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IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO.

STATE OF OHIO, ex rel., :
J. MICHAEL WATKINS, :
 :
Plaintiff-Relator : CASE NO. 82-CI-064
 :
vs. :
 :
ROBERT W. TEATER, Director, :
OHIO DEPARTMENT OF NATURAL RESOURCES :
Succeeded by :
MYRL H. SHOEMAKER, and : JUDGMENT ENTRY
 :
STEVEN H. COLE, Chief, :
DIVISION OF WILDLIFE :
Succeeded by :
RICHARD P. FRANCIS, :
 :
Defendants-Respondents :

For the reasons stated in the accompanying decision,
IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The court declares Regulation No. 1501:31-15-17(G) to be invalid.
2. Defendants-Respondents Myrl H. Shoemaker and Richard P. Francis and their successors in office are permanently enjoined from enforcing the limited hunting season for crows set forth in Regulation No. 1501:31-15-17(G).
3. Defendants-Respondents shall pay the costs of this action.

JOURNALIZED

DEC 8 1983

D. WILLIAM UDELL, CLERK
WAYNE COUNTY, OHIO

Mark K. Wiest
Mark K. Wiest, Judge

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MYRL H. SHOEMAKER, and :
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DIVISION OF WILDLIFE :
Succeeded by :
RICHARD P. FRANCIS, :
 :
Defendants-Respondents :

HISTORY OF CONTROVERSY

Relator filed this action on March 3, 1982, requesting that the court declare Division of Wildlife Order 1501:31-15-17(G) invalid and permanently enjoin the defendants from enforcing it. The defendants moved to dismiss and the motion was overruled on December 2, 1982. It was further ordered in the December 2, 1982, judgment entry that, by agreement of the parties, the matter would be decided by the court on the briefs of the parties without an oral hearing. On December 15, 1982, defendants filed a motion for summary judgment and the plaintiff's counsel filed a trial brief. On January 25, 1983, a stipulation was filed by the parties that they were submitting the matter to the court on cross-motions for summary judgment. On February 28, 1983, the

defendants' motion for summary judgment was granted for three reasons: 1) that the lawsuit was barred by sovereign immunity; 2) that the plaintiff had no standing to bring a taxpayers' suit; and 3) that the plaintiff failed to show irreparable harm. The plaintiff then appealed and on August 31, 1983, the Court of Appeals reversed and remanded. The Court held that the doctrine of sovereign immunity was not a bar to the plaintiff's lawsuit. The Court further stated that although the motion was called summary judgment, since no Rule 56 "evidence" was presented, the motion was, in effect, one to dismiss under 12(B)(6). Under 12(B)(6), the question was whether the complaint stated a claim upon which relief could be granted and the Court of Appeals said that it did, and thus the remand. On November 1, 1983, the parties filed a pleading entitled "Stipulation and Waiver of Hearing" by which they submitted the matter to the court without hearing upon a stipulation of facts and the briefs of the parties which had been filed before the appeal was taken.

DISCUSSION OF FACTS AND LAW

Before the merits of relator's claim can be reached under the Declaratory Judgment Act, the court must determine whether a justiciable controversy exists between the parties to this lawsuit and whether speedy relief is necessary to the preservation of relator's rights which might otherwise be impaired or lost. Sterling Drug v. Wickham, 63 Ohio St. 2d 16 (1980). Paragraphs 2, 5, 6, 7, 8 and 10 of the "Stipulation and Waiver of Hearing" answer both questions: "Yes"!

There is no question that Regulation No. 1501:31-15-17(G) conflicts with Sec. 1533.07 R.C. They each provide a different "season" for the taking or hunting of crows. The statute (last amended October 30, 1969) provides that crows may be killed at anytime except Sundays. The regulation (effective May 18, 1981) restricts hunting of crows to Thursday, Friday and Saturday of each week from the second Thursday of June to the third Saturday of the following March. This court, for the reasons stated in the remainder of this decision, believes that the statute must prevail in this conflict.

The regulation in question was adopted by the Chief of the Division of Wildlife ("Chief") pursuant to the power delegated to him by the legislature in Sec. 1531.08 R.C. which became effective on September 27, 1974. That section gives the "Chief" authority over all matters pertaining to wild animals.

Sec. 1533.07 is entitled "Protection Afforded Non-Game Birds". A non-game bird is defined by Sec. 1531.01(T)R.C. as: "includes all other wild birds not included and defined as game birds". Paragraph (S) defines "Game birds". Paragraph (X) defines "Wild animals" in pertinent part as : "include . . . wild birds . . ." A crow, by definition, is both a wild animal and a non-game bird. Herein lies the problem. Does the delegation of authority over "wild animals" in Sec. 1531.08 give the Chief the power to permit the hunting of non-game birds?

In State ex rel., Hyter v. Teater (1977), the Lucas County Court of Appeals said no. The Sixth District Court of

Appeals, in rejecting the same arguments advanced by the respondent herein, held that the Chief was not authorized by Sec. 1531.08 to establish a season for the hunting of morning doves.

This court agrees with the rationale adopted by that court and will therefore adopt its holding, namely that Sec. 1531.08 R.C. does not delegate to the Chief of the Division of Wildlife the authority to establish seasons for the hunting of non-game birds. In that case, the morning dove; in this case, the crow.

Reg. No. 1501:31-15-17(G) is invalid since the Chief has exceeded his authority by establishing a season for the hunting of crows. Relator is entitled to the permanent injunction enjoining the defendants or their successors from enforcing the regulation.


Mark K. Wiest, Judge

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