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Constitutionalism and Ecology

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NOTES

CONSTITUTIONALISM AND ECOLOGY

> There is an insidious logic that implies that men must adapt to machines, not machines to men; that production, speed, novelty, progress at any price must come first, and people second; that mechanization may be pushed as far as human endurance will allow.
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> We have mastered the arts of animal husbandry, we know the life laws of crops and insects, we know how to plan our agricultural output. In effect, we have enhanced the future of everything—except the overall future of the human race.
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> We have learned neither how to grow, nor at what pace, and THAT is our failing and our future trouble.
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> The time has come for us to evolve an ecology of man in harmony with the constantly unfolding ecologies of other living things. We need a man-centered science which will seek to determine the interrelationships of life. . . . Our goal should be to accomplish both full production and the full life. . . prosperity that will include prosperity of the human spirit . . . we need to realize that: bigger is not better; slower may be faster; less may well mean more.[1]

I. Introduction

Concern for the environment in the past decade has come to extend beyond the province of a few educators and private agencies to become an object of national attention. New theories on its preservation arise daily. In this context, this note will examine the present problem in North Dakota; will explore legislation in effect and note its deficiencies; will examine common law remedies and note

1. S. UDALL, MAN, AN ENDANGERED SPECIES, U.S. DEPARTMENT OF THE INTERIOR CONSERVATION YEARBOOK No. 4, at 3 (1970).

their deficiencies as well; and will suggest an alternative solution—namely, the inclusion of a new environmental clause within the North Dakota Constitution.

A. The Scope of the Problem

"There is, of course, pollution in the Red River here. There is pollution in the Red River all the way from its source to the mouth of the River in Canada."[2] This statement was made six years ago.[3]

Problems were recognized years ago. What has been the result? The 1970 Report of the Souris-Red-Rainy River Basins Commission notes: "Surface water quality in the Red River Basin is satisfactory during normal years, *despite an increasing degradation in the Red River proper.*"[4] The report continues, "Mainstream and Red River water is not considered suitable at this time for recreational activity involving water contact."[5]

The Red River is not North Dakota's only pollution problem, though it is the most blatant. The report of the Commission cited above further notes: "The greatest problem in the Souris Basin is the high chemical content, and water in this basin *is marginal at best.*"[6] (emphasis added).

This report summarizes:

> Each of the basins suffer to some extent from eutrophication of its lakes. Lake Metigoshe, in the Souris, is losing recreation and wildlife values because of eutrophication. Serious eutrophication[7] exists and many of the lakes in the area have lost value as recreational sources.[8]

North Dakota's pollution problems are not limited to water. In May of 1969 the Grand Forks Herald reported that hundreds of song birds were killed in Grand Forks due to the aerial spraying of mosquitoes.[9] A similar event took place in Fargo, and considerable property damage resulted.[10] The growth of industry and tremendous

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2. K. ROLVAAG, PROCEEDINGS CONFERENCE: IN THE MATTER OF POLLUTION OF THE INTERSTATE WATERS OF THE RED RIVER OF THE NORTH 5 (1966).

3. PUBLIC HEALTH SERVICE OF MINNESOTA, PROCEEDINGS CONFERENCE: IN THE MATTER OF POLLUTION OF THE INTERSTATE WATERS OF THE RED RIVER OF THE NORTH 99 (1966):

> Sewage and industrial wastes discharged into the Red River of the North and the Red Lake River from Minnesota cause pollution in the interstate waters of the Red River of the North which endangers the health or welfare of persons in North Dakota. . . .

4. ANNUAL REPORT OF THE SOURIS-RED-RAINY RIVER BASINS COMMISSION 9 (1971).

5. *Id.* at 9.

6. *Id.* at 9.

7. "Eutrophication" is defined as the increase of mineral and organic nutrients which reduces the dissolved oxygen in a body of water.

8. ANNUAL REPORT OF THE SOURIS-RED-RAINY RIVER BASINS COMMISSION 9 (1971).

9. Grand Forks Herald, May 26, 1969, at 1, col. 3.

10. The Fargo Forum, Aug. 1, 1969, at 1, col. 2.

potential for industrialization in the state opens far more avenues for the pollution of North Dakota's air.

Mr. H. R. Morgan, field representative for the National Wildlife Federation, after witnessing the burning of crude oil in North Dakota's oil fields noted: "After a few hours in this field, where I witnessed accumulations of oil being burned from waste collection pits with the resulting black clouds of smoke, I felt physically ill and mentally depressed."[11]

In addition, the problem of aerially applied economic poisons arises. In 1968 North Dakota ranked first in the amount of herbicides applied to 10,776,618 acres of cropland.[12] Most of these herbicides are aerially applied. The effects are only now beginning to be realized.[13]

This summary only highlights air and water pollution problems because they are most evident and because the most extensive studies have been carried on in these areas.[14]

Though causes are many and varied, the Director of the Division of Water Supply and Pollution Control in the state suggests a major source of concern in North Dakota:

> There are some authorities in the field who state that agricultural wastes are the biggest source of pollution in our nation. Certainly the control of pollution from this source presents a highly complex problem to State water pollution control agencies because of the many factors involved and because the wastes are not at a point source entering the river but from thousands of points. In addition, there are many aspects of the problem of wastes from agriculture which are very variable. There is still much research needed into the problems of control of silt, of pesticides and herbicides in runoff from agricultural areas, in the amounts of nitrates, phosphates, and other nutrients in fertilizers being used which may be carried off the fields, and this, too, would of course be dependent upon the type of soil. As noted, feedlots are only part of the problem but it is felt that there is enough knowledge to begin working on this problem even though in this field there are numerous questions which are still unanswered.[15]

Accepting the conclusion that pollution does exist in North

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11. Morgan, *Conservationists and Responsibilities for Their Environment,* CONSERVATION NEWS, Jan. 1, 1969, at 4.

12. Note, *The Peril of Air Pollution in North Dakota,* 46 N.D. L. REV. 217, 222 (1970).

13. Among the effects are the gradual extinction of some species and high incidence of DDT-infected tissue in animals high in the food chain. A high incidence of DDT has been found in mothers' milk.

14. Nor is this discussion of air and water pollution problems intended to be exhaustive.

15. Letter from Norman L. Peterson to authors, Sept. 1, 1971. (Hereinafter referred to as letter from Peterson.)

Dakota, that many of its causes are identifiable, and that the problem is becoming more serious all the time, it must be asked why this is so. Is there legislation in North Dakota designed to protect the environment? If so, is it effective? If not, why not? If it is not, can it be made effective, or must we look to other solutions? Do other sources of law exist which offer effective protection?

II. Existing Legislation and Its Enforcement—An Overview

A. *Water Pollution*

The North Dakota Century Code provisions authorizing the "control, prevention, and abatement of pollution of the surface waters of the state" extend from section 61-28-01 through section 61-28-08. The first inadequacy is apparent on the face of the provisions.

The title indicates that the provisions are applicable only to "surface" waters of the state. Yet, section 61-28-02(6) purports to cover ground as well as surface water. Furthermore, both the State Health Department and the State Water Commission have some role relating to water pollution; yet these provisions prescribe a separate water pollution control board as well. And if the problem is oil field pollution, it appears to be within the jurisdiction of the Industrial Commission.[16]

Members of the State Water Pollution Control Board, who are not already in the employ of state agencies, serve without compensation. No matter how dedicated the individual, to serve without compensation on such a Board could only strain the time and resources of the average member. This is even more true when one considers the composition of the Board. The ten members include the already deluged heads of the departments of health, water conservation, and game and fish, the state geologist, four citizen members representing municipal, industrial, wildlife and agricultural interests, and two citizen members representing at-large interests.[17]

Not only do some of the members serve without pay, thereby placing little or no obligations upon any of them, but also, four of the members are chosen to specifically represent special interests.

The problem with special interest group representation is that representation by such interests is contrary to the purposes of such a board. The interests of political subdivisions, usually municipalities, are represented on the control boards. It would seem that munici-

16. Address by Robert E. Beck, Prof. of Law, University of North Dakota, at Annual Meeting of Action Committee for Environmental Education, Bismarck, North Dakota, Feb. 28, 1970. (Hereinafter referred to as Address by Prof. Beck.)

17. N.D. CENT. CODE § 61-28-03 (Supp. 1971).

palities, particularly cities, would have a stake in effective regulation. However, it is municipalities which face financial crisis and upon which the withdrawal of industry will have the greatest effect. Municipalities may oppose effective regulation not only because they fear competitive disadvantage in seeking industry, but also because they themselves constitute a large class of polluters.[18]

It could, however, be argued that representatives of the general public, the heads of the various state departments, act as countervailing forces to industry, municipalities and agriculture.[19] Since "conservation oriented" departments are designated by the Code, such a conclusion does not appear altogether illogical at first glance. Various weaknesses, however, are apparent here as well.

Though the departmental heads are designated as members, the actual selection process goes beyond legislative designation—i.e., the department head designated is also delegated the power of selection since he may choose a member of his agency for the position and no limitations are put upon such a selection.[20]

Furthermore, even assuming that these representatives of the general public are numerous enough and interested enough to provide a balancing influence, to whom does such a public representative look for support when confronted with other well organized special interest groups? The general public? And, more importantly, how does he measure the interest of the general public? Public interest is neither identifiable nor predictable as a balancing of other interests.[21]

Another clear defect in water pollution legislation is a statute designating the priorities of water use.[22] It reads:

> In all cases where the use of water for different purposes conflicts, such uses shall conform to the following order of priority:
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> 1) Domestic use.
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> 2) Livestock use.
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> 3) Irrigation and industry.
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> 4) Fish, wildlife and other outdoor recreational uses.[23]

When one considers the continuing eutrophication of lakes and other

18. Vaughn, *State Air Pollution Control Board: The Interest Group Model and the Lawyer's Role,* 24 OKL. L. REV. 39 (1971).

19. *Id.* at 39.

20. N.D. CENT. CODE § 61-28-03. (1960).

21. Vaughn, *supra* note 18, at 41.

22. N.D. CENT. CODE § 61-01-01.1 (1960).

23. *Id.*

recreational areas cited at the opening of this paper,[24] the low priority of such areas appears misplaced. This is especially true when one considers the fact that the above priorities are those established for the entire state, not only the densely inhabited regions.

Also, as mentioned previously,[25] the North Dakota Water Conservation Commission has a role in water pollution control in that it is the department responsibile for a system of water appropriation in the state. However, the question arises as to whether the Commission has sufficient police powers to supervise the system.[26]

The State Health Department, too, has a role in the control of water pollution.[27] However, it has been noted:

> One of the problems facing this Department is lack of personnel. We have *only two full* time people for *both field work and office work*. In addition, we have *one man* whose job it is to take care of the stream monitoring program. We have thirty stations scattered throughout our state which must be visited and samples taken on a monthly basis. As a result, we must necessarily point our efforts toward solution of the more serious pollution problems and sometimes a private individual's over-flowing septic tank may have to wait until there is time to check into it.[28] (emphasis added).

B. *Air Pollution*

North Dakota has an Air Pollution Control Act.[29] Its provisions are subject to some of the same criticisms already levelled at the Water Pollution Control legislation.

The Air Pollution Control Advisory Council is delegated the duty of advising the State Health Department in matters pertaining to environmental protection. Among special interest groups represented on that Council are county or municipal government, the solid fuels industry and the fluid and gas fuels industry. Three other members are heads of state departments who have authority to delegate their positions to others in their departments. The Council purportedly does not have any enforcement powers. However, its "approval" is required before the Health Department may adopt, amend, or repeal the rules and regulations implementing the Act.[30]

The Air Pollution Control Act, on its face, appears to provide adequate authority to control most air pollution in the state. However,

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24. *See* notes 5-8 *supra*.
25. *See* note 16 *supra*.
26. Address by Prof. Beck.
27. *See* note 16 *supra*.
28. Letter from Peterson.
29. N.D. CENT. CODE ch. 23-25 (Supp. 1969).
30. *Id.*

the laws themselves are useless without proper enforcement, and the enforcement is seriously hampered:

> The State Department of Health's budget for air pollution control in 1971 was $30,000. In 1972 it has risen to $65,000. In 1971 there were 2.75 professional people on the staff in air pollution. Currently we have 3.05 professional people, our engineer's position has yet to be filled. Our budget of $65,000 a year and our staff of 3.05 professional people is, in my opinion, still inadequate to do a good job of air pollution control in the State.[31]

The statement above woefully understates the total inadequacy of the budget and enforcement capabilities.

North Dakota has no laws controlling agriculturally related air pollution such as windblown dust, airborn pesticides and herbicides caused by poor spraying practices and dust from harvesting operations. The problem of insecticides, pesticides and herbicides is one which requires more specific legislation than present law provides,[32] although they can be considered air contaminants as defined in chapter 23-25 and regulated under this law. The problem of land use, transportation control and motor vehicles are other areas that need more specific legislation.[33] Under section 23-25-01 (1) of the North Dakota Code, an air contaminant is defined as ". . . dust, fumes, mist, smoke, other particulate matter, vapor, gas, or a combination thereof, not including water vapor, water mist, or steam condensate." The difficulty of including economic poisons within this definition is that none of the categories adequately describes the method of application of such poisons.[34] In addition, only in the 1971 Legislative Session were herbicides even included within the definition of "economic poisons"[35] for purposes of regulation under the North Dakota

31. Letter from Dana K. Mount, Division of Environmental Engineering, State Department of Health, to authors, Sept. 7, 1971. (Hereinafter referred to as Letter from Mount) The North Dakota State Department of Health will submit an implementation plan pursuant to 42 U.S.C. § 110 (1971) for "implementation, maintenance, and enforcement" of a national primary ambient air quality standard. If such a plan is acceptable to the Air Pollution Control Office of the Environmental Protection Agency, North Dakota will gain additional federal funds. If approval is withheld, the federal government will initiate its own state-wide plan.

32. Note, *Pesticide Use and Liability in North Dakota*, 47 N.D. L. REV. 335 (1971).

33. Letter from Mount.

34. The most likely classification of herbicides *et al*, would appear to be "particulate matter." Atmospheric particulate matter has been classified as smoke, dusts, mists, and fumes with each reflecting the source or nature of the particulate. Further qualification of this definition cited in the *Hearings on Air Pollution Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 90th Cong., 2nd Sess., at 1043 (1968), states that, "Suspended particulate matter is generally considered to consist of any or all of the particles mentioned previously, (smoke, dust, mists, and fumes) when they are of such a size and density that they tend to remain suspended in the atmosphere—i.e., settle slowly if at all." This definition appears to require a certain quantity and duration before the particulate matter would be considered as air pollution. Making such a determination through normal air sampling methods, however, may be impossible.

35. N.D. CENT. CODE § 19-18-03 (Supp. 1971). *See also* Note, *Pesticide Use and Liability in North Dakota*, 47 N.D. L. REV. 335, 336 (1971).

Insecticide, Fungicide, and Rodenticide Act. It has also been noted:

> North Dakota has vast reserves of lignite coal in the western half of the State and the potential growth in the number of power plants burning lignite to make gas, oil, and other chemicals would appear to be quite substantial in the near future. It is hoped that the new Federal laws and regulations and the State laws and regulations will be adequate to control air pollution from these plants, but the sheer number of these plants that is possible in the future may present a serious air pollution problem even though the most efficient control equipment that present technology can provide is applied to these plants.[36]

North Dakota also has a weather modification statute which limits to licensed personnel the right to attempt weather modification. However, enforcement here is left to the Aeronautics Commission, and the special interests represented within that Commission present further problems.[37] It was that Commission's lobbying in the main which caused the 1971 Legislature to eliminate a provision from the North Dakota Code allowing the judicial application of "strict liability" concepts to aerial sprayers.[38]

C. *Conclusion*

The problem in North Dakota, therefore, is not a lack of law. The problem is, rather, that the laws have numerous deficiencies, especially as to enforcement capability. And enforcement deficiencies are directly related to a lack of dedication to the principals of a clean environment.

III. THE TRADITIONAL LEGAL THEORIES—AN OVERVIEW

The usefulness of the traditional legal theories such as private nuisance, public nuisance, trespass, negligence, and strict liability, for controlling pollution in North Dakota is not clear. Case law in

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36. Letter from Mount.

37. Note, *Pesticide Use and Liability in North Dakota,* 47 N.D. L. REV. 335, 347 (1971).

38. Address by Harold Vavra, Director North Dakota Aeronautics Commission, Annual Aerial Sprayers Seminar, Devils Lake Junior College, May 1971.

In addition, in 1969, the North Dakota Legislature passed legislation requiring that mine-owners reclaim strip-mined land. Such strip-miners are required to get a permit, deposit $200 per acre bond, present a reclamation plan acceptable to the Public Service Commission and implement that plan. The law, however, applies only when the overburden exceeds ten feet in depth and, more importantly, it does not appear that the Commission may deny a permit to someone who has given them trouble before. N.D. CENT. CODE ch. 38-14 (Supp. 1971).

Another statute requires that, if trees are cleared up to a river bank in flood areas, trees must be planted back for at least 200 feet. Whether this requirement is enforceable is questionable since no enforcement machinery has been set up. N.D. CENT. CODE § 61-16-11(18) (Supp. 1971).

The 1971 Legislature also passed a noise pollution control statute so devoid of enforcement capability as to be inconsequential. N.D. CENT. CODE § 23-01-17 (Supp. 1971).

these areas is often insufficiently developed to determine if they would be helpful in controlling environmental degradation. Therefore, this overview, will attempt to predict the utility of these legal theories on the basis of general case law from other jurisdictions, where North Dakota law is insufficient.

A. *Private Nuisance*

The law of private nuisance in North Dakota comes from essentially two sources: statute[39] and common law.[40] The common law of private nuisance prohibits the unreasonable use of property so as to substantially interfere with the use and enjoyment of another's property.[41] At first glance, a private nuisance suit, possibly resulting in an injunction, would appear to be an effective means of controlling pollution; however, further scrutiny shows that there are formidable obstacles to any plaintiff's success.

For the plaintiff to recover, he must first prove that defendant's use of his property has been unreasonable. The North Dakota Supreme Court states the requirement in this manner:

> The ultimate question in each case involving an alleged nuisance is whether the challenged use is reasonable in view of all the surrounding circumstances.[42]

The plaintiff must also show a substantial interference with his property interests resulting from the defendant's use of his land,[43] the state of mind of the defendant being irrelevant.[44] This requirement presents two obstacles to the plaintiff. First, he must show a substantial interference with the enjoyment of his land, which is different from that suffered by the public generally.[45] Second, he must show that the substantial interference was caused primarily by the defendant. Thus, even though substantial pollution exists, such as water pollution that kills fish in the rivers or air pollution that kills birds or wildlife,[46] a private individual cannot bring the action because he cannot show some special injury, different in kind and degree from that suffered by the public generally.[47] Further, the sec-

39. N.D. CENT. CODE §§ 42-01-01, 02, 03 (1960).

40. The case law does not indicate the potential limits of the law of private nuisance clearly. However, many cases would seem to be good starting points for the development of private nuisance as a legal tool for controlling pollution.

41. *See generally* Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968).

42. Ingmundson v. Midland Continental R.R., 42 N.D. 455, 173 N.W. 752 (1919).

43. Town of Colton v. South Dakota Cent. Land Co., 25 S.D. 309, 126 N.W. 507 (1910).

44. Thorson v. City of Minot, 153 N.W.2d 764 (N.D. 1967).

45. Pace v. American Radiator and Standard Sanitary Corp., 346 F.2d 321, 323 (7th Cir. 1965).

46. Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195 (Ore. 1939); Goldsmith & Powell v. State, 159 S.W.2d 534 (Tex. Civ. App. 1942).

47. Pace v. American Radiator and Standard Sanitary Corp., 346 F.2d 321, 323 (7th Cir. 1965).

ond requirement of showing a causal connection between defendant's activities and the alleged interference can prevent recovery in cases where a large number of polluters contribute to the fouled air or water, making it impossible to determine the individual responsibilities.

The final and most important obstacle to a plaintiff's using private nuisance as an effective tool for controlling pollution is the difficulty encountered in securing an equitable injunction as opposed to money damages. Traditionally, the courts have been reluctant to grant injunctive relief because they felt that the remedy is harsh and one not to be employed unless the facts undeniably demand it. This reluctance is exemplified by the application by the courts of the doctrine of comparative injury in dealing with a suit for an injunction.[48]

Today, nuisance appears to be of diminishing significance in controlling pollution since the problems described above cause litigation directed against large industrial and municipal complexes to be prohibitively expensive, thereby forcing many potential plaintiffs to submit to a polluted environment rather than bear the high cost of litigation.[49]

B. *Public Nuisance*

The North Dakota Century Code defines a public nuisance as "one which at the same time affects an entire community or neighborhood or any considerable number of persons. . . ."[50] and limits the remedies for such a nuisance to action by the state unless the private individual can show a special injury.[51] Because of its wide diffusion, pollution affects many people in an equal degree.[52] Therefore, the usefulness of public nuisance as a device for controlling pollution would seem to greatly depend upon the questionable effectiveness of the state enforcement officials who are hindered by such problems as political pressure and inadequate budgets.[53] In addition, public nuisance has been historically associated with abatement of brothels, gambling dens, and similar institutions, and the case law

48. Note, *Environmental Law: The Price of Pollution,* 39 U.M.K.C. L. REV. 200, 203 (1970); The court in Boomer v. Atlantic Cement Co., 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (1967), while not expressly saying so, in fact applied the comparative injury doctrine. This doctrine requires the court, in a suit for an injunction, to balance the loss to the plaintiffs if the nuisance is continued against the loss to the defendants and the public if it is enjoined.

49. This survey of the difficulties encountered in using the private nuisance action to control pollution is not comprehensive. Other obstacles exist such as the doctrine of "coming to the nuisance", "balancing of equities", "laches", and "assumption of risk".

50. N.D. CENT. CODE § 42-01-06 (1960).

51. N.D. CENT. CODE § 42-01-08 (1960); If special injuries can be shown the plaintiff would in effect be pursuing a private nuisance action and be confronted with the problems discussed in the section dealing with private nuisance.

52. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights,* 1967 DUKE L. J. 1126, 1135.

53. Reitze, *Pollution Control: Why Has It Failed,* 55 A.B.A.J. 923 (1969).

is not easily transferable to problems of the physical environment.[54] Thus, public nuisance, like private nuisance, would at best be of questionable utility to the environmentalist.

C. *Trespass*

A trespass is defined as an actionable invasion of interests in the exclusive possession of land.[55] To establish trespass, one need only show an intentional, unprivileged entry onto the land.[56] This requirement of proof has traditionally been a difficult one in an anti-pollution lawsuit because it was necessary to show a direct physical entry by an "object," which was defined by some courts as a thing more substantial than a particle of smoke or dust. In addition, if an intervening force, such as wind or water, carried the contaminating objects onto the plaintiff's land, some courts held that the entry was not "direct" enough to constitute a trespass.[57] However, in a landmark decision, the Supreme Court of Oregon held the Reynolds Metal Company liable in trespass when flouride compounds in the insubstantial form of gases and particulates drifted from its plant chimney and settled on plaintiff's land.[58]

In upholding the lower court's award to the plaintiff, the court discussed and dismissed the former impediment to recovery in trespass for pollution by stating:

> The view recognizing a trespassory invasion where there is no 'thing' which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a direct invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E=mc^2$ has taught us that mass and energy are equivalents and that our concept of 'things' must be reframed. . . . Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.[59]

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54. Note, *Environmental Law: New Legal Concepts in the Antipollution Fight*, 36 Mo. L. REV. 78, 84 (1971).
55. Note, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1115 (1970).
56. Note, *Environmental Law: New Legal Concepts in the Antipollution Fight*, 36 Mo. L. REV. 78, 84 (1971).
57. *Id.* at 85.
58. Martin v. Reynolds Metal Co., 342 P.2d 790 (Ore. 1959).
59. *Id.* at 793-94.

While this case would seem to foretell wider use of trespass as a legal weapon against polluters, there remain some major obstacles to such use.

Greatest of these obstacles is the defense of prescriptive rights, whereby, if the trespass has occurred over a long period of time, the polluter-trespasser may have acquired a prescriptive right to continue his activity.[60] In addition, the difficulty of pin-pointing the source of the pollution which caused the injury to the plaintiff, the courts' tendency to balance the equities, and the cost of litigating against large economic interests discourage prolific use of trespass.[61]

D. *Negligence*

Negligence is the failure of a person to observe, for the protection of another's interests, that degree of care, precaution, and vigilance justly demanded by the circumstances, by reason of which failure such other person suffers injury.[62] This definition would seem to make recovery from the defendant conditional upon two elements: a showing that defendant was negligent and showing of a causal relationship between his negligence and the plaintiff's injury.[63] However, difficulty would be encountered by the environmental litigant in trying to show that defendant was negligent because there is currently no widely recognized "standard of care" against which the conduct of the alleged polluter may be measured.[64]

In North Dakota, a violation of a statutory duty is evidence of negligence although not negligence as a matter of law.[65] Therefore, the statutory duties imposed by North Dakota's pollution control laws would seem to, at the very least, shed some light on the applicable standard of care in North Datota.[66] However, in the absence of an express statement by the legislature concerning the extent to which the pollution legislation affects the standard of care applicable in common law negligence actions, the courts will probably fashion some other more accommodating standard. One commentator has outlined such a standard like this:

> The standard to which the courts will hold the producer of pollutants depends in final analysis upon the view the judge

60. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights,* 1967 DUKE L. J. 1126, 1142.

61. Note, *Environmental Law: New Legal Concepts in the Antipollution Fight,* 36 MO. L. REV. 78, 85 (1971).

62. Zerr v. Sommer, 179 N.W.2d 330 (N.D. 1970).

63. Clark v. Payne, 48 N.D. 911, 187 N.W. 817 (1922).

64. Note, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution,* 16 WAYNE L. REV. 1085, 1121 (1970).

65. Steel v. Downs, 438 F.2d 310 (8th Cir. 1971).

66. The statutory duties imposed by the North Dakota Water Pollution Control Act and the North Dakota Air Pollution Control Act would be a good starting point for formulating the standard of care applicable to negligence cases involving pollution.

> and jury take of the social utility of pollution control, which is in turn a product of how serious a danger to our society they consider air pollution. The standard no doubt will be seriously affected not only by the state of scientific knowledge as to the causes and effects of air pollution, but also by the state of technology and the extent to which present pollution control devices are effective and economically feasible.[67]

Finally, the environmental litigant will be confronted with the persistent problem of proving causation where the sources of pollution are numerous.

E. *Strict Liability*

The principle of strict liability allows for recovery against a defendant even though no fault can be attributed to him. Generally speaking, the actions of nuisance[68] and trespass[69] encompass the concept of strict liability since each allows a recovery where no fault on the part of the defendant has been shown. However, individuals may suffer damage from pollutants in circumstances falling neither into the category of nuisance or trespass. In such cases, it may be necessary for the complainant to urge principles of strict liability which are separate from the actions of nuisance and trespass.

Courts have recognized three theories of strict liability which may be helpful to a plaintiff. (1) The English Rule of *Rylands v. Fletcher,* (2) the doctrine of absolute nuisance and (3) the position taken by the Restatement of Torts.[70] The Rule of *Rylands v. Fletcher* was expressed by the Supreme Court of Montana, quoting Lord Blackburn, as follows:

> We think that the true rule of law is, that the person who, for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in *at his peril,* and if he chooses not to do so, is prima facie answerable for all the damage which is a natural consequence of its escape.[71] (emphasis added).

The doctrine of absolute nuisance dictates liability where there would ordinarily be none under the more common theory of nuisance

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67. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights,* 1967 DUKE L. J. 1126, 1147.

68. Thorson v. City of Minot, 153 N.W.2d 764 (N.D. 1967); The court stated: "One need not prove negligence to establish that a nuisance has been maintained."

69. Slattery v. Rhud, 23 N.D. 274, 136 N.W. 237, 239 (1912). The court stated: "If defendant . . . unlawfully trespassed on plaintiff's lot . . . , it is an elementary rule of law that he must respond in damages . . . even though he . . . acted with care in so doing."

70. Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310, 313 (1954).

71. Dulton v. Rocky Mountain Phosphates, 151 Mont. 54, 438 P.2d 674, 680 (1968).

(i.e. defendant is acting reasonably in all respects).[72] In such cases the courts entertain the notion that in certain cases, certain property rights are fixed and invariable and the competing interests will not be weighed in reaching a verdict.[73] These nuisances may be of three types. First are those defined by statute.[74] These declarations of the legislature are conclusive of what constitutes actionable nuisance and will preclude any inquiry into the reasonableness of defendant's conduct.[75] Second are those activities which are carried on with full knowledge of the substantial certainty of harm to follow.[76] Finally, ultrahazardous activities are nuisances despite the lack of negligence.[77]

The position taken by the Restatement of Torts[78] is presented as follows:

> The actor is liable in an action for damages for a nontrespassory invasion of another's interest in the private use and enjoyment of land if,
>
> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
>
> (b) the invasion is substantial; and
>
> (c) the actor's conduct is a legal cause of the invasion; and
>
> (d) the invasion is either
>
> (i) intentional and unreasonable; or
>
> (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.[79]

While the Restatement has not been widely adopted, some courts have attempted to interpret and apply the above rule in pollution cases.[80]

F. *Constitutional Rights*

In addition to the common law actions, an injured party may have available a constitutional action which would be useful in con-

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72. Note, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1119 (1970).
73. *Id.*
74. The North Dakota Century Code defines such statutory nuisances in N.D. CENT. CODE § 42-01-02 (1960).
75. Note, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1119 (1970).
76. *Id.*
77. *Id.*
78. RESTATEMENT OF TORTS § 822 (1939).
79. *Id.*
80. Washak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); Evans v. Moffat, 192 Pa. Super 204, 160 A.2d 465 (1960).

trolling pollution.[81] The initial substantive obstacle to the successful assertion of a constitutional right to an environment free of substantial and unnecessary degradation is a finding that such a right exists in, and is protected by the United States Constitution.[82] The next and possibly greatest obstacle where the defendant-polluter is a private party is the state action requirement.[83] Although the minimal limits to the state action requirements are unclear, it would appear that the state must be almost directly involved in the alleged offending conduct. To this extent Judge Murray in *Environmental Defense Fund, Inc., v. Hoerner-Waldorf, Inc.*,[84] stated:

> The activities of State Planning Boards and City Commissions may well constitute state actions, but to support a Ninth or Fourteenth Amendment suit, the action of the state must be . . . the proximate cause of the unconstitutional action. . . .[85]

In summary, it would appear that, at present, the suit by an environmentalist asserting a federal constitutional right to a clean environment will be unsuccessful. However, as the concern for the environment increases, the existence of constitutional environmental rights may be recognized, thereby eliminating the first obstacle to a successful constitutional lawsuit. In addition, finding state action to be involved in the degradation will become less difficult with the enactment of stringent state environmental legislation which places a duty upon the state to prevent environmental degradation. Thus it would appear that the prospects for future success are not insignificant.

H. *Conclusion*

Taken together, common law remedies are subject to the same criticisms leveled at statutory remedies. Both exist—and exist extensively—but their utility in handling environmental problems is limited. It would appear, therefore, that, rather than continue to enact more unsuitable remedies, the need exists to embark upon a new path.

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81. Such an action was unsuccessfully pursued in Environmental Defense Fund, Inc. v. Hoerner-Waldorf Corp., No. 1694 (D. Mont. Aug. 25, 1970).

82. That such a right exists was recognized, in dictum, in Environmental Defense Fund, Inc. v. Hoerner-Waldorf Corp., No. 1694 (D. Mont. Aug. 25, 1970). Judge Murray did not recognize broad rights, but did recognize a right to health implicit in the fifth and fourteenth amendments Due Process Clause; the ninth amendment which states "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" might also be a source of environmental rights. U.S. CONST. amend. IX.

83. Note, *Toward A Constitutionally Protected Environment*, 56 VA. L. REV. 458, 474 (1970).

84. Environmental Defense Fund, Inc. v. Hoerner-Waldorf Corp., No. 1694 (D. Mont. Aug. 25, 1970).

85. *Id.*

IV. THE INDISPENSIBLE SUPPLEMENT TO NORTH DAKOTA'S ENVIRONMENTAL PROTECTION

Since the inadequacy of the existing legal framework for controlling pollution is apparent, it becomes the responsibility of the environmentalist to propose other more effective and supplemental alternatives. These alternatives may take at least three forms: (1) expanded common law actions which present fewer obstacles to the successful pursuit of the environmental lawsuit; (2) improved statutory controls administered by state agencies and/or a statutory right of action to be used by private individuals in lawsuits against private and/or public polluters; and (3) constitutional provisions commanding state action to control pollution and/or a constitutional right of action to be used by private individuals in lawsuits against private and/or public polluters.[86] To determine which of the three alternatives is most suitable for dealing with North Dakota's present and future pollution problems, each must be examined individually.

The probability of the courts creating expanded common law actions which present only reasonable obstacles to the victims of pollution in North Dakota is minimal at best. In light of past experience, it would seem reasonable to say that any rapid and timely expansion of the common law actions to meet the needs of our environment will not occur.[87] Therefore, the first alternative is probably non-existent for North Dakotans.

The propriety of using statutory law to control pollution is not questioned. Virtually every state in the United States has enacted legislation of one form or another to control pollution.[88] However, it appears equally unquestionable that the legislative approach is not comprehensive enough, in and of itself, to bear the *complete* responsibility for controlling pollution.[89] Most often legislative responses to perceived problems are too particular and hence short-lived.[90] Furthermore, what is enacted by statute can be changed by statute; such a change taking the form of a bill authorizing action "notwithstanding any other provision of the law."[91] In addition to the ease with which statutory protections can be evaded, there is another problem inherent in continuing to attack the problem solely through legislation. Widely publicized, but under-funded, new legislation gives

86. Note, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1131-34 (1970).

87. Cann, Institutionalization on the North Dakota Supreme Court (unpublished article on file at the office of the North Dakota Law Review).

88. *See generally* THE BUREAU OF NATIONAL AFFAIRS, ENVIRONMENT REPORTER.

89. Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061 (1970).

90. *Id.*

91. Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666, 671 (1970).

the appearance of action without the substance. "It lulls the public into a false confidence that something is being done."[92]

It is clear that the statutory alternative alone is not one which will lead citizens to the enjoyment of an environment free from pollutants. Rather, it would appear that it will be necessary for North Dakotans to look for the only remaining realistic alternative for assistance in fighting the war against pollution. That alternative is the constitution.

A rational approach to an effective constitutional provision for dealing with environmental problems requires that a search be made to determine what form such a provision should take to be effective, and yet acceptable to the voters of North Dakota. In particular, it must be decided whether the provision will be "benign" or "active," "a mere precatory statement" or an assertion of new priorities.[93] The former would be politically acceptable to everyone, yet it would accomplish little to effectively retard environmental deterioration. An "active" or "operative" provision would be more controversial, but it would offer greater hope of stopping intolerable pollution.[94]

Since the active provision will be more helpful than the benign provision, it is then necessary to determine in more detail what form the active provision should take. Several essentially active provisions have been proposed or enacted on the state level[95] and several have been proposed at the federal level.[96] Some of these proposals have simply commanded governmental action compatible with the state policy of preservation of the environment,[97] while others have contained an additional legal aspect, a private constitutional right of action to be used by private individuals in lawsuits against public and/or private polluters.[98]

Virginia's article is representative of the provisions which have simply commanded governmental action to preserve the environment.[99] Article XI of the Virginia Constitution declares the policy of the Commonwealth to be to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, and further states that

92. *Id.;* In light of the insufficient funding of the pollution control legislation in North Dakota it would seem that North Dakotans may have been lulled "into a false confidence that something is being done."

93. Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061 (1970).

94. *Id.*

95. Proposals have been offered in North Carolina, Massachusetts, Pennsylvania, and Idaho. Provisions have been enacted in New York, Illinois, Rhode Island and Virginia.

96. H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968); S.J. Res. 169, 91st Cong., 2d Sess. (1970); H.R.J. Res. 54, 91st Cong., 1st Sess. (1969); H.R.J. Res. 505, 91st Cong., 1st Sess. (1969); H.R.J. Res. 1205, 91st Cong., 2d Sess. (1970); H.R.J. Res. 1294, 91st Cong., 2d Sess. (1970); S.J. Res. 14, 92d Cong., 1st Sess. (1971); H.R.J. Res. 522, 92d Cong., 1st Sess. (1971).

97 VA. CONST. art. XI, §§ 1, 2; R.I. CONST. art. 1, § 17.

98. N.Y. CONST. art. XIV, §§ 4, 5; ILL. CONST. art. XI, §§ 1, 2.

99. VA. CONST. art. XI, §§ 1, 2.

the legislature may undertake the conservation, development, or utilization of natural resources in furtherance of such policy.[100]

Illinois' constitutional provision concerning the environment is a comprehensive representation of those provisions which contain both the command for state action and the private environmental right.[101] Article XI of the Illinois Constitution declares that "the public policy of the state and the *duty* of each person is to provide and maintain a healthful environment for the benefit" of the people.[102] (emphasis added). In addition, it further commands the legislature to implement the public policy through appropriate legislation and creates in each person an actionable right to a healthful environment which may be enforced "against any party, governmental or private, through appropriate legal proceedings subject to *reasonable* limitation and regulation" by the legislature.[103]

While the Virginia provision appears to leave the future of the environment up to the legislature and thus the democratically elected majority, the Illinois provision checks the legislature's discretion which may or may not be vigorously utilized in protecting the environment by giving reasonable power to the minority to prevent action of the majority which is in derogation of the minority's fundamental right to a healthful environment. By so doing, Illinois has boldly and explicitly placed the right to a healthful environment on a plane with other more familiar inalienable rights such as the right to life, liberty and the pursuit of happiness; rights which are not subject to the whims of the majority. Illinois has recognized that, today, the threats "to our environment and to our survival are as real as were the dangers to free speech and free assembly" to the United States Constitutional Convention of 1783.[104]

To blindly praise the Illinois constitutional provision and urge enactment of something very similar in North Dakota without further search for the shortcomings of the provision would be unwise.[105] The aspect of the provision which simply commands the legislature to enact legislation to control pollution would, in light of the statements of environmentalists and their opposition, be acceptable to both sides.[106] However, there are objections to a provision allowing

100. *Id.*
101. ILL. CONST. art. XI, §§ 1, 2. Creation of a statutory duty could establish a standard of care for purposes of a negligence suit.
102. *Id.*
103. *Id.*
104. Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666, 672 (1970).
105. The authors feel that the provision should not protect the environment at the cost of economic bankruptcy.
106. Acquiesance by the environmentalists in the legislative approach is self evident. In addition, the opposition's acquiesance is evident from a statement of the Michigan Manufacturers Association which recommends legislative-administrative action to control pollution. Michigan Manufacturers Association, Statement on House Bill 3055, May 13, 1970.

private individuals to maintain suits against other private individuals to vindicate their right to a healthful environment. One such objection states that the unbridled assault upon industry and other polluters would result in driving industry from the state with such a provision in its constitution into one with a less rigorous environmental policy.[107] In fact, this objection to an unlimited private right is a very legitimate one. However, the Illinois provision does not provide an unlimited right. The Illinois provision provides for a right to sue "*subject* to *reasonable limitation* and *regulation*" by the legislature.[108] (emphasis added). By subjecting the private right to reasonable limitation by the legislature, the constitution has struck a particularly timely and appropriate balance between the diverse political and economic interests of the majority and the environmental interests of the minority.[109] Such a balance, insures a more compromising and therefore successful approach to the prevention of environmental degradation.

V. CONCLUSION

That North Dakota has pollution problems is undeniable. Evidence of it exists throughout the state and threatens to increase rather than lessen. A survey of common law and statutory remedies has demonstrated that they are inadequate on their face, in their enforcement, and because they are simply inflexible and therefore inapplicable to the specific problems presented by pollution.

The incorporation of the recommended constitutional provisions, therefore, would accomplish several ends. It would demonstrate an active dedication by the people of the State to an abatement of pollution. It would facilitate enforcement through the inclusion of the private sector as plaintiffs in anti-pollution actions; and it would also insure that such litigants could not transcend legitimate bounds prescribed by legislative mandate.

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107. Roberts, *The Right to a Decent Environment: E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 687 (1970).

108. ILL. CONST. art. XI, § 2. A reading of article XI in conjunction with § 1(d) of the Transition Schedule indicates that legislative action to limit the private right of action is not a condition precedent to the creation and use of the private right, i.e. the provision providing for the private right of action is self executing. Thus, the legislature is prevented from indefinitely delaying use of the private right by failure to provide for reasonable limitations.

109. The word minority is not completely appropriate since the prevention of environmental degradation is in everyone's best interest.