



**THE ATTORNEY GENERAL
OF TEXAS
AUSTIN, TEXAS**

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ATTORNEY GENERAL

FAGAN DICKSON
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December 22, 1948.

Hon. Howard D. Dodgen, Executive Secretary
Game, Fish and Oyster Commission
Austin, Texas

Opinion No. V-751.

Re: The authority of the Game,
Fish and Oyster Commission
to regulate the taking and
the possession limit of min-
nows from Possum Kingdom
Lake.

Dear Mr. Dodgen:

You have requested an opinion with reference to
the above-captioned subject, in the following respects:

"At the regular quarterly meeting of
the Game, Fish and Oyster Commission, held
in Austin, Thursday, October 14, 1948, a
resolution was adopted, under the authority
of H. B. 1049, 47th Legislature, page 839,
chapter 515, whereby a previous resolution
adopted by said Commission was amended.

"The resolution referred to, among
other things, prohibited the taking of
minnows, by any means and at any time, from
the waters of Possum Kingdom Lake. The
more recent amendment referred to seeks
to relax the previous regulation so as to
allow the use of common minnow seines of
not more than ten feet in length, in the
taking of minnows from Possum Kingdom Lake,
and to further restrict the number of min-
nows which may be taken from said Lake and
which may be possessed.

". . .

". . . We, therefore, respectfully re-
quest your opinion on the following ques-
tions:

Hon. Howard D. Dodgen, Page 2, V-751.

"1. Does the Game, Fish and Oyster Commission have authority to regulate or prescribe the means and methods for taking minnows from Possum Kingdom Lake?

"2. Does the Game, Fish and Oyster Commission have authority to limit the number of minnows to be taken and possessed from such Lake?"

Your inquiry requires the consideration of whether the statute authorized the Commission to promulgate the rule in question initially, and thereafter whether such authority was repealed by subsequent legislation.

We first dispose of the question as to whether Acts 1941, 47th Leg., Ch. 515, Page 839, codified as Art. 978j(note), V. P. C., authorizes the Commission to amend a rule previously adopted by it with reference to the taking of minnows from Possum Kingdom Lake.

The pertinent provisions of the foregoing Act are:

"Section 1. It shall be unlawful to take, catch, or attempt to take, catch, or have in possession, or dispose of, any fish from the waters of the lake impounded by Possum Kingdom Dam, which Dam is situated in Palo Pinto County, except when same may be permitted in regulations promulgated in accordance with the directions given in this Act.

"Sec. 2. It shall be the duty of the Game, Fish and Oyster Commission immediately, and thereafter from time to time, to make studies of the supply of fish and each species of fish in the body of water impounded by Possum Kingdom Dam; to determine the food supply available therein for the various fishes; the relationship of the species of fish one to the other; the spawning habits and rate of reproduction of the different species

of fish in this body of water; and on the basis of this information to equitably permit the taking of any species of fish from said body of water at such time or seasons, and in such numbers and sizes, and with such tackle or gear as will not interfere with the conservation of fish in said body of water in the public interest. It shall also be the duty of the Game, Fish and Oyster Commission to provide regulations that will permit a reasonable harvest of the annual increase of any and all species of fish in the lake waters impounded by Possum Kingdom Dam with due regard to the future supply of such fish and the maximum public recreational benefit therefrom.

"Sec. 4. Any regulation permitting the taking of fish or permitting the use of certain gear or tackle or providing an open season for taking fish on the waters impounded by Possum Kingdom Dam made in accordance with the provisions of this Act shall remain in full force and effect until same is suspended or amended, and any suspension or amendment of a regulation shall be done after the same manner and with the same approval required for the promulgation of a regulation made hereunder.

"Sec. 5. Any person who fishes, or attempts to take or catch fish, or has any fish in his possession, or disposes or attempts to dispose of same, or who uses any tackle or gear for taking or attempting to take or catch fish in any of the waters impounded by Possum Kingdom Dam, except in accordance with permissive regulations issued by the Game, Fish and Oyster Commission of the State of Texas and approved by the Board of Directors of the Brazos River Conservation and Reclamation District and then in effect, or without having in his possession the license required of him by this Act, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum not less than Ten Dollars (\$10), nor more than Two Hundred Dollars (\$200).

"Sec. 7. All laws or parts of laws of this State which to any degree permit fishing in Possum Kingdom Lake be and the same are hereby repealed, and all other fishing laws of this State, in so far as they conflict with any provision of this Act, be and the same are hereby repealed."

Under authority granted the Commission by the foregoing provisions, the Commission previously promulgated a rule closing the waters of Possum Kingdom Lake to the taking of minnows. You now wish, by amendment, to relax such rule by permitting the taking of minnows through the use of a minnow seine not to exceed ten feet in length, and not to exceed fifty minnows in possession.

We think that minnows, which are unquestionably fish, come within the regulatory provisions of Section 2 of the Act, which, under the clear language of the Act, grants authority to the Commission to regulate the "tackle or gear" with which fish may be taken from Possum Kingdom Lake, and the possession limit thereof. Regulating the length of a minnow seine would come within such prescribed authority.

The authority of the Commission to amend a rule previously adopted by it, with respect to the taking of fish from Possum Kingdom Lake, is found in Section 4 of the Act.

The second consideration requires the determination of whether subsequent legislation has repealed the authority of the Commission to regulate the taking of minnows from Possum Kingdom Lake.

In this regard, you particularly refer us to the provisions of Acts 49th Leg., 1945, Ch. 9, Page 13, codified as Art. 927a, V. P. C., the pertinent provisions of which are:

"Section 1. There shall be no closed season or period of time when it shall be unlawful to take, catch or retain fresh water fish by the use of ordinary hook and line or artificial lures. Other devices, the use of which is permitted by law, may be used for the purpose of taking fresh water fish at any time of the year, but only in compliance with such other restrictions as are placed on their use by the laws of this state.

"Sec. 2. It shall be unlawful for any person to take from public fresh waters and retain, or place in any container, boat, creel, live-box or on any fish-stringer any large-mouth black bass, small-mouth black bass, spotted bass, or any sub-species of large-mouth black bass, small-mouth black bass, spotted bass, that is less than seven (7) inches in length.

"Sec. 3. It shall be unlawful for any person in any one day to catch and retain, or to place on or in any device or container for holding same while he is fishing, any fish that is taken from the public fresh waters of this state in excess of the following limits: large-mouth black bass, small-mouth black bass, spotted bass, or any sub-species of the same, singly or in the aggregate, fifteen (15), of which not more than ten (10) shall be of greater length than eleven (11) inches; white bass, twenty-five (25); blue catfish, channel catfish and yellow catfish, singly or in the aggregate, twenty-five (25); crappie or white perch, twenty-five (25).

"Sec. 4. Any person who violates any provisions of this Act, upon conviction shall be fined in a sum not less than Five (\$5.00) Dollars, nor more than Fifty (\$50.00) Dollars.

"Sec. 5. All laws or parts of laws, local, general, or special, insofar as they provide a closed season or period of time when it is unlawful to take or catch fish or to use artificial lures, or insofar as they provide a size limit, possession limit, or daily catch limit, or otherwise conflict with any provision of this Act, shall be and the same are hereby repealed; except that nothing herein contained shall repeal Chapter 213, House Bill No. 654, Regular Session, 48th Legislature, or regulations made thereunder to govern the taking of fish in Lake Texoma, which is the body of water impounded by the dam at Denison, Texas."

Section 1 of the foregoing Act, as quoted above, does not repeal the authority of the Commission to promulgate regulations prescribing the means and methods with which fish may be taken from Possum Kingdom Lake, except to the extent that the Commission may not close the fishing season on Possum Kingdom Lake at any time during the year for the taking, catching or retaining of fresh water fish "by the use of ordinary hook and line or artificial lures." Section 1 further provides specifically that:

" . . . Other devices, the use of which is permitted by law, may be used for the purpose of taking fresh water fish at any time of the year, but only in compliance with such other restrictions as are placed on their use by the laws of this state."

This language would indicate that the Commission is not authorized to close any portion of the year to the taking of minnows by the use of a minnow seine from the waters of Possum Kingdom Lake, but no further restriction is imposed on the regulatory authority of the Commission pertaining to the length of minnow seines.

With reference to the authority of the Commission to exact, by proper regulation, a possession limit on minnows taken from Possum Kingdom Lake, it will be observed that Art. 927a, V. P. C., quoted above, prescribes a possession limit on large-mouth black bass, small-mouth black bass, spotted bass, white bass, blue catfish, channel catfish, yellow catfish and crappie. No imposition of a possession limit on minnows is found in the general possession statute as noted. Therefore, the provisions of Art. 927a, V. P. C., are not incompatible with the imposition of a possession limit by the Game, Fish and Oyster Commission, by a proper regulation complying with the provisions as to notice, on minnows taken from the waters of Possum Kingdom Lake.

No inquiry having been made as to the constitutionality of Acts 47th Leg., 1941, Ch. 515, Page 839, we express no opinion thereon.

Hon. Howard D. Dodgen, Page 7, V-751.

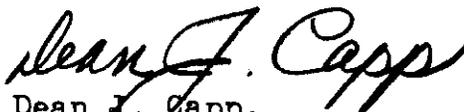
SUMMARY

The Game, Fish and Oyster Commission is authorized under the provisions of Acts 47th Leg., 1941, Ch. 515, Page 839, to amend a regulation heretofore adopted by it, in order to prescribe the means and methods with which minnows may be taken from the waters of Possum Kingdom Lake and to set a possession limit on same.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By


Dean J. Capp,
Assistant.

APPROVED:


FIRST ASSISTANT
ATTORNEY GENERAL.

DJC:jmc