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1. CONSERVATION AND NATURAL RESOURCES, DIVISION OF—HAS AUTHORITY TO BRING AN ACTION<sup>n</sup> IN NAME OF STATE TO ENJOIN A THREATENED INJURY TO OR DESTRUCTION OF WILD ANIMALS—PROPERTY OF STATE—WILD ANIMALS INJURED OR KILLED BY SUBSTANCE INTRODUCED INTO STREAM OR LAKE.
2. WHERE SUCH INJURY ACCOMPLISHED FACT, STATE CAN BRING ACTION FOR DAMAGES AGAINST PERSON CAUSING SUCH INJURY OR DESTRUCTION.
3. DEPARTMENT OF HEALTH—COOPERATION WITH CONSERVATION—VIOLATION PUBLIC HEALTH LAWS—POLLUTION STREAM OR LAKE—WILD ANIMALS INJURED OR KILLED—DUTY OF CONSERVATION TO PROTECT AND PRESERVE WILD ANIMALS OF STATE—MAY PROCEED AGAINST PERSON CAUSING INJURY—MAY NOT INFRINGE ON ANY RIGHT OF STATE DEPARTMENT OF HEALTH.

## SYLLABUS:

1. The Conservation and Natural Resources Commission has the authority to bring an action in the name of the state of Ohio to enjoin a threatened injury to or destruction of wild animals, which are the property of the state of Ohio, by the introduction into a stream or lake in this state of a substance which injures or kills such wild animals.
2. Where an injury to or destruction of wild animals, the property of the state of Ohio, is an accomplished fact, the state can bring an action for damages against the person causing such injury or destruction.
3. In the event of the pollution of a stream or lake which injures or kills wild animals, the property of the state of Ohio and also violates the laws governing public health, the Division of Conservation and Natural Resources should cooperate with the Department of Health in correcting the violation. If, however, such cooperation is impossible, the Division of Conservation and Natural Resources is still charged with the duty of protecting and preserving the wild animals of the state, and it may proceed against the person causing such injury so long as such proceeding does not infringe on any right of the Department of Health.

Columbus, Ohio, March 5, 1946

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

Dear Sir:

Your recent request for my opinion reads in part as follows:

"The sections of the General Code dealing with the subject of stream pollution control are numerous and confusing. In order to clarify their position in such instances of pollution as are inimical or destructive to wild animals the Conservation and Natural Resources Commission respectfully requests your opinion on the following questions:

(1) When reliable evidence is available that substances, lethal or injurious to wild animals, is being or about to be introduced continuously or intermittently into a stream or lake, by what means shall the Conservation and Natural Resources Commission proceed to seek legal remedial action against the offender in order to prevent the introduction of such substances into said lakes and streams?

(2) Has the Conservation and Natural Resources Commission authority to seek the recovery of damages for the loss of fish, game or other wild animals of the state of Ohio resulting from stream or lake pollution, and through what procedure shall the Conservation Commission seek such recovery?

(3) When injury or loss of wild animals has occurred through pollution of streams or lakes which has also created a nuisance detrimental to public health and comfort, or has polluted a public water supply, should the Conservation Commission proceed with appropriate legal enforcement measures concerning protection, etc., of wild animals separately or in conjunction with the State Department of Health?

It is understood that streams and lakes mentioned in the above questions are those only over which the state of Ohio has control."

The provisions of law concerning the authority of the Conservation and Natural Resources Commission over the wild animals in the streams and lakes over which the state of Ohio has control appear in Title III, Chapter 28, of the General Code. The parts thereof which are pertinent to your inquiry read as follows:

## Section 1390, General Code :

“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. \* \* \*”

## Section 1391, General Code :

“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.*” (Emphasis added.)

## Section 1415, General Code :

“No person shall take, catch, injure or kill fish in any waters over which the state of Ohio has jurisdiction by means of quicklime, electricity, or any kind of explosive or poisonous substances, or place or use quicklime, electricity, explosive or poisonous substances in any such waters, excepting for engineering purposes and upon the written permission of the conservation commissioner. Each fish taken, killed or had in possession in violation of this section shall constitute a separate offense.”

## Section 1438-1, General Code.

“It is the purpose of this act and the policy of the state of Ohio to provide an adequate and flexible system for the proper management of the clams or mussels, crayfish, aquatic insects, fish, frogs, turtles, birds and quadrupeds, to guarantee a future supply of such wild animals and to provide for their present use and development for public recreation and food supply.

In conformity with article II, section 36 of the constitution of the state of Ohio, providing for the passage of laws for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and sections 1390, 1391 and related sections of this chapter, *the conservation and natural resources commission shall have authority and control in all matters pertaining to the protection, preservation, propagation, possession and management of the wild animals defined in section 1390 of the General Code.* \* \* \*” (Emphasis added.)

The fourth paragraph of Section 1438-2f, General Code, is as follows :

“The commission shall enforce by proper legal action or proceeding the laws of the state and its orders for the protection,

preservation, propagation and management of wild animals, sanctuaries and refuges for the propagation of such wild animals; and shall adopt and carry into effect such measures as it deems necessary in the performance of its duties.”

Section 1391, General Code, *supra*, provides that the ownership and title to all wild animals in the state of Ohio is in the state, which holds it in trust for the benefit of all the people. Such ownership is a proprietary right of the state. The proprietary rights of a state are ordinarily as absolute and as unqualified as those of an individual (see 37 O. Jur. 242), and like any individual it has the right to invoke the aid of the courts by way of injunction to prevent a threatened injury to or destruction of its property.

It is stated in 21 O. Jur. 1115:

“An injunction may issue to prevent irreparable injury to public as well as private property.”

Since wild animals are the property of the state and the authority and control for their protection and preservation has been expressly delegated to the Conservation and Natural Resources Commission, it is my opinion that where an injury to or killing of such wild animals through the pollution of streams or lakes over which the state has control is threatened, it is not necessary for you to sit idly by until the killing is an accomplished fact. On the contrary, the Conservation and Natural Resources Commission has the authority to bring an action in the name of the state of Ohio to enjoin such a threatened injury to or destruction of such property. Where such injury is an accomplished fact, and you can establish the value in money of the damage to the property of the state, the state again, like an individual, can sue the person causing such damage for the injury to its property. In such a case it will be proper for you to certify the claim to this office, where such action as may be necessary will be taken.

In connection with your last question, the fifth paragraph of Section 1438-2f, General Code, should be considered:

“The commission is hereby authorized to enter into contracts and agreements with persons, other departments and subdivisions of this state and with other states and the United States for the accomplishment of the purposes for which it is created,

*and shall cooperate with and shall not infringe upon the rights of other state departments, political subdivisions, and other public officials, and public and private agencies in the conduct of conservation plans and other matters in which the interests of the commission and such other departments and agencies overlap."*  
(Emphasis added.)

For many years the department of health of the state of Ohio has had extensive authority concerning the pollution of streams and lakes and the sources of public water supplies in this state. However, a careful study of the statutes granting such authority discloses that it relates to pollution affecting public water supplies, public health, public comfort, public welfare and public nuisances, whereas your authority is related solely to wild animals. In the event of a pollution which violates both the laws administered by the department of public health and those contained in Title III, Chapter 28, of the General Code concerning wild animals, you should cooperate with the department of health in correcting the condition which affects your common interest. If, however, for any reason such cooperation is impossible, you are still charged with the duty under the statutes of protecting and preserving the wild animals of the state, and you may proceed as indicated in this opinion against a person injuring such wild animals so long as such proceeding does not infringe on a *right* of another state department, political subdivision, etc.

In specific answer to your questions, it is therefore my opinion :

1. The Conservation and Natural Resources Commission has the authority to bring an action in the name of the state of Ohio to enjoin a threatened injury to or destruction of wild animals, which are the property of the state of Ohio, by the introduction into a stream or lake in this state of a substance which injures or kills such wild animals.

2. Where such an injury to or destruction of wild animals, the property of the state of Ohio, is an accomplished fact, the state can bring an action for damages against the person causing such injury or destruction.

3. In the event of the pollution of a stream or lake which injures or kills wild animals, the property of the state of Ohio, and also violates the laws governing public health, the Division of Conservation and Natural Resources should cooperate with the Department of Health in correcting

the violation. If however, such cooperation is impossible, the Division of Conservation and Natural Resources is still charged with the duty of protecting and preserving the wild animals of the state, and it may proceed against the person causing such injury so long as such proceeding does not infringe on any right of the department of health.

Respectfully,

HUGH S. JENKINS,  
Attorney General.