

1927

LICENSING BOATS—ENFORCEMENT OF LAW—RULES AND REGULATIONS—SECTION 479 G. C. APPLICABLE TO LANDS AND WATERS SET ASIDE FOR PUBLIC PARK AND RECREATIONAL PURPOSES—MOSQUITO CREEK RESERVOIR.

SYLLABUS:

The rules and regulations as set forth in Section 479, General Code, governing the enforcement of law and the licensing of boats, etc. are applicable to the lands and waters set aside for public park and recreational purposes at Mosquito Creek Reservoir.

Columbus, Ohio, May 28, 1947

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

Dear Sir:

I have your letter requesting my opinion which reads as follows:

“On July 1, 1946, the War Department issued to the State of Ohio a license on Mosquito Creek Reservoir in Trumbull County, Ohio, which covered the Recreational Development of this lake. This license was approved by your office on October 16, 1946, and is covered in your opinion No. 1262.

Your opinion is further requested as to whether Section 479 (Rules and Regulations; Lakes and Parks), of the Ohio General Code, would apply as to law enforcement, boat licenses, etc., upon the above-mentioned lake under this license.”

The license to which you refer in your letter was made on the thirty-first day of July, 1946, between the Secretary of War of the United States, and the State of Ohio acting through its Department of Agriculture, Division of Conservation and Natural Resources.

It appears that the seventy-fifth Congress of the United States during its third session, passed an act authorizing the construction of certain public works for flood control and other allied purposes including construction of dam and reservoir projects. Construction of these projects was placed under the jurisdiction of the War Department and under the direct supervision of the chief of engineers. The Secretary of War was authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project (Public Law No. 761, approved June 28, 1938).

The seventy-seventh Congress at its first session amended and supplemented the act of 1938, referred to above, and authorized additional appropriations to carry these changes into effect (Public Law No. 228, approved August 21, 1941).

The above acts are codified as U. S. C. Title 33, Section 701 et seq.

The seventy-eighth Congress at its first session appropriated to the War Department, Corps of Engineers, the sum of \$4,385,000 for improve-

ments in connection with the Mosquito Creek projects, in the following language: (57 Statutes 544, approved July 12, 1943)

“Flood control general: For the prosecution of a dam and reservoir on Mosquito Creek, Ohio, authorized by the acts of June 28, 1938, and August 18, 1941, \$4,385,000.”

Sections 13770 and 13771, General Code, deal with the acquisition of land in this state by the United States and the jurisdiction thereof, and provide:

Section 13770:

“That the consent of the state of Ohio is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, court houses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.”

Section 13771:

“That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.”

Article I, Section 8, Clause 17, of the Constitution of the United States, referred to in Section 13770 supra, provides:

“The Congress shall have Power * * *:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may be, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; * * *.”

From the foregoing it is seen that Ohio has by an act of the General Assembly consented to the acquisition of land and ceded exclusive jurisdiction over such lands acquired by the United States, in this State.

However, the act of Congress of October 9, 1940, deals with this question and provides in part:

“Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.”

This act is codified in two places in the U. S. C., i. e., Title 40, Section 255, and Title 33, Section 733.

Notwithstanding the fact that the laws of a state wherein lands acquired by the United States contain provisions under which consent to such acquisition is given, and jurisdiction over such lands is ceded to the United States, it is now well settled that the above quoted constitutional provision of the United States does not compel it to assume exclusive jurisdiction over such lands. In *Atkinson v. State Tax Commission of Oregon*, decided January 31, 1938, 303 U. S. 20; 62 L. Ed. 621, it is stated in a per curiam opinion:

“In *Silas Mason Co. v. Tax Commission*, 302 U. S. 186, ante, 187, 88 S. Ct. 233, supra, we said that as a transfer of exclusive jurisdiction rests upon a grant by the State, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent. But we found no constitutional principle ‘which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests.’ The mere fact that the Government needs title to property within the boundaries of a State ‘does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction.’”

In *Stewart & Company v. Sadrakula*, 309 U. S. 94, 84 L. Ed. 596, decided January 29, 1940, is a statement of like effect which is as follows:

“It is now settled that the jurisdiction acquired from a state by the United States whether by consent to the purchase or by cession may be qualified in accordance with agreements reached by the respective governments. The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred.”

In *Adams v. United States*, 319 U. S. 312, 87 L. Ed. 1421, decided May 24, 1943, it was held as disclosed by the first headnote:

“Unless and until notice of acceptance of jurisdiction has been given, Federal courts are without jurisdiction to punish under criminal laws of the United States an act committed on lands acquired by the United States, where the applicable statute (Act of October 9, 1940, 40 U. S. C. Section 255) provides that United States agencies and authorities may accept exclusive or partial jurisdiction over lands acquired by the United States by filing notice with the governor of the state, or by taking other similar appropriate action, and that unless and until the United States has so accepted jurisdiction it shall be conclusively presumed that no such jurisdiction has been accepted.”

See also *Murray v. Gerrick & Co.*, 291 U. S. 315, 78 L. Ed. 821; *Arlington Hotel Co. v. Fant*, 278 U. S. 439, 73 L. Ed. 447; *James v. Dravo Contracting Co.*, 302 U. S. 132, 82 L. Ed. 155.

The act of 1940, 40 U. S. C. 255, 33 U. S. C. 733, supra, provides that exclusive jurisdiction of the United States over such lands shall not be required but that the head or other authorized officer of any department, if he may deem desirable, may accept on behalf of the United States such jurisdiction by filing a notice of such acceptance with the governor of the state wherein such lands are situated. An examination of the files of the office of the governor discloses that no such notice has been filed there with respect to the lands acquired by the United States in connection with the Mosquito Creek dam and reservoir project. Therefore, it seems conclusive and it is accordingly my opinion in the light of the above provisions, that since acceptance of exclusive jurisdiction was not effected in accordance with the provisions of the Federal statutes, jurisdiction over such lands still remains in the State of Ohio.

At its second session the seventy-eighth Congress passed an act in connection with the exercise of jurisdiction over the rivers of the nation, through the construction of works of improvement, for navigation or flood control, and declared it to be the policy of the Congress to recognize the interests or rights of the states to the fullest possible extent for all purposes of such waters. This act is known as Public Law No. 534 and was approved December 22, 1944. It has been codified as U. S. C. Title 16, Section 460 d and provides:

“The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: Provided, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, *without charge*, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.”

(Emphasis added.)

Acting in compliance with the authority granted in the above quoted provision of the Federal statute, the Secretary of War, under date of July 31, 1946 granted to the State of Ohio a “license” which reads in part:

“That the Secretary of War, under authority of Section 4 of the Act of Congress, approved 22 December 1944 (68 Stat. 887, 889), hereby grants to the State a license for a period of twenty-five (25) years beginning on the date of this license, but revocable at will by the Secretary of War, to occupy and use, for public park and recreational purposes only, certain lands in the

Mosquito Creek Reservoir Area, in Trumbull County, Ohio,
* * *

The State shall equip, maintain and control all public recreational facilities constructed by it as aforesaid, and the establishment, maintenance and control thereof shall include temporary concession privileges and such other activities as are necessarily incident thereto. The State may negotiate contracts for the operation of concessions appropriate to State park and conservation usage, such as boat liveries, sale of bait and fishing tackle, bathing facilities, and the like, subject to the written approval of the said District Engineer. The construction of wharves, piers, boat slips or other facility of any type shall be subject to the prior written consent of said District Engineer."

"The yearly average expenditure by the State on the licensed areas, including the water areas, for management, operation, improvement and maintenance of fish and game propagation and regulation, general recreational program and facilities, law enforcement and patrol shall equal at least the yearly average income from the sale of permits and concessions.

The State shall supervise and patrol the licensed areas, including the water areas, by one or more duly authorized agents of the Ohio Division of Conservation and Natural Resources."

The question of the authority of the State of Ohio to enter into such an agreement with the Federal Government is fully discussed in my opinion No. 828, dated March 23, 1946, addressed to Honorable Frank L. Raschig, Director of Public Works. The syllabus of that opinion provides in part:

"The State of Ohio, through the Division of Conservation and Natural Resources of the Department of Agriculture, has authority to accept in behalf of the State of Ohio a grant from the Federal government of the right to use Mosquito Creek Reservoir and the grounds constituting its shore line for park and recreation purposes."

Section 472, General Code, provides:

"All lands and waters now or hereafter dedicated and set apart for public park or pleasure resort purposes, or which may hereafter be acquired for such purposes, shall be under the control and management of the conservation council, who shall protect, maintain and keep them in repair. The conservation council shall have the following powers over all such lands and waters, to-wit: To make alterations and improvements thereof, to construct and maintain dikes, wharves, landings, docks, dams and

other works, and to construct and maintain such roads and drives in, around, upon and to such lands and waters as shall make them conveniently accessible and useful to the public. And said conservation council may, subject to the approval of the attorney general, acquire by gift, purchase or by appropriation proceedings, on behalf of the state, such real and personal property, rights and privileges as may be necessary in its judgment for the use, extension, enlargement and maintenance of such public parks and resorts, and for new public parks, resorts, reservoirs, channels, drives, roadways, docks, dams, landings, wharves and other improvements. The value of such real or personal property, together with the cost of appropriation, where appropriation proceedings are necessary, shall be paid out of the funds derived from the sale of special privileges and from leases of state land in and adjacent to the parks or pleasure resorts for which such purchase or appropriation is made, or when such costs exceed one thousand dollars, then out of moneys in the general revenue fund appropriated for such purposes, but no expense for these purposes shall be incurred until the General Assembly has first appropriated the money therefor.

“The conservation council shall maintain such police regulations and enforce such rules for the government of the public parks as may be prescribed by law.” (Emphasis added.)

By virtue of an act passed by the ninety-third General Assembly, effective June 28, 1939 (118 O. L. 83) the Conservation Council was abolished and under the provisions of Section 1438-4, General Code, “conservation council” as used in the above section (and also in Section 479, General Code, which will be referred to infra) is amended to read as “the conservation and natural resources commission,” which latter mentioned body was created by the same act. Therefore, it is readily seen that under the provisions of Section 472, General Code, the conservation and natural resources commission is specifically directed to maintain police regulations and enforce rules, as prescribed by law, in connection with all lands and waters set apart for public parks or pleasure resort purposes.

Section 479, General Code, sets out a series of rules whereby your commission is to be governed and whereby its authority as concerns these park areas is elaborated. As a part of this section, Rules 1 to 25 inclusive therein set forth provide for the qualifications and duties of such patrolmen. Beginning with Rule 26 of this section are found the rules relative to requiring permits of the various types of watercraft, and the fees applicable thereto.

Under the specific provisions of the license granted by the Federal Government, when considered in connection with the above cited statutory provisions, it seems very clear that all the rules and regulations as set forth in Section 479, General Code, governing the enforcement of law and the licensing of boats, etc. are applicable to the lands and waters set aside for public park and recreational purposes at Mosquito Creek Reservoir.

Respectfully,

HUGH S. JENKINS,
Attorney General.