

3158.

FISH CHUTES—OVER PRIVATE MILL DAMS—NEED NOT BE CONSTRUCTED BY OWNERS—EXCEPTIONS NOTED—WHEN COUNTY COMMISSIONERS MUST CONSTRUCT SAID CHUTES.

SYLLABUS:

1. *It is not necessary for the owner of a private mill dam erected in any water of the state to construct a fish chute in such dam for the free passage of fish over the dam, unless the owner is required to do so either by contract or by special grant of the legislature.*

2. *By virtue of section 2496, General Code, the county commissioners, on petition of five or more freeholders of the county, shall construct and maintain a fish chute for the free passage of fish across a mill dam owned and erected by private interests in any water of the state of Ohio.*

COLUMBUS, OHIO, April 17, 1931.

HON. J. W. THOMPSON, *Conservation Commissioner, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date referring for my consideration, pursuant to a resolution of the conservation council, the question presented by Mr. Tobias Bretney as to the responsibility for the construction of a fish chute in a mill dam owned by the King Powder Company of Kings Mills, Ohio, and located on the Little Miami River.

Inasmuch as I am not advised under what authority the King Powder Company erected this mill dam, I shall assume, for the purpose of this opinion, that the owner of the mill dam is not required, either by contract or by special grant of legislature, to construct a fish chute in this dam.

The earliest legislation on this question was contained in an act which may be found in 69 O. L., page 15. This act required the owner of a mill dam across any river or creek in Ohio to erect a passageway or fish chute across the dam so as to permit the free passage of fish. The act was subsequently repealed by the Ohio Legislature.

The following sections of the General Code of Ohio and parts thereof are pertinent to your inquiry. Section 1416 provides in part as follows:

“No person shall locate, place or maintain in any of the waters of this state over which the state has jurisdiction, any obstruction to the natural transit of fish. The chief of the division of fish and game, assistant chief, or any fish and game protector or other person, may take up, remove or clear away such obstructions, except mill dams, \* \* \*.”

Section 1438-2 provides in part:

“The word ‘waters’ as used in this section shall be construed to mean and include any lake, pond, reservoir, river, stream, or other body of water, whether natural or artificial, in which fish, water fowl, or game may be protected by the laws of this state.”

Section 1430 provides in part as follows:

“All moneys derived from such licenses are hereby appropriated for the use of the conservation council for the protection, propagation and preservation of fish, including the establishment, operation and maintenance of fish hatcheries, the leasing, purchasing or otherwise acquiring

title to land for said hatcheries, constructing fish chutes and dams and other methods of fish propagation and fish culture.”

Section 2496 provides as follows:

“Upon the petition of not less than five freeholders of a county, the commissioners thereof shall erect, maintain and keep open and free for the passage of fish, a sufficient passageway or chute over a dam across a river or creek. The commissioners shall let the work of erecting such passageway or chute and providing the materials therefor, to the lowest responsible bidder. When built and accepted by them, all expenses attendant upon its erection, maintenance or keeping open and free, upon approval of the county commissioners, shall be paid from any funds of such county not otherwise appropriated. But such passageways or chutes for fish over dams owned by the state shall be erected, maintained and kept open and free by the division of conservation.”

These sections provide that the natural passage of fish in waters in this state can not be obstructed and that any obstruction may be removed, except a mill dam. However, if the obstruction is a mill dam the removal thereof is controlled by section 2496, which provides that the county commissioners, upon the petition of at least five freeholders of the county, shall erect and maintain a fish chute for the free passage of fish over a dam and that fish chutes over dams owned by the state shall be erected and kept open by the division of conservation and that the cost of constructing fish chutes is to be paid from revenue obtained through the sale of licenses as provided for by section 1430. It appears to me that by virtue of section 2496 the county commissioners have authority and are duty bound to erect fish chutes in dams, other than those owned by the state, which are located in their respective counties. In other words, if the dam was erected and owned by a private company, the county commissioners could construct a fish chute for the free passage of fish over the dam whenever five or more freeholders of the county petitioned the county commissioners to do so. Section 2496 does not require nor compel the owner to construct a fish chute in a private mill dam or pay any of the expenses thereof, even though a mill dam may be an obstruction preventing the free passage of fish. It is an obstruction that can not be removed by the conservation department or its officers by virtue of section 1460, General Code, and therefore the only way to secure the free passage of fish would be by constructing a fish chute as provided for by section 2496.

I also call your attention to the fact that section 2496 requires that the division of conservation of the state of Ohio construct fish chutes in dams owned by the state and that the construction thereof does not require a petition to be signed by five or more freeholders in order to initiate such work.

It is therefore my opinion that:

1. It is not necessary for the owner of a private mill dam erected in any water of the state to construct a fish chute in such dam for the free passage of fish over the dam, unless the owner is required to do so either by contract or by special grant of the legislature.

2. By virtue of section 2496, General Code, the county commissioners, on petition of five or more freeholders of the county, shall construct and maintain a fish chute for the free passage of fish across a mill dam owned and erected by private interests in any water of the state of Ohio.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*