

2476.

WATER LEASES—PIPES CARRYING WATER FROM PORTAGE LAKES—  
SUPERINTENDENT OF PUBLIC WORKS AND NOT CONSERVATION  
COMMISSIONER HAS AUTHORITY TO EXECUTE.

**SYLLABUS:**

*The Superintendent of Public Works has authority to make leases for water to be taken by means of pipes from the Portage Lakes and the Conservation Commissioner does not have such authority.*

COLUMBUS, OHIO, October 23, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

“The question has arisen as to whether the Superintendent of Public Works or the Conservation Commissioner, has authority to make leases for water to be taken through the pipes from the Portage Lakes.

Section 433 of the General Code, (O. L. 113, page 553), as amended by Senate Bill No. 131, provides that ‘The Superintendent of Public Works shall collect, or cause to be collected, water rents as they become due under existing leases, and shall have authority to make new leases for water and shall collect rentals for canal lands other than reservoir lands dedicated for public park and pleasure resorts, for pipe permits and all tolls on the canals or other public works of the State.’

Section 478, (O. L. 113, page 555), as amended by Amended Senate Bill No. 131, provides that ‘The Conservation Commissioner shall collect or cause to be collected, all rentals for leases of State lands, pipe permits, boat licenses, dock licenses, in State Reservoir Parks’.

There is apparently a conflict of authority between these two sections. The quantity of water that will be leased will not affect the level of the reservoirs to any great extent, and it is not very material as to which department issues the leases, but the authority should rest in one department or the other, and it is this problem that I am putting up to you for solution.

An early opinion will be greatly appreciated.”

The Portage Lakes referred to in your communication, and other state reservoirs, were constructed as feeders for the state canals under authority of an act of the Legislature passed in the year 1825, and together with said canals the same became a part of the public works of the state. *C. N. & Z. Electric Railway Company vs. Nelson*, 14 C. C. (N. S.) 129. The status of the Portage Lakes and other state reservoirs as a part of the public works of the state is recognized in the provisions of Section 411, General Code, by which the Portage Lakes are assigned to division number two of such public works.

By several acts of the Legislature passed from time to time beginning with the act of February 18, 1830, authority was given to the canal commissioners or to the Board of Public Works or other authority having at the time control and management of the public works, to sell or lease surplus water from the canals, reservoirs or other canal feeders, for hydraulic or other uses.

Under the provisions of Section 412, General Code, the authority and duty of

controlling, maintaining and caring for the public works of the state are imposed and conferred upon the Superintendent of Public Works. The present statutes relating to the sale or lease of surplus water from the canals and reservoirs of the state are Sections 431 and 14009 of the General Code.

Section 431, General Code, provides inter alia that: "The Superintendent of Public Works may lease surplus water power on any of the public works, under such rules and regulations as may be prescribed by him."

Section 14009, General Code, provides in part, as follows:

"Whenever, in the opinion of the Superintendent of Public Works, there shall be any surplus water in any of the state canals, or in any of the feeders, or reservoirs, or at any dams created by the State for the purpose of supplying any of said canals with water, or erected for improving the navigation of any river, over and above the quantity of water which may be required for the purpose of navigation, said Superintendent of Public Works may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he may deem most beneficial for the interests of the state, subject to such conditions, reservations and restrictions as he may deem necessary and proper. All rentals shall be fixed by the Superintendent of Public Works with the approval of the Governor and Attorney General.  
\* \* \* "

By an act of the Legislature, passed April 28, 1902 (95 O. L., 283) which, as later amended, was carried into the General Code of 1910 as Section 469, the lakes named in your communication, and other state reservoirs were dedicated and set apart for the use of the public, as public parks or pleasure resorts.

Prior to the amendment of Section 472, General Code, in the enactment of the Conservation Act by the 88th General Assembly, which act is referred to in your communication, said section provided that all lands and waters dedicated and set apart for public parks or pleasure resort purposes, or which may hereafter be acquired for such purposes, should be under the control and management of the Superintendent of Public Works, who shall protect, maintain and keep them in repair.

It is thus seen that prior to the enactment of the Conservation Act, the control and management of the reservoirs of the state, in their status both as public works and public parks, were duties imposed upon the Superintendent of Public Works, and that said officer was authorized to sell or lease surplus waters from said reservoirs as public works of the State.

By said Conservation Act referred to by you (113 O. L. 551) there was created in the Department of Agriculture a Division of Conservation, which includes within itself the functions and duties of the offices of Conservation Council and Conservation Commissioner, provided for in said act. By Section 472, General Code, as amended in said act, it is provided in part, as follows:

"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, landing 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.  
\* \* \* "

By Section 1438-1, General Code, enacted as a part of said Conservation Act, it is provided that: "The conservation council shall have and take the general care, protection and supervision of the state parks known as Lake St. Marys, Portage Lakes, Lake Loramie, Indian Lake, Buckeye Lake, Guilford Lake and all other state parks and lands owned by the state or in which it is interested or may acquire or become interested, except lands, the care and supervision of which are vested in some other officer, body, board, association or organization."

By Section 1438-3, General Code, likewise enacted as a part of said Conservation Act, it is provided that all records, leases, papers, supplies, rights and property belonging to or in the custody of the Department of Public Works for the supervision, maintenance and improvement of the state reservoir parks, pertaining to and necessary for the administration of the powers and duties transferred to the Division of Conservation shall be transferred to and shall be in custody of and under the control of the Division of Conservation.

As a matter of some significance, in the consideration of the question presented in your communication, it is noted that Section 471, General Code, as amended in the Conservation Act, provides as follows:

"No state lands in or adjacent to Buckeye Lake, Indian Lake, Lake St. Marys, Guilford Lake or Portage Lakes shall ever be sold, but the Conservation Commissioner may lease such lands, including marginal strips and marsh lands around said lakes, the outer slopes of artificial embankments, islands, borrow pits and state lands adjacent thereto as he deems proper under the laws governing the leasing of canal lands."

In your communication you have quoted parts of Sections 433 and 478, General Code, as amended by said act. These sections as amended, now read as follows:

Sec. 433. "The Superintendent of Public Works shall collect or cause to be collected, water rents as they become due under existing leases and shall have authority to make new leases for water and shall collect rentals for canal lands, other than reservoir lands dedicated for public park and pleasure resorts, for pipe permits and all tolls on the canals or other public works of the state. Rent from the lease of water from any other part of the public works shall be a first lien upon the estate created by such lease. Whenever such estate is sold or disposed of by a judicial process, the court shall order the rent due thereon to be paid from the proceeds. Moneys received from water rents and rentals for state lands other than from state reservoir parks, tolls, fines, pipe permits, sale of canal lands and from all other sources shall be paid weekly into the state treasury to the credit of the general fund of the state, in accordance with the provisions of Section 24 of the General Code."

Sec. 478. "The conservation commissioner shall collect or cause to be collected, all rentals for leases of state lands, pipe permits, boat licenses, dock licenses, in state reservoir parks and moneys for special privileges of any nature in or adjacent to such parks and shall keep such accounts in separate books to be provided for that purpose, and in transmitting such funds to the state treasurer he shall accompany them with a separate statement, giving the names of persons from whom and for what purpose such moneys were collected, and to what park or pleasure resort such funds are to be credited, and shall furnish a duplicate statement to the Auditor of State."

It will be noted from the statutory provisions quoted and otherwise referred to

above, that although the control and management of the state reservoirs as public parks and pleasure resorts are, by the provisions of the Conservation Act, conferred upon the Conservation Division of the Department of Agriculture, said state reservoirs still retain their status as public works of the state under the control and supervision of the Superintendent of Public Works. This is in conformity with Section 12 of Article VIII of the state constitution which provides that "so long as this state shall have public works which require superintendence, a Superintendent of Public Works shall be appointed by the Governor for the term of one year, with the powers and duties now exercised by the Board of Public Works until otherwise provided by law, and with such other powers as may be provided by law". Aside from any question that might be suggested with respect to the power of the Legislature to confer powers and duties relating to the public works of the state as such upon any officer or agency of the state other than the Superintendent of Public Works, it is to be observed that now as before the enactment of the Conservation Act specific authority to execute leases for water out of the state canals and reservoirs as public works of the state is conferred upon the Superintendent of Public Works; and there is no statutory provision which in terms grants such authority to any other officer or board. Secs. 431 and 14009, General Code.

The question presented in your communication arises by reason of the fact that Section 478, General Code, as amended by the Legislature in the enactment of the Conservation Act, provides, among other things, that the Conservation Commissioner shall collect or cause to be collected all rentals for pipe permits in state reservoir parks. A pipe permit, so-called, is nothing more than a water lease by which the lessee therein named is granted the right to take from a canal, reservoir or other feeder constituting a part of the public works of the state, a comparatively small quantity of water for a limited period of time, usually not more than five years, such water by the terms of the lease or permit to be withdrawn by means of small pipes which, in most instances, do not exceed one inch, an inch and a half or two inches in diameter. The provision of Section 478, General Code, here noted, with respect to the right of the Conservation Commissioner to collect rentals for pipe permits, is in conflict with the provisions of Section 433, General Code, as amended in the enactment of the Conservation Act, by which the Superintendent of Public Works is required to collect rentals for pipe permits on canals "or other public works of the state". The specific question presented in your communication, which is one as to the proper authority to execute a water lease of this kind, does not call for a discussion of the applicable rules of statutory construction for the purpose of determining whether or not effect is to be given to the provisions of Section 478, General Code, or to those of Section 433, General Code, with respect to the collection of rentals on pipe permits providing for the lease of water from the state reservoirs. With respect to the question at hand, it is sufficient to note that not only Sections 431 and 14009, General Code, which were not amended by the Legislature in the enactment of the Conservation Act, but as well Section 433, General Code, which was amended in the enactment of the Conservation Act, confer upon the Superintendent of Public Works express authority to execute leases for water, whether such leases be of the kind known as pipe permits or otherwise.

Upon the considerations above noted and confining myself to the specific question presented in your communication, I am of the opinion that the Superintendent of Public Works has authority to make leases for water to be taken by means of pipes from the Portage Lakes and that the Conservation Commissioner does not have such authority.

Respectfully,  
GILBERT BETTMAN,  
Attorney General.