



# University of Hawaii at Manoa

**Environmental Center**  
Crawford 317 • 2550 Campus Road  
Honolulu, Hawaii 96822  
Telephone (808) 948-7361

Office of the Director

RL:0316

Proposals 50, 524, 678, 679, 698, 699, and 700  
RELATING TO WATER RESOURCES

Statement for  
Con Con Committee on Environment, Agriculture,  
Conservation and Land  
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by  
Williamson Chang, School of Law  
Doak C. Cox, Environmental Center  
Peter J. Rappa, Environmental Center  
Margaret Kimmerer, Environmental Center

Proposals 50, 524, 678, 679, 698, 699, and 700 would amend Article X of the Constitution to add certain provisions specific to water resources. This statement on the proposals does not reflect an institutional position of the University of Hawaii.

Article X, Section 1, already provides that the legislature shall promote the conservation, development and utilization of a natural resources including, specifically water resources. Because conservation is usually taken to mean the wise balance of preservation and development for use, the combination of conservation, development and utilization seems to emphasize unduly the development and use, even destructive use, of the resources. However, it is within the power of the legislature to determine where the balance is most wisely placed; no amendment of the Constitution is strictly necessary to provide the State with regulatory powers over its water resources; and the desirability of any amendment concerning water resources should be judged in accordance with the extent to which it clarifies the powers of the State and recognizes the needs to balance preservation and useful development of water resources.

## Proposal 50

Proposal 50 would express the right of the State to manage and control all water resources of the State. This power seems covered under the present Article 1 not merely as a right but as a duty. The proposal would make explicit the extension of the regulatory power to private property, but the power is not now limited to public property. Furthermore, the State has the power to condemn private property, including water rights, for public purposes. Although the reaffirmation of power to control may be desirable, the proposal adds no new powers to those already held by the State, and is better amended to the form of Proposal 524 which, in addition, to reaffirming state control, adds the reasonable and beneficial use criteria.

#### Proposal 524

The intent of Proposal 524 is to reaffirm, make more specific, and remind the legislature of the power of the State to regulate the development and use of the waters of the State. However, it is phrased as a statement that the waters themselves are subject to State regulation, overlooking the existence of natural hydrologic principles which the State has no power to change. Perhaps, the addition of "uses of water" to the first phrase would eliminate any doubt as to the purpose of the provision. The reasonable and beneficial-use measure that is indicated in the proposal is appropriate as applied to water development and use, and would provide broad guidelines for future legislative action to determine proper uses.

#### Proposal 678

Proposal 678 would declare that surface and groundwaters are the property of the State to be held in trust for the people. Although the term ownership is not used, the use of the word property suggests that the waters may be owned by the State. In actuality the concept of ownership is not usefully applied to the waters themselves because the operation of the hydrologic cycle can only be modified by human agencies, and water will continue to flow through the cycle for natural reasons. The use of the word "property" may lead to confusion and possible litigation. The same can be achieved by the use of "control" or "regulate" as used in Proposal 524.

The concept of ownership is usefully applied to water rights, that is rights to the use of water. There is an inconsistency in Proposal 678 between its provision in Part 1 that all waters are the property of the State and its recognition in Part 2 that there are vested appurtenant, riparian, and correlative water rights. This confusion is caused by the use of the word "property." These water rights were judicially declared and may be changed by later court decisions. Since they were defined by court decisions, the meaning or applicability of the several water rights doctrines mentioned in the proposal may be changed or abrogated by the courts in the future. Hence, the implications of their meanings may change in some way not foreseen by the Convention. Use of the terms "vested" and "guarantee" should be avoided since they may create doubt as to the power of the State to condemn property rights, which is a power that must be reserved to the State in order to effectuate a new water policy. Moreover, the U.S. Constitution already provides the needed security to protect property rights.

Proposal 678 would also establish a new Hawaii Water Authority to regulate and administer the water resources of the State. The functions of this proposed new authority are already in part performed by the Division of Land and Water Development of the Department of Land and Natural Resources, and the remaining functions could be placed in that Division under existing Constitutional provisions.

Because the Division of Water and Land Development has water- development responsibilities, it is questionable that that Division should continue to have the regulatory powers it now has, or additional regulatory powers, over the water developments of others. Creation of a new agency or board to perform the regulatory functions may be desirable. However, the Legislature already has the power to create such a new agency, and a Constitutional mandate for such establishment is neither needed nor appropriate. The critical question is whether the establishment of such a central agency is a decision best made by this convention or rather by the legislature, which would be in a better position to decide after appropriate study of the proper nature of the water management system.

### Proposal 679

Proposal 679 would declare that the waters of the State cannot be owned either individually or collectively. This is in accord with the principle that the concept of ownership cannot usefully be applied to the waters themselves but only to rights to their use and really need not be expressed. The proposal would also establish a water authority, a decision best left for the legislature as has been discussed in connection with Proposal 678.

### Proposal 698

Proposal would reaffirm the power now held by the State to condemn private water rights and rights of way. It would add nothing to the present power, and in placing this power in a Water Resources Agency, the implementation of its provisions and possibly even existing provisions would depend upon the approval of Proposal 699 which deals with the establishment of this agency.

### Proposal 699

Proposal 699 would establish a new Water Resources Agency to regulate and administer the water resources of the State. The guidelines to the reasonable and beneficial use of water that would be required of this agency would be necessary to the implementation of Proposal 700, if that were adopted. Our comments on the Hawaii Authority proposed in Proposal 678 would, apply to the proposed Water Resources Agency.

Under Section 1 of Article X, the State also already has the power to regulate water uses that is the principal topic of Proposal 700.

### Proposal 700

Proposal 700 would recognize the importance and limited extent of water resources. It would also declare that all water is public water to be controlled, distributed, managed or preserved by the State. The use of term "public water", while a better term than "ownership" may still cause confusion as to what the relationship of the public to the water is (e.g. "trust"?). This seems to confuse the matter of ownership of water rights, which we have discussed in connection with Proposal 678, with the matter of regulation of waters development and use while the reaffirmation of State control is desirable, it is, perhaps more succinctly stated in Proposal 524.

This proposal would also mandate that not only the State but every person has the affirmative duty to insure that water resources are used beneficially to the fullest extent possible and that waste or unreasonable use of water be prevented. The recognition of individual responsibilities in the conservation of water resources would be appropriate, but the establishment of individual duties of the sort proposed would be confusing in the light of the lack of consensus as to the distinction between uses of water that are beneficial and those that are wasteful, even in terms of overall public interests.

Moreover, it would create confusion as to whether private citizens are also duty-bound to enforce this provision against other citizens.

The proposal further would limit public expenditures for water development to those that are in the best interest of the people, which is surely appropriate but surely unnecessary of restatement in the Constitution. However, it does impose the same limitations on private expenditures without setting forth what constitutes the "best

interest of the people." The vagueness of this standard would have a detrimental effect on beneficial private expenditures. The statement that this section shall be self-executing as far as possible is contradictory to the statement that the legislature shall provide for its implementation.

Proposal 700 would seem to add nothing needed and appropriate to the present provision of the Constitution.

#### Conclusions

Among the several proposals considered here, Proposal 524 is simplest, best avoid confusing and litigation-creating language and best expresses the broad policy formulations which are appropriate for constitutional provisions. Proposal 524 would reaffirm the necessity of state regulation of water, and provide a basis for future state legislative action which might include the creation of a water resource agency to determine reasonable and beneficial uses and their relative importance.