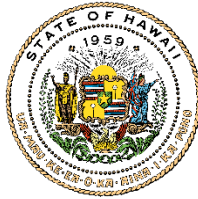


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



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

P.O. BOX 621
HONOLULU, HAWAII 96809

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
WATER & LAND

Thursday, February 9, 2023
9:30 AM

State Capitol, VIA VIDEOCONFERENCE, Conference Room 430

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

House Bill 758 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 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 a less burdensome avenue for individuals to lawfully exercise legitimate traditional and customary fishing practices protected by the Hawaii State Constitution. 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 a SAP in order to

¹ See §187A-6, Hawaii Revised Statutes

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BOARD OF LAND AND NATURAL RESOURCES
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COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

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.



HB758
RELATING TO NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY FISHING
PRACTICES
House Committee on Water & Land

February 9, 2023

9:30 AM

Room 430

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB758, 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.

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.**

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

¹ HRS §10-3.



HB758
RELATING TO NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY FISHING
PRACTICES

House Committee on Water & Land

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.

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



Ka Moku'aina 'O Hawai'i Aha Moku O Pae'Aina

State of Hawai'i Aha Moku

P. O. Box 621

Honolulu, Hawaii 96809

Testimony of the Hawaii State Aha Moku

Before the House Committee on

Water and Land

Thursday, February 9, 2023

9:30 A.M.

Conference Room 430

IN SUPPORT of House Bill 758

Relating to Native Hawaiian Traditional and Customary Fishing Practices

House Bill 758 authorizes the department of land and natural resources (DLNR) to issue special activity permits for the purpose of recognizing and protecting individuals exercising their Native Hawaiian traditional and customary rights.

The Hawaii State Aha Moku (Aha Moku) supports this measure.

It is true that despite 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.

However, we caution DLNR to make sure that when giving out these permits they 1) identify the exact place where the person wants to exercise their rights; and 2) if they are not from the ahupua'a they wish to fish and gather, then protocol calls for Kupuna or konohiki of the specific site to be consulted. We have found too often, people who are Hawaiian do not understand that natural resources of an ahupua'a comes with cultural responsibilities. Ahupua'a have traditional gathering rights that are protected by the konohiki or *lawaiia* (native Hawaiian fisherman) of that place. Just fishing, even if one is Hawaiian, where one wants without asking is considered "*maha'oi*".

Thank you for the opportunity to share Kupuna knowledge with you.

Respectfully,

Rocky Kaluhiwa, Po'o, Kakuhihewa

Hawaii State Aha Moku

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Unity, Equality, Aloha for all



To: HOUSE COMMITTEE ON WATER AND LAND

For hearing Thursday, February 9, 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.

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

Submitted on: 2/7/2023 11:06:03 AM

Testimony for WAL on 2/9/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Regina Gregory	Individual	Support	Written Testimony Only

Comments:

Support, so long as there is not a more graceful way to accomplish the goal.

HB-758

Submitted on: 2/8/2023 7:10:16 PM

Testimony for WAL on 2/9/2023 9:30:00 AM

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

Comments:

La'a Poepoe, submitting testimony in clear **opposition** to bill 1036. As a kilo lawai'a, kia'i po'o of Kupeke loko i'a on Molokai, and as a native hawaiian who actively utilizes traditional & customary practices of lawai'a, I find this bill to be a perversion of the tenets of customary hawaiian practices, specifically dealing with responsible harvest and 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 unregulated, abusive harvest, which would then be in 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 abuse our shared resources beyond what is already sufficiently provided by constitutional law 12-7.