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ENFORCEMENT OFFICERS — HAVE AUTHORITY TO ENFORCE FISH AND GAME LAWS ON BODY OF WATER CREATED BY DAMMING A FLOWING STREAM—PROVISO, SUCH STREAM EITHER CONTINUOUSLY OR SEASONABLY PROVIDES A PASSAGEWAY FOR FISH TO PUBLIC WATERS OR WATERS SITUATED ON LAND OF ANOTHER—SECTION 1441 G. C.

SYLLABUS:

The enforcement officers specified in Section 1441, General Code, have authority to enforce the fish and game laws on a body of water created by damming a flowing stream where such stream either continuously or seasonally provides a passageway for fish to public waters or waters situated on the land of another.

Columbus, Ohio, November 12, 1948

Hon. H. A. Rider, Commissioner, Division of Conservation and Natural Resources
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

"Receipt is acknowledged of your informal Opinion No. 362, dated May 5, 1948, wherein you refer to a former opinion of the

Attorney General to the effect that privately owned lakes, ponds, or other bodies of water, which have no communication with any other body of water, are not subject to the fish and game laws of Ohio.

"I would appreciate your further opinion as to whether or not the Division of Conservation has authority to enforce the fish and game laws with respect to a body of water which is created by damming up a flowing stream. There has been a question raised in two or three instances where this situation prevails, and we are in doubt as to our authority to enforce the laws in such cases."

Section 1391, General Code, provides in part:

"The ownership of, and the title to all wild animals in the state of Ohio, not legally confined or held by private ownership, legally acquired, is hereby declared to be in the state, which holds it in trust for the benefit of all the people. Only in accordance with the terms of the General Code, or commission orders, then in effect, shall individual possession be obtained. No person shall at any time of the year take, in any manner, or possess any number or quantity of wild animals defined in this chapter, except as provisions of the General Code, or the commission orders then in effect, may permit to be taken, hunted, killed or had in possession, and only at such time and in such place, and in such manner, as the General Code or the commission orders, then in effect, may prescribe, and no person shall buy, sell, offer for sale the same, or any part thereof, transport or cause to be transported, except as permitted by the terms and provisions of the General Code or the commission orders then in effect. * * *"

The term "wild animals" used in the above quoted section is defined in Section 1390, General Code, as follows:

"Words and phrases as used in this chapter shall be construed as follows: * * * Wild animals: Clams or mussels, crayfish, aquatic insects, fish, frogs, turtles, wild birds and wild quadrupeds."

It is true, as pointed out to you in my Informal Opinion No. 362, dated May 5, 1948, that if the boundaries of a single owner or group of owners comprehend the entire surface of an inland body of water and if there are no means of passage by which the fish therein can migrate to other waters, the fish in such water are the absolute property of the owners of the land, even though uncaught, and are not subject to the fish and game laws of the state.

However, in your present question you inquire as to the application of the fish and game laws with respect to a body of water created by damming a flowing stream. Precisely the same question was before the Supreme Court of Mississippi in the case of Ex Parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700. In that case it appears that one Louis Fritz had caught fish by using a seine longer than permitted by statute. The fish were caught in Horn Lake which had an outlet into the Mississippi. This outlet sometimes ceases to flow in times of drought. Fritz contended that since he was the owner of a considerable portion of the bed of the lake and had permission to fish from other riparian owners, that he had the right to take fish in any manner he might see fit, that the public had no interest in the fish in his waters, and that the state of Mississippi was without power to regulate or in any wise restrict or control him in his dominion over the fish. In the report of this case the court said at page 723 of 38 Southern Reporter:

> "* * * It is perfectly clear that he does not own the fish in Horn Lake, and this would be true even if he owned the bed of the entire lake and all its waters. Fish are ferae naturae. They are incapable, until actually taken, of absolute ownership, except in artificial lakes or in small ponds that are entirely land locked. In all running streams, large lakes, small lakes with outlets into other waters, the right of the state to regulate the time, the manner, and extent of the taking of fish, is unquestioned. It is part of the police powers of the state, which has never been parted with, and cannot be surrendered. By reason of the migratory habits of fish, their ownership is in the public, and no individual has any absolute property right in them until they have been subjected to his control. It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers through the caprice, improvidence, or greed of the riparian proprietors as well as trespassers. People v. Collison, 85 Mich. 105, 48 N. W. 292; West Point Water Power & Land Imp. Co. v. State, 49 Neb. 218, 66 N. W. 6; Weller v. Snover, 42 N. J. Law, 341; People v. Reed, 47 Barb (N. Y.) 235; People v. Doxtater, 75 Hun (N. Y.) 472, 27 N. Y. Supp. 481; State v. Blount, 85 Mo. 543; Gentile v. State, 29 Ind. 409; State v. Roberts, 59 N. H. 484; People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; Peters v. State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; Organ v. State, 56 Ark. 270, 19 S. W. 840; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Rodman, 58 Minn. 393, 59 N. W. 1098.

> "Citation of authorities in support of the general position maintained in this opinion could be multiplied indefinitely. Indeed, we know of no well-considered case anywhere which denies or materially qualifies it. It is held with practical unanimity in all jurisdictions that animals ferae naturae are not the subject of private ownership until reduced to actual possession; that the ownership of such animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common; and that the state may regulate and restrict the taking of such animals, or absolutely prohibit it if deemed necessary for their preservation or for the public good. * * *"

From the foregoing it is clear that the sovereign ownership of the fish does not depend on the right of the public to take the fish. While the owners or their lessees or licensees may have the exclusive right to fish and any person fishing without permission could be prosecuted as a trespasser, nevertheless the fish, until reduced to possession, remain the property of the people of the state and hence subject to control and regulation by the state.

It seems to be well established that the same principle is applicable whether the body of water is permanently connected with public waters or whether such connection is only seasonal. This question was specifically considered by the Supreme Court of Illinois in the case of People v. Bridges, 142 Ill. 30, 31 N. E. 115, where the court said at page 117 of the Northeastern Reporter:

> "* * * Again, it is contended that the body of water in question cannot be deemed to have been within the contemplation of the legislature when it passed said statute, because the land covered by said water, as well as all the lands by which it was surrounded, are the private property of Miller, and that said body of water, by reason of its situation, is subject to no right of navigation in favor of the public and no right of easement in favor of other riparian proprietors. It has no outlet, and during the greater portion of the year it is cut off from and has no communication with the water course near which it is situated. It is said that Miller's rights in said body of water are so paramount and exclusive that, if he chose to fill it up, and thereby destroy it as a lake or pond, no rights of any private party or of the public would be infringed; and this is put forward as the test of legislative intention to include said lake among the waters enumerated by said act. It seems to us to be a sufficient answer to this contention that the statute itself, neither expressly nor by implica-

> tion, has established any such test. There may be, and doubtless are, various, and perhaps many, lakes, ponds, sloughs, and bayous in the state, which are so far private property that the owner may drain them or fill them up without infringing any public or private right, but which, so long as they are permitted to remain in their natural condition, are places where fish common to the waters of the state are propagated and raised. And, while this is so, the statute makes no distinction between bodies of water thus situated and those in respect to which public rights or private easements exist. * * *"

To the same effect is the case of State v. Lowder et al., 198 Ind. 234, 153 N. E. 399. The second headnote in the Northeastern report of the case provides:

> "2. If, at time of high water, pond was so connected with public waters as to permit migration of fish to and from it, owner of land on which pond was situated did not have such an exclusive interest in the fish therein as to be immune from prosecution for taking fish therefrom with a seine; it being immaterial that at low water there was no connection between the pond and a river into which it sometimes overflowed, or that pond was located on two or more tracts of land owned by different persons."

See also Peters v. State, 96 Tenn. 682, 36 S. W. 399; Taylor Fishing Club v. Hammett (Texas) 88 S. W. (2d) 127; Sollers v. Sollers, 77 Md. 148, 26 A. 188.

In your letter you inquire whether the Division of Conservation has authority to enforce the fish and game laws. In this connection your attention is invited to the following language in Section 1441, General Code:

> "The law enforcement officers of the division of conservation and natural resources shall be known as game protectors. The commissioner, game protectors, and such other employees of the division as the commissioner may designate, and other officers as are given like authority, shall enforce all laws pertaining to the taking, possession, protection, preservation, management and propagation of wild animals and all commission orders then in effect. * * *"

Therefore, in view of the foregoing and in specific answer to your question you are advised that the enforcement officers specified in Section 1441, General Code, have authority to enforce the fish and game laws on a body of water created by damming a flowing stream where such stream either continuously or seasonally provides a passageway for fish to public waters or waters situated on the land of another.

Respectfully,

HUGH S. JENKINS,
Attorney General.