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1. GUERNSEY-SALT FORK WATERSHED DEVELOPMENT—APPROPRIATION $250,000.00 TO DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WATER—ITEM IN AM HB 932, 101 GA BECAME LAW FOLLOWING REPASSAGE OVER GOVERNOR'S VETO—END NINETY DAY REFERENDUM PERIOD—SECTION 1c, ARTICLE II, CONSTITUTION OF OHIO.
2 CONSERVANCY DISTRICT—CHAPTER 6101., RC—DOES NOT HAVE EXCLUSIVE JURISDICTION IN TERRITORY INCLUDED WITHIN ITS BOUNDARIES—CONSERVATION AND FLOOD CONTROL PROJECTS—CONSENT OF GOVERNING AGENCY NOT REQUIRED WHERE DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WATER, HAS BEEN AUTHORIZED BY LEGISLATIVE ENACTMENT TO FUNCTION.
3. ACQUISITION OF PROPERTY IN FURTHERANCE OF WATER IMPROVEMENT PROJECTS LIMITED—EXERCISE OF RIGHT OF EMINENT DOMAIN—TAKING OF PRIVATE PROPERTY—CHAPTER 1523., RC.
4. FEDERAL CONSTITUTIONAL CONSIDERATIONS—FLOOD EASEMENTS ACQUIRED BY UNITED STATES OR AGENCY THEREOF—PUBLIC PROPERTY—DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WATER—WITHOUT AUTHORITY TO INTERFERE WITH PROPERTY OF UNITED STATES WITHOUT CONSENT OF FEDERAL AGENCY CONCERNED—CHAPTER 1523., SECTION 1523.01 RC.

SYLLABUS:

1. The item in Amended House Bill No. 932, 101st General Assembly, appropriating the sum of $250,000.00 to the Department of Natural Resources, Division of Water, for the "Guernsey-Salt Fork Watershed Development," became law following its repassage over the governor's veto at the end of the ninety-day referendum period provided in Section 1c, Article II, Ohio Constitution.

2. A conservancy district organized under the provisions of Chapter 6101., Revised Code, does not have exclusive jurisdiction in the territory included within its boundaries, to carry on conservation and flood control projects; and where the Department of Natural Resources, Division of Water, has been authorized by legislative enactment to carry on such a project within any such district the consent with respect thereto of the governing agency of such district is not required.

3. The Department of Natural Resources, Division of Water, in the acquisition of property in the furtherance of water improvement projects under authority of Chapter 1523, Revised Code, is limited, in the exercise of the right of eminent domain, to the taking of private property only.

4. Both because of federal constitutional considerations and because flood easements acquired by the United States, or an agency thereof, constitute public property within the meaning of Section 1523.01, Revised Code, the Department of Natural Resources, Division of Water, is without authority, in the construction of a water improvement project under the provisions of Chapter 1523., Revised Code, to interfere with such property of the United States without the consent of the federal agency concerned.

Columbus, Ohio, February 25, 1956

Hon. A. W. Marion, Director, Department of Natural Resources
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The 101st Ohio General Assembly appropriated for the use of the Department of Natural Resources, Division of Water, $250,000.00 for 'Guernsey-Salt Fork Watershed Development' (Amended House Bill No. 392); thereafter, this item was vetoed by the Governor. Because there seems to be a great deal of dispute as to whether or not the 101st Ohio General Assembly later overrode this veto, your informal opinion answering the following question is respectfully requested:

"(1) Is there presently available for the use of the Department of Natural Resources, Division of Water, $250,000.00 for 'Guernsey-Salt Fork Watershed Development'?

"If your answer to the above question is in the affirmative; i.e., that the 101st Ohio General Assembly did override the Governor's veto and therefore these funds are available, your

answers to the following additional questions are respectfully requested:

"(2) As the proposed Guernsey-Salt Fork Project would be located within the Muskingum Conservancy District, would the Department of Natural Resources, Division of Water, have to first obtain permission from the Muskingum Conservancy District before undertaking the construction of this improvement?

"(3) As the proposed Guernsey-Salt Fork Project would be located within the Wills Creek Flood Control Project—which project is managed and controlled by the U.S. Army Corps of Engineers—would the Department of Natural Resources, Division of Water, have to first obtain permission from the U.S. Army Corps of Engineers before undertaking the construction of this improvement?

"(4) As most, if not all, of the land which would be required for this project is burdened by flood easements (the flood easements were acquired by the U.S. Army Corps of Engineers in connection with the Wills Creek project and they authorize the Army Engineers to inundate this land if necessary) could the Department of Natural Resources, Division of Water, construct an improvement on this land and/or impound water on this land without first obtaining the cancellation and release of these easements?

"(5) If the United States Government would not voluntarily release these flood easements, could the Department of Natural Resources, Division of Water, appropriate the United States Government's interest in this land."

I note from the legislative journals of the 101st General Assembly that Amended House Bill No. 932 was originally passed as an emergency measure, receiving the vote of two-thirds of the members elected to each house as required in Section 1d, Article II of the Ohio Constitution. The item here in question was vetoed by the Governor. Upon reconsideration in the Senate this item was repassed with a two-thirds vote of all elected members, but in the House only 88 votes were cast for repassage, i.e., less than two-thirds of the members elected to that branch.

Section 16, Article II, Ohio Constitution, provides in part:

"* * * If *three-fifths of the members elected to that house vote to repass the bill,* it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If *three-fifths of the members elected to that house vote to repass it,* it shall become a law notwithstanding the objections of the governor, except that in no case shall a bill be

> repassed by a smaller vote than is required by the constitution on its original passage. * * * The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, *unless repassed in the manner herein prescribed for the repassage of a bill.*"
> (Emphasis added.)

The item here in question did receive a "three-fifths vote" upon consideration for repassage, and thus the precise question at this point concerns the effect of the requirement that a vetoed bill may not "be repassed by a smaller vote than is required by the Constitution on its original passage."

In Miami County v. Dayton, 92 Ohio St., 215, the syllabus reads in part:

> "* * * 10. An act of the general assembly, purporting to be an emergency act but which failed to receive the two-thirds majority in one branch of the general assembly, as required by the constitution for an emergency act, becomes at the end of the ninety-day referendum period a valid act of the general assembly if otherwise constitutional."

On the point here involved it was said by Judge Wanamaker, page 221:

> "It being conceded that this act had a majority vote in both houses and that no attempt was made to invoke the referendum provisions of the constitution thereon, then at the end of the ninety-day period the same became a valid law as enacted. * * *"

In the case at hand the bill, including this vetoed item, purported to be an emergency measure. Only a majority vote was required for "original passage" of the bill, but a two-thirds vote was required to pass or repass either the bill or an item therein *as an emergency measure*. In short, the Dayton case emphasizes the legal requirement of a vote on the emergency feature separately from the bill itself. Accordingly, it would clearly appear in the case of the item here involved that although the vote for repassage was insufficient to repass such item *as an emergency*, so as to become immediately effective, it was nevertheless sufficient to repass it so as to become law following the ninety-day referendum period provided in Section 1c, Article II, Ohio Constitution.

As to your second question, it may be noted that the Muskingum Watershed Conservancy District territorially embraces the whole of seven counties, and parts of nine others. This does not mean, however, that

the district thus organized is given *exclusive* jurisdiction to carry out water conservation and flood control projects within the territory embraced within its boundaries, for the powers of the governing agency of such a district appear to be permissive rather than mandatory. See Section 6101.15, Revised Code. Moreover, although such districts are given a power of eminent domain which is dominant with respect to certain public utilities, townships, counties and municipalities, it cannot be supposed that they could acquire by appropriation any conservation or flood control works, properties or rights constructed or owned by any *state* agency.

Your question regarding a possible need to secure the "permission" of the district to proceed with the project in question is evidently based on a notion that the district enjoys *exclusive* jurisdiction within its territory to carry on conservation and flood control works. I find no statutory justification for such a view, and this question must, therefore, be answered in the negative.

You do not indicate that the project here in question will interfere with any existing works, properties, or rights, such as flood easements, of the conservancy district, and it is unnecessary, therefore, here to consider the relative legal positions of the district and the state department in such a situation.

As to your third, fourth and fifth questions, we may note that the authority of the Division of Water, Department of Natural Resources, to acquire property in furtherance of projects of the sort here involved is set out in Section 1523.01, Revised Code, as follows:

> "* * * Said chief, subject to the written approval of the director of natural resources and the governor, may acquire by gift, purchase, or by appropriation proceedings, in the name of and on behalf of the state, such real and personal property rights, privileges, and appurtenances as are necessary in his judgment for the construction of such reservoirs, dams, storage basins, dikes, canals, raceways, and other improvements, or for the alteration, enlargement, or maintenance of existing reservoirs, dams, and other improvements, together with such rights of way, drives, and roadways as are necessary for convenient access thereto. *The appropriation proceedings referred to in this section shall be restricted to private property only.*" (Emphasis added.)

As to your last three questions, it can scarcely be doubted that any flood easements acquired by an agency of the United States is public rather than private property; and since the power of the division to

exercise the right of eminent domain is limited to private property only, it necessarily follows, where any interference with such property is involved, that the consent of the federal agencies concerned would be required.

This conclusion is probably sufficient to dispose of all of your questions relative to the lands, or rights therein less than a fee simple title, owned by the United States or an agency of the United States. Additional reasons pointing to the lack of authority of the division to interfere with federal rights in the lands here involved are found in the "supremacy clause" in Article VI of the federal constitution, and in the "property clause" in Section 3 of Article IV, of that instrument. In the matter of the application of this latter provision, in Opinion No. 152, Opinions of the Attorney General for 1951, page 23, I said, pages 27, 28, 29:

> "A further constitutional question here involved is the application of Article IV, Section 3, Clause 2 of the United States Constitution, which reads as follows:
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> " 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.'
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> "This clause was the subject of consideration in Utah Power & Light Co. v. U.S., 243, U.S. 388, 61 L.E., 791, the first headnote in which case reads as follows:
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> " 'The inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power.'
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> "In the opinion by Mr. Justice Van Devanter in this case, the following statement is found, pp. 403, 404:
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> " 'The first position taken by the defendants is that their claims must be tested by the laws of the state in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a state, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers, and laws of the state in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (art. 4, Sec. 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that

the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, *but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them.* Thus, while the state may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves, or invest others with any right whatever in them. United States v. McGratney, 104 U.S. 621, 624, 26 L. ed. 869, 870; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U.S. 151, 168, 29 L. ed. 845, 851, 6 Sup. Ct. Rep. 670; Wisconsin C. R. Co. v. Price County, 133 U.S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341.' (Emphasis added.)

"The Utah Power case is cited with approval in Wilson v. Cook, 327 U.S. 474, 90 L. ed. 793, in which the following statement by Mr. Chief Justice Stone is found (p. 487):

" 'Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c 100, 5 Stat. 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, *save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution.* Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525, 539, 29 L. ed. 264, 265, 5 S. Ct. 995; Utah Power and L. Co. v. United States, 243 U.S. 389, 404, 61 L. ed. 791, 816, 37 S. Ct. 387.' (Emphasis added.)"

For the reason thus noted it may be said, with respect to your last three questions, that to the extent that any federal property is concerned, the Division of Water is without authority to carry on any project which would interfere with the rights of the United States in the lands involved without the consent of the federal agency concerned.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The item in Amended House Bill No. 932, 101st General Assembly, appropriating the sum of $250,000.00 to the Department of Natural Resources, Division of Water, for the "Guernsey-Salt Fork Watershed Development," became law following its repassage over the governor's veto at the end of the ninety-day referendum period provided in Section 1c, Article II, Ohio Constitution.

2. A conservancy district organized under the provisions of Chapter 6101., Revised Code, does not have exclusive jurisdiction in the territory included within its boundaries, to carry on conservation and flood control projects; and where the Department of Natural Resources, Division of Water, has been authorized by legislative enactment to carry on such a project within any such district the consent with respect thereto of the governing agency of such district is not required.

3. The Department of Natural Resources, Division of Water, in the acquisition of property in the furtherance of water improvement projects under authority of Chapter 1523., Revised Code, is limited, in the exercise of the right of eminent domain, to the taking of private property only.

4. Both because of federal constitutional considerations and because flood easements acquired by the United States, or an agency thereof, constitute public property within the meaning of Section 1523.01, Revised Code, the Department of Natural Resources, Division of Water, is without authority, in the construction of a water improvement project under the provisions of Chapter 1523., Revised Code, to interfere with such property of the United States without the consent of the federal agency concerned.

Respectfully,
C. William O'Neill
Attorney General