

DITCHES: : Sections 246.200 and 246.210, RSMo 1949,
:prohibiting certain obstructions of
DRAINAGE DISTRICT: :drainage ditches, do not apply to acts
:done by the State Highway Commission.
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June 24, 1953

Honorable Lawson Romjue
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Romjue:

By your letter of June 11, 1953, you requested
an official opinion as follows:

"A land owner in this county has organized himself as a private drainage district under the name of Private Rock Branch Drainage and Levee District. A relocation of U.S. Highway No. 36 crosses a drainage ditch of the District. The State Highway Commission instituted condemnation proceedings to acquire the necessary property interest to go over the land and ditch in question and the land owner and District have filed exceptions to the commissioner's report.

"Under the construction plan of the State Highway Commission, the crossing of the drainage ditch is by means of an earthen fill with a 42 inch flat bottom tube or pipe to allow the water to flow underneath the earthen fill; the land owner and District are not satisfied with this type of crossing because he or it contends that the elevation is not right and also that the pipe will not carry the water and also will fill up by sedimentation. A suit seeking a permanent injunction has been filed by the District against the State Highway Commission and a second suit has been filed by the District against the contractor, which I understand is an Illinois corporation, also seeking a permanent injunction. The Division Engineer of the State Highway Commission here in

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Macon has advised me that the re-location and plans are entirely regular and approved by the State Highway Commission.

"The land owner (who is really the District) has conferred with me and left a letter with me, copy of which I am enclosing. He of course is seeking by any and all means possible to prevent the construction of the re-location in the manner which the State Highway Commission has approved and is doing the work, contending that a criminal prosecution should be instituted under the provisions of Sections 246.200 and 246.210.

* * * * *

"Under the facts outlined in this letter, will you please advise me (1) what my duties as the Prosecuting Attorney are, (2) what discretion I may have as Prosecuting Attorney to either not file an information or to await the outcome of the injunction suits, and (3) if it is your determination that I should proceed to file a criminal information or informations, what officers or employees of the State Highway Commission should be made defendants."

You ask whether the act of the State of Missouri in placing an earthen fill with a 42 inch flat bottom tube or pipe in a drainage ditch is within the purview of the following sections:

"246.200.--1. No person, corporation, county court or other municipal corporation shall be permitted to sink, set, or drive any posts, pillars or piling in any of the ditches, drains or watercourses constructed by any district organized under the laws of this state for the purpose of erecting any bridge, trestle or covering over or across any such ditch, drain or watercourse. All supports for any such bridges, coverings or trestles shall be erected or placed on the banks of such ditches, drains or watercourses so as not to obstruct the flow of the water therein. * * *."

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"246.210.--1. It shall be unlawful for any person, persons, association or corporation to fill up, or cause to be filled up, injure, impair or destroy the usefulness of any drain, levee, ditch, dike, revetment or other works now constructed or hereafter constructed in any drainage or levee districts organized under the provisions of any previous existing or future laws of Missouri, relating to the formation of drainage or levee districts to reclaim swamp, wet and overflowed lands for sanitary or agricultural purposes.

"2. It shall also be unlawful for any person, persons, association or corporation to in any manner throw or cause to be thrown, fall or cause to be fallen, place or cause to be placed, float or cause to be floated any tree, tree top, brush, log or other substance in any drain, ditch, floodway, basin or other works constructed by any drainage district constructed in this state; or to build any fence, dam, or other works across any such ditch; or to pasture any stock on any levee or right of way of any levee while the waters in the river or rivers, are at or near flood stage in such rivers; or to use any such levee for road purposes by driving or riding any ass, mule, horse or oxen on the top or on the side of any levee or by driving any vehicle thereon at any time.
* * *."

In determining the meaning of any statute, we have certain rules of statutory construction to aid and guide us. One of these statutory constructions is the rule "expressio unius est exclusio alterius" which is defined by the St. Louis Court of Appeals in *City of Hannibal vs. Minor*, 224 S.W. (2d) 598, 1.c. 605:

"There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio

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unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another."

Since Section 246.200 specifically prohibits any "person, corporation, county court or other municipal corporation" and Section 246.210 specifically prohibits any "person, persons, association or corporation" from obstructing drainage ditches, it seems that the action of the Legislature in specifically naming the types of persons and organizations to which the statutes apply, would, applying the above rule, exclude the State of Missouri and its agents from the penalties therein provided.

There is another doctrine which excludes the State from the operation of the two sections in question. This doctrine is stated by 59 C.J., "Statutes", Section 653, page 1103, as follows:

"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. * * *."

The two sections in question do not expressly name the State of Missouri or its agencies, nor does the language of the statutes manifest a clear intention to include the State and its agencies. Since the State is not clearly included within the statutes, we must conclude that commission of the acts prohibited, when done by the State and its agencies, is not criminal.

CONCLUSION

It is, therefore, the opinion of this office that Sections 246.200 and 246.210, RSMo 1949, do not apply to the State Highway Commission in the discharge of their official duties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

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JOHN M. DALTON
Attorney General