STATE:)
CONSERVATION COMMISSION:) Land purchased by the State in a Drainage
DRAINAGE DISTRICT:) District subsequent to the organization
TAXATION:) and formation of said Drainage District, is not subject to an annual maintenance tax.

FILED
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September 2, 1952

9/24/52

Mr. I. T. Bode, Director
Missouri Conservation Commission
Jefferson City, Missouri

Dear Mr. Bode:

This will acknowledge receipt of your request for an official opinion which reads:

> "We request your opinion on matters herein stated.
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> "The Conservation Commission of Missouri had acquired and is acquiring altogether about four thousand acres of swamp, wet and overflowed lands in Wayne, Bollinger and Stoddard Counties for the purpose of establishing and maintaining a public improvement known as Duck Creek Wildlife Area. Our acreage in Bollinger and Stoddard Counties is located within the boundaries of the Little River Drainage District; but Wayne County is not in said District.
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> "Little River Drainage District is a district organized and existing under the provisions of sections 242.010-242.690 R.S. Mo. 1949, it being one organized by the Circuit Court thereunder. It has been in existence for many years and is today still functioning as such. We are advised that on April 1, 1952, the District paid off all its bonds; and that now the District Board needs to levy and plans to levy only the maintenance tax authorized by section 242.490. That section indicates the levy is made on or before September in each year; and presumably such levy was made last September and will be made this coming September. A good portion of the Commission acreage was acquired before September, 1951, and some has been acquired since.

"These facts may or may not be necessary in arriving at your conclusion. The lands acquired and being acquired in Bollinger and Stoddard Counties are traversed and drained by ditches constructed and maintained by the Drainage District. In order to procure a supply of water for use in and over the Area, at least one of the ditches of the Drainage District will be lengthened so as to connect it with the Castor River. Certain of the ditches through the Commission lands will be widened, deepened and improved; and all of the Drainage ditches in the Area will be used in bringing and furnishing the necessary water. The District will in writing agree and consent to such extensions, improvements and uses, and they will be convenient and beneficial in the construction, maintenance and operation of the Area. As indicated, we do not know whether such consent and use will affect your opinion on the conclusion asked.

"We ask you the following:

"Are said lands, owned by the Commission (that is, the State) in the Area, subject to or exempt from any such maintenance tax as may have been levied or may be levied after the acquisition of a tract?

You inquire if the Conservation Commission is liable for a so-called annual maintenance tax assessed against land owned by said Commission lying within the Little River Drainage District.

Under Section 242.020, RSMo 1949, the original owners of said land apparently agreed to the expense of organization and of making and maintaining the necessary improvements to effect the reclamation of said lands in said Drainage District and to further protect the same from the effects of water.

Section 242.490, RSMo 1949, authorizes the board of supervisors of such drainage district, upon the first day of September each year after the completion of improvements, to levy a tax upon each tract of land within the district and upon corporate property to be known as a maintenance tax.

Section 242.260, RSMo 1949, specifically provides that said board of supervisors of the district, in assessing benefits to lands, public highways, railroads and other right-of-ways, railroad roadbeds and other property not traversed by such works

and improvements as provided in the plan for reclamation, shall not consider what benefits will be derived by such property after other ditch improvements and other plans for reclamation shall have been constructed, but shall assess only such benefits as will be derived from the construction of works and improvements set out in the plan of reclamation or as same may afford an outlet for drainage or protection of overflow of such property; that the public highways, railroads and other right-of-ways, roadbeds, railroad and other property shall be assessed according to the increased physical efficiency and described maintenance cost of roadbeds by reason of the protection to be derived from the proposed works and improvement.

It can be seen that under the foregoing statutes no specific authority is given to tax lands owned by the State of Missouri and lying within such a drainage district unless we consider corporate property as that owned by the state, which, of course, would not include this land owned by the State of Missouri for the reason corporate property ordinarily has been defined by the Courts as property held in a proprietary capacity and not governmental capacity. In this instance, the Conservation Commission of the State of Missouri has acquired this property under authority of Section 41, Article IV, Constitution of Missouri, 1945, and, therefore, holds same in their governmental capacity.

Section 6, Article X, Constitution of Missouri, 1945, specifically exempts from taxation all property real and personal of the State of Missouri, and further provides that all laws exempting from taxation property other than the property enumerated in said Article X shall be void. Section 137.100 RSMo 1949, among other things, provides that the following subjects shall be exempt from taxation for state, county or local purposes; land and other property belonging to the state.

It is a well established rule of statutory construction that in construing taxing statutes if said statutes do not specifically include the state that the state is exempt from such taxation. See Section 87, Volume 48, page 692, Am. Jur.; also 115 Mo. 557, 22 S.W. 37, 37 Am. Sts. Rep. 415. (See also Normandy Consolidated School District vs. Wellston Sewer District, 77 S.W. (2) 477, l. c. 478-479 [2-3]).

The courts have also held that drainage districts only have such power as conferred upon them by an act of the Legislature and necessary implied power to carry out the express power granted by

the Legislature. See Grand River Drainage District of Cass and Bates County v. Reid, 341 Mo. 1246, 111 S.W. (2d) 151.

Furthermore, the courts have held that the Legislature may say that public property may be benefited by public improvements and that a municipality be made to respond to assessments therefor by a general judgment to be paid out of funds in the general treasury. See Drainage District No. 1 of Bates v. Bates County, 269 Mo. 78, 189 S.W. 1176. The courts have also held that such assessments are not enforceable against public roads and highways by foreclosure of lien and sale, but by judgment. See Drainage District v. Trail Creek Township, 371 Mo. 933.

The General Assembly of the State of Missouri has specifically authorized said drainage district to assess public roads and highways, railroads, etc., for benefits. However, no such specific authority has been granted to tax lands of the State of Missouri. By so doing we may assume that the legislative intent was that said State land is not subject to such assessment under the well-known canon of statutory construction, that the expression of one thing is exclusion of another. Kansas City v. J. I. Case Threshing Machine Co., 87 S.W. (2) 195, 337 Mo. 913.

So, if we are to consider this maintenance tax as a tax, then definitely the Little River Drainage District cannot legally assess such tax against land owned by the state or the Conservation Commission as the case may be and located within said drainage district.

However, let us examine the law to determine if it is actually a tax or merely an assessment benefit. The statute clearly denotes it as a tax. However, in State ex rel. Drainage District No. 28 of New Madrid County, et al, v. Thompson, 41 S.W. (2d) 941, l. c. 945, the Court said:

> "The uniform tax laws of our Constitution invoked by respondent has no application to this case for the reason that special assessments levied in a drainage district to pay for local improvements made in the district are not taxes within the meaning of this clause of the Constitution. (cases cited)."

The Appellate Courts in this state have on numerous occasions held that special benefit assessments cannot be legally assessed against public property in the absence of an express enactment or clear implication. In Normandy Consolidated School District vs. Wellston Sewer District, supra., at l. c. 479, the court said:

"[4] Now in the case at bar there is no claim that the Legislature made any express mention of school property as being subject to assessment for the special taxes provided for in the law, but what the sewer district does insist is that such a legislative intent is clearly and necessarily to be implied from the all-inclusive nature of the language used. Suffice it merely to say that by section 11037 of the law (Mo. St. Ann. Sec. 11037, p. 7405) it was provided that a uniform tax should be levied 'upon all the lands' within any sewer district, and by section 11044 (Mo. St. Ann. Sec. 11044, p. 7411) that upon the assessment of benefits a tax of a portion of such benefits should be levied 'on all lots, tracts and parcels of land, railroad and other property in the district,' said tax to be apportioned to and levied 'on each lot, tract, or parcel of land or other property in said district' in proportion to the benefit assessed. No doubt similar expressions are to be found elsewhere in other sections of the act, but the provisions heretofore specifically referred to are enough to indicate the general character of the language used by the Legislature in designating the property it intended to be held subject to the tax.

"At first blush it might indeed seem that a legislative intent to hold public property subject to the assessment would be implied from the language requiring the tax to be levied upon all the lands, lots, tracts, and parcels of land in the district, and yet as the authorities run such mere general language may not be held to constitute the expression of a clear intent that public property should be liable to the tax along with all private property.

"In City of Edina, etc., v. School Dist., etc., supra, the statute provided that the cost of paving and curbing all streets should be levied as a special assessment 'upon all lots and pieces of ground upon either side of such street * * * abutting thereon,' and yet the Supreme Court in banc held that such language was not sufficient

> to warrant the imposition of such special assessment upon the defendant school district which was sued upon tax bills issued against its property which abutted upon the street improved and received the benefit of the improvement. A similar result was reached in City of Clinton v. Henry County, supra, where the law provided that the assessment should extend to 'all lots and parcels of ground on either side of such street,' but was held not to include property benefited by the improvement but held by the county for strictly public purposes.
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> "So in the case at bar we must hold that the terms of the sewer law did not reveal a clear legislative intent that school property should be subject to the imposition of the taxes provided for therein, and as adding support to this idea it is not amiss to point out that the provisions made for the collection of the taxes likewise refute any idea that public property was intended to be taxed.
> * * * * * * * * * * * * * * * * "
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> (Underscoring ours)

See also, City of Edina v. School Dist., 305 Mo. 452, 267 S.W. 112, 113; 36 A.L.R. 81532.

There are Federal District Court cases construing similar state statutes in Oregon and other states that hold benefit assessments can be made against state and federal owned land in drainage district. See United States v. Aho, 68 Fed. Sup. 358, wherein the United States Government was condemning land in a drainage district. The government's contention was, that it was only necessary to pay the fee title owners of said land and not necessary to allow for any annual assessments against said land by the drainage district. The court held that such benefits are concomitants of easements appurtenant to the particular parcel of land in said drainage district. However, in the State of Oregon there was specific legislative authority for such assessments against the State of Oregon, which is not the case in Missouri, and the District Court held all of the land was subject to the assessment, that to not assess government owned land therein might destroy drainage districts.

However, in view of the foregoing Missouri Appellate Court decisions which have not been specifically overruled holding that such an annual assessment is not a tax but merely a benefit assessment and that the immunity provision of the constitution of Missouri from taxation is not applicable, and further in view of the foregoing decisions holding that even before such benefit assessments can be

Mr. I. T. Bode, Director

assessed against state owned land there must be statutory authority specifically providing for the assessing of such benefits against state owned property or clear implication, we are forced to conclude that such benefit assessments cannot be assessed against the state owned land within said drainage district.

CONCLUSION

It is the opinion of this department that the land in question located within the Little River Drainage District and presently owned by the State of Missouri, for the use and benefit of the Conservation Commission is not subject to an annual maintenance tax assessed by said drainage district.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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