

Hawaii

# Chad Blair: Last Chance For The Water Rights Bill

The Senate has only Tuesday to revive the contentious legislation. But a related court case remains in limbo.



---

By Chad Blair    / About 8 hours ago

 Reading time: 7 minutes.



---

If you happen to be around the State Capitol around 10 a.m. tomorrow, stop into the Senate gallery for a little fireworks.

There is chance that [House Bill 1326](#), known informally as the water rights bill, will get a vote. If it passes, land owner Alexander & Baldwin, several utility companies and a handful of farming and ranching operations would get a seven-year extension on divert public waters.

It's by no means certain that this will happen. But the Senate has the support of Gov. David Ige, who [has shown his cards](#) in supporting the measure that is opposed by a lot of environmental groups, Native Hawaiian activists and others. Many call HB 1326 the “water theft” bill because they say it benefits A&B more than any other entity.

To bring the bill out of the Senate Ways and Means committee, [where it was deferred](#) (that is, shelved) nearly three weeks ago, nine members of the 25-member Senate would need to vote in favor. It is not clear whether there are nine votes, but it is very possible and horse-trading is said to be going on behind closed doors.



Senate President Ronald Kouchi in the Senate chamber in January.

The higher hurdle, should HB 1326 get a floor vote Tuesday, is that a majority of votes are needed to pass it and send it to Ige for his expected signature. If 25 senators are on the floor, that works out to 13 “aye” votes.

The draft of the bill senators would vote on, by the way, would be the last version approved by the House, [known as the HD 2](#). A proposal by Sen. Kai Kahele, [known as the SD 1](#), is not expected to get a vote. It called for carving A&B out of the mix and shortening the water permit extension to just three years.

But anything could happen. Look no further than last Friday, [when senators split 12-12](#) on whether to force operators of short-term vacation rentals to pay

state taxes.

Surprise, surprise! That measure, Senate Bill 1292, is said to be in play as well Tuesday on the Senate floor. [Click here to read more on that story.](#)

Officially, Senate leadership is not commenting on either bill. But practically everyone who follows the Big Square Building in Beretania is, if only on background.

There is even talk of a change in Senate leadership, where some of the members of the [so-called Opihi Club](#) may be picked off and swallowed like tasty limpets.

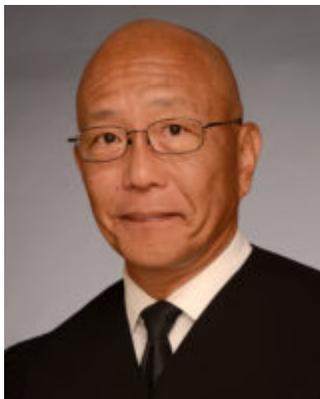
## About That Lawsuit

The legal challenge that led to the Legislature passing a three-year extension for the water rights is called the Carmichael case.

I won't go into the legalese in this space, but in short a Circuit Court judge that the state Board of Land and Natural Resources should not have allowed A&B et al to keep diverting water.

Thus, the revocable permits were invalidated and the case is on appeal to the state's Intermediate Court of Appeals.

That was in December 2016. The ICA still has not heard the case. But there have been some developments, and the timing is certainly interesting.



Earlier this month Chief Judge Lisa Ginoza recused herself from Carmichael. She was replaced by Keith Hiraoka, who Ige appointed late last year to the court.

Hiraoka was Ige's high school classmate and former campaign manager.

Judge Keith Hiraoka

At the time of the nomination, I opined that Hiraoka [was a good pick](#). I still feel that way. But not everyone does.

Many are whispering that there is an inherent conflict of interest in Hiraoka presiding over a court case that has resulted in the governor getting directly involved in approving related legislation (that is, HB 1326).

At least one person familiar with the case is brave enough to go on the record — the same person who raised concerns about bias when Hiraoka was nominated to the ICA.

“I think it is so totally inappropriate for Hiraoka to hear the Carmichael case,” said David Kim Frankel, who was an attorney with the Native Hawaii Legal Corp. when it represented the plaintiffs suing the BLNR. “Just from a good government perspective there should be no appearance of impropriety. And it is totally inappropriate given Hiraoka’s relation to Ige and Ige’s public proclamation about the Carmichael decision.”

Attorney Jeff Portnoy, however, who has been a member of the Judicial Selection Commission, sees no conflict.

“The governor nominates all judges, including judges that are for and against the state as well as parties all the time.”



David Kimo Frankel

Ginoza is not the only member of the six-judge ICA to recuse herself from the case. Judge Katherine Leonard recused herself in 2018. In both cases no reason was given.

Portnoy is an attorney with Cades Schutte, which represents A&B in the Carmichael case, but I did not ask him to comment on the merits of the case. He did allow that the Carmichael case seems to be moving slowly, but it could be for any number of reasons, including how complicated the case is.

I asked the Judiciary about the case and got this answer back: “In response to your inquiry about the status of Carmichael v. Alexander & Baldwin, CAAP-16-0000071, it will be decided as soon as reasonably practicable,” said Jan Kagehiro, director of the Communications and Community Relations Office for the courts.

## But Wait, There’s More

Here’s another other development in the Carmichael case, which includes not only the BLNR and A&B as defendants but also several of the entities seeking water permit extensions.

On April 18 the ICA decided that oral arguments would not be necessary. If any party felt otherwise, it needed to let the court know.

The order was issued at 8 a.m. that day, the same Friday that Ige asked lawmakers to reconsider taking up HB 1326 again.

I should note as well that the NHLC — still the attorneys for Healoha Carmichael, Lezley Jacintho and Na Moku Aupuni O Koolau Hui — disagrees with Ige’s rationalization for reviving HB 1326. The governor relied on an analysis of his administrative director, Ford Fuchigami, who found the legislation sound and the need for the bill critical.



Sign up for our FREE morning newsletter and face each day more informed.

In a memo to all legislators April 21, the NHLC characterized the executive branch as using its power and influence “to misstate the law and champion a manufactured water crisis that has no basis in fact.”

New legislation, NHLC lawyers argued, is not needed, as there are other avenues for recourse while the lawsuit wends its way through the courts.

“Neither the Department of Land and Natural Resources nor the Department of the Attorney General is constrained by any law or court order to continue to provide all new and existing water permittees the water to which each of them is lawfully entitled,” the April 21 memo says.

The memo continues:

*“Again, Alexander & Baldwin is the only existing revocable permit holder whose water use was declared unlawful by a court of law. None of the other eight to nine permit holders, or new permit applicants for that matter, need be unduly concerned about a lawsuit to which none was a party, or a court order that cannot be enforced against their specific water uses.”*

See you Tuesday in the Senate. And if SB 1292 is pulled, see you again on Thursday when a final vote would come.

## Will you contribute to our Spring Campaign?

Civil Beat is small, but we’re growing fast because of supporters like you. Our growth means that we can cover more issues, hold more community events, expose more wrongdoing, and spotlight more innovative solutions. Our four-week goal is \$50,000, and every little bit helps. Our reporters are the beating heart of our newsroom. As a nonprofit, every dollar raised from the community goes to support them and their important work.

YES, I'LL DONATE TODAY

## About the Author

Chad Blair   



Chad Blair is the politics and opinion editor for Civil Beat. You can reach him by email at [cblair@civilbeat.org](mailto:cblair@civilbeat.org) or follow him on Twitter at [@chadblairCB](https://twitter.com/chadblairCB).

[Use the RSS feed to subscribe to Chad Blair's posts today](#)

Comments

Aloha, Civil Beat readers. We appreciate your thoughtful comments. But in order to make commenting an engaging experience for as many readers as possible, a few rules: Please limit the number of times you comment per story so everyone has a chance to participate without feeling like they are in the middle of an argument between just a few people. Language and words are important so please avoid snark and put-downs. DO NOT WRITE IN ALL CAPS; that comes across as yelling, don't you think? Not every comment may get posted. We may suspend commenters who overstep at our sole discretion.

**No links, please.**

Click on Sign In To Comment. Your old account should still work. If you don't already have an account you need to create one.

Need help? Email [membership@civilbeat.org](mailto:membership@civilbeat.org).

Sign in to comment

All Comments 3

Viewing Options ▾

**EltonYugawaRA** 25 minutes ago

Fascinating that CB is the only organization following this issue and providing insight and commentary. Nothing by the SA or the local TV outlets.

Thanks to Chad and others for their efforts.

Respect 🙏 Reply ↩

Share 🗨 Report 🚩

**KennethConklin** 2 hours ago

My comment here is about philosophy, logic, and pono -- about what the law SHOULD say, not what it does say at present.

There are no streams which flow from any island to another island; and no underground aquifers which send water between islands. All water on any island originates on that island and remains there unless bottled and transported out.

Therefore the only people who SHOULD have "standing" to participate in decisions about water usage are the local people who live on that island or own land or businesses on that island. Each

usage are the local people who live on that island or own land or businesses on that island. Each island should have its own local water board, and there should not be any interference from the state or federal governments nor from any laws or institutions other than local ones arising from and accountable to the people of that island.

The same concept should apply to roads, for the same reason -- no roads go between islands. We should never need to wonder who is responsible to maintain a road -- state or county.

Respect  Reply 

Share  Report 

---

**td** 2 hours ago

Many thanks for this update. CB has done a wonderful job bringing clarity to the issue before the legislature.

Respect  Reply 

Share  Report 

## THIS IS YOUR WAKE UP CALL.

Sign up for our FREE morning newsletter and face each day more informed.

And don't worry, we hate spam too! You can unsubscribe any time.