



STATE OF KANSAS

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November 16, 1978

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ATTORNEY GENERAL OPINION NO. 78- 368

Mr. Leland E. Rolfs
Counsel
State Board of Agriculture
503 Kansas Avenue
Topeka, Kansas 66603

Re: Waters and Watercourses--Dams--Chief Engineer

Synopsis: Section 9 of ch. 431, L. 1978, exempts all dams and like structures impounding thirty acre feet of water or less from all jurisdiction which is vested in the Chief Engineer of the Division of Water Resources of the State Board of Agriculture by sections 1 through 8 of said bill.

* * *

Dear Mr. Rolfs:

In 1977, the Lieutenant Governor inquired of this office concerning the authority of the Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture to enter upon private property to assure compliance with the terms of any consent or permit which may have issued under K.S.A. 82a-301 through -305, for the construction of a dam or other water obstruction. In that opinion, we pointed out that the existing statutes did not provide an adequate basis for effective oversight of much dam construction and maintenance in the interests of public safety. In response, the 1978 legislature enacted Senate Bill No. 803, found at ch. 431, L. 1978. Section 1 thereof states thus:

"It is the intent of the legislature by this act to provide for the exclusive regulation of construction, operation and

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maintenance of all dams or other water obstructions by the state to the extent required for the protection of public safety. All dams or other water obstructions are declared to be under the jurisdiction of the division of water resources of the state board of agriculture and the chief engineer thereof. The chief engineer or his or her authorized representative shall supervise the construction, modification, operation and maintenance of dams or other water obstructions for the protection of life and property."

Under section 2, the chief engineer is authorized to adopt rules and regulations

"in order to establish standards for the construction, modification, operation and maintenance of dams and other water obstructions and to administer and enforce the provisions of this act."

Section 3 specifically grants the chief engineer the right of entry upon private property for the purpose of inspecting any dam or other water obstruction. Section 4 authorizes the chief engineer to issue orders under certain circumstances to require the correction of any condition which may present a hazard to public safety, or which may constitute a violation of any rules and regulations adopting standards governing such dams or other obstructions. Section 4 authorizes the chief engineer to issue orders under certain circumstances to require the correction of any condition which may present a hazard to public safety, or which may constitute a violation of any rules and regulations adopting standards governing such dams or other obstructions. Sections 6, 7 and 8 amended K.S.A. 82a-301, -302, and -303, existing statutes which provide for the issuance of permits as a prerequisite for the construction or alteration of any dam or other water obstruction. Section 9 amended K.S.A. 82a-304 to provide thus:

"The provisions of this act shall not apply to any dam which impounds thirty (30) acre feet of water or less."

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As stated above, section 3 of the act authorizes the chief engineer or his or her authorized representative "to inspect any dam or other water obstruction," and provides that for that purpose, they shall "have the right to access to private property." You inquire, first, whether, in view of section 9, *supra*, the Chief Engineer has the authority to inspect a dam which impounds thirty acre feet of water or less. Similarly, you inquire whether he has authority to issue any order, under section 4 of the act, to order any dam or like obstruction breached or repaired, if it impounds thirty acre feet of water or less.

The question is raised because the exemption of such dams and other obstructions, those impounding thirty acre feet of water or less, was included in the act by a section which amended K.S.A. 82a-304, a part of the existing enactment, K.S.A. 82a-301 *et seq.* Thus, the question is raised whether the phrase "[t]he provisions of this act" applies only to the existing act of which K.S.A. 82a-304 was a part, K.S.A. 82a-301 *et seq.*, or whether it applies to the entire 1978 enactment. K.S.A. 77-201 provides in pertinent part thus:


"In the construction of the statutes of this state the following rules shall be observed, *unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute: First* The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." [Emphasis supplied.]

It is clear that in 1978 Senate Bill 803, the legislature intended to and did vest in the Chief Engineer broad regulatory and enforcement powers and responsibility regarding the construction, maintenance and operation of all dams or other obstructions "to the extent required for the public safety." In the course of that act, the legislature found it expedient to amend, albeit not substantially, existing statutes which provided for the issuance of permits for dam construction and alteration. Clearly, the legislature intended to adopt and incorporate the existing statutory permit provisions, as amended, as an integral part of the 1978 statutory scheme vesting broad powers in the chief engineer. Section 9 of the act, exempting those structures impounding thirty

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acre feet or less from the "provisions of this act," is likewise an integral part of the entire act, and reflects an express legislative intent that such structures be exempt from all supervisory regulatory and enforcement powers of the Chief Engineer, and not merely from the permit provisions of sections 6, 7 and 8 thereof. Accordingly, in my judgment, the Chief Engineer has no authority to inspect a dam which impounds thirty acre feet of water or less, or to issue any order respecting the correction of any hazard or other condition in such structures. In sum, section 9, in my opinion, exempts all dams impounding thirty acre feet of water or less from all jurisdiction which is vested in the Chief Engineer by 1978 Senate Bill No. 803.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: Mr. Kenneth Wilke
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