

TESTIMONY
SB 2951
LATE

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Conservation Council for Hawai'i

Testimony Submitted to the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs
SB 2951 Relating to Agriculture
Hearing: Friday, February 5, 2010 2:45 pm Room 229

Opposition to SB 2951

Aloha. Conservation Council for Hawai'i opposes SB 2951, which provides for fair compensation when leased public land for agricultural or pastoral uses is withdrawn, condemned, or taken for public purposes. SB 2951 is not in the public interest. It will have an adverse fiscal impact on the State in general and, specifically, the Department of Land and Natural Resources. Our understanding is that current law already calls for fair compensation when this situation arises. Why is this bill necessary? A virtually identical bill was vetoed by the Governor last year.

SB 2951 is not necessary because HRS Chapter 171 – governing leases of state land – already provides a fair process and adequate compensation to lessees of state land in the event leased land is revoked for an unforeseen reason. Essentially, SB 2951 is a give-away to private parties leasing state land. Last year, DLNR provided detailed information on how a similar bill last year would affect the State and DLNR, and why it should be vetoed.

SB 2951 was motivated by rancher on the Big Island who have had the privilege of leasing state (ceded) land on Mauna Kea and now fear proposals to restore habitat for the endangered palila bird in the area. We believe this is an unusual situation, and the entire law governing leases should not be changed because of four ranchers.

If, in fact, there are reasons to amend HRS Chapter 171, the legislature should request a comprehensive review by the Legislative Reference Bureau or other appropriate entity next session.

Please oppose SB 2951. This bill is not in the public interest. Mahalo nui loa for the opportunity to testify.

Marjorie Ziegler

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Attached: Final draft of Environment Hawai'i article on similar bill in 2009



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FINAL DRAFT Environment Hawai'i July 09 Leases SB 1345

Ranchers Who Lost Land to Palila Seek Extra Compensation from State

To judge by the testimony submitted, **Senate Bill 1345**, calling for holders of leases of state lands to be compensated if any acreage is withdrawn, was one of the less controversial measures taken up by the 2009 Legislature. Only the Department of Land and Natural Resources voiced opposition to the bill in hearings by several committees of the House and Senate. All the other testimony – all of it from ranchers and cattlemen's groups – was strongly in support.

Yet once the bill was sent to Governor Linda Lingle, SB 1345 suddenly generated fierce interest among environmental and conservation groups, who worry it could set a bad precedent and, what's more, undermine the state's ability to exercise responsible stewardship over public lands.

The bill calls for the state to compensate lessees for the "loss of reasonably anticipated income associated with the withdrawn leased land," to reimburse lessees "for any insurance costs associated with the withdrawn" land, and, at the lessee's request, to extend the lease for "not more than the number of years remaining in the original lease."

What prompted the bill was the dissatisfaction of four ranchers with terms under which conservation easements were placed over some 6,500 acres of high-altitude Mauna Kea lands that had been included in their leases. The easements are called for in a 1999 agreement involving state and federal agencies that sets forth mitigation measures to offset the loss of habitat for the endangered palila (*Loxioides bailleui*) caused by the rerouting of the cross-island Saddle Road.

The ranchers are called out specifically in the findings section of the bill: "The purpose of this Act is to prevent similar situations as the Saddle Road withdrawal from occurring in the future."

Existing law provides that public land under lease "shall be subject to withdrawal by the board of land and natural resources at any time during the term of the lease with reasonable notice ... for public uses or purposes, including ... easements of all kinds." When land is withdrawn, lease rents are to be reduced in proportion to the value of the land withdrawn, and lessees are to be paid the "proportionate value" if legally permitted, permanent improvements are damaged or destroyed. If crops are taken, the Land Board is to pay the lessee the value of the crops. (See Section 171-37, paragraph 3, of Hawai'i Revised Statutes, for the full text.)

Laura Thielen, DLNR administrator, was alone in her opposition to the bill. "The department's standard lease form already 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," she noted. "To require the department to pay the lessees' insurance costs and speculative income losses on top of the existing remedies could prove costly to the state. The department characterizes the income losses under the bill as speculative because the bill provides no framework for evaluating such claimed losses. The bill merely states that the department compensate a lessee for 'loss of reasonably anticipated income associated with the withdrawn leased land.' ... Further, the bill provides compensation for lost income as opposed to lost profits. A lessee should not be compensated for income without deducting the operating expenses required to generate that income. Finally on the compensation aspect of the bill, there is the potential for costly litigation resulting from a dispute between the state and a lessee over the calculation of losses resulting from the taking."

Thielen also noted that existing law already authorizes the Board of Land and Natural Resources "to grant lease extensions ... and make other modifications to the lease where the partial taking of leased land results in significant economic hardship to the lessee.... The bill would allow the taking of even a small portion of land, for example 100 square feet for a utility easement on a 1,000-acre lease, would automatically qualify the lessee for an extension."

As the bill progressed through cross-over and into the House of Representatives, Thielen's testimony grew more impassioned and her arguments lengthier. On April 6, she told the House Committee on Finance, "An automatic extension in statute would go against all the provisions for fairness in the leasing of state land

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in Chapter 171, HRS [Hawaii Revised Statutes]. When seeking public lands for private use, potential lessees are well aware of the benefits and drawbacks of leasing state lands as opposed to conducting their activities on private lands. First and foremost is the knowledge that those lands are public assets that must serve primarily the interests of the general public and the public trust purposes, and secondarily the needs of a private user.”

Mitigating Circumstances

To understand the bill’s genesis, it is necessary to go back ten years, to 1999, when the heads of the state departments of Transportation and Land and Natural Resources signed a memorandum of understanding with representatives of five federal agencies (the Federal Highways Administration, or FHWA, the Military Traffic Management Command, the U.S. Army Garrison—Hawaii, the Fish and Wildlife Service, and the U.S. Geological Survey’s Biological Research Division). The MOU set forth the measures that each agency committed to undertake to mitigate the loss of palila habitat as a result of improvements to the Saddle Road. Part of the mitigation measures included setting aside so-called “replacement lands,” areas that were or could be habitat for palila that could replace land lost to the road project.

The DLNR committed to two tasks with respect to the replacement lands: first, to assist the FHWA and the state DOT “in compensation negotiations with current lessees of the state replacement lands;” second, to “perform all administrative and right-of-way related work to ensure subdivision and transfer of the [palila critical habitat] replacement land parcels.”

In 2001, the Legislature passed Act 236, instructing the DLNR to “expedite discussions” with representatives of the four ranches affected by the designation of the replacement lands: Parker Ranch, K.K. Ranch, S.C. Ranch, and Boteilho Hawaii Enterprises. The department was to “identify and investigate all alternatives that will: (1) Fairly compensate the ranchers for losses suffered as a result of the withdrawal of any leased lands; and (2) Avoid providing exceptions to public land leasing policies.” Act 236 also authorized the DLNR to allow lessees to use up to 10 percent of the land remaining in their lease for “alternative agricultural use” without increasing lease rent.

When it reported on the negotiations in January 2002, the DLNR told the Legislature that the ranchers would be eligible for reimbursement of “actual reasonable expenses for vacation of the property” as provided for in federal law, “as well as any required payment for improvements to the property.”

Some of the ranchers “felt that compensation by DOT would not sufficiently address the actual damages,” the report stated. Federal law “primarily views compensation for cattle on a salvage value basis and does not address the loss of future revenue from additional calves,” it noted.

According to Dave Gedeon of the Federal Highways Administration, the ranchers could have received compensation for relocation and for improvements under federal law, but their expenses had to be documented. None of the ranchers could satisfy this requirement, he said.

In an effort to address the ranchers’ concerns, the Land Board approved “in principle” lease extensions if ranchers needed longer lease terms as a condition of financing. “With these extensions,” the DLNR report stated, “the lessees will have another 20 years to recoup those revenues lost due to the removal of the palila mitigation areas from grazing.”



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At the time of the report, all four leases were to expire within 10 years. "With the anticipation that the [Land] Board will grant lease extensions... the ranchers feel that the impact of the loss of the grazing areas to the palila mitigation requirement has been reasonably mitigated," the DLNR wrote. "Although not what they would consider ideal, they are accepting of the Board's actions."

A Slow Start

In November 2002, a 10-year easement over 6,542 acres of the land under lease to the ranchers on the north and west slopes of Mauna Kea was granted to the state Department of Transportation, for which the DOT paid the DLNR \$221,900. Under the original MOU, the state was to pay for installing an ungulate-proof perimeter fence around the replacement lands, but by 2003, it was clear that the state would not have the funds. In January 2004, the MOU was amended, so that now funds for fencing would be covered by the Federal Highways Administration. The USGS would take over responsibility for controlling predators and alien species on the replacement lands. The DLNR would be responsible only for mowing for a period of five years.

It took years – and some \$2.6 million in federal highway funds – for the replacement lands to be fenced, however. And in the meantime, the ranchers were free to graze their cattle in the easement areas, rent-free.

SC Ranch, where the easement took 791 acres out of the 7,780 acres originally under lease, was notified in September 2005 that fencing was completed except for final gate installation. Still, the DLNR did not give the ranch "official notice" to remove all cattle until July 2006, with a deadline to get the cattle out by August 15, 2006. The annual lease rent for SC Ranch had been reduced by \$3,597 to adjust for the easement. Thus, to SC Ranch, the value of the use of state pasture lands for three years and eight months came to roughly \$13,200.

Boteilho Hawai'i Enterprises, whose lease covered 7,932.36 acres, saw its pre-easement annual rent of \$32,640 drop to \$23,470.77, to adjust for the 2,228 acres removed in the easement. It, too, was given an August 15, 2006 deadline for cattle removal from the easement area. The value of 3.67 years of free grazing on the easement lands in the Boteilho lease comes to \$33,650.

K.K. Ranch lost 2,123 acres to palila critical habitat, out of the 7,267 acres originally under lease. For that, it saw its annual lease rent reduced from \$30,000 to \$21,233, giving the easement lands a rental value of \$8,767 a year. K.K. Ranch also enjoyed the free use of the easement lands for 3.67 years, for a total value of \$32,175.

Unlike the three previous leases, that held by Parker Ranch was on the western slope of Mauna Kea, adjoining existing palila critical habitat. Of the 1,739 acres under lease, 1,399 were placed in the conservation easement. For this lease, Parker Ranch saw its annual rent cut from \$9,125 to \$1,782. Again, the ranch was given an August 2006 deadline to have all cattle removed from the easement area. The use of 3.67 years of the easement area, rent-free, had a value of \$26,949 to Parker Ranch.

But the freeloading did not come to an end when the last fence was completed. According to DOFAW wildlife biologist David Leonard, "On Jason Moniz's ranch [K.K. Ranch], there have been cows on that easement persistently. Some of that was because the fence was damaged by very large storms, fences through the gullies washed out. But there also have been cases where the gates have been left open and cows come in on a pretty consistent basis."

The easements are to expire in 2012, when the Saddle Road mitigation agreement ends. What happens then?

According to DOFAW biologist Scott Fretz, "it's always been our intention to set those aside as forest reserves.... We testified against [SB 1345] and also recommended that the governor veto it... And we're hoping that she does. ... [SB 1345] would really complicate setting aside the lands, since it would require us to pay an unknown sum to those lessees, which would completely change the cost-benefit scenario for those lands."

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