

# HB 1617

RELATING TO PUBLIC LANDS.

Provides for fair compensation when leased public land for agricultural or pastoral uses is withdrawn, condemned, or taken for public purposes. Effective 7/1/2050. (Proposed SD1)

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

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**Testimony of  
WILLIAM J. AILA, JR.  
Chairperson**

**Before the Senate Committees on  
WATER, LAND, AND HOUSING  
and  
JUDICIARY AND LABOR**

**Tuesday, March 20, 2012  
12:30 PM  
State Capitol, Conference Room 016**

**In consideration of  
HOUSE BILL 1617, HOUSE DRAFT 2, PROPOSED SENATE DRAFT 1  
RELATING TO PUBLIC LANDS**

House Bill 1617, House Draft 2, Proposed Senate Draft 1 (House Bill 1617), proposes to provide for new untested forms of compensation to lessees when leased public land for agricultural or pastoral uses is withdrawn, condemned, or taken for public purposes.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) has serious **concerns** about 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.

House Bill 1617 is a reintroduction of Senate Bill 2951 that was vetoed by the Governor in 2010. Like its predecessor, House Bill 1617 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, ensures transparency and fairness in the disposition of State assets and most importantly to guarantee 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. The Department points 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

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CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
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FIRST DEPUTY

**WILLIAM M. TAM**  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
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CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

provide extraordinary and unprecedented compensation to such tenants when they have reaped years of benefit from below market rates.

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.<sup>1</sup> 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."<sup>2</sup>

On top of the relief already provided by law, House Bill 1617 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. No lessee has approached the Department with such a request.

House Bill 1617 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 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.

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<sup>1</sup> In the case of the palila critical habitat mitigation area on Mauna Kea, 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.

<sup>2</sup> House Bill 1617 states that it is the Department's position that a rent reduction is sufficient compensation in a withdrawal situation. But the Department has never taken that position. Rather, the Department's position is that the current law, including compensation for improvements taken, is sufficient. In the case of the palila mitigation easement, the affected lessees were given the opportunity by the Department of Transportation to submit claims for improvements lost as a result of the withdrawal. None of lessees submitted claims.

Additionally, House Bill 1617 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.



## Hawaii Cattlemen's Council, Inc.

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### SENATE COMMITTEE ON WATER, LAND, AND HOUSING SENATE COMMITTEE ON JUDICIARY AND LABOR Tuesday March 20, 2012 12:30 pm Room 016

#### **HB 1617 HD2 PROPOSE SD 1 RELATING TO PUBLIC LANDS**

Provides for fair compensation when leased public land for agricultural or pastoral uses is withdrawn, condemned, or taken for public purposes.

Chairs Dela Cruz and Hee, Vice Chairs Solomon and Shimabukuro and Members of the Committees:

My name is Alan Gottlieb, and I am a rancher and the Government Affairs Chair for the Hawaii Cattlemen's Council. The Hawaii Cattlemen's Council, Inc. (HCC) is the Statewide umbrella organization comprised of the five county level Cattlemen's Associations. Our 130+ member ranchers represent over 60,000 head of beef cows; more than 75% of all the beef cows in the State. Ranchers are the stewards of approximately 25% of the State's total land mass.

The Hawaii Cattlemen's Council **strongly supports** HB 1617 HD 2, Proposed SD1, with the following suggested changes to hopefully address some of DLNR's concerns with the bill:

We propose to remove 3 words in Section 2 of the bill:

(b) In addition to compensation received under subsection (a) or section 171-38, a lessee shall be entitled to compensation for costs attributable to the diminished use of the leased land, ~~including but not limited to~~ reimbursement for the cost of any insurance required by the board to be maintained, or property tax paid by the lessee; provided that a lessee of land subject to easements shall be entitled to compensation under this subsection only if the easements are placed upon the land subsequent to the original lease and prevent the lessee from using the land for the original intended

As this bill states, the legislature closely considered this issue in 2010 and passed SB 2951 CD1, only to be vetoed by then Governor Lingle.

In 2010, we met with Gov Lingle's Policy director and discussed their concerns and felt we answered those concerns.

This bill essentially enhances existing laws on fair compensation when a State Agency withdraws land or places an easement on a State lessees' lease. Chapter 171-36, 37 & 38 already provide for Fair Compensation for "... the proportionate value of the lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease..." and for "... the value of growing crops..."

What the current law does not do and what HB 1617 HD 2, Proposed SD1 proposes to do is add two things to the existing law:

1. Section 2, part (a) "In the case of breeding livestock that cannot be relocated or marketed for the breeding value, the board shall pay to the lessee the difference between the appraised breeding value and the salvage value, including the cost of transportation to market."

It had been argued in testimony by others on SB 2951 that a lessee would have plenty of notice (some said over 2 years) if their land was being withdrawn, but that is not always the case, and some may have as little as 6 months or less. What is the difference between a breeding animal and a market animal? A breeding animal has a useful life often over 10 years long, and that animal has a high cost to bring it to breeding age, or is often

purchase and may be worth around \$1,000. That animal can't always be readily moved somewhere else, like some may assume. On the Mainland (and what the Federal Law assumes) a rancher could take their breeding animal to a local livestock auction and get its market value or put it on a truck and haul it to the next state and sell or pasture it there. But that is not the case in Hawaii. What would a rancher in Hawaii do with 1,000 breeding cows in a seven year drought like we are experiencing today? There is no other pasture to move the animals to, or buyers for large numbers of breeding animals. That rancher may have to have that animal slaughtered, and may receive only \$250 for its lower meat value. That is the loss we are referring to and which we think should be included in the loss of crop definition, already a part of the current law.

2. The second thing this bill does (Section 2 part b) is reimburses a lessee for costs associated with property taxes or insurance on lands upon which an easement has been placed by the State. DLNR in their own testimony on SB 2951 argued this is a miniscule amount, with which we agree, but imagine adding the insult to injury to a lessee who has a major portion of their lease placed under an easement, has NO use of that land, never needs to go on that land, but needs to bear the cost of property taxes and insurance for that land. One might think that an easement would generally be a small part of a lease, for a utility or road, but that is not always the case. In the case of the Palila mitigation for the Saddle Road on the Big Island in 2001, some ranchers lost over 30% of their leased areas (over 2,000 acres) which they cannot use in any way, but must still pay property taxes and insurance on that land with the easement. Why was an easement place, rather than withdrawing that land? We're not sure, but assume because it was expedient and did not require any subdivision.

There is a sentence in Section 2 (b) which states "... A lessee shall be entitled to compensation for costs attributable to the diminished use of the leased land...". We are not sure what type of situation this might apply to, and we believe it would be up to the State Agencies to define when that might be used, and place the burden on a lessee to make a strong argument of a loss if and when they tried to make a case using this provision.

This bill, while not retroactive for losses from past withdrawals, would apply not only to future leases but to existing leases for future takings. One of the earlier version of SB 2951 made it applicable only to future leases but we made a case and the legislature agreed that fair compensation should include all leases including existing ones, so that breeding animals be included in the existing law covering crop losses.

There was concern during the course of the 2010 legislative session that if there was a federal project that did not have the funds to meet the State's obligation in their lease, that the Federal Project may not happen. We believe we have found provisions in Federal law that would require the Federal Government to pay for the new provisions of breeding animals as they could be considered personal property: Code of Federal Regulations, Title 49, Volume 1, Part 24, Section 24.301, pg. 244, (14). In any case under laws of Eminent Domain in our country, the laws don't require fair compensation for what the Government can afford to pay, but requires payment for the value of the taking.

What HB 1617 HD 2, Proposed SD1 does not do (despite testimony in 2010 on SB 2951 to the contrary by others):

- It is not the same as the bill the Governor Vetoed in 2009, SB 1345. Senator's Takamine, Kokobun, Representatives Tsuji and Ito set up a meeting in November 2009 with several cattlemen, a representative of the Hawaii Farm Bureau Federation, Duane Okamoto then deputy at HDOA, DLNR staff including then Deputy Tsuji, DOT staff and Federal Transportation personnel and Biologists. While much of the discussion revolved around the past Saddle Road project, we reiterated that nothing we were trying to do with this bill affected past projects or the Palila mitigation. We then went through SB 1345 line by line and DLNR told us the things they could not live with and also told us the things that they were likely ok with. When SB 2951 was drafted, all of the items DLNR said they could not live with were removed. All that remained in the bill were the things that DLNR told the Senators and Representatives present that they could probably live with.
- It does not affect the Palila Mitigation and does not prevent the State from doing future withdrawals or placing easements. It simply requires fair compensation on any loss in value of breeding animals if the State does do a taking, in addition to their much larger exiting responsibility to pay fair compensation for assets constructed on the land.

- It is not retroactive and will not in any way affect previous takings.
- It does not give ranchers or farmers something that no other State lessee would receive in a taking or set a precedent. All State leases including commercial, industrial, resort and residential property leases are covered by Chapter 171-37 and provide for “....if any permanent improvement constructed on the land by the lessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value thereof shall be paid based on the unexpired term of the lease...”

As we have all watched the demise of many segments of the Hawaii livestock industry in recent years, including poultry, dairy and the struggling hog industry, Law and policy makers have been asking the beef cattle industry what we need to be sustainable. In response, in 2007, our industry worked together to create a Strategic Plan.

**Overall, our industry’s outlook is a positive one.** The Hawaii Beef Cattle Industry has great opportunity for continued growth, which certainly works towards your mandates for bio-security for food production in Hawaii. However, our industry’s condition is also fragile, especially if we begin to lose production on some of our large land tracts, many of which are leased from the State of Hawaii (DLNR, DOA and DHHL).

Actions, such as the removal of large portions of land from a state tenant, can cause serious financial losses as noted in this bill. Uncompensated losses to a farmer or rancher or any business can drive a marginal operator out of business, threatening not only that one business, but in the case of the Hawaii beef cattle industry, the entire industry itself. Allow me to explain:

Like the Hawaii dairy industry, our industry is dependent on a critical mass to help support its infrastructure (processing plants, transportation, marketing) and like dominos, key producers in our industry can quickly fall, if too much of our lands and productivity are lost. The small ranchers are especially susceptible, because without the big ranchers helping to support that infrastructure, everyone loses. Today there are 2 dairies in Hawaii which supply less than 10% of our locally consumed milk. Just 25 years ago there were 19 dairies supplying 100% of the locally consumed milk, plus ice cream production!

The genesis for this bill stems from actions taken by the BLNR in November 2008 when there was a proposal before the board for a direct lease to be awarded to a bio-fuels company for 37,000 acres of State lands currently leased to several of our member ranches. Several of these ranchers were very concerned having already lost significant portions of their leases to previous takings by the BLNR in 2001 under the Cayatano administration as a result of a Palila Mitigation action required by the then proposed realignment of the Saddle Road. These beef cattle producers had upwards of 30% of their leases removed without any compensation other than a lease reduction comparable to the acreage they could no longer graze. Infrastructure loss, the need to reduce their herd size by up to 30% and the continuing fixed costs required to carry the reduced herd (which did not decrease with the loss of one third of their carrying capacity) resulted in significant losses to particularly the smaller of the ranches. This all occurred while 15 million dollars in mitigation funds were distributed amongst the government agencies involved, including to DLNR upfront for the lease rent loss they would not receive from their lessees. To lose acreage which represented up to 30% of a beef cattle operation or any business is bad enough, but to not get any compensated for the taking was and still is absurd.

No business that invests large amounts of capital and plans its operation to function at a certain size should be subject to a significant change in the size or terms of their lease part way through their lease agreement. How could Wal-Mart or Home Depot function if part way through their lease their landlord said “we changed our minds and we’re removing 30% of your lease”. That would have a devastating effect on their business. We wonder why anyone would think it is not the same for a cattle ranch.

We, The Hawaii Beef Cattle Industry, would like you to understand our issues today when our industry is strong and has continued potential, rather than to come back to you in several years to tell you we’re all but done.

Thank you for giving me the opportunity to testify in favor of this very important issue.

**Dane Wicker**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, March 19, 2012 6:27 AM  
**To:** WLH Testimony  
**Cc:** jacinthow001@hawaii.rr.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: William Jacintho  
Organization: Maui Cattlemen's Association  
E-mail: [jacinthow001@hawaii.rr.com](mailto:jacinthow001@hawaii.rr.com)  
Submitted on: 3/19/2012

Comments:

We support proposed SD 1, and the proposed changes by the Hawaii Cattlemen's Council.



~~Dane Wicker~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Saturday, March 17, 2012 9:04 AM  
**To:** WLH Testimony  
**Cc:** hawaiiifish@gmail.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Ronald P. Weidenbach  
Organization: Hawaii Aquaculture and Aquaponics Association  
E-mail: [hawaiiifish@gmail.com](mailto:hawaiiifish@gmail.com)  
Submitted on: 3/17/2012

Comments:

This is an important issue and bill for the Hawaii livestock industry and DLNR lessees. The HAAA strongly supports the proposed SD 1, and the proposed changes by the Hawaii Cattlemen's Council. Thank you for the opportunity to testify.

~~James Wicker~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, March 19, 2012 9:08 AM  
**To:** WLH Testimony  
**Cc:** director@hciaonline.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Alicia Maluafiti  
Organization: HCIA  
E-mail: [director@hciaonline.com](mailto:director@hciaonline.com)  
Submitted on: 3/19/2012

Comments:

~~Jane Wicket~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Sunday, March 18, 2012 1:33 PM  
**To:** WLH Testimony  
**Cc:** jdmoniz@hawaiiantel.net  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Jason D. Moniz  
Organization: KK Ranch/Hawaii Cattlemen's Council  
E-mail: [jdmoniz@hawaiiantel.net](mailto:jdmoniz@hawaiiantel.net)  
Submitted on: 3/18/2012

Comments:

In support of SD 1 and the changes proposed by the Hawaii Cattlemen's Council.

**Blaine Wicker**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, March 19, 2012 7:24 AM  
**To:** WLH Testimony  
**Cc:** kaimiunger@gmail.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: **Support**  
Testifier will be present: No  
Submitted by: Keith Unger  
Organization: McCandless Ranch  
E-mail: [kaimiunger@gmail.com](mailto:kaimiunger@gmail.com)  
Submitted on: 3/19/2012

**Comments:**

McCandless Ranch supports SD1, and the proposed changes by the Hawaii Cattlemen's Council.

~~Dane Wilson~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Sunday, March 18, 2012 11:03 AM  
**To:** WLH Testimony  
**Cc:** karin@princevilleranch.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Karin Guest  
Organization: Princeville Ranch  
E-mail: [karin@princevilleranch.com](mailto:karin@princevilleranch.com)  
Submitted on: 3/18/2012

**Comments:**

We support proposed SD 1, and the proposed changes by the Hawaii Cattlemen's Council.

~~Raymond Foster~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, March 19, 2012 7:40 AM  
**To:** WLH Testimony  
**Cc:** amsray@heartofhawaii.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Raymond Foster  
Organization: Individual  
E-mail: [amsray@heartofhawaii.com](mailto:amsray@heartofhawaii.com)  
Submitted on: 3/19/2012

Comments:

I support proposed SD 1, and the proposed changes by the Hawaii Cattlemen's Council. It is important for our agricultural businesses to have assurance that they will be considered valuable by our state government in the decision that affects the industry.

~~Dana Miller~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Sunday, March 18, 2012 7:23 AM  
**To:** WLH Testimony  
**Cc:** chris@ponoholo.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Christopher English  
Organization: Individual  
E-mail: [chris@ponoholo.com](mailto:chris@ponoholo.com)  
Submitted on: 3/18/2012

Comments:

I support proposed SD 1, and the proposed changes by the Hawai'i Cattlemen's Council.

~~CONFIDENTIAL~~

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Saturday, March 17, 2012 10:24 AM  
**To:** WLH Testimony  
**Cc:** dawn.m.bicoy@monsanto.com  
**Subject:** Testimony for HB1617 on 3/20/2012 12:30:00 PM

Testimony for WLH/JDL 3/20/2012 12:30:00 PM HB1617

Conference room: 016  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Dawn Bicoy  
Organization: Individual  
E-mail: [dawn.m.bicoy@monsanto.com](mailto:dawn.m.bicoy@monsanto.com)  
Submitted on: 3/17/2012

Comments:

We support proposed SD 1, and the proposed changes by the Hawaii Cattlemen's Council.  
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