

LINDA LINGLE  
Governor



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Chairperson, Board of Agriculture

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TESTIMONY OF SANDRA LEE KUNIMOTO  
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEES  
ON  
AGRICULTURE  
AND  
WATER, LAND, OCEAN RESOURCES, & HAWAIIAN AFFAIRS

FEBRUARY 1, 2008, 8:30 A.M.

HOUSE BILL NO. 2354  
RELATING TO INDEMNITY

Chairpersons Tsuji and Ito and Members of the Committees:

Thank you for the opportunity to comment on House Bill 2354. This bill provides that the State indemnify the owner of an irrigation system, dam, or reservoir for tort liability under certain conditions, including the designation of important agricultural lands (IAL) via the voluntary process described in Section 205-49, Hawaii Revised Statutes. The Department of Agriculture (DOA) supports the intent of this bill and offers some comments.

The DOA agrees that measures are necessary to encourage irrigation infrastructure owners to keep these facilities available for agriculture. Due to the tragic incident on Kauai and the new dam safety laws, the DOA recognizes the increased difficulties experienced by the owners of these systems to keep these systems

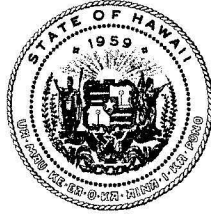
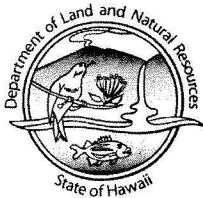
TESTIMONY OF SANDRA LEE KUNIMOTO  
HOUSE BILL NO. 2354  
FEBRUARY 1, 2008, 8:30 A.M.  
PAGE 2

operational. Acquiring insurance to cover any and all liability may become expensive and/or difficult to find. Limiting liability to gross negligence may help achieve a more affordable insurance solution. We respectfully request the following additional language to the definition of "Irrigation system" under §663-\_\_ (a) to strengthen the bill: add "access trails" after "reservoirs" to read "... reservoirs, access trails, and accessory facilities ...."

We appreciate the idea of creating alternative processes for landowners to designate their land as IAL and also the attempt to encourage agricultural irrigation owners to keep these assets in use for active agricultural production.

Thank you for the opportunity to testify on this bill.

LINDA LINGLE  
GOVERNOR OF HAWAII



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

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HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON  
OF THE BOARD OF LAND AND NATURAL RESOURCES**

**on House Bill 2354 – Relating to Indemnity**

**BEFORE THE HOUSE COMMITTEES**

**on**

**WATER, LAND, OCEAN RESOURCES & HAWAIIAN AFFAIRS**

**and**

**AGRICULTURE**

**February 1, 2008**

House Bill 2354 declares that the State indemnify, defend and hold harmless the owner of an irrigation system, dam, or reservoir under certain conditions, primarily where the reservoir services lands that qualify as “important agricultural lands” designation pursuant to Chapter 205, Hawaii Revised Statutes. The Department of Land and Natural Resources (Department) is strongly opposed to the provision of any indemnity to owners of regulated dams based on the use or service of the reservoir.

The Department currently regulates 136 dams in the State. 116 of these regulated dams have irrigation identified as their primary purpose and of these 101 have been identified as having a high hazard classification. A high hazard classification indicates that loss of life is anticipated should failure of the dam occur. Additionally, the average age of these irrigation dams is 85 years, versus the average age of 39 years for dams of all other purposes combined.

Based on these numbers, House Bill 2354 could potentially negatively impact the effectiveness of the Hawaii Dam Safety Program by as much as 75%. The indemnification of owners may lead to owners placing a lower priority on maintenance and improvements necessary for the safe and efficient operation of their dams and reservoirs. Owners may be willing to put up money for maintenance but not on capital improvements or substantial improvements for deferred maintenance expenses. Because of the age of these reservoirs there is more of a concern for their maintenance, stability and ability to handle storm flows than to any “gross negligence or wanton act or omission of the owner”, which this measure may allow for.

While the Department does acknowledge the importance in supporting agriculture in Hawaii, it believes however, that this proposal could potentially decrease public safety and leave the downstream lands at a higher risk for dam failures or mis-operations.



## TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 2354, RELATING TO INDEMNITY.

**BEFORE THE:**

HOUSE COMMITTEES ON WATER, LAND, OCEAN RESOURCES & HAWAIIAN AFFAIRS  
and ON AGRICULTURE

**DATE:** Friday, February 1, 2008 **TIME:** 8:30 AM

**LOCATION:** State Capitol Room 325  
*Deliver to: State Capitol, Room 427, 5 copies*

**TESTIFIER(S):** Attorney General Mark J. Bennett  
or Deputy Attorney General Dennis K. Ferm

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Chairs Ito and Tsuji and Members of the Committees:

The Attorney General opposes this bill.

The purpose of this bill is to require the State to indemnify, defend, and hold harmless the landowner who has an irrigation system, dam, or reservoir on his property for personal injury or property damage caused by the owner's act or omission under certain circumstances, i.e, if the Land Use Commission grants the agricultural landowner's petition to designate all the owner's land as "important agricultural land" and the Attorney General finds that, in fact, the owner's petition has been so granted. The only exception to the State's duty to indemnify, defend, and hold harmless the landowner would be if the Attorney General determines that the personal injury or property damage is caused by the gross negligence or wanton act or omission of the owner.

To require the State to indemnify and undertake these other legal obligations simply on the basis that land has been designated as "important agricultural land" could potentially cost the State millions of dollars. Without any fault on the part of the State itself, this bill would require the State to act as the insurer of private landowners whose negligent maintenance of the dams,

reservoirs, and irrigation systems on their property cause potentially devastating losses.

In addition, the significant legal obligations of the State to defend, indemnify, and hold harmless these landowners whose lands have the designation of "important agricultural lands" are wholly dependent on the agency reviews conducted or the petitions submitted by farmers or landowners to the Land Use Commission under the provisions of part III of chapter 205 of the Hawaii Revised Statutes. Such significant legal obligations, with potentially great financial consequences to the State, would be dependent on the varying results of agency periodic reviews, whether farmers and landowners chose to submit petitions and the actions of the Land Use Commission on those petitions.

The decisions of the Land Use Commission under the criteria set forth in part III of chapter 205 of the Hawaii Revised Statutes are concerned primarily with agricultural development, not the potential tort liability of the owners and occupiers of agricultural lands. Yet, if this bill were to become law, those decisions of the Land Use Commission primarily concerned with agricultural development would steer the State into situations in which the State would be required to essentially act as an insurer of negligent landowners and farmers; persons over whom the State had little, if any, opportunity to control prior to the disaster occurring that triggers the State's obligations under this bill. The financial consequences to the State could be enormous.

This bill is also vague in that it does not set forth how the designation of "important agricultural land" under the provisions of subsection (b) may be terminated so that the State's responsibility to indemnify, etc., no longer exists pursuant to subsection (c). That is, subsection (c) provides that "The State shall not be responsible for indemnifying, defending, or holding harmless any person when subsection (b) [the provision authorizing the designation] is inapplicable." The bill, however, does not

expressly provide when or how the designation of "important agricultural land" would no longer apply to a particular parcel of land once that designation is granted. In fact, the bill states in subsection (c) that "[n]o express declaration to this effect from the attorney general, any other state officer, or any court shall be necessary to remove the State's responsibility as soon as the "important agricultural land" designation is removed from any parcel initially designated under subsection (b) (1)."

In order to determine under what circumstances the designation of "important agricultural land" may no longer apply, one must refer to the criteria and procedures set forth in part III of chapter 205 of the Hawaii Revised Statutes. The bill, however, does not refer to that statute.

Section 205-52 of the Hawaii Revised Statutes contains the criteria and procedures by which the designation of "important agricultural land" may be removed. That statute provides, "In these periodic reviews or petitions by the farmers or landowners for declaratory rulings, the 'important agricultural lands' designation shall be removed from those important agricultural lands where the commission has issued a declaratory order that a sufficient supply of water is no longer available to allow profitable farming of these lands due to government actions, acts of God, or other causes beyond the farmer's or landowner's reasonable control."

Under this bill, according to the criteria quoted, landowners or farmers whose land is no longer profitable would not be entitled to the indemnity, defense, and protection of the State while farmers and landowners whose property is profitable would be entitled to the legal protection and indemnity of the State. A landowner or farmer who no longer owns or operates profitable agricultural land, and is therefore presumably less capable of obtaining insurance or compensating others for damages caused by a dam, irrigations system or reservoir on his property, would not be entitled to the State's defense, indemnity, and legal protection.

This bill would eliminate or greatly decrease any incentive landowners with irrigation systems, dams, or reservoirs on land designated as "important agricultural land" would have to exercise their responsibility to maintain and insure their property. Owners of land designated as "important agricultural land" might very well eliminate or reduce their maintenance activities on their land and reduce or eliminate their liability insurance coverage they would otherwise carry in the hope that, if a disaster is caused by their dam, for example, the Attorney General will determine after its occurrence that it was not due to the owner's gross negligence or wanton act or omission. The real persons at risk that the Attorney General may retrospectively determine the owner to be grossly negligent or wanton are the owner's neighbors. This bill would likely result in greater risk of harm to neighboring citizens and their property with less likelihood of obtaining monetary compensation for the damages and losses they might sustain.

While the Attorney General recognizes the importance of developing agricultural lands throughout the State, requiring the government to indemnify negligent agricultural landowners will not promote responsible management of Hawaii's agricultural industry. The net effect of this bill would be to relieve negligent landowners of their responsibility to exercise reasonable care in the maintenance of their lands.

The Attorney General also opposes this bill because it does not provide for any mechanism, e.g., administrative hearing, etc., upon which the Attorney General is to make the retrospective determination of fault called for under subsection (c). In addition, it is not clear under what circumstances a party is to attempt to prove that the Attorney General's determination of gross negligence or wanton act or omission constitutes a clear abuse of discretion or willful misconduct. If the intent of the bill is for this issue to be litigated in a subsequent civil trial involving the personal injury or property damage caused by the dam, for example,

such a civil action could result in a cumbersome trial within a trial. Such a proceeding would be prejudicial to the State since the State would have to defend the Attorney General's determination regarding the landowner's fault, then potentially, defend the landowner in the same lawsuit pursuant to this bill's obligation to defend, indemnify, and hold harmless that same landowner.

For the foregoing reasons, the Attorney General urges the Committees to hold this bill.



HAWAII FARM BUREAU FEDERATION  
2343 ROSE STREET  
HONOLULU, HI 96819

JANUARY 30, 2008

HEARING BEFORE THE  
HOUSE COMMITTEE ON WATER, LAND, OCEAN RESOURCES AND HAWAIIAN AFFAIRS  
AND  
HOUSE COMMITTEE ON AGRICULTURE

TESTIMONY  
HB 2823 RELATING TO DAM SAFETY  
HB 2354 RELATING TO INDEMNITY

Chair Ito, Tsuji and Committee Members:

My name is Alan Takemoto, Executive Director, of the Hawaii Farm Bureau Federation, which is the largest non-profit general agriculture organization representing approximately 1,600 farm and ranch family members statewide.

Hawaii Farm Bureau Federation, on behalf of its member farmers, ranchers and agricultural organizations **strongly SUPPORT with changes, HB2354**, providing indemnity protection to landowners and farmers who own and run irrigation infrastructure including dams using good management practices.

Affordable water supplies for agricultural use is largely dependent upon rainfall. The sporadic pattern of Hawaii's rainfall requires that water during heavy rainfall periods be stored in reservoirs (dams) for use during drier times. There are many existing reservoirs and as there is conflict for existing uses, new sources of agricultural water will probably need to be reservoir (dam) dependent. The tragedy at Kaloko has highlighted the risks associated with dams raising issue of liability with landowners. There are threats of closing existing reservoirs or raising lease rents to address liability costs. Either measure will be detrimental to agriculture.

HFBF strongly believes agriculture exists for public benefit. Everyone consumes or uses agricultural products. Successful agriculture is critical to increasing Hawaii's self sufficiency to help us withstand crisis such as 9-11. When crisis hit, it is too late to plant a field or start raising livestock. We therefore believe that it is in the interest of the State to encourage landowners and farmers to install and maintain irrigation infrastructure necessary to grow crops and raise livestock. Indemnity from liability assuming good maintenance practices are carried out is a reasonable policy statement by the State to encourage this investment.

HB2823 contains the language that will address the concern. Associated irrigation infrastructure to the dams was inadvertently left out. Having dams but no transmission systems does not make sense. As such, we suggest replacing the language contained in HB2354 which has a more inclusive title, with the contents of HB2823.

Our concern with the language of HB2354 is that it tries to address issues beyond the intent of this measure. In most cases, dams are located far away from the agricultural lands they service. Transmission systems can modify the delivery locations. Therefore, we strongly urge that the identification of Important Agricultural Lands and the indemnification process needs to be decoupled.

We respectfully urge passage of HB2354 with substituted language contained in HB 2823. Thank you.

**HB 2354  
RELATING TO INDEMNITY**

**PAUL T. OSHIRO  
MANAGER – GOVERNMENT RELATIONS  
ALEXANDER & BALDWIN, INC.**

**FEBRUARY 1, 2008**

Chair Ito, Chair Tsuji, and Members of the House Committees on Water, Land, Ocean Resources & Hawaiian Affairs and Agriculture:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin, Inc. (A&B) and its agricultural companies Hawaiian Commercial & Sugar Company and Kauai Coffee Company, Inc. on HB 2354, "A BILL FOR AN ACT RELATING TO INDEMNITY." We support the general intent of this bill.

After over twenty five years of debate, negotiation, and compromise, the IAL Law was finally passed in the 2005 Legislative Session. After years of pursuing a land-use approach to this constitutional mandate, the IAL law that was successfully passed was one premised on the principle that the best way to preserve agricultural lands is to preserve agricultural businesses and agricultural viability. As such, Act 183 (2005) not only provides the standards, criteria, and processes to identify and designate important agricultural lands (IAL) to fulfill the intent and purpose of Article XI, Section 3 of the Hawaii State Constitution, it also provides for the passage of a package of incentives designated to support and encourage sustained, viable agricultural activity on IAL—prior to the designation of IAL. Once the package of incentives is passed, IAL may be designated in one of two ways --- by voluntary petition by the farmer/landowner to the

State Land Use Commission (LUC); or subsequently by the Counties filing a petition to designate lands as IAL pursuant to a County identification and mapping process. In either case, the LUC must find that the lands qualify for IAL designation pursuant to the standards, criteria, objectives, and policies set forth in the IAL Law prior to designation.

This bill provides indemnification from the State for an owner of an irrigation system, dam, or reservoir from personal injury or property damage caused by the owner's act of omission if the Attorney General confirms that the Land Use Commission has designated all agricultural lands owned by the owner and irrigated by the irrigation system, dam, or reservoir as IAL. This indemnification will not apply when the personal injury or property damage is determined by the Attorney General to have been caused by the gross negligence or wanton act or omission of the owner of the irrigation system, dam, or reservoir. We support the general intent of this bill as an incentive to encourage land owners to seek the identification and designation of their lands as IAL. In addition, we believe that this bill may encourage owners of irrigation systems, dams, or reservoirs to service IAL designated lands, thus increasing the availability of water for IAL related agricultural businesses.

We would like to note that the provisions in this bill will not cover irrigation systems, dams, or reservoirs that while primarily servicing IAL, may also service some non-IAL parcels.

Thank you for the opportunity to testify.



## KAMEHAMEHA SCHOOLS

February 1, 2008

The Honorable Ken Ito and Clift Tsuji, Chairs, and Members  
Committee on Water, Land, Ocean Resources and Hawaiian Affairs  
Committee on Agriculture  
The House of Representatives  
Hawaii State Capitol  
415 South Beretania Street, Room 325  
Honolulu, Hawaii 96813

Good Morning Chairs Ito and Tsuji and Members:

**Testimony in Support of House Bill No 2354 Relating to Indemnity**

I am Kapu C. Smith, Senior Land Asset Manager for Kamehameha Schools' Kawailoa Plantation in Waialua, Oahu. I am here to testify in support of HB2354 because it recognizes that continued operation and maintenance of irrigation systems, dams and reservoirs that deliver water for agricultural use are essential to "important agricultural land" (IAL). In fact, you can't have one without the other. As such, landowners statewide need to be provided incentives which encourage the retention and expansion of these systems. This bill is a start in the right direction. However, we would like to suggest exception language which is not as broad as proposed and also a fresh look at some of the other changes proposed during last session in regard to HB1905.

Thank you for the opportunity to express our views on this matter.