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COMMITTEE PROPOSALS CONCERNING RESOURCES

Statement for the
Con-Con Committee on Environment, Agriculture,
Conservation and Land
Public Hearing, 5 September 1978

By
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Reviewed here are seven proposals prepared by the Committee on Environment, Agriculture, Conservation and Land for amendment of Article X of the Constitution, the article concerning natural resources, including land. The Environmental Center earlier reviewed a number of individual proposals dealing with the same topics as these seven. As appropriate, most of the earlier Center statements were multi-authored so as to represent a variety of disciplinary competencies. The Committee-proposal versions here reviewed were those distributed on 3 September. Preparation of multi-authored reviews has been impossible for the period elapsing since, but where applicable the contributions of other authors to the earlier reviews are reflected in the reviews in this statement.

The statement does not reflect an institutional position of the University.

3. Environmental Rights

The environmental rights proposal would add a new two-paragraph section to Article X. The first paragraph would establish a healthful environment as an individual right. The second would establish broad individual standing to sue in the courts in enforcement of this right.

The enjoyment of a healthful environment is appropriately recognized as a right equivalent to any other fundamental human right. Healthfulness of the environment is appropriately related in the proposal, not exclusively, to clean air and water and freedom from excessive noise. It also is said to include freedom from unnatural and excessive levels of ionizing radiation. What kinds of radiation the authors have in mind as a present or potential threat is not clear.

Tbe benefit of present and future generation should be the aim of environmental management. The expression of this benefit in the proposal in connection with the right is, however, awkward. The right might be expressed as applying to persons in the present

and in future generations, or as applying to persons in the present generation but with respect to the healthfulness of the environment for their descendents as well. Perhaps the phrase "for the benefit of present and future generation would best be deleted from this section but noted elsewhere.

In statements on other proposals to establish broad individual standing the Environmental Center has noted that such establishments elsewhere have not resulted in the rash of environmental suits that their opponents have feared. However, this proposal would provide that:

> "In a dispute over a proposed action's environmental consequences, the burden of proof shall be upon the agency or individual taking the disputed action to show that said action will not have deleterious effects upon the environment or the public health."

This would require the defendant to prove the unprovable.

Suppose that my neighbor uses in his garden a weed spray. Suppose that some year my breadfruit tree does not bear as heavily as I think it should. Suppose furthat that I do not get along well with my neighbor.

What is to prevent my suing him for use of the weed spray. I don't have to prove that my breadfruit tree was damaged. I don't even have to mention my breadfruit tree. All I have to do is say that he was spraying weeds, and perhaps note that I smelled the weed spray, and claim that his action had deleterious environmental effects. My neighbor, however, would be found guilty if he could not prove that his action caused no environmental detriment whatever. He could not possibly do this. The most specific weed sprays have some detrimental effect on species other than those they are designed to control. Even if my neighbor used a weed spray that has been officially approved for an approved purpose and by an approved means he could not prove that it had no detrimental effect. Hence, he would automatically be found guilty.

Our lives depend upon our consumption of natural resources and our discharge of wastes. Both processes are inevitably deleterious. We may minimize but not eliminate the detriments. Except for actions such as seeing, indeed, all of our actions probably result in a combination of beneficial and detrimental effects, we could not defend them if we had to prove that they were without detriment--the detriment would be provable in the case of many, but they are properly defensible even so if in the net the effects are beneficial.

The second paragraph of the proposal should be rewritten to substitute the proof of net benefit for the proof of absence of detriment, or, preferably, to delete entirely the sentence concerning the burden of proof.

4. Preservation of Conservtion and Agricultural Lands and Park and Recreational Areas

The proposal relating to the preservation of conservation and agricultural lands, and park and recreational areas would add to Article X a new section on Aina Malama lands. It is similar to previous "Aina Malama" proposals, and to it apply the previous comments of the Environmental Center concerning the dissatisfaction with land management

decisions from which the proposals stem, the alternative mean that are available to make changes in land use more difficult, and the effect that the creation of the Aina Malama category of Conservation Lands, Agricultural Lands, and Parks and Recreational Areas will have in increasing the vunerability to change of use in those lands that are not included in the Aina Malama.

The current proposal avoids some of the difficulties presented in certain of the earlier proposals. It provides, however, that only voters in the representative districts in which candidate lands are situated may choose whether the lands shall be included in the Aina Malama. This may make it easier to place lands in the Aina Malama, and also to take lands out as well. It means, however, that people concerned island-wide, county-wide, and state-wide will under certain circumstances have no voice in the decisions.

For candidate lands that are located in more than one representative district, the proposal provides that registered voters in the several districts may petition for the inclusion in Aina Malama, but it is not clear whether the 15 percent requirement applies to the population of registered voters in all of the districts together, or district by district, and the majority vote requirement for inclusion in Aina Malama refers to the districts only in the singular.

5. Conservation and Development of Resources

The proposal on the Conservation and Development of Resources would replace the present Section 1 of Article X.

In the proposal the present listing of "agricultural resources, and fish, mineral, forest, water, land, game and other natural resources" would be replaced by "agricultural, mineral, energy and all other natural resources." The new list is briefer, it would still be inclusive with respect to all natural resources, it would still include those agricultural resources that are natural, including the soil. It is curious, however, that water resources would no longer be explicitly included, considering the current concern with water resources and their fundamental importance.

In the proposal, the combination of functions of "conservation, development, and utilization" would be replaced by the combination "conservation and preservation" plus the combination of "development and utilization" consistent with conservation and with furtherance of self-sufficiency. To those who use "conservation" as meaning a wise balance of preservation and development for use, the new wording remedies a pro-development bias in the original wording. To those who use "conservation" as essentially synonymous with "preservation," the new wording may seem biased pro-preservation.

In any case "benefit to present and future generations" is appropriately recognized in the proposal as the purpose of the functions. The declaration of the public trust concept at the end of the proposal seems to add nothing to that recognition.

8. Water Resources

The water resources proposal would add a new two-paragraph section to Article X. The first paragraph would apply the public trust concept to the waters of the State. The second would require the establishment of a water resources agency to determine policies, define beneficial and reasonable uses, protect water resources, and establish a permit procedure for new uses of water.

I will simply refer to comments submitted earlier to this committee by Williamsom Chang of the Law School concerning the public trust concept and turn to the institutional part of the proposal.

The State Water Commission is considering the advisability of establishing a new, independent agency or commission to regulate water resource development and use statewide. If the Commission were already agreed that such an institution should be established and agreed on the formulation of its nature, powers, and placement, the Convention might find certain fundamentals of the Commission proposals sufficiently important to warrant incorporation in the Constitution. Recognizing that the Commission has not yet completed its consideration, it would seem well that any proposal for constitutional amendment concerning such an institution be general. As the Environmental Center has previously pointed out, the Legislature already has the power to establish such a new institution under the Constitution without amendment.

The principal reason for a change in the institutional arrangement for water management seems to be to separate the powers to regulate the development and use of water resources generally from the responsibilities of agencies to develop these resources for certain specific uses. It is too much to expect that a water development agency be impartial in its regulation of the combination of its own developments and those of other parties.

A second reason may be to clarify and make more uniform and more appropriate the divisions of regulatory powers and responsibilities between the State and the counties.

It is with respect to these reasons that I make the following comments, suggestions, and questions:

1) The proposal should not specify that the institution in question should be an agency (as the proposal does in line 6). A commission or some other sort of governmental body may serve the need better, and it would be best to leave to the Legislature the choice of institutional type, constitution, and placement.

2) General overall water conservation, quality, and use policies should be determined by the Legislature, not by an agency or commission (as proposed in lines 7 and 8), although the agency or commission may usefully provide details as to interpretation of the policies.

3) The resources to be protected would be best described as the water resources; or watersheds and water resources; or watersheds and surface-and groundwater resources; or watersheds, groundwater resources, and natural stream environments. Watersheds need protection for groundwater as well as for natural stream environment purposes. The other purposes listed in lines 10-11 as applying to the natural stream environment add detail which is not only unnecessary but undesirable because incomplete. They do not include retention of minimum undiverted stream flows for the preservation of stocks of aquatic biota.

4) Is it "criteria for priority of use" that is intended by "poriority use criteria" in line 11? Whatever is intended, these are well qualified by the adjective general, because relative benefits of different uses will be different from place to place and time to time.

5) The proposal would guarantee appurtenant rights and existing riparian and correlative uses (ls. 12-13). The phrase appurtenant rights and existing riparian and correlative uses" should be replaced by "appurtenant and other vested rights" because the courts may hold that other forms of water rights than appurtenant rights may apply in Hawaii, and because these other forms are not restricted to riparian and correlative rights. The term "guaranteeing" should be replaced by "recognizing" because it would be most unwise to imply that the State could never modify an existing use or extinguish a vested right, even an appurtenant right, by its condemnation.

6) The provision for a "permit procedure for all new uses" (p. 1, l. 13 - p. 2. l. 1) should be replaced by "a system for regulating the development and use," because it would be unwise to restrict the means of implementing the regulatory power that is needed to a permit system alone, and because the regulatory power must extent to present uses as well as new uses. Even present regulations apply to already existing uses.

7) Finally, although it is clear that both the State and the Counties have appropriate concerns in the regulation of water development and use, it would be unwise to specify in the Constitution how the concerns of the two levels of government are to be taken into account as provided on page 2, lines 2-3. This would best be left to the Legislature to determine.

9. Energy

The proposal relating to energy would add a new section to Article X that would encourage certain forms of energy development and prohibit others.

By qualifying the nuclear power plants whose use would be prohibited in Hawaii as nuclear fission power plants, this proposal is considerably improved over earlier versions. For parallelism of construction, the words "to achieve" in line 6 should be replaced with "the achievement of".

11. Preservation of Historic Sites

This proposal would add to ARticle X a new section relating to the preservation of objects and places of historic and cultural importance. The provisions are largely redundant of Article VIII, Section 5, whose amendment to delete provisions equivalent to those proposed in Article X should be part of the proposal.

A second paragraph of the proposal would establish a broad standing in the courts to enforce the provision of the first paragraph, but since the first paragraph, as appropriate, merely requires the State to implement programs of conservative objects and places of historical and cultural importance and does not indicate what objects, what places, or how great the cultural and historical importance of an object or place must be to warrant maintenance or restoration, the standing provision seems to have no foundation.

13. Regulation of Natural Resources

The proposal on the Regulation of Natural Resources would amend Article X, Section 2 which now deals with the management of natural resources owned and controlled by the State in such a way that it would require, in addition, regulation of all natural resources. The regulatory power is now provided in Section 1. Hence, the amendment would eliminate what is now a useful distinction between the two sections. Furthermore, in requiring that the State regulate certain resources in manner similar to public utilities, the proposal suggests something that would be unwise.

A public utility is characteristically a monopoly closely controlled by the government. The public utility provision in the proposal would relate to any natural resource that is "scarce, essential to the public well-being, or otherwise vitally affected with the public interest." Water resources are scarce on Niihou and Kahoolawe, and scarce with respect to demand on Oahu. Water is certainly essential to the public well being. What is meant by "affected with the public interest" is not clear, but the public interest clearly affects water resources development and hence the resources themselves, the extent of water resources is clearly a matter of public concern and the extent of their development is clearly a matter of public interest. Yet it may be doubted tht management of water-resource development as a monopolistic public utility would be of overall public benefit.