committee needed was a "champion," Kahele said, and he was happy to oblige.

"I told my staff, 'If we're ever going to help lead this state, then we have to challenge ourselves with tough issues and put ourselves in the center of the controversy.'"

It was only last fall, Kahele said, that he truly began to understand water diversion after hiking a 100-year-old irrigation ditch on Moloka'i. "Until I assumed the chairmanship, it wasn't something that I was knowledgeable about." In fact, Kahele voted for holdover permits when the last extension bill came up in 2016. "I didn't know anything about it and just went along for the ride," he confessed. "I was one of those votes that allowed a three-year extension.

"So this year, I knew the bill was coming and began to think strategically about it as soon as it was introduced."







Sen. Kai Kahele had tough questions for state officials

Death by Committee

It seems apparent now that party leadership knew it had a wild card in Kahele and tried to dilute any moves he might make. Instead of being heard in his committee, the bill was given to a joint committee: Kahele's Water and Land, and Ways and Means, chaired by the powerful Donovan Dela Cruz. Dela Cruz immediately tried to create a second bill, HB1171, using a controversial maneuver called "gut and replace." The blowback was significant and Dela Cruz yanked HB1171 within days of creating it.

Then an effort was made to outright cancel the joint committee hearing set for Tuesday April 2. "There were a lot of backdoor things going on," said Kahele. "The meeting was in jeopardy up to two hours before. But I demanded that we have it. The public had submitted testimony and people had flown in from all over the state to share their stories. It would have been horrible to cancel it on such short notice."

The hearing lasted almost six hours and senators and participants described the situation as tense. Kahele and colleagues Gil Riviere and Jarrett Keohokalole were tough in their questions to Suzanne Case, chairperson of the Department of Land and Natural Resources, and Attorney General Clare Connors. They asked why the unproductive policy of granting temporary water permits without any kind of environmental review had been allowed to fester for years. Meanwhile, influential A&B lobbyist Meredith Ching watched from the back of the room. Although the company was at the forefront of testifiers' complaints, it offered no testimony of its own. The hearing ended at 6pm Tuesday, with a committee vote scheduled for Thursday April 4.

The morning after the hearing, The Honolulu Advertiser ran a story with a comment from A&B calling the \$62 million rebate issue "a red herring," and adding "the failure to pass this bill will not cost A&B \$31 million or \$62 million as inferred by many."

The statement solidified Kahele's thinking. "It basically said that A&B didn't need this bill," he said. "That's when I realized what I was going to do with the bill, and that was to remove Alexander and Baldwin from it."

The next day, in a swashbuckling thrust of legislative derring-do, Kahele announced that he was amending HB1326 to remove A&B from the bill entirely, meaning its temporary permits would expire this year. HB1326's holdover permit extensions would now be given only to farmers, ranchers, and a couple of utility companies.

"This is not the same bill," Kahele told the committee room crowd. "This is a completely different bill that protects farmers and ranchers. It provides transparency and accountability

and opens a new chapter on how we manage and protect our public trust resources in the state of Hawai'i."

Among the senatorial comments that followed, Sen. Gil Riviere's were particularly powerful. Speaking of the fact-finding visit he made to Maui in February with Kahele and others, Riviere said, "I think one of the issues I learned quite clearly is that the Upcountry water issue is a non-issue. They've got the water. There is zero chance Upcountry water will be affected. Mahi Pono expressed that they can do for the next year with the water they have already on their lands. They showed us plans where they can use existing water... they can go through the process to get their license."

Riviere then turned his attention to A&B and its dire predictions of water shortages on Maui if the bill didn't pass. "There is no crisis on Maui. In fact this whole crisis has been trumped up since three years ago when [A&B] lost their lawsuit. They came in here and said, 'That law is inconvenient' because for 15 years they hadn't been able to get the environmental impact statement done. Three years later they still haven't gotten that statement done. There's no question that this crisis is in reaction to Alexander and Baldwin kicking the can down the road. It's time to get on with the leases on Maui."

To Kahele, Riviere said, "You listened to all the people. Alexander and Baldwin went back and put a press release out. They said, 'This bill is not about the water or about A&B.' There was a representative from A&B here [who] never testified. They never said, 'We need this bill.' So I think you wisely went back and you adjusted this bill."

At that point, A&B's Ching finally stepped forward, telling legislators that she had seen no need to testify because she had met privately with Kahele to express her company's position.

Kahele said later that while he respected Ching, he disliked her remarks. "I met with anyone who came to my office. [The Ching meeting] was a private meeting and a private conversation we had for Alexander and Baldwin to share their position and answer questions in private. This [hearing] was a public forum on the record, with testimony as part of the public record that the public can review and that legislators making critical decisions can review. If A&B really wanted the bill, then it should have come to the table and told us why."

The ensuing Water and Land Committee vote was tight: 3 for and 2 against. It moved immediately to the Committee on Ways and Means (whose members were also in the room), but Chairman Dela Cruz called an immediate recess. He came back moments later and declared the bill "deferred indefinitely" to the shouts of "No!" from bill supporters.

It was a highly unusual vote. Journalist Henry Curtis noted in a column that he had been covering the Legislature for 25 years and had never seen "a joint hearing where the first committee voted to pass a bill and the second committee chair 'deferred indefinitely' [killed] a bill."

On Friday April 5, hosannas rang out in progressive/conservation circles throughout the Hawaiian Islands. HB1326 was dead, smothered in committee. "Water Rights Bill Goes Down the Drain," read the Civil Beat headline. "Hawaii Senate Kills Water Bill," read another.

In addition to protecting one of Hawai'i's most precious resources, for celebrants it signaled the death of plantation politics. Powerful legacy corporations like A&B were no longer going to dictate self-interested political policy, they crowed. "Big Daddy" had left the house.

Kahele spoke at length with me about the votes and their aftermath. "It sends a clear and strong message that [Hawaiian] politics as we have known them are changing. This is a generation that is awakened. It's a generation that is intelligent and knows its history. It sticks to its core values."

Sen. Riviere was pleased with the results as well. Still, he cautioned wryly, "Nothing is dead in the land of the zombies."





**"The Upcountry water issue is a non-issue. They've got the water. There is zero chance Upcountry water will be affected," Sen. Riviere said**

### **Dawn of the Dead**

Riviere's words were prescient. Within 24 hours, the cheering abruptly ceased. Rumor washed through political junkie circles and into the media: A group of senators were organizing a rare

legislative maneuver that would abnormally resuscitate HB1326 – the unamended version of the bill that passed the House, included A&B, and gave all permit holders a seven-year extension. The move would be made Tuesday April 9 during a Senate floor vote, sources said. It would require nine members of the 25-member Senate to vote to yank the unamended bill out of committee and bring it to the Senate floor. Then, if 13 members voted to support the original HB1326, it would go directly to the governor for signature.

"It's a nuclear option," said Kahele. "I think they're desperate and are going to unprecedented lengths" to resurrect the bill."

Kahele's actions hadn't won him any friends among party leadership, which wanted HB1326 passed in its original form, nor with Alexander and Baldwin. His colleagues took action as well. As *Civil Beat's* Chad Blair noted, "While it is difficult to dust fingerprints on why certain bills die, I can tell you that two bills authored by Kahele... were killed in House Finance Chair Sylvia Luke's committee Friday [the day after Kahele's committee vote]."

A&B took aim in published comments, saying the bill's death created a "serious" situation and that the company regretted "that the bill became so divisive when it didn't need to be."

Kahele was incensed by the remarks. "They were completely different from A&B's statements the day before when they said they didn't need the bill. And you know why they said that? Because they thought they had the votes. Because they always have had the votes."

When I suggested to Kahele that I had serious doubts that A&B would be contributing to his congressional campaign, he chuckled.

"That's a fair assessment. You're right, someone running for Congress – they wouldn't have touched this with a 10-foot pole. But it doesn't matter to me. I don't weigh my political future on how people view me or who decides to contribute to my campaign, because at the end of the day if I do what I know is the right thing to do, with integrity and honesty, then I'm on the right side of the street."

As he made those comments, Kahele was already aware that a move was afoot to undo the actions of both committees. It wasn't unexpected.

"It is a typical situation of 'live to fight another day,'" he said. "They decided, 'Let's make everyone think we lost and then regroup for attack.' How do you do that? Well, you have to go to unprecedented lengths. You have to convince nine senators that this issue is so vital and

critical that it would warrant them taking the bill out of committee and overruling the 'subject chair' [Kahele] to pull it down to the floor. Then it's game on."

As Tuesday approached, HB1326 opponents buttonholed senators, while A&B lobbyists took their complaints higher. Governor David Ige told legislators "something has to happen" by the end of the session.

With a white-hot media spotlight now shining on the Senate and a deafening outcry from bill opponents, its Tuesday floor vote was closely watched by a capacity crowd in the visitors gallery. However, HB1326 was not included in the lengthy list of bills presented that day for votes. This is what did happen though: During a recess, the senators retreated to discuss the possibility of amending HB1326 to match Kahele's version that passed the Water and Land Committee. After a debate that was described to me as "robust," the senators decided that they didn't want to pass *any* version of HB1326 and promises were made that the bill wouldn't be raised again for the rest of the session.

Outside Senate chambers, opponents gathered to cheer the result. Sierra Club Hawaii director Marti Townsend victoriously exclaimed, "We collectively have kicked A&B out of the Capitol!"

Sen. Kahele said Tuesday that he is convinced that the bill is dead for this session in the Senate. "Truly dead." Then he paused, probably thinking about those zombies.

"Well, of course something still could happen in the House."

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*Image 1 courtesy Kai Kahele*

*Image 2 courtesy Gil Riviere*

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