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Proposals 171, 230, 518, 657, 701, 757, 783, and 808
RELATING TO RESOURCE CONSERVATION

Statement for
Con Con Committee on Environment, Agriculture,
Conservation and Land
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Proposals 171, 230, 518, 657, 701, 757, 783 and 808 have in common that they would revise or replace Section 1 of Article X of the Constitution. Hence they are addressed together in this statement. The statement does not reflect an institutional position of the University of Hawaii.

Article X, Section 1 provides that the legislature shall promote the conservation, development, and utilization of agricultural resources and of natural resources. Of the natural resources it names specifically fish, mineral, forest, water, land, and game.

Conservation, in itself, means a wise balance of preservation and development for use. Hence the combination of conservation, development and utilization seems to give undue weight to the use end, and even destructive use, of the preservation-use spectrum. This unbalance seems represented also in the legislation that has been passed under Section 1, and in the regulatory activities of the executive agencies, particularly the Department of Land and Natural Resources in which the principal resource management powers have been vested. That Department has, for example, paid more attention to the development of water resources to which the State has water rights for the supply of water through State systems than to the oversight, management, and regulation of water resources in general. It has left to the Department of Health the proposal to limit stream diversions, although the authority of the department to regulate stream diversions is quite questionable and the pertinent competence of that Department is much less than that of the Department of Land and Natural Resources.

Some of the proposals considered here relate specifically to water conservation, but present deficiencies in present management practices are not restricted to water

resources. Regulations recently adopted concerning geothermal development are much more concerned with administration of the geothermal rights owned by the State than with the conservation of geothermal resources.

It should not be considered, however, that the present deficiencies in practice are in actuality the result of the unbalance implied in Article X, Section 1. They represent, rather, the slowness of the legislative and executive branches of government to recognize the full importance of the preservation aspect of conservation as well as the development aspect. In spite of the unbalance implied by Section 1, the language of that article does not prevent the legislature from deciding where the proper balance should be, and under the statutes that have been passed, the executive boards and agencies have considerable latitude in their regulatory activities.

Hence, although it would be desirable to amend Section 1 to remove the unbalance, there can be no assurance that the constitutional amendment will actually result in appropriate conservation of natural resources in practice.

Furthermore, care should be taken in any amendment, that the present unbalance, should not be overcorrected so that appropriate development of resources is unduly impeded.

It should be recognized that Section 1 now relates to agricultural as well as natural resources. Agricultural resources are based on the natural resources of the soil, terrain, and climate, but they involve artificial aspects in addition, technology and individual know-how. No amendment involving this section should cancel its applicability to agricultural resources unless some substitute were provided.

Hence, in reviewing the eight proposals of concern, although we consider that amendment of Article X, Section 1 would be desirable, such amendment is not strictly necessary, and that the effects indicated or implied by each proposal should be examined in some detail.

Proposal 171

Proposal 171 would delete the present Section 1 of Article X and add a section making it a duty and power of the State and of each person to conserve and protect land, air, water, native and endemic flora and fauna and other natural resources from pollution, impairment, destruction and depletion.

Where the present Section 1 seems somewhat unbalanced in favor of development and use, the proposed substitute seems unbalanced in favor of preservation. Most uses of natural resources involve their impairment to some extent. Even the development of renewable resources for particular uses decreases their availability for other uses, and non-renewable resources cannot be developed without their reduction.

The duty of every person that would be expressed in the proposal is not clear. Would everyone have to participate in a Conservation Corps? Although the benefit of present and future generations is expressed as an aim in the proposal, neither present nor future generations would be able to make full use of the resources of the State under the provisions of the proposed amendment.

The proposal would, in addition, establish a standing to sue. We have commented on such provisions for standing with respect to other proposals, and wish here simply to reinforce the need to relate such standing to rights that are reasonable and appropriate.

Proposal 230

Proposal 230 would amend Section 1 to establish, as a first priority in the development of agricultural and natural resources, those developments that would contribute to the self-sufficiency of the State.

Although further development of self-sufficiency is an appropriate general aim, it would seem unwise to base the first priority in all resource management decisions on this aim alone. If use of particular resource might contribute either: i) to the production of either some product of small value in the State or, ii) some product of great value elsewhere, whose sale might add materially to the income of the State and its people, but not to the production of both products, it would seem that the use of the resource for the latter would be more in accord with the public welfare in general.

A Constitutional provision that the State should seek or promote self-sufficiency might be appropriate but would not seem necessary. The proposed provision, at least in its present form, seems unwise.

Proposal 518

Proposal 518 would amend Section 1 so that it would, in its placement of promotional duties on the legislature, qualify the development and utilization of agricultural and natural resources to be promoted as development and utilization consistent with conservation. It would thus appropriately remedy the present unbalance of Section 1

Proposal 657

Proposal 657 would replace the present Section 1 with a new section. The applicability of the replacement would be restricted to public natural resources, excluding privately owned resources and the non-natural aspects of agricultural resources. It would establish the applicability of the public trust concept to the resources covered. And it would replace the present combination of functions: conservation, development, and utilization; by the two combinations of: i) conservation and ii) protection, and management and regulation.

The proposal would remove the present unbalance of Section 1 but replace it with an unbalance in the opposite direction, combining conservation and management, (which are neutral) with preservation, (which would exclude development) and with regulation, which would curb development. The unbalance would be particularly drastic because, in the language of the proposal, the protection would be from destruction, impairment, pollution, and depletion to the greatest extent possible. Although such uses as enjoyment of scenery would still be permitted, no development of resources would be possible because any development involves some impairment such as by pollution or depletion.

In restricting its applicability to public natural resources, the proposal would undesirably reduce the present applicability of Section 1 to agricultural resources, and very unwisely cancel its present applicability to natural resources subject to private ownership.

Proposal 701

Under Proposal 701, Sections 1 and 2 of Article X would be replaced by two new sections, the first dealing with the conservation, development, use, management, and disposition of resources generally, the second dealing with water specifically.

The first of the proposed new sections is in two parts.

The first part, would require the State to perform, with respect to the natural, cultural, and aesthetic resources, the functions of protection, maintenance and preservation, for appreciation of the present and future generations. This part would also require the State to promote development and utilization of flora and fauna, natural energy, agricultural, water, mineral, and oceanic resources.

As we have pointed out earlier both the protection and maintenance end and the development and utilization end of the preservation-use spectrum are important. However, since the enumerations of the resources to be protected under the first part of the proposed section is different from the enumeration of those to be developed under the same part, the phrasing suggests that those who would have to interpret it should examine it closely to see what is in the protection enumeration that is not the development enumeration, and vice versa. Because the relative importance of preservation vs development of a particular resource may change from time to time, we suggest that it would be unwise to try to make a distinction in the Constitution between those resources in which preservation is the more important and those in which development is the more important.

The remainder of the first new section proposed is actually the language of the present Section 2 of Article X except as this language is preceded by the phrase: unless otherwise stated.

The second new section proposed would declare that notwithstanding the existence of vested water rights, the State is custodian of all the freshwater resources within its boundaries. The effect would presumably be to confirm that the State has the power to regulate all such resources. This is actually a present power of the State, one under which legislation has been passed controlling waste, controlling pollution, and controlling use more generally when and where water is limiting.

The second section would also require the legislature to vest in a single commission the authority to manage fresh water resources. This would require merging, in a single commission, managerial and regulatory authorities that are now spread between the Department of Land, Natural Resources, the Department of Health, and possibly other departments. As the conservator of public health, the DOH usefully has regulatory powers with respect to water quality. As the conservator of natural resources, the DLNR usefully has regulatory powers with respect to water flows. Although centralization of authority as proposed would have certain advantages, it would thus have disadvantages also. Placements of authority of this sort would best be left to legislation and not specified in the Constitution. Furthermore, whereas the term management applies well to the State functions that are appropriate in the case of water resources whose rights of use it owns and which it develops the term regulation seems a better fit to the functions that are appropriate in the case of those water resources that are subject to private water rights or development by private parties.

The second section would, in addition establish, as criteria for water resource management, the general welfare of the State, beneficial use, and the prevention of wasteful and unreasonable authorizations. Most of these are appropriate criteria whose explicit statement may be useful although it seems unnecessary in the light of other Constitutional provisions. It is, however, more precisely wasteful and unreasonable uses of water that is of concern, not the wasteful and unreasonable authorizations.

Proposal 757

Proposal 757 would replace Section 1 of Article X with a new section providing that the State has an interest in the natural resources within its domain, independent of and behind the title of all of its citizens. The intent appears to be to recognize the State's sovereignty over the natural resources and its powers to regulate uses. The actual language appears appropriate, although not that usually used.

The proposed new section would also provide that the State has the duty and power to conserve and protect the natural resources, and to develop and utilize them in the public interest. The proposal would thus rectify the unbalance represented in the present Section 1.

The proposed new section does not mention agricultural resources, and would thus appear to cancel certain powers and duties now placed in the legislation having to do with the non-natural aspects of agricultural resources.

Proposal 783

Proposal 783 would revise Section 1 to add geothermal and other energy resources to the specific natural resources it now lists. Since Section 1 already covers all natural resources, the addition is unnecessary, although the current interest in geothermal development suggests possible desirability to its explicit inclusion.

This proposal would also qualify the word development by the addition of the adjective ecological. The intent may be to emphasize that development should be ecologically conservative, but since conservation is already a requirement, the addition seems unnecessary. The actual language suggested would seem to alter completely the original intent of the use of the word development, which was development for human use.

Proposal 808

Proposal 808 would replace the present Section 1 with three new sections.

The first of the proposed new sections is similar to the first part of the first new section proposed in Proposal 701, and our comments on that section apply to this proposal. In addition, it should be noted that not all historic qualities should be maintained, as the proposal would require, nor should present cultural and aesthetic qualities where these present qualities are undesirable.

The second of the proposed new sections is identical to the present Section 2 and should not be adopted unless Section 2 is deleted or revised.

The third of the proposed new sections is identical to the second new section proposed in Proposal 701, and our comments on that section apply to this one also.