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PUBLIC WORKS, DEPARTMENT OF—WITHOUT LEGAL AUTHORITY TO REQUIRE PERMIT TO REMOVE SAND AND GRAVEL FROM NAVIGABLE STREAM—WHOLLY WITHIN BOUNDARIES OF STATE—NO AUTHORITY TO CHARGE ROYALTY THEREFOR.

SYLLABUS:

The Department of Public Works is without legal authority to require a permit to be taken for the removal of sand from a navigable stream which is wholly within the boundaries of the state or to charge any royalty therefor.

Columbus, Ohio, September 9, 1942.

Hon. Frank L. Raschig, Director,  
Department of Public Works,  
Columbus, Ohio.

Dear Sir:

I have your letter requesting an opinion, which letter reads as follows:

“The XYZ Company is withdrawing sand and gravel for its own use from the bed of the A River. This river has been declared navigable by the United States War Department. The river is wholly within the boundaries of the State and inasmuch as the river is meandered, the abutting property owners

rights stop at the line of meander. This department is not charged with any statutory authority to maintain any jurisdiction over this particular river.

The company is not paying any royalty for the sand or gravel, nor do they have any permit from any county, state or federal authority to remove said sand and gravel from the river bed.

Do we have any authority to require the XYZ Company to obtain a permit from us to remove this sand and gravel and to charge them any royalty therefor?"

The rights of the United States and the states, respectively, over navigable waters, are somewhat clearly stated in 45 Corpus Juris, p. 419, et seq., and I quote from that work at page 419 as follows:

"By virtue of the commerce clause of the federal constitution and the clause empowering congress to make all laws necessary to carry into execution the federal judicial power in admiralty and maritime matters, 'navigable waters of the United States,' which include water over which by themselves or in connection with other waters commerce may be carried on between states or with foreign countries, and of which admiralty has jurisdiction, are under the control of congress which has power to legislate in regard thereto so far as commerce is concerned. While this power is limited to control of the waters for purposes of navigation, it is a sovereign and supreme power within its appropriate sphere of action, and it is not lost or weakened by reason of previous inaction or acquiescence by congress in the exercise of authority by a state, but the federal power, when and to the extent exercised, is exclusive of state authority. The federal power to control and improve navigable waters is also superior to the title of the state or of individuals to the land under water, and authority granted by the states confers extraordinary powers. It is for congress to determine when and to what extent its power shall be brought into activity, and it may be exercised through general or special laws."

Further quoting from page 421 as to the rights of the state:

"Subject to the paramount authority of congress over commerce and the navigable waters of the United States, and to private property rights, a state has full power to legislate concerning the use of navigable waters which are within the territorial limits of the state, without regard to whether or not they connect with waters outside such limits. In other words, the power of the state is plenary until the federal government sees fit to exercise its constitutional prerogative."

Referring specifically to the matter of dredging a navigable stream, I quote the following from the same authority at page 427:

“Congress has power to regulate and prohibit hydraulic mining which causes the obstruction of navigable streams and waters. The dredging of sand from the privately owned bed of a navigable stream for commercial purposes may also be controlled and prohibited by the federal government as an obstruction to navigation.”

In an opinion which I rendered under date of July 9, 1940, in answer to a request from you, the general principles underlying the rights and powers of the state of Ohio relative to the navigable waters and subaqueous lands thereunder within the state were discussed somewhat at length and many authorities reviewed (Opinions Attorney General, 1940, p. 443). It is unnecessary at this time to repeat the discussion contained in that opinion. It is sufficient to say that whatever rights the state of Ohio has in the navigable waters within its boundaries and the land beneath the same, are held in trust for the benefit of public uses rather than in a proprietary capacity, and such rights are subject to the paramount control of the United States.

It was held in *State v. Cleveland & Pittsburgh Railroad Co.*, 94 O.S. 61, that “the title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted.”

My former opinion turned upon the construction of an act of the Legislature known as the “Erosion Bill”, codified as Sections 412-24 to 412-33 of the General Code, under the terms of which act authority was granted to the Superintendent of Public Works to issue permits, subject to the approval of the Governor and Attorney General, to take and remove sand, gravel, mineral and other substances from the bottom of such lake either on a royalty basis or for a fixed annual rental.

That act of the Legislature was passed for the purpose of enabling the state, through the Superintendent of Public Works, to cooperate with the Federal Government in preventing beach erosion and for shore protection, and in aid of navigation, as provided in an act of Congress contained in 46 Statutes at Large, Vol. I, 1930, p. 945.

Referring to the purposes aforesaid, I stated in that opinion:

“It would appear that the sale of such material and granting of permits, under the authority of Section 412-28, General Code, by the Superintendent of Public Works, is limited to the sale and issuance of such licenses for removal of sand, gravel, etc., as in the aid of navigation, or incidental to beach and shore erosion prevention projects.”

You state in your letter that your department is not charged with any statutory authority to maintain any jurisdiction over the particular river in question. From an examination of the statutes, I am unable to find any enactment of the Legislature of Ohio relative to the protection of navigable waters or the regulation of the removal of sand or gravel or other material beneath the same in the state of Ohio, excepting that above referred to, relating to the shore of Lake Erie, nor does there appear to be any authority granted by law to your department to deal with the matter except as hereinabove indicated with respect to Lake Erie. Your department having been created by statute, has only such powers as have been granted by the statutes creating it and defining its duties.

It is unnecessary at this time to enter upon a discussion of the rights which the state might have, by appropriate legislation, to regulate and control removal of sand and gravel from navigable streams within the state of Ohio. It is sufficient to say that whatever right the state might have, it has not seen fit to exercise it.

Specifically answering your question, therefore, I am of the opinion that your department has no authority to require any person or company to obtain a permit for the removal of sand or gravel from the stream in question, and is without authority to charge any royalty therefor.

Respectfully,

THOMAS J. HERBERT  
Attorney General.