

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

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



**STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA**

P.O. BOX 621
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DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

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FIRST DEPUTY

DEAN D. UYENO
ACTING DEPUTY DIRECTOR - WATER

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BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
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

**Testimony of
DAWN N. S. CHANG
Chairperson**

**Before the House Committee on
WATER & LAND**

**Thursday, February 8, 2024
9:00 AM**

State Capitol, Conference Room 430 & Videoconference

**In consideration of
HOUSE BILL 2219
RELATING TO THE COMMISSION ON WATER RESOURCE MANAGEMENT**

House Bill 2219 proposes to increase the number of Commission on Water Resource Management (Commission) members from 7 to 8, with only 5 of the 8 members required to have substantial experience in water resource management. This bill also adds the Chairperson of the Hawaiian Homes Commission (HHC), or the Chairperson's designee, as a member of the Commission. **The Department of Land and Natural Resources (Department) offers comments.**

The Commission recognizes that the Commission's decision-making process has been enhanced since the addition of a member with substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage such as those preserved by Hawaii Revised Statutes (HRS) Section 174C-101 by Act 184, Session Laws of Hawai'i 2003.

HRS Section 174C-101 focuses on two separate sources of water rights of Native Hawaiians, rights conferred via the Hawaiian Homes Commission Act in subsection (a) and traditional and customary rights in subsections (c) and (d). The Hawai'i Supreme Court recognized these rights as distinct public trust purposes, one public trust purpose is the reservations of water for the Department of Hawaiian Home Lands (DHHL) and the other public trust purpose is the protection of the use of water for the exercise of Native Hawaiian traditional and customary rights.

When the United States transferred responsibility for the administration of the Hawaiian Homes Commission Act to the State of Hawai'i in the Hawaii Admission Act, it impressed upon the State a solemn duty to faithfully administer the spirit of the Hawaiian Homes Commission Act (*see* Article XII,

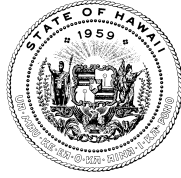
Section 2, Hawai'i State Constitution). Accordingly, it is the intent of the State of Hawai'i to provide the essential resources, especially water, to the Department of Hawaiian Home Lands necessary for native Hawaiian beneficiaries to utilize the lands set aside for them.

The Department believes that the one additional member under this measure is complementary rather than supplementary, in that the Commission should have one member who could provide input on issues that may affect the unique water rights and needs under HRS Section 174C-101(a), while at the same time serve the broader interests of the general public. However, the inclusion of the Chairperson of the HHC or their designee on the Commission may result in conflicts of interest. DHHL is a party before the Commission with permit applications and reservation petitions, including important contested case hearings. If a Commission member is representing a particular organization, such as DHHL, and the organization appears before the Commission for administrative action, then there may be a question of whether the member has a conflict of interest as to that organization. Active participation by both the organization and the member representing the organization on the Commission would, on its face, appear to be in conflict. The Commission has a trust duty to the general public, whereas the HHC Chairperson has a trust duty to native Hawaiian beneficiaries. Inclusion of the HHC Chairperson as a voting member on the Commission may result in perceived or potential conflicts between the HHC Chairperson's trust duties to DHHL's beneficiaries versus the general public and other public trust purposes.

Thank you for the opportunity to provide comments.

JOSH GREEN, M.D.
GOVERNOR
STATE OF HAWAII
*Ke Kia'āina o ka Moku'āina 'o
Hawai'i*

SYLVIA J. LUKE
LT. GOVERNOR
STATE OF HAWAII
*Ka Hope Kia'āina o ka Moku'āina
'o Hawai'i*



KALI WATSON
CHAIRMAN, HHC
Ka Luna Ho'okele

KATIE L. DUCATT
DEPUTY TO THE CHAIRMAN
Ka Hope Luna Ho'okele

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
Ka 'Oihana 'Āina Ho'opulapula Hawai'i

P. O. BOX 1879
HONOLULU, HAWAII 96805

TESTIMONY OF KALI WATSON, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE HOUSE COMMITTEE ON WATER & LAND
HEARING ON FEBRUARY 8, 2024 AT 9:00AM IN CR 430

**HB 2219, RELATING TO THE COMMISSION ON WATER RESOURCE
MANAGEMENT**

February 8, 2024

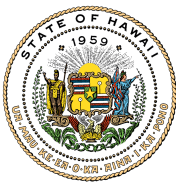
Aloha Chair Ichiyama, Vice Chair Poepoe, and Members of the Committee:

The Department of Hawaiian Home Lands (DHHL) strongly supports this bill which would 1) increase the number of Commission on Water Resource Management members from 7 to 8, with only 5 of the 8 members required to have substantial experience in water resource management and 2) add the Chairperson of the Hawaiian Homes Commission (HHC), or the Chairperson's designee, as a member of the Commission on Water Resource Management.

The State Water Code requires that decisions of the Commission on Water Resource Management incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian Home Lands. This bill would allow for greater advocacy for beneficiaries of the Hawaiian Homes Commission Act to ensure that sufficient water remain available for current and foreseeable development and use of Hawaiian Home Lands.

Please see the attached Ethics Opinion from the Hawai'i State Ethics Commission confirming that there would be no Conflict of Interest that would require the HHC Chairperson/designee to recuse themselves from voting on matters related to DHHL. This legislative proposal was approved by the HHC and included in the Governor's administrative package by request of our Department.

Thank you for your consideration of our testimony.



HAWAI'I STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

December 18, 2023

Via Email: kali.watson@hawaii.gov
oriana.a.leao@hawaii.gov

Mr. Kali Watson
Chair
Hawaiian Homes Commission
Department of Hawaiian Homelands
P.O. Box 1879
Honolulu, Hawai'i 96805

Re: *Request for an Ethics Opinion (AOD-2023-1174)*

Aloha Chair Watson,

This letter is in response to a request for advice from you. You provided three draft legislative bill drafts proposing to place the Hawaiian Homes Commission ("HHC") Chairperson, or their designee, as a voting member on the Commission on Water Resource Management, the Hawai'i Housing Finance and Development Corporation, and the Hawai'i Community Development Authority. You asked, if those bills were to become law, whether the State Ethics Code, Hawai'i Revised Statutes Chapter 84, would prohibit the HHC Chair or their designee from voting on matters related to the Department of Hawaiian Homelands due to a conflict of interest.

I. Application of the State Ethics Code

A. Conflicts of Interest

The state conflicts of interest section (Haw. Rev. Stat. § 84-14) prohibits conflicts between public employment and private financial interests. For example, Haw. Rev. Stat. § 84-14(b) prohibits state employees from acquiring financial interests in businesses subject to their official action so that conflicts between their duties to the State and their own, personal financial interests do not arise.

Under the proposed legislative bill drafts, the HHC Chairperson would not acquire a financial interest in an outside, private business. Rather, the HHC Chairperson would be expected to continue acting in the State of Hawaii's best interests (regardless

of which state position that person fills). Accordingly, no conflict of interest can be established under the state ethics code. *See, e.g.,* Haw. Eth. Adv. Op. 1979-378 (April 2, 1979) (stating a conflict of interest, under Haw. Rev. Stat. § 84-14, cannot arise without “a financial interest in a business or undertaking”).

While all state employees are required to act in the State of Hawaii’s best interests, the Ethics Commission previously noted it may be natural for a state employee with two positions to “support a program whose goals and budget [they] had helped to articulate.” *See id.* Accordingly, assuming the Legislature places the HHC Chair as a voting member on another board or commission, it is anticipated that the HHC Chair would likely champion HHC issues. This, presumably, is a policy decision for the Legislature to make.

B. Fair Treatment and Confidential Information

It should be noted that the fair treatment and confidential information portions of the state ethics code may come into play if the HHC Chair were serving in two different roles. The fair treatment section, Haw. Rev. Stat. § 84-13, prohibits the use of an official position to provide unwarranted benefits or advantages to oneself or others. There may be fact situations where the fair treatment law could be applicable. The HHC Chair should be cautious about using one position if it could be perceived to unreasonably benefit another entity. If in doubt, the HHC Chair should consult with the Ethics Commission.

Similarly, the confidential information section, Haw. Rev. Stat. § 84-12, prohibits the disclosure of information – not otherwise available to the public – obtained in the course of a state employee’s duties “for the benefit of anyone. . . .” There may be situations where the HHC Chair obtains information in one role that they could not disclose or use in another capacity.

II. Conclusion

A state code of ethics conflict of interest would not be established if the HHC Chair were to serve on another **state** board or commission. Accordingly, there would be no requirement under the ethics code for the HHC Chair to recuse themselves from a decision involving HHC or DHHL while serving on another board or commission.

I hope this advice is helpful to you. If I have misstated any of the facts, then please inform me as soon as possible as this may affect the advice given. The advice in this letter concerns only the application of the state ethics code. Other laws may also apply to these situations. For this reason, you should also consult with your counsel.

Mr. Kali Watson
December 18, 2023
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If you have any further questions, please do not hesitate to contact me.

With Warm Aloha,

A handwritten signature in black ink, appearing to read "RDH", written in a cursive style.

Robert D. Harris
Executive Director & General Counsel

RDH/ls

January 25, 2024

SENATE COMMITTEE ON HAWAIIAN AFFAIRS

Re: Comments on S.B. 2656

Relating to the Commission on Water Resource Management

The purpose of this Bill is to add the Chair or the Chair's designee of the Department of Hawaiian Home Lands (DHHL) to the Commission on Water Resource Management (CWRM) board of Commissioners. The State Water Code mandates that the "Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands..." Hawaii Revised Statutes (H.R.S) §174C-101. This Bill would allow the DHHL to protect the interests of the beneficiaries of the Hawaiian Homes Commission Act, 1920.

Historically, the Department of Hawaiian Home Lands have not been able to participate in important policy and decision-making efforts by the CWRM board of Commissioners. This Bill will "provide an opportunity for the Chair or the Chair's designee to participate in setting policies, defining uses, establishing priorities and procedures over land-based surface water and ground water resources" which are essential components in the development of Hawaiian home lands.

By amending § 174C-7(a) and (b) of the H.R.S. to include this Bill, the state of Hawaii will be able to uphold its constitutional mandates. The state of Hawaii has a kuleana (responsibility) to uphold the public trust doctrine. *In re Wai'ola O Moloka'i, Inc.*, 103 Haw. 401 (2004), the court held that "a reservation of water was an essential mechanism by which to effectuate the state's public trust duty to ensure the continued availability and existence of its water resources...". Furthermore, "The public trust doctrine applies to all water resources, unlimited by any surface-ground distinction. Haw. Const. art. XI, § 1 and Haw. Const. art. XI, § 7 adopted the public trust doctrine as a fundamental principle of constitutional law in Hawaii and the legislature, pursuant to the constitutional mandate of Haw. Const. art. XI, § 7, incorporated public trust principles into the code." *Id.* The public trust doctrine also includes the protection of traditional and customary practices of Native Hawaiians, protection of stream water in its natural course, and domestic water use. By increasing the number of CWRM members to 8 by adding the Chair or the Chair's designee, the state would ensure that DHHL's water rights are protected as mandated by the Constitution of the state of Hawaii.

HB-2219

Submitted on: 2/7/2024 3:42:08 PM

Testimony for WAL on 2/8/2024 9:00:00 AM

| Submitted By | Organization | Testifier Position | Testify |
|--------------|--------------|--------------------|------------------------|
| Nani | Individual | Oppose | Written Testimony Only |

Comments:

Subject: Testimony in OPPOSE of HB2219

To: Chair, Vice Chair, and members of the committee

Re: HB2219 RELATING TO THE COMMISSION ON WATER RESOURCE MANAGEMENT.

I am testifying on behalf of **strong opposition of this bill HB2219**. Five members shall be appointed by the governor is the problem with our over use and mismanagement of our vital resources. This majority only continues the wavering rules and whims of each governor. The majority bias of this system that has proven to choose profits over people decade after decade without consideration for our future in NOT SUSTAINABLE.

We need to move away from this government control ad start helping our Kama'aina who appreciate this vital resources of our lands. Our precious wai should be Independent and free from political control.

In conclusion, we need to find ways to separate out from the state and its profitability mentality and the corruption of accommodating developers instead of the livelihood of our people. The CURRENT BILL SB3327 is the first step in the right direction for our future.

Sincerely,

Nani Be