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OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY

TESTIMONY BY CRAIG K. HIRAI
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
ON
SENATE BILL NO. 3046, S.D. 1

March 17, 2022
2:00 p.m.
Room 325 and Videoconference

**MAKING AN EMERGENCY APPROPRIATION TO THE DEPARTMENT OF THE
ATTORNEY GENERAL**

The Department of Budget and Finance (B&F) offers comments on this bill.

Senate Bill No. 3046, S.D. 1, appropriates an unspecified amount of general funds for FY 22 for the Department of the Attorney General for major litigation involving the State.

B&F notes that, with respect to the general fund appropriation in this bill, the federal Coronavirus Response and Relief Supplemental Appropriations Act requires that states receiving Elementary and Secondary School Emergency Relief (ESSER) II funds and Governor's Emergency Education Relief II funds must maintain state support for:

- Elementary and secondary education in FY 22 at least at the proportional level of the state's support for elementary and secondary education relative to the state's overall spending, averaged over FYs 17, 18 and 19; and
- Higher education in FY 22 at least at the proportional level of the state's support for higher education relative to the state's overall spending, averaged over FYs 17, 18 and 19.

Further, the federal American Rescue Plan (ARP) Act requires that states receiving ARP ESSER funds must maintain state support for:

- Elementary and secondary education in FY 22 and FY 23 at least at the proportional level of the state's support for elementary and secondary education relative to the state's overall spending, averaged over FYs 17, 18 and 19; and
- Higher education in FY 22 and FY 23 at least at the proportional level of the state's support for higher education relative to the state's overall spending, averaged over FYs 17, 18 and 19.

The U.S. Department of Education has issued rules governing how these maintenance of effort (MOE) requirements are to be administered. B&F will be working with the money committees of the Legislature to ensure that the State of Hawai'i complies with these ESSER MOE requirements.

Thank you for your consideration of our comments.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

S.B. NO. 3046, S.D. 1, MAKING AN EMERGENCY APPROPRIATION TO THE DEPARTMENT OF THE ATTORNEY GENERAL.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Thursday, March 17, 2022 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325 and Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
John H. Price, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to appropriate funds for expert witnesses and specialized legal representation of the State of Hawai'i in major litigation.

There are currently major ongoing lawsuits that require the retention of expert witnesses and specialized legal counsel. These lawsuits include Dannenberg v. State of Hawai'i, Civ. No. 06-1-1141-06, a case that involves a class action lawsuit brought on behalf of State and County retirees alleging that the Hawai'i Employer-Union Health Benefits Trust Fund has diminished or impaired their health care benefits; Kalima v. State of Hawai'i, Civ. No. 99-4771-12 LWC, involving a class action lawsuit brought on behalf of beneficiaries of the Department of Hawaiian Home Lands (DHHL) against the State of Hawai'i, DHHL, and the DHHL Individual Claims Review Panel for damages due to delays in receiving homestead and other property; and D. W. Aina Le'a v. State of Hawai'i, Civ. No. 17-00113 SOM-WRP, in which a property developer seeks damages for financial losses allegedly caused by the Land Use Commission reverting land from an urban to agricultural classification. The plaintiffs in these cases are alleging that they are entitled to damages from the State in nine figures.

Subsequent to the Department's request for additional funds and submission of our written testimony in support of this bill, the State became involved in litigation arising from the Red Hill fuel storage matter. The Department of Health's emergency order that

the Navy defuel, among other things, was upheld by a Final Decision, Order, Findings of Fact, and Conclusions of Law after an evidentiary administrative hearing. However, the Navy has appealed that decision to the State court and filed a separate lawsuit in federal court attacking the decision. While various media reports and the Navy's own press release indicate that the Navy ultimately intends to defuel and decommission, no settlement has occurred, and the litigation is continuing along with discussions between the parties. But, even if these lawsuits are dismissed, that will not resolve potential claims against the State based on the leakage of fuel from the Red Hill storage tanks.

New lawsuits have already been commenced against the rental agents, property managers, and the Navy on behalf of the residents affected by the contaminated water. Although not named as a direct defendant, there is a distinct possibility that a defendant could file a third-party complaint against the State, or a plaintiff could identify the State as a "John Doe" defendant. Plaintiffs are alleging that the defendants did not sufficiently protect plaintiffs from fuel contamination for decades.

The Red Hill cases are anticipated to require expert testimony in various fields including hydrology, soils geology, civil engineering, structural engineering, ground water pollution and remediation, economic loss assessment, and medical causation.

Standing alone, these matters would be expected to require significant expenditures for expert witnesses and outside counsel greater than the amount initially requested in the Department's emergency appropriation. In addition, the State may incur mediation fees if the parties agree to mediate the current lawsuits and administrative permitting case in an effort to reach a global settlement. Consequently, we are asking that the amount of funds appropriated be increased by \$3 million.

Vigorous, expert legal representation, with the judicious use of necessary expert witnesses, can save the State costly judgments or benefit the State with positive outcomes in some instances. For example, last year, the Department of the Attorney General resolved a case that was initiated against the State by a computer implementation contractor alleging breach of contract (Ciber, Inc. v. State of Hawai'i, Dep't of Transp., Civ. No. 15-1881-09). The contractor sought \$17,000,000. We counter-claimed against the contractor for losses and damages the State incurred as a

result of the contractor's failure to meet the terms of its contract. Through the tenacious efforts of Special Deputy Attorneys General and the retention of appropriate expert witnesses, the final outcome was that the contractor recovered nothing, and the State recovered more than \$30,000,000 from the contractor's insurance companies. The result could not have been attained without the retention of experienced, specialized, private counsel and top flight expert witnesses. While not inexpensive, the return on investment was outstanding; the results, spectacular.

Funding for expert witnesses and specialized legal counsel is needed to allow the defending State entities to continue mounting an effective defense in the lawsuits against the State. Having the necessary funds to aggressively defend cases with expert witnesses and specialized legal counsel will likely result in smaller payouts in cases where the State is liable. It will also enhance the State's opportunity to recover damages when a meritorious counterclaim exists.

Fortunately, high-value cases against the State are fairly rare. They also vary greatly in subject matter. Because of these factors, it is not financially feasible to maintain such specialized legal talent in-house. Further, whether the State is defended by in-house counsel or a retained Special Deputy Attorney General, experienced, qualified, and credible expert witnesses are crucial in many cases, even those cases with less damage exposure than those mentioned above. Resources for such expertise are a necessary and routine part of litigation.

In addition, because the funds will likely be needed beyond the end of the current fiscal year, we ask that the bill be amended to add a new section 4 to read as follows:

"SECTION 4. The appropriations authorized under this Act for major litigation for fiscal year 2021-2022 shall not lapse at the end of the fiscal year for which the appropriation is made; provided that any unexpended and unencumbered balance of the appropriation made in this Act as of the close of business on June 30, 2023, shall lapse as of that date."

The Senate Committee on Ways and Means requested that subsequent committees consider this anti-lapse provision. (S. Stand. Comm. Rep. No. 2710 (February 18, 2022)).

The Senate Committee on Ways and Means also amended the measure by changing the appropriation amount to an unspecified amount, and it also inserted a defective effective date. We request that this Committee reinsert the amounts requested and make the bill effective upon its approval.

We respectfully request passage of this bill to provide funds appropriated out of the general revenues of the State of Hawai'i in the sum of \$4,000,000 for fiscal year 2021-2022 to be used by the Department of the Attorney General in major litigation involving the State.

Thank you for the opportunity to testify.

SB-3046-SD-1

Submitted on: 3/15/2022 3:37:00 PM

Testimony for JHA on 3/17/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jennifer Azuma Chrupaluk	Individual	Oppose	Written Testimony Only

Comments:

Unless you are hiring people to give back Royal Patent lands, I hereby oppose.