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STATE OF HAWAI'I | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

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Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
JUDICIARY & HAWAIIAN AFFAIRS

Thursday, March 2, 2023
2:00 PM

State Capitol, VIA VIDEOCONFERENCE, Conference Room 325

In consideration of
HOUSE BILL 758, HOUSE DRAFT 1
RELATING TO NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY FISHING
PRACTICES

House Bill 758, House Draft 1 proposes to authorize the Department of Land and Natural Resources (Department) to issue special activity permits for the purpose of recognizing and protecting individuals exercising their Native Hawaiian traditional and customary rights. **The Department supports this bill.**

Article XII, section 7 of the Constitution of the State of Hawai'i provides protections for "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." Despite these constitutional protections, individuals who choose to exercise their rights to gather aquatic resources in ways that contravene state fishing laws are subjected to the risk of civil and criminal citation and arrest before being afforded an opportunity to validate their traditional and customary rights.

The Department seeks to remove the risk of civil and criminal citation and arrest for Native Hawaiian cultural practitioners exercising constitutionally protected traditional and customary rights. The Department currently has authority to issue Special Activity Permits (SAPs) for scientific, educational, management, or propagation purposes.¹ Allowing the Department to issue SAPs for the purpose of exercising traditional and customary fishing practices would provide Native Hawaiian fisher and gatherer practitioners who may be questioned about the legitimacy of their fishing and gathering, an immediate way to show proof that they are lawfully

¹ See §187A-6, Hawaii Revised Statutes

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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

exercising legitimate traditional and customary fishing practices protected by Article XII, section 7 of the Hawai‘i State Constitution and sections 1-1² and 7-1³ of the Hawaii Revised Statutes (HRS).

The Department is aware of concerns that have been raised regarding the potential for abuse of SAPs issued for traditional and customary Native Hawaiian fishing practices. An SAP does not provide a blanket exemption from fishing laws. Rather, it is a permit that authorizes specific activity that would otherwise be unlawful. Prior to issuing an SAP, the Department requires applicants to first complete an application that describes in detail the proposed activity they wish to conduct, including time, location, gear or method, size and number of each species to be taken, and purpose. The Department reviews each application with careful consideration of environmental, cultural, and social impacts prior to issuing permits. When an SAP is issued, there are strict terms and conditions limiting the scope and nature of the activity authorized by the permit. Permittees are also required to submit a report at the end of the permit period documenting all activities conducted under the permit.

For traditional and customary Native Hawaiian gathering rights, Hawai‘i courts have established a three-pronged analysis to help ascertain whether a specific activity is Constitutionally protected.

First, a person must qualify as Native Hawaiian.⁴ Native Hawaiians are generally defined as people who are descendants of the native people who lived in Hawai‘i prior to 1778. A person’s genealogy can be proven by relatives, community members, and documents.

Second, the practice must be a valid traditional and customary practice.⁵ The Court has relied on six elements to inform this determination:

- (1) The purpose is to fulfill a responsibility related to subsistence, religious, or cultural needs of the practitioner's family;
- (2) The practitioner learned the practice from an elder;
- (3) The practitioner is connected to the location of practice, either through a family tradition or because that was the location of the practitioner's education;
- (4) The practitioner has taken responsibility for the care of the location;
- (5) The practice is not for a commercial purpose; and
- (6) The practice is consistent with custom.

² HRS §1-1. “The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.”

³ HRS §7-1. “Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.”

⁴ See *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425 at 449 (1995); See also *State v. Hanapi*, 89 Hawai‘i 177 at 185-86 (1998).

⁵ *Id.*

Third, the right must be exercised on undeveloped or less than fully developed land.⁶ Most areas within the Department's jurisdiction to regulate fishing are considered undeveloped submerged lands.

In addition to the three-pronged analysis, the Court in State v. Pratt, 127 Hawai'i 206 (2012), applied a "Totality of the Circumstances" balancing test. The Court found that even though all three prongs of the analysis were satisfied, it is necessary to look at the totality of the circumstance and balance the interest of the State in regulating an action and the interest of an individual in exercising their asserted traditional and customary Native Hawaiian practice.

If authorized to issue SAPs for traditional and customary Native Hawaiian fishing practices, the Department would carefully review the environmental, cultural and social impacts of the specific proposed activity and consult with cultural experts or community members on the validity of a traditional and customary practice.

It is important to clarify that allowing the Department to issue SAPs for the purpose of exercising traditional and customary fishing practices does not, in any way, add a requirement that one must have an SAP in order to exercise traditional and customary fishing practices. Traditional and customary practices are protected by the state Constitution. Having an SAP for traditional and customary fishing practices would help a fisher more easily and quickly explain to law enforcement that they are exercising traditional and customary fishing practices, which are protected by the state Constitution.

Mahalo for the opportunity to testify in support of this measure.

⁶ *Id.*



HB758 HD1
RELATING TO NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY FISHING
PRACTICES
House Committee on Judiciary & Hawaiian Affairs

March 2, 2023

2:00 PM

Room 325

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB758 HD1, which would create an arbitrary mechanism attached to the exercise of Native Hawaiian rights that could lead to the erosion of those constitutionally protected rights and a system of abuse, which in turn, could cause irreparable harm to Native Hawaiian cultural practitioners. **OHA takes care to note that the Department of Land and Natural Resources (DLNR) had reached out to meet on the issues at the core of this measure and both agencies will continue to work together to address these issues to advance our mutual interests. In light of this discussion with DLNR, OHA wishes to impress upon the Legislature that it will coordinate efforts with the Native Hawaiian community and the appropriate Native Hawaiian traditional and customary practitioners to address the challenges expressed by this measure for collaborative efforts with DLNR to ensure the preservation and protection of our natural environment and Native Hawaiian identity.**

For the purpose of reiterating the important reasons for OHA's opposition, OHA maintains that this measure's proposed mechanism is no less inappropriate than an optional permitting process to better assist law enforcement in its identification of an individual based on their race, skin color, national origin, gender, sexual orientation, disability, or religion. OHA understands that the underlying intent of the Legislature, with the proposal of this measure, is to protect our precious and finite natural resources. However, the preamble of this measure suggests that there exist contraventions to resource protection laws by Native Hawaiian cultural practitioners engaged in constitutionally protected traditional and customary practices. As the principal public agency in the State responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians,¹ **OHA must strongly disagree with that notion and affirmatively state that traditional and customary Native Hawaiian practices embody long-held principles in sustainability that have allowed the Native Hawaiian people to thrive in these islands for millennia. Native Hawaiian traditional and customary practitioners are not the problem, and this proposal is not the solution.**

¹ HRS §10-3.



HB758 HD1
RELATING TO NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY FISHING PRACTICES

House Committee on Judiciary & Hawaiian Affairs

The concept proposed by this measure may sound both productive and innocuous, however, this measure would instead establish a pathway – one that currently does not exist – for the potential systemic abuse of constitutionally protected Native Hawaiian rights. This measure would institutionalize that potential for abuse. OHA provides this explanation in the hope that the Legislature would defer this measure and leave the regulation of Native Hawaiian cultural practices to their respective communities of Native Hawaiian cultural practitioners.

Native Hawaiian cultural practitioners engaged in traditional and customary practices, including those who are connected to coastal, marine, and aquatic resources, such as lawai'a (fishers), are protected by Article XII, Section 7 of the Hawai'i State Constitution. This protection exists in the absence of any form of identification and continues to exist despite the identification, perception, or belief of any enforcement officer.

This measure states that the intent of the proposed mechanism is “to assist in the recognition and protection of any person exercising their protected rights,” which “would provide a less burdensome avenue for individuals to lawfully exercise legitimate traditional and customary fishing practices protected [by] the Hawaii State Constitution.” OHA is deeply concerned by the inference of this measure that there needs to be a mechanism that assists in singling out individuals, who may be engaged in a constitutionally protected activity. **The equivalent implementation of this proposed policy would see members of any religion being subject to an optional permit to better assist law enforcement in determining which worshippers were legitimate practitioners, for their own protection.**

Furthermore, by creating a permitting system for the identification of Native Hawaiian traditional and customary practices – even one that is optional – the Legislature would be facilitating the potential erosion of constitutionally protected Native Hawaiian rights. This proposed mechanism, with the force and effect of law, could become the open floodgate that causes cascading regulations on every single traditional and customary practice belonging to Native Hawaiians.

Finally, OHA wishes to emphasize the critical importance of Native Hawaiian agency in the perpetuation, and even self-regulation, of Native Hawaiian traditional and customary practices. Any form of identification for Native Hawaiian cultural practitioners should come from a process created by that community of practitioners, for that community of practitioners.



HB758 HD1
RELATING TO NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY FISHING
PRACTICES

House Committee on Judiciary & Hawaiian Affairs

OHA appreciates the opportunity to provide testimony on this measure and urges the Legislature to **DEFER** HB758 HD1. Mahalo nui loa.

HB-758-HD-1

Submitted on: 2/28/2023 11:21:59 AM

Testimony for JHA on 3/2/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Godfrey Akaka	The Native Hawaiian Gathering Rights Association	Oppose	Written Testimony Only

Comments:

My name is Godfrey Akaka Jr. President for The NHGRA. We oppose this bill as our people are already protected under Article 12 Sec. 7 in relation to native gathering. Requiring our people to obtain a permit is a form of racism to identify and segregate individuals of race. The Native Hawaiian Gathering Rights Association identifies Native Gathering as a cultural practice not limited to other races. The Native Hawaiian Gathering Rights Association also identifies that article 12 sec.7 also protects those not of Hawaiian blood but those subject or ancestral lineage of those who resided in the Hawaiian Kingdom prior to Jan. 17, 1893 overthrow as Hawaiian citizens. Further, article 12 sec 7 and or the State of Hawaii also should recognize the importance of these protections as well as those who are ohana members who need to gather for their family members. As you can see the complexity of this issue can be overwhelming. As a member of the DLNR fishers working group representing Molokai, we are working on solutions to increase biomass as well as solutions to decrease the constant need for fishing restrictions and regulations. Should you have any questions, please contact me at 808-213-1013 Mahalo.

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Unity, Equality, Aloha for all



To: HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

For hearing Thursday, March 2, 2023

Re: HB 758 RELATING TO NATIVE HAWAIIAN TRADITIONAL AND
CUSTOMARY FISHING PRACTICES.

Authorizes the department of land and natural resources to issue
special activity permits for the purpose of recognizing and protecting
individuals exercising their Native Hawaiian traditional and customary
rights. Effective 6/30/3000. (HD1)

TESTIMONY IN OPPOSITION

This testimony has three main points.

1. Playing the race card authorized in this bill would be immoral, divisive, and inflammatory.
2. Federal law overrides state law, and nullifies it when tested in court. Thus the U.S. Constitution 14th Amendment Equal Protection Clause overrides the racially exclusive interpretation of Article 12 Section 7 of the Hawaii Constitution.
3. Article 12 Section 7 of the Hawaii Constitution should not be interpreted as racially exclusionary. If it is interpreted properly there will be no need to have a race card or to play it.

1. Playing the race card authorized in this bill would be immoral, divisive, and inflammatory.

Do we want our state government to issue a race card which can be carried in a wallet so that someone can play this race card to stop an enforcement officer from arresting a person who is violating a regulation? Sort of like a racial variant of someone having a card identifying them as a member of the police benevolent society and showing the card when pulled over for speeding?

The basic issue in this bill is whether it would be wise for the legislature to authorize creation of a "race card" that would give immediate immunity from arrest or citation to anyone of the favored race who shows the card to an enforcement officer, at the same time the officer is arresting someone else standing in the same place who is engaged in the same activity (perhaps fishing) which violates a law or regulation. Allowing government to issue such a race card would be a clear case of government-sponsored "systemic racism." Establishing such a system would be both immoral and illegal. This bill explicitly says its purpose is to help a person of the favored race to avoid the inconvenience of being detained and the need to later provide evidence of favored status during a trial or administrative hearing. To facilitate this bill's purpose of eliminating inconvenience, perhaps this bill could be amended to authorize a possessor of the card to leave it at home after having the letter "K" tattooed on their forehead.

This bill would establish a highly visible racial division between first-class citizens who can do activities right in front of second-class citizens who are forbidden to do those activities -- as visible as having side-by-side drinking fountains labeled "White" and "Negro" -- as visible as Rosa Parks being ordered to leave her seat in the front of the bus and go sit in back to make way for a White who comes onto the bus and is entitled by law to sit in the front. Such racial divisiveness is potentially incendiary; its high visibility in this situation may elicit anger and could incite violence.

2. Federal law overrides state law, and nullifies it when tested in court.

Article VI, Paragraph 2 of the U.S. Constitution establishes that the federal Constitution, and federal law generally, take precedence over state laws, and even state constitutions. Therefore the U.S. 14th Amendment "Equal Protection" clause -- "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." -- overrides and nullifies Article 12, Section 7 of the Hawaii Constitution which purports to give special rights to "ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778."

As a deterrent to passing the present bill, let's recall a civil rights lawsuit illustrating how Hawaii has previously suffered the embarrassment and expense caused by racial segregation in our voting laws. In year 2000 the Supreme Court's decision in Rice v. Cayetano used the U.S. Constitution's 15th Amendment to nullify the portion of Hawaii's Constitution that imposed a racial restriction on who can vote in elections for the board of directors of a state government agency (OHA).

3. Article 12 Section 7 of the Hawaii Constitution should not be interpreted as racially exclusionary. If it is interpreted properly there will be no need to have a race card or to play it.

Article 12 Section 7 of the Hawaii Constitution is cited in this bill as the alleged justification empowering the race card. But the correct way to

interpret it is that all Hawaii's people, regardless of race, are entitled to the same rights customarily and traditionally exercised by native Hawaiians who inhabited the Hawaiian Islands prior to 1778. Such an interpretation would guarantee that people of the favored race -- the descendants of those native Hawaiians -- would have those rights; and that interpretation would also avoid the illegality and immorality of racial exclusivity. And of course Article 12 Section 7 concludes by saying that the exercise of those rights is "subject to the right of the State to regulate such rights." That last part clearly says that whatever special rights some ethnic Hawaiian activists think their racial group alone possesses could lawfully be nullified because they are "subject to the right of the State to regulate such rights."

To see why Article 12 Section 7 (and also the PASH decision) pertains to all Hawaii's people and is not racially exclusive, we must look back to the Mahele laws beginning in 1848 culminating in the Kuleana Act of 1850.

A single phrase, and especially an individual word in that phrase, has been subjected to deliberate distortion over time because of what the word meant in Hawaiian when proclaimed into law eighteen decades ago and what it has come to mean in English since then. The phrase is: "koe nae ke kuleana o na kanaka." Word for word, here's exactly what it says: "reserving however the rights of the people."

The meaning of that phrase has been twisted by today's Hawaiian sovereignty activists to mean that there are special land and ocean rights exclusively for ethnic Hawaiians that are not available to anyone lacking a drop of the magic blood. But in fact the rights referred to in that phrase (including gathering, beach access, and fishing) are rights belonging to all Hawaii's people regardless of race. Here's the explanation of why that phrase was included in the property deeds granted under the Mahele, and how the meaning of the word "kanaka" has morphed into today's racial meaning which was not intended in the 1840s.

When private land ownership was created by granting royal patent deeds during the unfolding stages of the Mahele, chiefs were given huge swaths of land, while peasants living on and farming individual parcels were given the right to have fee-simple ownership of their parcels. The problem was that the chief's land completely surrounded the peasant's small parcel, thus making it necessary for a peasant to trespass through the chief's land in order to gather materials necessary for daily life, or to go to the ocean for fishing. So in the interest of what we today might call "social justice", the chief's royal patent deed gave him ownership "reserving however the rights of the people" [for gathering or shoreline access]. That Hawaiian phrase "koe nae ke kuleana o na kanaka" today is always translated to mean "reserving the rights of the native tenants." However, there was nothing racial about the word "kanaka" back in 1850, although today it has come to refer to so-called "Native Hawaiians." The word "kanaka" simply meant person, or human being, with an implication that it might be referring to a servant or peasant. [Someone who has no servant might be called by the name "kanaka'ole"] If you look up "kanaka" in the big Pukui/Elbert dictionary you will find no racial terms. Furthermore, the word "kanaka" does not mean "tenant" -- that word is "hoa'aina." Although non-natives made up only a small percentage of Hawaii's population in 1850, the rights reserved to the "kanaka" in the Kuleana Act were reserved for ALL the "people" regardless of race and regardless whether they were tenants (ordinary people living there or perhaps tenant farmers) under a particular chief.

The Hawaii Constitution Article 12 Section 7, and also the PASH decision by the Hawaii Supreme Court, include racial restrictions which are modern distortions and simply do not grow out of the Mahele or the Kuleana Act. "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." The traditional and customary rights of native Hawaiians from before 1778, and still possessed under the Kuleana Act of 1850 and still to this day -- those terms describe what rights are being referred

to, but those terms should NOT be construed as limiting those rights to members of any particular racial or ethnic group. By interpreting those rights to be possessed by ALL Hawaii's people, we would ensure equality under the law for everyone including ethnic Hawaiians. Indeed, at the time of the Mahele and Kuleana Act, those rights WERE INDEED possessed by all Hawaii's people regardless of race -- a fact which did not in any way diminish the pride or success of the native Hawaiians.

The fact that the racially inclusive interpretation of "koe nae ke kuleana o na kanaka" is not the usual interpretation should serve as an important illustration of the fact that the only people who have sufficient fluency in Hawaiian language have been trained by teachers and institutions which are politically active; and the students mastering the language under their tutelage have been indoctrinated with their political views and will interpret the meaning of laws in a manner that facilitates their political agenda.

HB-758-HD-1

Submitted on: 3/1/2023 9:48:06 AM

Testimony for JHA on 3/2/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Steve Roy Kaiser	Individual	Oppose	Remotely Via Zoom

Comments:

Aloha and I would like to recommend that on page 4 Line 11-15 be stricken. The whole reason for this bill is to make it clear who and what those who want to exercise customary practices can legally do it. And yet making it not a requirement with no way to monitor it who and what is incredible irresponsible. So if enforcement shows up and says where is your permit the answer will be no need? And then is that person really native hawaiian? Is that person using a bonified customary fishing method? Say he fishes with hawaiian fish poison? Or sets up a bullpen netting? Small mesh netting? This addition makes for an impossible enforcement situation and can be abused.

HB-758-HD-1

Submitted on: 2/28/2023 9:10:49 PM

Testimony for JHA on 3/2/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dana Keawe	Individual	Oppose	Written Testimony Only

Comments:

Strongly Oppose HB758

DLNR regulating Native Hawaiians/Kānaka Maoli customary practices by requiring special permits is not pono. This kind of House Bill needs to be implemented by the leadership, input and blessings of the Kānaka Maoli lawai'a/customary practitioners from every island first. Not dictated by DLNR.

Renewing special permits every year is not pono.

Special permit allowing the use of chemicals and electric methods on coastal marine life is not pono.

Revoking special permits for 1 year is not pono.

Who in DLNR decides, dictates, enforces & regulates special permits & rules at every protected area in the State of Hawai'i? DLNR testified on Feb 28, 2023. that they cannot regulate illegal commercial activity at Kaneohe Bay on O'ahu because they don't have the funds or 3 staff members required.

Protecting Native Hawaiian/Kākana Maoli is most important i agree.

But not with HB758.

Please defer HB758 and oppose while considering comments above.

Mahalo,

Dana Keawe

HB-758-HD-1

Submitted on: 3/1/2023 5:31:17 PM

Testimony for JHA on 3/2/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Laa Poepoe	Individual	Oppose	Written Testimony Only

Comments:

La‘a Poepoe, submitting testimony in clear **opposition** to bill 758. As a traditionally trained kilo lawai‘a, kia‘i po‘o fishpond manager of Kupeke loko i‘a on Molokai, and as a native hawaiian who actively utilizes traditional & customary practices of lawai‘a to eat fish from the area where i live, I find this bill to be a perversion of the tenets of customary hawaiian practices, specifically dealing with responsible harvest and the regulation of sustainable gathering practices. This bill appears to undermine our most important customary practice of malama ‘aina, to then allow the possibility of a permitted yet unregulated abusive harvest, which would then be in direct contradiction of our customary practices and protections afforded by the public trust doctrine to make rational decisions for shared public resources.

This proposed bill would allow registered permit holders the ability to lawfully abuse our shared resources beyond what is already sufficiently provided by constitutional law 12-7.

HB-758-HD-1

Submitted on: 3/1/2023 11:56:19 PM

Testimony for JHA on 3/2/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
james pirtle	Individual	Oppose	Written Testimony Only

Comments:

i oppose this bill, it is cleverly worded to steal not only native hawaiian gathering rights but the rights of all fishermen in the state of Hawaii. I OPPOSE THIS BILL!!! It shoiuld be freely accepted and allowed to gather from the ocean for hawaiian customs and other local customs of locals in the state of hawaii.