MINNESOTA CONSTITUTIONAL STUDY COMMISSION

NATURAL RESOURCES COMMITTEE REPORT

This report constitutes committee recommendations to the Constitutional Study Commission. See the Final Report for the Commission's action which in some cases differed from the committee recommendations.

November, 1972

COMMITTEE

Representative Aubrey Dirlam, Chairman

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TABLE OF CONTENTS

The full Constitutional Study Commission failed to accept the recommendation of the Natural Resources Committee as to Section 2 of the proposed Environmental Bill of Rights, discussed on pages 6 and 7 of this report.

The Commission decided that before incorporating the procedural remedies of Section 2 into the Constitution, it would be wise to await the results of Minnesota's experience with the enforcement provisions of the 1971 Environmental Rights Act (Chapter 952, Regular Sessions Laws, 1971), since the procedural remedies of this legislation parallel those provided in Section 2 of the proposed Environmental Bill of Rights.

I. INTRODUCTION

The Natural Resources Committee was charged with examination of provisions of the Constitution which deal with natural resources. We were also assigned the responsibility of making a recommendation on a proposed "Environmental Bill of Rights."

The Committee held two public hearings. One hearing was in Moorhead on May 5, 1972, the other in St. Paul on June 6, 1972. The testimony presented to us centered on the environmental bill of rights. We also received a summary of testimony originally presented to the Education and Finance Committees on the matters of Trust Fund Lands. We did not believe it necessary to have this testimony repeated.

Our recommendations are in three parts. Part II of this report deals with the proposed Environmental Rights Amendment. Part III discusses the administration of Trust Fund Lands. Part IV considers other articles of the Constitution relating to natural resources.

II. ENVIRONMENTAL BILL OF RIGHTS

The issue

The Committee heard a number of witnesses who proposed including an "Environmental Bill of Rights" in the Minnesota Constitution. Such a bill of rights would provide an express recognition of the right of citizens to a healthy environment and articulation of the duty of state government to foster environmental protection. It might also include legal remedies for citizens who believe that their rights are inadequately protected by usual governmental processes.

Present constitutional provisions

There is no language in the present Minnesota Constitution dealing with this question.

The Bill of Rights in the Minnesota Constitution consists of restrictions on the power of government. It is negative language: the government shall not abridge freedom of speech, the government shall not establish a religion, etc. The entire concept of an Environmental Bill of Rights is the reverse of this. It would recognize a special, affirmative duty on the part of state government to promote a clean and healthy environment.

Thus the introduction of an Environmental Bill of Rights would be a departure from the traditional type of guaranteed right.

General iscussion

There appears to be universal agreement that protection of the environment is a prime duty of modern state government. As

pollution threatens our air and water and other kinds of poorly planned development pose a threat to our forests and lakes, the state has taken firm measures to combat these environmental threats.

The amendment of the Constitution to include a statement of a duty of the state to protect the environment would firmly articulate the importance of environmental matters to the people of Minnesota. It would serve as a constant reminder of this fundamental duty in the basic document of state government.

Procedural rights

Several witnesses who appeared before the Committee also asked that a constitutional amendment include some recognized and defined procedural rights, so that individual citizens (or groups of citizens) could go to court to enforce environmental rights, if the Legislature was remiss in enacting appropriate environmental legislation or if enforcement agencies failed adequately to enforce such laws. Suits might be brought either against the public enforcement agencies, to require them to impose or enforce more stringent standards, or against individuals or companies who were alleged polluters.

Traditional judicial doctrine has restricted the individual's access to the courts in such cases. Usually a plaintiff must show that he is an affected party, before he has "standing to sue". In some cases this has meant that interested individuals could not bring suit, because they could not show the necessary direct causal connection between the activity complained of and some demonstrable injury to them.

Those who have gone to the courts have also met other substantive and procedural barriers to relief. Parties are normally required to exhaust administrative remedies before going to the courts. Thus, before seeking judicial relief, the individual must go through the administrative agency. The courts will uphold the decision of the agency if there is "substantial evidence" to support it, thus giving the agency substantial leeway in determining the outcome of the case.

Proponents of an environmental rights amendment would like to have immediate access to the courts and to judicial remedies. If the Legislature or the enforcement agencies fail to adopt adequate standards for pollution control, they would like to have such standards promulgated and imposed by the courts.

At its Moorhead hearing, the Committee also received testimony indicating that judicial resolution of such disputes is not appropriate. Professor Carl Auerbach, a member of the Commission, indicated that judicial procedure is not adequate to handle such multi-party disputes. The controversies often involve a question of balancing economic and social interests. The decision-maker, whether judge or administrator, must weigh the relative damage of a limited degree of pollution against the advantage of relief of regional unemployment, for example. Since, in his view, these decisions are value judgments, they should be taken by officials who are politically responsible for the consequences of their actions. The courts can then determine whether there is adequate basis for the decisions by ordinary processes of judicial review.

Recommendation

For the reasons which appear below, the Committee recommends adoption of an Environmental Rights Amendment to the State Constitution. We believe that the provisions of the recently adopted Illinois Constitution provide a good model for use to follow. A bill to accomplish this result is included in the appendix to this report. The amendment would include both a declaration of public policy and a procedural section.

Declaration of public policy

The Committee believes that it is proper for the Constitution to contain a declaration of public policy of the state. Such a declaration would reaffirm the views of the people of Minnesota on protection of the environment. It would act as a constant reminder to the Legislature of this public concern. Protection of the environment is not a transient matter; it deserves constitutional recognition.

A declaration will serve as a guide to legislative, administrative, and judicial action. Clearly, the Constitution cannot contain all of the regulations and rules necessary to protect the environment. Much will remain for statutes, regulations, court and agency decisions, and other governmental action.

We believe the Illinois language declaring the public concern in the environment to be well drafted and appropriate for adoption in Minnesota. As altered to delete references to a particular state, it would provide:

> Section 1. The public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The law shall provide for the implementation and enforcement of this public policy.

Procedural rights

The Committee also believes that it is proper to include a declaration of the rights of individuals to resort to the courts to enforce their environmental rights. Substantive and procedural barriers to the judicial enforcement of such rights cannot persist in the face of strong public demand for such remedies. If there is a constitutional right, there must be an appropriate remedy.

Again, we believe that the Illinois language strikes the best balance between those who would leave such procedural rights to be spelled out by the Legislature and those who would detail them in the Constitution. As modified to fit Minnesota, the language would require:

> Section 2. Each person has a right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as may be provided by law.

This language would guarantee the existence of an individual remedy. If the Legislature failed to act to regulate such resort to the courts, the individual could proceed in accordance with the ordinary rules of civil procedure. If the Legislature unreasonably limited recourse to the courts, the individual could likewise resort to the courts.

The language would, however, permit the Legislature to prescribe reasonable limitations and regulations for the enforcement of such rights. It might, for example, require resort to the Pollution Control Agency before individual suits were brought, at least in some cases.

We do not believe that the problems associated with such class action suits have been sufficiently defined or resolved to permit the writing of detailed rules of procedure into the Constitution. We also do not believe that the details of rules of procedure belong in a constitutional document. We have, therefore, rejected the notion of spelling out these procedural rights in elaborate detail.

The principal effect of our proposal would be to enhance the status of procedural remedies which already exist, not to propose new ones. Individual rights to bring suits on environmental matters already exist under Chapter 116B of the Minnesota Statutes, the Environmental Rights Act of 1971, and under the class action provisions of the Rules of Civil Procedure. Our proposal will not abolish these remedies, but make them part of the constitutional protection available to citizens.

One of our reasons for choosing the language of the Illinois constitution is the experience which may be observed there. Since the section took effect on January 1, 1972, it is too soon to measure the problems and advantages experienced under the provision. By the time the Legislature meets to consider our recommendation, a full year of experience will have been observed. We recommend the Legislature examine this experience in considering the measure which we propose.

III. TRUST FUND LANDS

The issue

Do present constitutional provisions relating to the management and disposition of trust fund lands adequately meet the requirements of modern Minnesota? In particular, are the constitutional provisions relating to the trust lands too restrictive?

The constitutional provisions

The present provisions are contained in sections 4, 5, 6, and 7 of Article VIII, relating to the permanent school and permanent university funds, and in Article IV, section 32(b), relating to ther internal improvements trust fund lands.

History and administration of state trust lands

When Congress authorized the people of the Territory of Minnesota to call a convention to frame a state constitution, it offered to grant to the proposed state a substantial amount of land. Two sections in each township were set aside for public school purposes. Ten more sections were set aside to finance the construction of public buildings.

The state constitution "accepted, ratified, and confirmed" these grants of land and the conditions attached to them. Article II, section 3, provides that these conditions "shall remain irrevocable without the consent of the United States."

The lands have been managed in a number of ways. Some have been sold and the proceeds invested. Other land has been exchanged, so that the state could more easily manage them. Some land is held as part of state forests. Other land is outside of state forests, but continues to be held as public lands.

The Trust Fund lands are not the only state lands. Trust Fund lands are those given by the Federal government at the time of statehood, or lands substituted for them. Over the years, the state has also acquired other lands, by purchase, condemnation, or tax forfeiture. Many of these lands are also managed by the Department of Natural Resources, but they are not subject to the restrictions imposed on the Trust Fund Lands. These other lands are not discussed in the Constitution. Their management is entirely within the discretion of the Department, as directed by the Legislature.

The management of the Trust Fund Lands is, however, dictated by the Constitution and by the federal Enabling Act, which authorized the drafting of the first state constitution. These documents place great restrictions on the administration of this land.

Turst Fund Lands may be sold only at public sales. Thus an auction determines the best price for land, whenever it is desired to sell it. In the past much farm land was sold and the proceeds invested for the use of schools or the University. Very little land is sold now.

Some Trust Fund land, particularly the mineral rights on such land, is leased. Again, leasing is by public bidding. The Department of Natural Resources has long placed stringent ecological restraints on the development of such mineral leases.

Other Trust Fund Land has been designated as part of the State Forests. These forest lands are subjected to scientific timber management policies, consistent with sound principles for

the protection of the environment. Timber on these lands is periodically cut and sold. The proceeds of the sales are used for reforestation and forest management. Any "profit" on the transaction is paid to the school funds.

Problems presented to the Committee

The principal question relating to the use of Trust Fund lands is whether these lands could be set aside for non-income producing purposes. The Trust Fund lands must be managed for income, although ecological considerations are important in the minds of those responsible for their administration. A scientific or natural area is probably not income-producing. Hence trust administrators would consider such use of Trust Fund lands a violation of their obligations.

A similar question arose several years ago, with respect to the transfer of Trust Fund lands to the federal government for the Voyageurs National Park. At that time, it was concluded that the only proper approach would be to condemn the land, pay for it, and invest the proceeds for school purposes. Thus the School Trust Fund was treated like any other trustee or owner of land and received compensation. The competing public use made a payment for the land which it took.

Indeed, even schools have been held unable to take School Trust Fund lands without paying for them. In 1914, the courts ruled that one school district, which wanted to use Trust Fund land for a new school building, would have to institute a condemnation proceeding in the courts and pay the award made by a jury.*

*In re Condemnation of Lands, 124 Minn.271,144 N.W.960 (1914)

While the State Forests are, in one sense, investments of the public in the natural resources of the State, they can also serve to provide other uses to the citizens. At most places, the State Forests can provide some recreational resources for the people of the State. They can provide "green space." Since the State committed itself, when accepting the lands, to use the proceeds for school purposes, the principal objective must be sound management for income, consistent with overriding public concerns. Thus Trust Fund lands in State Forests can never be "wilderness areas," since this would not provide the kind of support for schools required by the Trust undertaking. Nor can they be state parks, with developed and permanent recreational facilities.

These are very good arguments for preserving and protecting wilderness areas, scientific areas, and parks. The Legislature can accomplish this by appropriating the necessary funds for the purchase of land. In proper circumstances it ought to do so. The stream of future finance for the schools, which the Trust Fund lands represent, ought to be protected too.

The Minnesota Public Interest Research Group also presented a statement at our June 5 hearing, requesting amendment of Sections 4 and 5. This amendment would require certain conditions for the sale or lease of trust fund lands. The Department of Natural Resources has long insisted on stringent conditions for ecological protection in the leases which it issues. Decisions to sell Trust Fund lands are now infrequent. Both matters appear to us to be better suited for legislative action than for constitutional change if any further environmental protection is

really needed. This is particularly true in light of our recommendations in Part II of this report.

Accordingly, the Committee recommends that the provisions of Article VIII, Secs. 4, 5, 6 and 7, relating to Trust Fund lands and their administration, be retained without amendment. Other portions of these sections, relating to the investment of cash funds, are within the purview of the Finance Committee; we make no recommendations with respect to them.

The Committee recommends that the Trust Fund provisions of Article VIII, relating to lands, be unaltered. We are advised that the Structure and Form Committee is proposing that Article IV, Section 32(b), be repealed and that lands in the Internal Improvements Fund be transferred to the Permanent School Fund. We concur in this recommendation. The trust provisions of Article VIII should provide adequate protection for the public.

IV. OTHER PROVISIONS

Two other articles of the Constitution lie within our purview. These are Article XVII, Forest Fire Prevention, and Article XVIII, Forestation.

Article XVII, Forest Fire Prevention

We received no testimony concerning this article. We believe that everyone agrees that forest fire prevention is desirable. The only question is whether this article is necessary in order to accomplish the desired result.

In 1923, the Minnesota Supreme Court held that the building of fire breaks was an "internal improvement," prohibited by Article IX, Secs. 5 and 10. Amendment XVIII was adopted in 1924 to make it clear that the State could engage in such works.

Since 1923, judicial interpretation of what is an "internal improvement" has changed considerably. Furthermore, we understand that the Finance Committee may make recommendations for the amendment of the sections involved, so that the Legislature could engage in works like this without specific constitutional authorization. If this occurs, the authorization contained in the amendment would become surplus language and could safely be repealed.

Article XVII does, however, seem to authorize several matters which would not be encompassed by a mere repeal of the prohibition on internal improvements. It authorizes the contracting of state debt for this purpose. It thus adds to the Legislature's rather limited authority to contract state debt (see Article IX, Sec.6, Subd.2(b)).

The article also authorizes the assessment of benefits against the lands benefitted. It may thus authorize a form of improvement tax, not assessed on an ad valorem basis. Under Article IX, Sec.1, this may be done only by municipalities.

The effect of this article may also be to override some restrictions on the use of State Trust Fund lands. The article may authorize the appropriation of benefit charges from the income of such lands. This is something which the Legislatu could not do without specific amendment.

Section 1 of the article thus appears to have continuing vitality. Section 2, however, seems to have served its purpose. It might be repealed as part of a general removal of obsolete language.

Accordingly, the committee recommends no immediate change in Article XVII, Sec.1. If there are adequate changes in Article IX, Article XVII might be substantially shortened or even eliminated. Article XVII, Sec.2 may be removed as part of a repeal of obsolete language.

Article XVIII, Forestation

Like its predecessor, Article XVIII was enacted to permit the State to engage in forestation projects. These would otherwise have been prohibited by the "internal improvements" language of Article IX, Sec.10. This amendment also authorizes a special tax treatment for forest lands, thus perhaps creating an exception to the provisions of Article IX, Sec.1.

We believe that both of these powers should be retained by the Legislature. If the language of Article IX remains as it is, the language of Article XVIII must be retained in order to accomplish this result. If the language of Article IX is altered, Article XVIII might be amended or totally removed from the Constitution, if it is clear that the Legislature retains the powers which are presently enumerated in it.

The Committee recommends no immediate change in Article XVIII, Sec.1. The need for this article should be reexamined if there are substantial changes in Article IX. Section 2 of this article might be repealed as part of a general repeal of obsolete language.

V. SUMMARY OF CONCLUSIONS

The Committee recommends the adoption of an Environmental Rights Amendment, patterned after the Illinois provision. A bill for the proposal of such an amendment is included as an appendix to this report.

The Committee has concluded that the present language relating to Trust Fund lands is adequate and should be retained. We see no special need for amendment or change.

The Committee has decided that Articles XVII and XVIII, relating to Forest Fire Prevention and Forestation, do not require immediate change. If there is revision of the internal improvements provisions of the Finance Article, several provisions of Article XVII and XVIII may become redundant and could be repealed without impairing the power of the Legislature to act in these fields. We recommend reexamination of these articles, if such amendments are proposed or adopted. Section 2 of each of these articles has served its purpose and could be repealed as part of a general removal of obsolete language.

APPENDIX A

Research Papers Prepared:

Richard Holmstrom, "Trust Fund Lands"
Richard Holmstrom, "Environmental Bill of Rights"
Richard Holmstrom, "Supplement to the Report on an Environmental Bill of Rights"

Witnesses Presenting Evidence to the Committee:

Peter Benzian, Minnesota Public Interest Research Group
Edmund Bray, The Nature Conservancy
Howard Vogel, Minnesota Environmental Control Citizens Association

Statements Received:

Governor Wendell Anderson
C. B. Buckman, Deputy Commissioner of Department of Natural Resources
Marion Watson, League of Women Voters

Others Invited to Make Statements:

Advisory Committee to the Commissioner of Natural Resources on Scientific & Natural Areas
Agricultural Stabilization Conservation Service
Air Pollution Control Association
American Fisheries Society
Association of Minnesota Counties
Association of Minnesota Division of Lands and Forestry
Cedar Valley Conservation Club
Central Conservation Association
Citizens for Integration of Highways and Environment
Clear Air, Clear Water, Unlimited
Committee on Urban Environment
County Land Commissioners Committee
Department of Agriculture, State
Department of Natural Resources, State
Department of Taxation, State
Environmental Health Division
Environmental Law Committee
Environmental Protection Agency
Environmental Planning
Environmental Sciences Foundation
Friends of the Wilderness
Land Exchange Review Board
Long Lake Conservation Center
MECCA
Metro Clean Air Committee
Minnesota Association for Conservation Education
Minnesota Conservation Federation

Minnesota Council of State Parks
Minnesota Environmental Defense Council
Minnesota Environmental Resources Council, Inc.
Minnesota Federation of Labor
Minnesota Out of Doors
Minnesota Police and Peace Officer's Association
Minnesota Public Interest Research Group
Minnesota Recreation and Park Association, Inc.
Minnesota Tree Farm Committee
Minnesota Water Resources Board
National Wildlife Federation
Nature Conservancy
North Central Forest Experiment Station
Save Lake Superior Association, Inc.
School of Forestry
Scientific and Natural Area Committee
Sierra Club
Soil Conservation Service
Soil Conservation Society
Southern Minnesota Conservation Association
State Soil and Water Conservation Commission
Timber Law Committee
Timber Producer's Association
Upper Midwest Research
W-168 Health Service
Wilderness Watch

Outdoor Writers:

Jim Peterson, Outdoor News
Hank Kehborn, St. Paul Pioneer Press
Ron Schara, Minneapolis Tribune
Joe Hennessy, Minneapolis Star
Bob Gologoski, St. Paul Dispatch
Rog Vessels, Sun Newspapers
United Northern Sportsmen
Upper Mississippi Valley Section, Soc.of Am.Foresters
Izaak Walton League
The Wildlife Society, St. Paul
The Wildlife Society, Fergus Falls

APPENDIX B

A bill for an act

proposing an amendment to the Minnesota Constitution, by adding an article; providing for public policy and private rights relating to environment.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. The following amendment to the Minnesota Constitution, adding a new Article XXII, is proposed to the people. If the amendment is adopted, the article shall read as follows:

Article XXII

Section 1. The public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The law shall provide for the implementation and enforcement of this public policy.

Sec. 2. Each person has a right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as may be provided by law.

Sec. 2. The proposed amendment shall be submitted to the people at the 1974 general election. The question proposed to the people shall be:

"Shall the Minnesota Constitution be amended to state public policy and private rights relating to environment?

Yes_____

No _____"