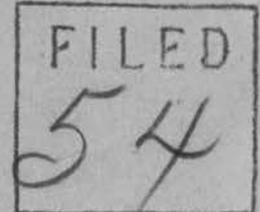


MISSOURI SOIL DISTRICTS COMMISSION: Members of Commission may not vote by mail upon matters pertaining to the duties of the Commission; Commission proceedings must be fully recorded in the minutes of the Commission; Commission is required to formulate and fix rules for the holding of referendums; duty of Commission to conduct referendums or designate a disinterested and competent person, or persons, to do so; failure of Missouri State Soil Districts Commission to follow procedure prescribed in the Act creating it will invalidate its actions.

April 21, 1949

Honorable J. H. Longwell
Chairman, Missouri State Soil
Districts Commission
128 Mumford Hall
Columbia, Missouri

5-13



Dear Sir:

This office is in receipt of your recent letter requesting an official opinion with reference to a state of facts set forth in your aforesaid letter. It is the custom of this department in regard to such inquiries to quote the entire content of the letter requesting the opinion. However, in view of the length of your letter I shall not quote it in its entirety, but will briefly state the situation which it presents; the specific questions which you ask; and our conclusions in regard to these questions.

It appears from your communication that the State Soil Districts Commission received petitions, in proper form, from two townships in Lafayette County, Missouri, asking for the establishment of a soil district in said townships. Following the receipt of these petitions a meeting of the Commission was held on November 22, 1948, at which meeting these petitions were discussed, and tabled pending further investigation of them by the Commission. On the following December 14, 1948, the Chairman of the Commission and the Extension Soil Conservationist met with the Lafayette County sponsoring committee in Higginsville in regard to the necessity of establishing such a soil district as the petitions requested, and of having a public hearing on the matter. Following this meeting the Chairman of the Commission wrote letters to the members of the executive committee of the Commission, consisting of three members of the five member Commission, asking them to vote by letter on the holding of a public hearing. The vote of the executive committee was two to one in favor of such a hearing. This public hearing was held January 11, 1949. On January 17, following, the Chairman of the Commission wrote to the members of the Commission, sending a copy of the record of the public hearing, and asking them to vote by letter on the matter of whether the referendum should or should not be held. The vote of the Commission was in favor of the referendum. On February 23, following, the referendum election was held in Lafayette County, and the vote was in favor of the establishment of the soil district. Following the election, representatives from Lafayette County appeared before the Commission on March 21,

1949, and protested that the referendum election was void and should be set aside because of voting irregularities. The representatives stated that in their opinion the irregularities were: (1) Unlawful use of powers of attorney; (2) Landowners voting as many times as they had deeds to land; (3) Opposition had no choice in selecting judges.

The Commission discussed this situation and it was the majority opinion of the Commission that the district in Lafayette County should be approved and recognized as a soil district on the basis of the referendum held in Lafayette County on the 23rd day of February, 1949.

With reference to the above situation you then ask the following questions:

Your first question is:

"Should there have been a meeting of the State Soil District Commission whereat, by proper procedure, the petitions which have been mentioned, were taken from the table so that they could be acted upon?"

We take it that in this question you are asking whether, instead of calling in to a meeting the members of the Commission, your sending them a report of the public hearing held on January 11, 1949, and having them vote by mail upon the matter of having or not having the referendum, was proper.

Let us at this time make the observation that the powers, duties and responsibilities of the State Soil Districts Commission are set forth and are limited by Senate Bill No. 80, as found in the Laws of Missouri for 1943, page 839, which bill, with an emergency clause, was enacted into law and was approved July 23, 1943. This aforesaid bill, which is the law of Missouri, does not set forth any particular manner in which the members of the Commission shall vote upon whether or not a referendum shall be held. Indeed the language of Senate Bill No. 80 does not, apparently, even make it necessary that an actual vote by the members of the Commission be taken upon this matter. That portion of Senate Bill No. 80 which we construe to relate to this particular matter states: "Upon reaching a favorable conclusion on these matters (the calling for a referendum election) the Commission shall call for and conduct, or cause to be conducted, a referendum, by ballot of land representatives within that area on the question of establishing the county or the specified township or townships as a soil conservation district." As we said above, from the language of the foregoing portion of the Act which relates to a determination by the Commission as to whether a referendum shall be called, it does not appear necessary that this

determination on the part of the Commission be reached by the members voting upon the question. You will observe that the language of the Act is, "upon reaching a favorable conclusion on these matters." Certainly voting upon the issue by the members of the Commission is the most expedient way in which to ascertain whether or not the Commission is favorably inclined toward holding the referendum, but we believe that such voting is not necessary in lieu of a general agreement by the members of the Commission at a Commission meeting that such a referendum be held. However, the question which now arises is whether it was proper for such an ascertainment of the attitude of the Commission toward the holding of a referendum be obtained by having the members of the Commission vote upon the matter by mail, from their homes throughout the state, instead of at a meeting of the Commission. We believe that the following sentence in Section 3, Subsection 3, of the Act, is revealing upon this point: "A majority of this Commission shall constitute a quorum, but the concurrence of a majority of the whole Commission shall be required for the determination of any matter within their duties." (Underscoring ours.) Certainly the determination by the Commission whether a referendum should be held was a "matter within their duties." And it would appear with equal certainty that the use of the word "quorum" contemplated that when the Commission decided any "matter within their duties," it should do so at a meeting of the Commission. Webster's Dictionary defines the word "quorum" as: "Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business." (Underscoring ours.) By no stretch of the imagination can we construe the use of the word "quorum" to mean anything but that when the Commission "determines any matter within their duties," it shall do so at a meeting of the Commission, not when the members of the Commission are scattered about Columbia and various parts of the State of Missouri.

Furthermore, the language of Subsection 3 which immediately follows the quoted sentence would seem to substantiate this opinion. The succeeding sentence is: "Each farmer member of the Soil Commission shall be entitled to expenses, including travel expenses, necessarily incurred in the discharge of his duties as a member of this Commission." This sentence provides travel expenses for each farmer member of the Commission incurred in the discharge of his duties, which, as we said, certainly include a determination of whether or not referendums shall be held. The language of Subsection 3, taken altogether, would seem to clearly indicate that when the Commission acts upon "any matter within their duties," it should do so at a meeting of the Commission, and that therefore there should have been a meeting of the State Soil Districts Commission, whereat, by proper procedure, the petitions in question were taken from the table so that they could be acted upon.

Finally, as being, in our opinion, determinative of this very

important issue, we direct your attention to the case of Wheeler v. River Falls Power Company, 215 Ala. 655, in which the court states:

"* * *The transcript of the record of the state board of health, put in evidence, disclosed the fact that there were present at the called meeting which undertook to adopt the rules and regulations in dispute three members of the state committee of public health, the state health officer included, and in addition the Governor, ex officio a member of the committee, and ex officio its chairman. Code Sec. 1047. But the state board of censors of the medical association of the state, which, when acting in its appropriate capacity, is the state committee of public health, is composed of ten members elected by the association, and the absentees, who had been informed of the pendency of the proposed rules and regulations and their contents unanimously by mail certified their concurrence in the act of adoption. This cannot be accepted as the authorized legislative act of the state committee of public health.

"There is no provision of state law whereby a minority of the committee of public health may exercise the legislative power as to minor details of administration committed to it by the Legislature, and it is clear that such power, having been committed to the aggregate of the members composing the committee, cannot by it be delegated elsewhere, or to any number of individuals acting separately. Of course, a quorum duly met may exercise the power of the committee. But a quorum is such number of the committee as is competent to transact its business, and that, according to the general law of such bodies, is a majority of the committee. The point here is that individual members of the committee, scattered about the state, cannot be counted to constitute a quorum of a meeting of the committee which in fact they did not attend. This proposition has been often stated, is clearly restated by the Supreme Court of the United States in *United States v. Ballin*, 144 U.S. 1, 12 S. Ct. 507, 36 L. Ed. 321, and further argument is hardly necessary. The sum of it is that, in the

absence of legislative authority to a different effect, a majority of the members must attend any meeting of the committee called for legislative purposes, otherwise there is no committee competent to act, but a majority of those present, when legally met, may bind all the rest. In other words, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. Says the Supreme Court of the United States, quoting from Chancellor Kent:

'There is a distinction taken between a corporate act to be done by a select and definite body as by a board of directors (in this case the committee of public health), and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide.'

"See cases referred to by the court in United States v. Ballin, supra, on pages 7 and 8 of the report. Quoting the language of the Supreme Court of Pennsylvania, 'congregated deliberation is deemed essential.' Commonwealth v. Cullen, 13 Pa. 133, 53 Am. Dec. 450.

"Section 1048 of the Code of 1923, to which for convenience we refer, provides that--

'When the state board of health (the medical association of the state of Alabama, Code Sec. 1046) is not in session said state committee of public health shall act for said board and have and discharge all the prerogatives and duties of said board, including the adoption and promulgation of rules and regulations provided for in this chapter (the chapter on Health and Quarantine). When said committee is not in session the state health officer shall act for said board and said committee and shall report to the said board,' etc.

"And subsection 6 of section 1051 of the Code, to which we have before referred, provides that the state board of health shall have authority and jurisdiction to 'adopt and promulgate rules and regulations providing proper methods and details

for administering the health and sanitary laws of the state, etc.

"We find nothing in the foregoing provisions of the statute law to derogate anything from what we have said on the authority of United States v. Ballin and the cases there cited and discussed.

"Upon consideration of the authorities on the subject and the reason of the matter, we feel constrained to hold that the alleged rules and regulations governing the impounding of waters have not the authority of law. They were therefore properly excluded by the trial court, and being excluded, the principles decided in Meharg v. Alabama Power Co., and the other cases in that line to which we referred in the outset, left no standing room for appellant in the trial court."

We would call your further attention to the case of State ex rel. Rutherford et al. vs. Rhodes, 85 Pac. 332, which states:

"Our statute prescribing the terms of county courts contains the following provision: 'The county court is held at such times as may be appointed by law, and at such other as the court in term or the county judge in vacation, may appoint, in like manner and with like effect as the circuit court or judge thereof is authorized by section 901.' B. & C. Comp. Sec. 915. The county judge and county commissioners of any county in this state do not constitute the county court thereof for the transaction of county business unless they assemble at the time prescribed by law, or at a time designated by a general order of such court to that effect made and entered in the journal during the term time, or by a special order made and filed by the county judge in vacation, authorizing the transaction of certain business therein specified. The county judge of Yamhill county and a county commissioner thereof not having assembled at a time thus prescribed, they did not compose the county court of that county for the transaction of county business, and could not make a valid order authorizing the calling of an election to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited therein, and their attempt to make a regulation to that effect was void. Marsden v. Harlocker(Or.) 85 Pac. 328."

Your second question is:

"Before the State Soil Districts Commission can call for a referendum on the establishing of a soil district must its minutes show its determination that the petitions are valid; must its minutes show that hearings were ordered to be conducted upon the subject of these petitions; must its minutes show that the Commission determined that the establishment of the proposed soil district would be effective in the saving of soil therein; must its minutes show that the proposed district, if established, could be feasibly administered; and must its minutes show that the Commission calls for a referendum upon the establishing of the proposed soil district?"

The single question present in the numerous subdivisions of question number 2, quoted above, is whether or not the minutes of the Commission's actions in regard to matters properly under consideration by it, must show what action was taken by the Commission upon these official matters.

Again, we direct your attention to Subsection 3 of Section 3, which states: "The State Soils District Commission shall provide for the execution of surety bonds for all of its employees who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all its proceedings and of all its resolutions, regulations and orders issued or adopted; and shall provide for an annual audit of all its accounts of receipts and disbursements." (Underscoring ours.) The underscored portion of the above quoted sentence plainly states that such a record of proceedings as you inquire about in question 2 must be kept, because the use of the word "shall" is mandatory and leaves the Commission no choice in this matter. There is no direct statement in the Act that these "full and accurate records" must necessarily be in the form of "minutes," but since there is no other possible manner, except through the keeping of minutes, in which a "full and accurate record of all proceedings" (underscoring ours) can be obtained, we deduce that this is what the Act intended, and that therefore the answer to your second question is, that before the State Soil Districts Commission could legally call for a referendum on the establishing of a soil district, its minutes must show, at least substantially, the various things enumerated by you in your second question. From the record of the minutes, which you have submitted to us, we do not believe that they constitute a compliance with the mandate of the Act that a "full and accurate record of all proceedings" be kept.

Your third question is:

"Before a referendum can be called must the Commission formulate and fix rules for the holding of referendums upon the establishing of a soil district?"

Upon this point we call your attention to the Act, Section 3 of which is headed: "Establishing Commission--Its powers and duties." Subsection 4b of Section 3 states, as being among the powers and duties of the Commission: "To formulate and fix the rules and procedures for fair and impartial referendums on the establishing or disestablishment of soil districts * * *."

Following the above quoted subsection is Section 3a of the Act, entitled: "Referendum--how conducted." Section 3a then proceeds to set forth certain rules which shall govern in the conduct of the referendum. It might, at first glance, appear that Subsection 4b of Section 3 of the Act places the obligation upon the Commission to formulate and fix the rules and proceedings for fair and impartial referendums on the establishing and disestablishment of soil districts, and that in Section 3a, following, they change their minds and fix the rules themselves. We, however, do not so interpret it, but rather are of the opinion that Section 3a merely sets forth certain things which shall and shall not be done in the holding of a referendum, and imposes upon the Commission the duty to formulate and promulgate such additional rules of procedure as are necessary for the fair and impartial conduct of a referendum. This view gains support from a close contemplation of Section 3a, which obviously does not furnish sufficient directive of itself for the conduct of a "fair and impartial referendum." Furthermore, we have no right whatever to assume that Section 3a of the Act was intended to invalidate Subsection 4b of Section 3, which is what we would have to do if we took the position that the Commission did not have the duty to "formulate and fix the rules and procedures for fair and impartial referendums on the establishing and disestablishment of soil districts." We would furthermore have to assume (if we held that the Commission did not have to formulate these rules) that it was the intention of the framers of the Act that Section 3a was intended to invalidate Subsection 4 of Section 3, which states: "In addition to the authority and duty hereinafter assigned to the State Soil Districts Commission, it shall have the following authority and duty: (b) To formulate and fix the rules and procedures for fair and impartial referendums for the establishing and disestablishment of soil districts * * *." (Underscoring ours.)

We have no reason or right to make the foregoing assumptions, all of which we would have to make if we found that the Commission was not obligated to formulate these rules. On the contrary, we must presume that the framers of the Act intended that every portion of the Act should be validated and given full effect. Our

answer therefore to your third question is that before a referendum can be called the Commission must formulate, fix and promulgate the rules and procedures for the conduct of such a referendum.

Your fourth question is:

"Must the minutes of the Commission show that a referendum is called on the establishing of the proposed district, and must the same show just how the referendum is to be conducted and where the polling places are and who the judges of the referendum shall be?"

This question, we believe, comprises within itself three questions, the first of which is:

"Must the minutes of the Commission show that a referendum is called on the establishing of the proposed district?"

For the reasons given in our answer to question 2 we believe that the minutes must so show.

The second part of your fourth question is:

"Must the same (the minutes) show just how the referendum is to be conducted?"

In view of our holding above, that it is the duty of the Commission to formulate and fix the rules and procedures for referendums, and of our further holding that it is the duty of the Commission to keep in its minutes a full and accurate record of all of its proceedings, and in view of the obvious fact that the formulation of rules and procedures for the holding of referendums are a part of the proceedings of the Commission, it is our opinion that the minutes of the Commission should show "just how the referendum is to be conducted."

The third part of your fourth question is:

"Must the minutes of the Commission show where the polling places are and who the judges of the referendum shall be?"

The language of this question indicates that your inquiry upon this point is whether, prior to the holding of the referendum, the minutes of the Commission "shall show" where the polling places are and who the judges of the referendum "shall be."

In our answer to your fifth and following question we will give as our opinion that the Commission may conduct such a referendum itself, or may appoint a person, or persons, to represent it in the holding of the referendum, and that in either case the Commission, or the person, or persons, referred to, should select the polling places and the judges and clerks. As these are part of the duties and proceedings of the Commission we believe that the places of polling, and the names of the judges and clerks, should appear in the minutes of the Commission after the referendum is held, but not necessarily before, inasmuch as it is our opinion that at the time when the Commission conducts the referendum, or at the time when the referendum is conducted by persons, or a person, representing the Commission, such polling places may be designated and clerks and judges selected.

Your fifth question is:

"Can the Commission, by order appearing in its minutes, appoint an individual or a group of individuals to select the polling places and name the judges and clerks of said referendum?"

Section 4 of the Act entitled: "Establishment of soil conservation districts--how." states: "* * *Upon reaching a favorable conclusion on these matters(the calling of a referendum), the Commission shall call for and conduct, or cause to be conducted, a referendum by ballot of land representatives within that area, on the question of establishing the county or the specified township or townships as a soil conservation district." (Underscoring ours.)

Section 9 of the Act, entitled: "Disestablishment of soil districts--referendum--procedure in case of disestablishment," states: "The State Soil Districts Commission, upon receiving at any time a petition for the disestablishment of any soil district, said petition being signed by not less than twenty-five land representatives in each township within the area covered by the petition, shall presently call for and conduct within that district a referendum upon the disestablishment of that district." (Underscoring ours.)

These two sections, which, we believe, complement each other, seem clearly to impose upon the Commission the duty of conducting referendums for the establishing and disestablishment of soil conservation districts. Conducting such referendum obviously entails the selection of polling places, and of judges and clerks to serve in such referendum. From the language of the sections quoted above it is our opinion that the Commission could conduct the referendum, which would include the selection of polling places, judges and

clerks. We believe, further, that by use of the phrase in Section 4 "or cause to be conducted," that the Commission could appoint a disinterested individual, or group of individuals, to select the polling places, and name the judges and clerks for the referendum. For the reasons given in our answer to your second question, such an order should appear in the minutes of the Commission.

Your sixth question is:

"Is the referendum held in Freedom township and Lexington township, Lafayette county, Missouri, on February 24, 1949, under the above stated facts, a legal and lawful referendum, and the result thereof under the minutes of the meeting of said Commission of November 22, 1948, and March 21, 1949, binding upon the proposed district and the inhabitants and landowners thereof."

It is the opinion of this office that the aforesaid referendum is not a legal and lawful referendum, binding upon the proposed district and the inhabitants and landowners thereof, because of the failure of the Commission to discharge adequately the duties imposed upon it in the steps preliminary to the holding of the referendum by the Act of the Legislature providing for the establishment of the State Soil Districts Commission.

We venture to add this further thought, although it is not embraced in any of the questions which you directed to us. In your letter to us you stated:

"On December 14, 1948, the Chairman of the Commission and the Extension Soil Conservationist met with the Lafayette County Sponsoring Committee in Higginsville. Following this meeting the Chairman wrote letters to J. W. Burch and F. V. Heinkel who with the Chairman constitute the executive committee of the Commission. The vote of the executive committee was two in favor of a public hearing, one against."

We deduce from this that one of the necessary preliminary steps to the holding of the referendum, namely, the determination of whether a public hearing was to be held, was taken, not by the whole Commission, but by an executive committee consisting of three members. We find nothing in the Act which would justify the taking of such a step by any number less than a majority of the whole Commission. The executive committee, you state, voted two to one in favor of a public hearing. On the contrary it seems to us that

Subsection 4 of Section 3 of the Act clearly implies that the concurrence of a majority of the whole Commission shall be required for the determination of any matter within their duties, which was not the fact in this instant case.

CONCLUSION

It is the conclusion of this department that members of the Missouri State Soil Districts Commission may not vote by mail upon matters pertaining to the duties of the Commission; that Commission proceedings must be fully recorded in the minutes of the Commission; that the Commission is required to formulate and fix rules for the holding of referendums; that it is the duty of the Commission to conduct referendums or to designate a disinterested and competent person, or persons, to do so; it is the opinion of this department that the failure of the Missouri State Soil Districts Commission to follow the procedure prescribed in the Act creating it will invalidate its actions; it is our further conclusion that the referendum election in this instant case is void because of the failure of the State Soil Districts Commission to adequately discharge the duties imposed upon it preliminary to the holding of the referendum, and that therefore the aforesaid referendum is not binding upon the persons who otherwise would be affected by it.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General