SOIL AND WATER CONSERVATION SUBDISTRICTS: STATE AGENCIES: (1) Soil and water conservation subdistricts organized under the provisions of Chapter 278, RSMo, to carry out watershed protection and flood prevention purposes and to further conservation and utilization of water for additional purposes including recreation, irrigation and wildlife development, have implied power to construct dams across non-navigable streams to achieve the ends for which the subdistricts are created; (2) Such soil and water conservation districts are governmental agencies of the state and do not come within the purview of Chapter 236 RSMo, which requires private persons or corporations to obtain permission of the circuit court to build dams for mills, electric power or other machinery; (3) Any damage to the riparian rights of downstream landowners from the construction of dams by soil and water conservation subdistricts would be consequential and result from the proper exercise of the police power of the state and be damnum absque injuria.

OPINION No. 304

August 22, 1967

FILED
304

Mr. Lee E. Norbury
Assistant Executive Secretary
Missouri State Soil and Water
Districts Commission
T-7 Bldg. University of Missouri
Columbia, Missouri

Dear Mr. Norbury:

This is in response to your request for an opinion of this office on the following questions:

> "1. Is it necessary for watershed subdistricts organized under the provisions of Chapter 278 RSMo to file a petition for permission under the provisions of Chapter 236 RSMo to construct a dam for flood prevention purposes?
>
> 2. If the answer is 'no' then do the provisions of Chapter 236 RSMo apply if additional purposes are included such as recreation, irrigation, wildlife development, etc.?

> "3. If these structures are constructed across intermittently flowing streams what is the riparian position of those landowners downstream from the structure?"

Chapter 278, RSMo, is entitled "Soil Conservation", and Chapter 236, RSMo, is entitled "Dams, Mills and Electric Power". We have, therefore, two acts of the legislature which must be considered with respect to construction of dams across non-navigable streams. Section 278.120, RSMo Cum. Supp. 1965, is as follows:

> "1. Any soil and water district organized under the provisions of this law shall be a body corporate and shall possess only such powers as herein provided, but any such powers possessed by said body corporate shall be particularly limited by the following provisos; provided, that the private property of any land representative or owner of property in such soil and water district shall be exempt from execution for the debts of the body corporate or soil and water district and no land representative or owner of property within said soil and water district shall be liable or responsible for any debts of the body corporate or soil and water district, and provided further, that no property of any character, title to which is not vested in said soil and water district, or a soil and water district as the case may be, shall ever be subject to any lien for any claim or judgment of or against said district, or a soil and water district as the case may be. Any soil and water district so organized shall be officially known and titled "The Soil and Water District of . . . . . County", and shall be so designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with.
>
> "2. A soil and water district through the board of soil and water district supervisors thereof shall have the following authority and duty in addition to other authority and duty granted in other sections of this law:

(1) To promote all reasonable measures for the saving of the soil and water within that soil and water district; and all such measures shall be in general agreement with those currently advocated by the college of agriculture of the University of Missouri for saving the productive power of Missouri farm land;

(2) To cooperate or enter into agreements with, and to aid within the limits of appropriations duly made available to it by law, any agency, government or otherwise, or any land representative within that soil and water district, in the saving of the soil and water within that district; and all such cooperations or agreements shall be in accord with the policies of the state soil and water districts commission; and any land representative of farm land within that soil and water district shall be eligible to enter into such cooperations or agreements with the soil and water supervisors; and no program or procedure of soil and water conservation shall be ordered or executed by the soil and water supervisors on any farm without the full consent and agreement of the land representative of that farm;

(3) To make available to any land representative within that soil and water district, through existing agencies if agreements with them seem feasible, or by such other feasible means as the supervisors shall prescribe, such services, materials, and equipment as will assist such land representatives to carry on operations for the saving of the soil and water;

(4) To accept grants, gifts, and contributions in money, services, or materials from the United States or any of its agencies, and to use or expend such grants, gifts or contributions in carrying on the soil and water district operations; and such use or expenditure shall be in accord with the policies of the state soil and water districts commission;

> (5) To make and execute contracts and other legal instruments, necessary for the saving of the soil and water in that district, subject to approval by the state soil and water district commission;
>
> (6) To accept for the purpose of saving soil and water in that district, contributions in money, services or materials from any source not otherwise provided for herein, and to enter into such agreements with land representatives as will tend to prevent future wastage of the soil and water presently benefited by these contributions."

Section 278.160, RSMo Cum. Supp, 1965, authorizes the formation of soil and water conservation subdistricts, as follows:

> "Subdistricts of a soil and water conservation district may be formed as hereinafter provided for the purpose of carrying out watershed protection and flood prevention programs for the prevention of floodwater and sediment damage and for furthering the conservation, development, utilization and disposal of water, and for increasing recreation, the supply of water, industrial development and agricultural water management, including fish and wildlife and recreational development."

In Hudgins v. Mooresville Consol. School Dist., 278 S. W. 769, 771, the court states " * * *that a power granted carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one expressed." The authority of the subdistrict to construct dams necessary to effectuate the purposes of Section 278.160, is implicit in the language of this section.

Your first question is whether the legislature intended to condition the authority granted to the subdistrict on approval of the circuit court to build dams pursuant to Chapter 236. Section 236.010, RSMo, is as follows:

> "Any person or corporation chartered and organized to construct, operate and maintain mills, electric power and light works, or other machinery, may

> erect a dam across any watercourse, not being a navigable stream, if such person or corporation is the proprietor of the land through which the watercourse runs at the point where it is proposed to erect such dam, by proceeding as herein provided."

Section 236.030, RSMo, provides:

> "In the case supposed in section 236.010, the person or corporation proposing to erect a dam shall file a petition in the circuit court of the county in which it is proposed to erect such mill, electric power and light works, or other machinery, in connection with the dam, and shall therein set forth:
>
> (1) A description of the land and an abstract of the title thereto;
>
> (2) The name of the watercourse, and a description of the point at which it is proposed to erect such dam;
>
> (3) The altitude of the dam which it is proposed to erect; and
>
> (4) The kind of mill, electric power and light works, or other machinery, which it is proposed to connect with the dam.

Section 236.270, states:

> "Any person who shall build or heighten any dam, or any other stoppage or obstruction on or across any watercourse, without first obtaining permission from the court of the proper county, according to law, and shall thereby work any injury to any other person, shall forfeit to the party injured double damages for such injury, to be recovered by civil action."

In Rector v. Tobin Construction Company, 351 S.W. 2d 816, the court quoted Section 236.270 and stated:

> "[8-10] The plaintiffs claim that they are entitled to double damages by virtue of Section 236.270 RSMo 1949, V.A.M.S. This section provides: 'Any person who shall build or heighten any dam, or any other stoppage or obstruction on or across any watercourse, without first obtaining permission from the court of the proper county, according to law, and shall thereby work any injury to any other person, shall forfeit to the party injured double damages for such injury, to be recovered by civil action.'
>
> This section is part of Chapter 236, bearing the title 'Dams, Mills and Electric Power'. The chapter dates back in part to the territorial laws of 1822, and it contains a special procedure for obtaining permission to dam watercourses. The very obvious purpose of the original act was to promote the construction of mills and to protect the owners of land along the watercourse from any damage that they might suffer because of the construction."

It is to be observed that Chapter 236, prescribes the conditions under which private persons or corporations may construct dams to obtain power for the operation of machinery. The permission of the circuit court is required for the construction of such dams, but only a person or corporation chartered and organized "to construct, operate and maintain mills, electric power and light works, or other machinery," is entitled to obtain the required permission. It appears therefore, that the subject matter and purpose of Chapter 236 which, under the conditions specified, authorizes the construction of dams by private persons or corporations, is quite different from the subject matter of Chapter 278, which authorizes the construction of dams for flood prevention purposes only by agencies of the state.

Article X, Section 15, of the Constitution of Missouri states:

> "Definition of 'other political subdivision.' - The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Paragraph 4, of Section 278.250, RSMo Cum. Supp. is as follows:

> "4. The governing body of each soil and water conservation district containing a subdistrict or a portion thereof shall make the necessary millage levy on the assessed valuation of all real estate within the boundaries of the subdistrict lying within their respective district to raise the needed amounts, but in no event shall the levy exceed four mills on each one dollar of assessed valuation per annum and, on or before the first day of September of each year, shall certify the rate of levy to the county court of the county within which the district is located with directions that at the time and in the manner required by law for the levy of taxes for county purposes the county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all the taxable property within the subdistrict, in addition to such other taxes as are levied by the county court."

It appears, therefore, that soil and water conservation subdistricts have the power to impose taxes and are agencies of the state. In Hayes v. City of Kansas City, 241 S.W. 2d 888, the court quotes with approval the following from 59 C.J., Sec. 653:

> "6. 'The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong.'"

Under this rule of law it is clear that soil and water conservation subdistricts organized under the provisions of Chapter 278, are not within the purview of Chapter 236, and the provisions of Chapter 236 impose no liability on such subdistricts to obtain permission of the circuit court to construct dams for flood prevention purposes.

This conclusion also applies to your second question.

Section 278.160, RSMo, as originally enacted in 1957, was limited to "carrying out watershed protection and flood prevention programs; for the prevention of flood water and sediment damage and for furthering agricultural phases of the conservation, development, utilization, and disposal of water within the subdistrict." However, in 1963 Section 278.160 was amended and expanded to include "and for furthering the conservation, development, utilization and disposal of water, and for increasing recreation, the supply of water, industrial development and agricultural water management, including fish and wildlife and recreational development."

In this amendment the legislature expressly authorized the formation of subdistricts for additional purposes, including irrigation, wildlife development and recreational purposes. When the construction of dams is an appropriate means to carry

out the purpose of the amendment, the authority to construct such dams is implied in the same manner and to the same extent as is the authority to construct dams for flood-prevention purposes.

This brings us to your third question concerning the riparian position of those landowners downstream from the structure:

In Bollinger v. Henry, 375 S.W. 2d 161, 166, the court pointed out that the rights of a riparian owner in the waters of a stream include "'the right to the flow of the stream in its natural condition in respect of both volume and purity, except as affected by reasonable use by other proprietors,'".

Inasmuch as a dam will reduce the natural flow and depth of a stream, and may to some extent impair the riparian rights of the downstream landowners, the question presented is whether such impairment constitutes damage that comes within the constitutional provision that private property shall not be taken for public use without just compensation.

The subdistricts are governmental agencies of the state. In constructing the dams, they are performing a public duty imposed by the legislature. The dams, therefore, are constructed by authority of the state in the exercise of its police power.

Drainage laws are closely akin to the soil conservation laws and in drainage cases the courts have held that governmental agencies employed in this exercise of the police power are to be classed with counties, road districts and school districts. In Sigler v. Inter-River Drainage Dist., 279 S.W. 50, 56, the court said:

> "[1,2] The fundamental question in this case is that of whether the plaintiffs' property was damaged within the meaning of the Constitution. It cannot be denied, and is conceded by the plaintiffs, that the creation and exercise of the functions of the drainage districts in this state is an exercise of the police power of the state. It is settled too that such a district is a governmental agency, exercising only public governmental functions, and, as such, to be classed with counties, road districts, and

> school districts. Morrison v. Morey, 146 Mo. 543, 48 S.W. 629; Land & Stock Co. v. Miller, 170 Mo. 240, 70 S.W. 721, 60 L.R.A. 190, 94 Am. St. Rep. 727; Wilson v. Drainage District, 257 Mo. 266, 165 S.W. 734; State ex rel. McWilliams v. Little River Drainage District, 269 Mo. 444, 190 S.W. 897; State ex rel. Caldwell v. Drainage District, 291 Mo. 72, 236 S.W. 15; State ex rel Hausgen v. Allen, 298 Mo. 448, 250 S.W. 905; Anderson v. Inter-River Drainage District (Mo. Sup.) 274 S.W. 448."

In the construction of the dams in question the subdistrict will not encroach upon the lands downstream from the structures, there will be no actual and physical taking or damage of such property, or enforced occupation thereof, or interference therewith, or the exercise of any proprietary functions in relation thereto. Any damage that may result to downstream landowners would be indirect, incidental and consequential, and is damnum absque injuria. Gagnepain v. Levee Dist. No. 1, 7 S.W. 2d 285, 287, par. 4, states:

> "[4] The damage results from an exercise of the police power of the state acting through an agency created by statute and called a drainage district. It was necessary to construct the levee to achieve the end for which the district was created, namely to protect the public health and promote the general welfare of the state. The statute expressly authorized the construction of the levee and the damming or changing of water courses. The district's acts were consequently lawful. There is no charge that the plan used by the district was arbitrary or unreasonable. It was the only method that could be used. A lawful exercise of the police power must meet with uncompensated obedience, although injury result therefrom. Such an injury is not a taking nor damaging within the meaning of the Constitution. The interest of the individual must always give way to the greater good that will result from a reasonable exercise of the police power. All property is held subject to its proper exercise by the state.

> The function of these drainage districts is purely governmental and not private in character. Hence, being purely an injury resulting from a proper and reasonable exercise of the police power by the state, the injury resulting is not within the constitutional limitation. C., B. & Q. R. R. v. Illinois, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, loc. cit. 604-610, 4 Ann. Cas. 1175; Gibson v. United States, 166 U. S. 269, 17 S. Ct. 578, 41 L. Ed. 996.
>
> We do not know from this petition whether due notice or hearing of the plan was given by the district, nor are we concerned with the rights these plaintiffs there had or could have invoked had they attempted to do so. The petition alleges the organization of the district and its building of the levee according to plans adopted. The damages are not for the taking of private property, but a damage which is consequential to the construction of the levee in this road along the Mississippi river. The damages are purely consequential and no liability therefore exists to landowners either within or without the district. So is the law now written, and we follow it."

CONCLUSION

It is the opinion of this office that (1) Soil and water conservation subdistricts organized under the provisions of Chapter 278, RSMo, to carry out watershed protection and flood prevention purposes and to further conservation and utilization of water for additional purposes including recreation, irrigation and wildlife development, have implied power to construct dams across nonnavigable streams to achieve the ends for which the subdistricts are created; (2) Such soil and water conservation districts are governmental agencies of the state and do not come within the purview of Chapter 236, RSMo, which requires private persons or corporations to obtain permission of the circuit court to build dams for mills, electric power or other machinery; (3) Any damage to the riparian rights of downstream landowners from the construction of dams by soil and

water conservation subdistricts would be consequential and result from the proper exercise of the police power of the state. Such damage is damnum absque injuria and does not come within the constitutional provision that private property shall not be taken for public use without just compensation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant L. J. Gardner.

Yours very truly,

Norman H. Anderson

NORMAN H. ANDERSON
Attorney General