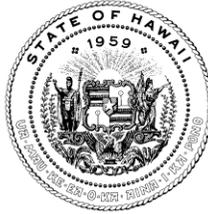


LINDA LINGLE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

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CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
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**RUSSELL Y. TSUIJI**  
FIRST DEPUTY

**KEN C. KAWAHARA**  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
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  
LAURA H. THIELEN  
Chairperson**

**Before the Senate Committee on  
WAYS AND MEANS**

**Thursday, February 18, 2010  
9:30 AM  
State Capitol, Conference Room 211**

**In consideration of  
SENATE BILL 2951, SENATE DRAFT 1  
RELATING TO AGRICULTURE**

Senate Bill (SB) 2951, Senate Draft (SD) 1 provides for extraordinary and previously unprecedented levels of compensation to lessees when leased public land for agricultural or pastoral uses is withdrawn, condemned, or taken for public purposes. The Department of Land and Natural Resources (Department) strongly opposes the proposed legislation because the concept behind the bill has the potential to impede the State's flexibility to set-aside portions of state lands for state public purposes.

SB 2951 SD1 is a reincarnation of SB 1345 that was vetoed by the Governor in 2009. The main differences between SB 2951 SD1 and SB 1345 are that the current bill does not provide for reimbursement of lessees' "loss of reasonably anticipated income", or for an automatic lease extension when land is taken for public purposes. But like its predecessor, SB 2951 SD1 would require the State to provide unprecedented additional levels of compensation in the form of hypothetical future income losses relating to breeding livestock under some circumstances, insurance costs and real property taxes payable on lands subsequent to the original lease date.

State law already provides clear safeguards for tenants and terms for leasing public lands. Chapter 171, Hawaii Revised Statutes (HRS), ensures transparency and fairness in the disposition of State assets and most importantly to guaranty that State land resources will be available when needed to meet the greater public safety and other public needs of all of Hawaii's residents. We point out that all existing tenants were aware of these provisions, willingly entered into leases with the state under these conditions, and received rent well below the market rate, in many cases for decades, due to these provisions. It would be in direct conflict with basic contract law and the general state welfare to now pass a measure which requires the state to provide extraordinary and unprecedented compensation to such tenants when they have reaped years of benefit from below market rates. Indeed, to take such action at a time of great

economic downturn and when the legislature is looking to departments to maximize state revenue is downright puzzling.

While providing limited preferential terms for the disposition of public lands for certain types of activities such as agriculture, renewable energy, government projects, industrial parks and utilities, etc., is well established in statute based on policy considerations, the State's right and responsibility to withdraw portions or all of the leased lands for a greater public purpose has never and should not be compromised.

The law already requires the State to compensate the lessee for the reasonable loss of vested rights under those affected leases. The Department's standard lease form contains a provision requiring the State to lower rents in proportion to the reduction in leased area and compensate the lessee for improvements made unusable in the process of taking leased lands for such purposes. Similarly, Hawaii law provides with respect to agricultural and pasture leases that:

"upon withdrawal any person with a long-term lease shall be compensated for the present value of all permanent improvements in place at the time of withdrawal that were legally constructed upon the land by the lessee to the leased land being withdrawn."

On top of the relief already provided by law, SB 2951 SD1 would require the State to reimburse lessees for any insurance required by the Department to be maintained on lands subject to easements that are placed on the land subsequent to the original lease date, if the easements prevent the lessee from using the land for its original intended use. Ostensibly, if such an easement prevented the lessee from making any use of the land, the Department could waive the insurance requirement for the area subject to the easement. However, there may also be cases where an easement prevents a lessee from using the land for its original purposes, but does not prevent all beneficial use of the area. For example, if the lease is a pasture lease, an easement might restrict the grazing of cattle on a portion of the land. But the lessee may have a water delivery system or other infrastructure on the easement area that provides a benefit to the remaining usable lease area. In such a case, the lessee should be required to maintain liability insurance for its operations in the easement area at its own cost.

SB 2951 SD1 would also require the State to reimburse a lessee for real property taxes paid on an area subject to such an easement. In the case of the Palila Critical Habitat Mitigation Lands easement that was placed on certain state pasture leases on Mauna Kea, Department staff researched the real property taxes lessees pay on the easement areas and determined that the amounts were negligible. The County Real Property Tax Division classifies the easement areas as waste with the result that the total annual real property tax on 2,226 acres of easement area under one lease was 84 cents per year. If an easement allows a lessee to continue beneficial use of the easement area<sup>1</sup>, as illustrated in the hypothetical example from the preceding paragraph, then it is not unreasonable to require the lessee to bear these nominal costs.

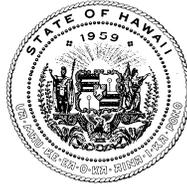
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<sup>1</sup> In the case of the Palila mitigation, the Board of Land and Natural Resources (Board) reduced the annual rent, pro rata, based upon the square footage of the easement area. Thus, no rent is assessed for the easement area, despite the Lessee retaining control and some beneficial use of that area. In addition, the Board allowed those Lessees affected by the conservation easement to use 10% of the remaining lands for alternative agricultural use, with no increase in rent for the difference between pasture and the alternative agricultural use.

Additionally, SB 2951 SD1 would require the State to reimburse pasture lessees for losses to breeding stock when the animals cannot be relocated or "marketed" for breeding value. In the normal situation, a lessee would have one or two years or more of notice of an impending taking of lease land. Accordingly, the Department believes a pasture lessee would have ample time to plan for the relocation or sale of livestock, and that the proposed amendment would only encourage damage claims against the State.

The lessees have enjoyed the special benefits associated with the use of the public lands including in many instances very low rent that effectively constitutes a subsidy of certain agricultural activities. As stated above, the withdrawal provision was included in the State's standard lease provisions to ensure that any important or overriding public purpose arising after the disposition of public lands can be addressed in an appropriate manner by the withdrawal of any lands needed for such action. The proposed modifications to the withdrawal provision would deprive the State of its right to use public lands for legitimate and important public purposes.

Passage of this bill in its current form would hinder the Department's ability to withdraw lands for any public purposes. Government agencies would be burdened with unknown project costs that will have to be paid by taxpayers.



Deputy Directors  
MICHAEL D. FORMBY  
FRANCIS PAUL KEENO  
BRIAN H. SEKIGUCHI  
JIRO A. SUMADA

IN REPLY REFER TO:

**STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097**

February 18, 2010

**TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION**

**SENATE BILL NO. 2951 SD 1**

**COMMITTEE ON WAYS AND MEANS**

The Department of Transportation opposes this bill for the following reasons:

1. SB 2951 is the same as last year's (SB 1345), changing 171 HRS to include withdrawal of leased lands, fair compensation and lease extension. The bill requires lands withdrawn or made unusable a proportionate value thereof shall be paid to the lessee based upon the unexpired term of the lease. Any person with a long term lease shall be compensated for the present value of all permanent improvements in place at the time of the withdrawal. For any tree crops damaged, the board shall pay to the lessee the residual value of the trees taken and the value of crops, not harvested. Livestock shall be compensated by the board paying the lessee the difference of the appraised breeding value and the salvage value. The bill also requires the lessee to be entitled to compensation for costs attributed to the diminished use of the leased lands and reimbursement for any insurance costs and property taxes. This will cause an undue burden on public projects.
2. There will be a conflict between public purpose approved by the Legislature and paying for compensation not covered by federal laws and public purpose projects approved by Congress.

Under 2007 49 cfr 24.101 (5) (c ), federal acquisition requirements for less than full fee interests all subparts apply. One requirement is to review the lease terms and condition acknowledged by the tenant (Lessee) when accepting the lease. Most lease terms have a condemnation clause that already adjusts for the compensation described above.

Under 24.105 when the State acquires tenant owned improvements as established to be real property, not personal property and just compensation established. This amount is the value of those improvements as it contributes to the fair market value of the whole property.

Under 24.106, the owner of the real property right (such as a lease) shall be reimbursed for all reasonable expenses the owner incurs, including: recording fees, transfer taxes, pro-rata share of any pre-paid property taxes, and moving and re-establishment costs.

This bill will affect the situation by creating a conflict with what is real property and what is personal property. For example, cattle is not considered as crop damage. Damages through federal regulations need to be supported by tax returns or other claims. If there are none, then it would be hard to justify. Other claims, such as the “in lieu of” payments, refer to going out of business costs. If the ranchers are not going out of business, this expense could not be evoked. Under federal regulations we need to reimburse based on receipts and justification.

In the Governor’s Message No. 834, SB 1345 was not approved because of being “objectionable and disproportionately and inappropriately compensates the lessees of public lands above other lessees of State lands.” Other laws already provide procedures for the withdrawal of leased lands and rents adjusted to reflect the portion of lands withdrawn and they must be adjusted to reflect the portion of lands withdrawn and must be compensated for the value of improvements on the withdrawn portion. The automatic extension circumvents the authority of the Board of Land and Natural Resources and hinders their ability to ensure that public lands are used for the highest and best public use.



*Shaping the future for birds*

Senator Donna Mercado Kim, Chair  
Senator Shan S. Tsutsui, Vice Chair  
Ways and Means Committee  
Hawai'i State Senate  
State Capitol  
Honolulu, HI 96813

American Bird Conservancy  
P.O. Box 249  
4249 Loudoun Avenue  
The Plains, VA 20198

RE: Opposition to Senate Bill 2951, S.D. 1, Relating to Agriculture

American Bird Conservancy (ABC) is a 501(c)(3) membership organization dedicated to the conservation of native wild birds and their habitats throughout the Americas. ABC acts to safeguard the rarest bird species, restore habitats, and reduce threats while building capacity in the conservation movement. ABC is the voice for birds, ensuring that they are adequately protected; that sufficient funding is available for bird conservation; and that land is protected and properly managed to maintain viable habitat.

We strongly oppose Senate Bill 2951, S.D. 1, Relating to Agriculture because of the bill's impact on Palila Critical Habitat Mitigation Lands. SB 2951 threatens long-term restoration efforts to benefit the Palila, a federally-listed endangered bird species that is in rapid decline. As part of mitigation for the construction of Saddle Road on the island of Hawai'i, which affected a part of designated Palila Critical Habitat, portions of three state grazing leases were withdrawn to allow for restoration to benefit the Palila. This area was fenced and starting about four years ago, thousands of mamane trees, the principle food plant of the Palila, have been planted with funding from Natural Resources Conservation Service and support from the HDLNR Division of Forestry and Wildlife. Perhaps more importantly, since being fenced, the remnant mamane forest previously existing on the site has recovered and natural regeneration is occurring.

Many hundreds of thousands of dollars have been invested in this site in the form of fencing and restoration and the Division of Forestry and Wildlife plans to plant 29,000 trees there in the next several months. If SB 2951 passes, it is likely that the state will be unable to provide financial compensation to the lease holders, cattle will be allowed back on the area, and they will quickly destroy the mamane that have been planted, or germinated naturally, and those trees that have recovered. Because mamane are slow growing and Palila rarely use trees less than 20 years old, it will be a long time before the area can support the bird. However, if cows are allowed back on the property it will never be of any use to Palila.



*Shaping the future for birds*

Progress is being made to protect Palila critical habitat, yet passage of this bill has the potential to undo years of complex negotiations to identify and initiate habitat mitigation to benefit the Palila, and end a mitigation project that is just starting to bear fruit. SB 2951 will literally send mitigation for the Saddle Road Realignment back to the drawing board with additional and potentially huge costs to tax payers.

We ask the Senate not to pass Senate Bill 2951, S.D. 1, Relating to Agriculture.

Thanks you for the opportunity to comment on this legislation.

Respectfully Yours,

A handwritten signature in black ink that reads 'George E. Wallace'.

George E. Wallace, PhD  
Vice President



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## Waimanalo Agricultural Association

February 16, 2010

Senate Committee on Ways and Means  
Conference Room 211,  
Thursday, Feb.18, 2010 (9:30 AM)  
State Capitol  
415 South Beretania Street  
Honolulu, HI 96814

Dear Senators:

RE: Support for:

- SB 2236, SD1 (SSCR2241) Relating to invasive species.
- SB 2523, SD1 (SSCR2182) Relating to agricultural inspections.
- SB 2780, SD1 (SSCR 2171) Relating to agricultural lands.
- SB 2951, SD1 (SSCR2172) Relating to agriculture.

Waimanalo Agricultural Association is in support of all of these bills. Currently, Waimanalo has a problem with Coqui frogs. Because of the necessary cost cutting measures in effect this year, a lot of indispensable agricultural inspectors are being laid off. Our farmers are stepping up to the challenge of trying to control the spread of the frogs. Requiring fines assessed to the people who fail to live up to their responsibility would help to make the right people accountable for the removal and elimination of invasive species (**SB 2236, SD1**). We support **SB 2523, SD1** which clarifies that low risk bulk material was not meant to be included in the original intent.

Hawaii is very vulnerable to invasive species taking hold and by the time we have the necessary lines of defense set up, it will be too late. By eliminating funding, we are in danger of losing all control of our environment. The Coqui frog alone would seriously affect our tourism industry.

We are in agreement with the process to protect ag lands (**SB 2780, SD1**). We also agree on fair compensation for leased lands (**SB 2951, SD1**) when agricultural use is withdrawn, condemned or taken for public purposes.

Mahalo,

Clifford Migita  
President WAA

## Testimony regarding Senate Bill 2951

Aloha all...

Here is my testimony...I, Constance Dustin Becker, oppose Senate Bill (SB)2951 because it threatens long-term restoration efforts to benefit the Palila, a federally endangered species that is in rapid decline. It is a unique creature and “we the people” voted long ago to protect it and other’s like it.

As part of mitigation for the construction of Saddle Road, which affected a part of Palila Critical Habitat, portions of three state grazing leases were withdrawn to allow restoration of habitat to benefit the Palila. After these areas were fenced, thousands of mamane trees, the principle food plant of the Palila, were planted with funding from NRCS and with support from the Division of Forestry and Wildlife. Since being fenced, the remaining mamane on site have started to recover naturally as well – a real conservation success story! All this recovery and restoration will be for nothing if SB 2951 is passed. Thousands of dollars have been invested in this site (fencing and restoration) and the Division of Forestry and Wildlife plans to plant around 29,000 trees there in the coming months. If SB2951 passes, it is likely that the state will be unable to provide financial compensation to the lease holders, cattle will be allowed back on the area, and they will quickly destroy the mamane and all the trees that have recovered.

Since mamane grow very slowly and Palila rarely use trees less than 20 years old, the four years of recovery are important to save – they are like an investment. If cows are allowed back on the property it will set back the recovery time, and make it more likely that the Palila go extinct and that will force various NGOS to sue the State for ignoring the goals of the Endangered Species Act, etc. etc. Very costly...

SB 2951 is a narrowly focused bill to benefit a few individuals and it is too costly of a trade-off compared with the public benefits of restoring native habitat and recovering an endangered bird that is unique to the entire planet. As a tax payer/voter in Hawaii, I do not want conservation money that I have helped contribute to be tossed aside to benefit a few privateers. Please honor the public good, the citizens’ investment made thus far for restoration and recovery of Palila, and toss SB 2951 in the waste bin with any other greedy bills. Do the right thing and vote NO on SB 2951.

Mahalo!

Dusti Becker