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Proposal No. 100
RELATING TO TRADITIONAL HAWAIIAN RIGHTS TO ACCESS

Statement for
Con Con Committee on Bill of Rights,
Suffrage and Elections
Public Hearing 21 July 1978

by
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Proposal 100 amend articles of the Constitution by adding a new section named "Traditional Hawaiian Rights to Access." This statement does not reflect the institutional position of the University.

The intended purpose of proposal 100 which is apparently to prevent the subversion of public lands and waters to private use through artifices of denial of right of way through private property, is wholly laudable. There would appear to be some difficulties with the proposal, however:

- a. The perpetual nature of the right proposed ("...or by the passage of time") causes a problem in that it would probably obligate the state to correct the results of natural conflagrations such as volcano or earthquake, where such disasters might interfere with access.
- b. Similarly, the matter of perpetuity also raises the related question of the establishment of a traditional right-of-way. It would be clear that once such a right-of-way had been established, it could not be extinguished or abridged. The evidence of that establishment might well be contentious, however, and there may be better means of establishing the privileges the proposal seeks to protect. For example, a simpler provision might be drafted which insures that land owners shall provide such access through their land at certain specified distances, etc.
- c. The proposal would tend to imply that right of access for the public exists only if a "traditional Hawaiian" right-of-way is established. The problem of the evidentiary support when based on tradition has already been raised. It would seem to be simpler to affirm that right of access exists and shall not be abridged.

- d. By basing the right of access on rights accruing to traditional Hawaiians, there appears to be a limitation both as to persons and as to historical time frame during which evidence of such rights can be demonstrated. This would appear to be an inadequate means to defend modern-day rights of access for the general public.
- e. Similarly, the dependence of the provision on "traditional Hawaiian" rights raises the questions as to whether such rights of access are extended to the general population or are restricted only to those of aboriginal ancestry. If the later, then specific qualifications would arise, and questions of compatibility with existing law would also arise. If it is not intended to restrict such access privileges to those of aboriginal ancestry, then it may, again, be better to base the provision on a general right of access for the public to public waters and lands.