



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 18, 1998

Mr. Andrew Sansom
Executive Director
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

Letter Opinion No. 98-064

Re: Whether the Franklin County Water District may require a fishing guide licensed by the Texas Parks and Wildlife Department to pay a fee and obtain a permit from the district before operating as a fishing guide on Lake Cypress Springs, and related questions (RQ-947)

Dear Mr. Sansom:

The Parks and Wildlife Department ("department") has exclusive authority to regulate the taking and possession of fish. The Franklin County Water District ("district"), on the other hand, is authorized to regulate recreational and business privileges on the lakes within the district's jurisdiction, such as Lake Cypress Springs ("lake"). You raise questions about the department's and the district's authority over the lake and its piscatory inhabitants. We conclude generally that the district's attempts to regulate the taking and possession of fish infringe upon the department's jurisdiction. We also conclude that the district may not charge a fee to fishing guides or fishing tournament organizers for the use of the lake. On the other hand, we conclude that the remaining district regulations about which you ask do not appear to infringe upon the department's jurisdiction. In reaching these conclusions, we assume Lake Cypress Springs was formed by damming a navigable waterway.¹

You specifically question the district's regulations relating to fishing guides, fishing tournaments, and fishing in general. The district requires all fishing guides on the lake, in addition to carrying a valid state fishing-guide license and to following applicable state and local fishing and water-safety laws, to obtain a permit from the district and to pay an annual fee to the district, the amount of which is set by the district. With respect to tournaments, the district requires tournament organizers to obtain the district's express permission. As part of the permit process, the district requires the applicant to remit a fee. The district further limits the number of boats participating in a tournament to fifty per day. State law makes no such requirements of fishing tournaments. Also, the district has adopted various rules stipulating the means and methods by which fish may be caught, and portions of these rules apparently differ from rules the department has promulgated. We note, for example, that both the district and the department purport to regulate the type of fishing

¹Lake Cypress Springs was formed, we understand, by damming Big Cypress Creek. Big Cypress Creek apparently is navigable, and the district has not asserted to the contrary.

equipment that may be used. You believe that, with the possible exception of the district's limitation on the number of boats that participate in a fishing tournament, the district's regulations are *ultra vires*.²

Because the powers of both the district and the department are limited by law,³ we begin our analysis of the issues you raise by examining each entity's constitutional and statutory authority. We will look first at the district's authority. The district, which was created in 1965 as a water conservation and reclamation district under article XVI, section 59 of the Texas Constitution,⁴ generally draws its authority from the constitution, its enabling act,⁵ and Water Code chapter 51.⁶ In particular, Water Code section 51.127(4) authorizes the district to regulate fishing, and "all recreational and business privileges" on a body of water within the district's jurisdiction.⁷

On the other hand, the legislature has delegated to the department primary responsibility for protecting the state's fish.⁸ The department alone administers laws relating to fish.⁹ Furthermore,

²You also indicate that a district rule establishing a closed season is invalid. Because we did not find in the materials you submitted any district rule establishing closed or open fishing seasons, we do not consider the issue here. *But see infra* text accompanying notes 15 and 35 (stating that department is authorized to dictate open and closed seasons for conservation purposes).

³The district is a creature of the legislature and has only those powers delegated to it. *See Franklin County Water Dist. v. Majors*, 476 S.W.2d 371, 373 (Tex. Civ. App.--Texarkana 1972, writ ref'd n.r.e.); *Lower Nueces River Water Supply Dist. v. Cartwright*, 274 S.W.2d 199, 207 (Tex. Civ. App.--San Antonio 1954, writ ref'd n.r.e.). Likewise, as an administrative agency of the state, *see Parks & Wild. Code* § 11.011, the department has only those powers the legislature has bestowed upon it. *See State v. Jackson*, 376 S.W.2d 341, 344 (Tex. 1964).

⁴*See Act of May 26, 1965, 59th Leg., R.S., ch. 719, § 1, 1965 Tex. Gen. Laws 1668, 1669.* The district is coextensive with Franklin County. *Id.*

⁵*Id.* § 4, 1965 Tex. Gen. Laws 1668, 1671-72. With the exception of the district's power to exact fees, the enabling act generally is irrelevant to the regulations about which you ask. We will briefly discuss it where it is relevant. *See infra* text accompanying notes 40 and 42.

⁶The district is given the powers of a water control and improvement district. *See Act of May 26, 1965, 59th Leg., R.S., ch. 719, § 4, 1965 Tex. Gen. Laws 1668, 1671.*

⁷Water Code section 51.127(4) also authorizes a water district to regulate boating. We note that the Water Safety Act, Parks & Wild. Code ch. 31, establishes numerous requirements with which boats and boaters must comply, e.g., numbering and necessary equipment. None of the district's regulations about which you ask concern any of these matters. We need not consider, therefore, whether the Water Safety Act supersedes the district's authority to regulate boating under Water Code section 51.127(4).

⁸Parks & Wild. Code § 12.0011(a).

⁹*Id.* § 12.001(a).

the Wildlife Conservation Act of 1983 (“act”),¹⁰ to which Franklin County is subject,¹¹ provides the department with jurisdiction of certain piscatorial matters. The act generally equips the department to ensure “the conservation of an ample supply of” fish and other “wildlife resources.”¹² More specifically, the act forbids anyone to catch or possess fish except as the Parks and Wildlife Commission (“commission”), which sets policies for the department,¹³ permits by proclamation.¹⁴ The commission must regulate the time periods during which, as well as the “means, methods, manners, and places” by or in which, an individual may take or possess wildlife resources.¹⁵ If the commission finds that an open season on a particular species may be safely provided or if an open season is required to prevent waste of a particular species, the commission must provide an open season.¹⁶

You believe the department’s regulations, promulgated under the act, conflict with the district’s regulations. The district apparently premised its regulations upon what the district calls its “private ownership” of the lake and its statutory authority. You ask whether the department’s or the district’s regulations prevail where they are inconsistent. Ultimately, because the act and Water Code section 51.127(4) give the authority to regulate fishing to different entities (the act gives the power to the department, while Water Code section 51.127(4) authorizes the district), we must consider which statute prevails. Before we reach that issue, however, we wish to consider two of the district’s contentions: that it is the private owner of the lake and that it may exact fees. Each of these issues must be resolved before reconciling the district’s regulatory power with that of the department.

Initially, we conclude that the district’s belief that it is the private owner of the lake is misguided. The district cites, in support of its contention, the fact that it built the lake by, we assume, damming a navigable river that runs through the district. Furthermore, the district states in its letter to this office, it “owns or controls all of the land upon which Lake Cypress Springs is situated. In addition, [it] owns . . . most of the land adjacent to [the lake].” The district also has

¹⁰*Id.* ch. 61; *see id.* § 61.001. An earlier version of the act, the Uniform Wildlife Regulatory Act, was enacted in 1967. *See* Act of May 27, 1967, 60th Leg., R.S., ch. 730, 1967 Tex. Gen. Laws 1959, 1959.

¹¹*See* Parks & Wild. Code § 61.003.

¹²*Id.* § 61.002. The term “wildlife resources” is defined to include fish. *See id.* § 61.005.

¹³*See id.* § 11.011.

¹⁴*Id.* § 61.054. We understand that the commission’s proclamations are codified in title 31 of the Texas Administrative Code.

¹⁵*Id.* § 61.052.

¹⁶*Id.* §§ 62.052, .053.

managed the lake since it was built. Consequently, the district believes, its “private property rights” authorize it to promulgate the regulations about which you ask.

The district is not private. Rather, it is a political subdivision of the State¹⁷ and therefore a public entity. Moreover, the district only holds the lake waters, lake bed, and the lake’s piscatory inhabitants in trust for the people of the State, who are the lake’s true owners. The citizens of this state own the waters and beds of navigable streams and lakes.¹⁸ Likewise, the citizens of this state own all fish contained in freshwater lakes in this State.¹⁹ Even if the district owns the soil underneath the lake bed or owns the land surrounding the lake, the lake is a public body of water subject to all applicable state laws.²⁰ As the Texas Supreme Court has stated, a permit to dam a navigable stream does not provide the permit holder title to the water or the fish in the water, nor does it provide a right to interfere with the public’s use of the water for lawful purposes, except to the extent necessary to maintain the dam and the lake.²¹

Next, we conclude that the district may not enact regulations requiring a fee of fishing guides or fishing tournament organizers. A public entity, other than a home-rule municipality, may impose a fee only if the law specifically authorizes it.²² Moreover, we may not construe a statute to imply authority to collect a fee.²³ While the district’s enabling act authorizes it to assess ad valorem taxes to pay off bonds and annual taxes to fund its operations,²⁴ it does not authorize the district to collect any fees. Furthermore, the district’s authority to regulate does not translate to the authority to levy a fee.²⁵ In addition, Water Code section 49.212(a), which authorizes the district to assess a fee “for providing or making available any district facility or service,” does not apply to the fishing-guide

¹⁷Act of May 26, 1965, 59th Leg., R.S., ch. 719, § 1, 1965 Tex. Gen. Laws 1668, 1669; *see also Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1*, 538 S.W.2d 659, 662 (Tex. Civ. App.--Amarillo 1976, writ ref’d n.r.e.).

¹⁸Parks & Wild. Code § 1.011(b); *see also Carrithers v. Terramar Beach Community Improvement Ass’n*, 645 S.W.2d 772, 775 (Tex. 1983); *State v. Bradford*, 50 S.W.2d 1065, 1076 (Tex. 1932).

¹⁹Parks & Wild. Code § 1.011(c).

²⁰In Attorney General Opinion M-1210, this office distinguished between public and private waters, although the waterways discussed in that opinion were owned by private entities, in contrast to the situation before us here. *See* Attorney General Opinion M-1210 (1972) at 3; *cf.* Attorney General Opinion JM-572 (1986) at 3 (stating that while municipality leases privately owned land for use as park, lake is public water).

²¹*See Diversion Lake Club v. Heath*, 86 S.W.2d 441, 443 (Tex. 1935).

²²*See* Attorney General Opinion DM-22 (1991) at 1, 2 (and sources cited therein).

²³*See id.*

²⁴*See* Act of May 26, 1965, 59th Leg., R.S., ch. 719, §§ 6, 11, 1965 Tex. Gen. Laws 1668, 1672-73, 1676.

²⁵*See* Attorney General Opinions DM-22 (1991) at 2-3, JM-345 (1985) at 1-3.

and tournament-organizer fees. The lake is not a facility as that term is commonly understood;²⁶ nor do we understand the water district to provide fishing guides or tournament organizers any service beyond that available to the nonpaying general public.²⁷ Parks and Wildlife Code section 25.004(2) also does not apply. It authorizes the district to collect a fee for “entry to and use of water-related park areas and their facilities,” but it does not authorize a fee for the use of the water itself.

We turn now to the issues you raise about the district’s fishing regulations: to the extent they are inconsistent, which entity’s regulations regarding the taking and possession of fish prevail. As we have stated, resolution of this issue will depend in part upon whether the act supersedes that portion of Water Code section 51.127(4) that authorizes the district to regulate fishing. In this regard, we note that the legislature last substantively amended section 51.127(4) or its statutory predecessor in 1935.²⁸ By contrast, the act’s statutory predecessor was enacted in 1967,²⁹ and various substantive amendments have been made since then.

For two reasons we conclude the act supersedes Water Code section 51.127(4) to the extent the two are inconsistent. First, because the act was enacted and substantively amended after the last substantive amendment to Water Code section 51.127 or its statutory predecessor, we believe the legislature intended the act to supersede Water Code section 51.127. The legislature has directed us to construe inconsistent statutes so that the latest in date of enactment prevails.³⁰

Second, we believe the legislature intended the act to reduce a myriad of game and fish statutes to one that applied nearly statewide. This office noted in 1951 the presence of numerous fish laws, each applicable only to a particular county.³¹ In its 1967 enactment, the legislature expressed its intent: “to ‘codify’ all previous Acts of the Legislature of a similar nature into a single Act and thereby reduce the bulk of such legislation and to produce a greater degree of uniformity”³² Similarly, the emergency clause of the 1967 enactment notes a “great need” to reduce the number

²⁶See Gov’t Code § 311.011(a).

²⁷This office has construed the statutory predecessor to Water Code section 49.212 to authorize a water district to collect a fee to provide garbage-collection service. See Attorney General Opinion H-632 (1975) at 2.

²⁸See Act of May 11, 1935, 44th Leg., R.S., ch. 340, sec. 3, § 7(a), 1935 Tex. Gen. Laws 792, 795. Section 51.127 was nonsubstantively codified in 1971. See Act of Mar. 29, 1971, 62d Leg., R.S., ch. 58, sec. 1, § 1.001(a), (c), 1971 Tex. Gen. Laws 110, 110 (stating that codification is nonsubstantive).

²⁹See Act of May 27, 1967, 60th Leg., R.S., ch. 730, 1967 Tex. Gen. Laws 1959, 1959-69.

³⁰See Gov’t Code § 311.025(a).

³¹See Attorney General Opinion V-1229 (1951) at 1.

³²Act of May 27, 1967, 60th Leg., R.S., ch. 730, § 15, 1967 Tex. Gen. Laws 1959, 1967.

of game and fish laws from seventy-two separate acts to one.³³ To this end, the 1967 enactment specifically repeals, to the extent of the inconsistency, all general and special laws not expressly saved that conflict with the act.³⁴

Thus, that portion of Water Code section 51.127(4) authorizing a water control and improvement district to regulate fishing is repealed because it is inconsistent with the department's exclusive authority under the act. The act gives the department sole jurisdiction of the taking and possession of fish in Franklin County, which jurisdiction includes the periods of time when fish may be taken or possessed;³⁵ the means, methods, and places in and by which one may take or possess fish;³⁶ and the establishment of open and closed seasons for fishing.³⁷ The district may not attempt to regulate any of the matters over which the act gives the department exclusive jurisdiction.

The district's enabling act, which prevails over any inconsistent provisions of general state law,³⁸ is in fact consistent with our conclusion. That enabling act gives the district numerous powers related to the purpose of managing waters within the district, but none related to fish.³⁹ We need not, therefore, consider whether the act has repealed any portion of the district's enabling act.

But we also conclude that the remaining district regulations about which you ask, with the possible exception of the district's limitation on the number of boats that may participate in a fishing tournament, are within the district's jurisdiction. We believe the district's requirement that fishing guides and fishing tournament organizers obtain permits from the district are within the district's authority to regulate recreational and business privileges on the lake.⁴⁰ Water Code section 51.127(4) expressly empowers the district to regulate recreational and business privileges on the lake, and we know of no other statute that supersedes the district's authority by bestowing the same

³³*Id.* § 19, 1967 Tex. Gen. Laws 1959, 1969.

³⁴*Id.* § 15, 1967 Tex. Gen. Laws 1959, 1968.

³⁵*See* Parks & Wild. Code § 61.052(a); *see also id.* § 61.054(b).

³⁶*See id.* § 61.052(b); *see also id.* § 61.054(b)(2), (3).

³⁷*See id.* §§ 61.052(a), .053.

³⁸Act of May 26, 1965, 59th Leg., R.S., ch. 719, § 4, 1965 Tex. Gen. Laws 1668, 1671.

³⁹*See id.* § 4, 1965 Tex. Gen. Laws 1668, 1671-72.

⁴⁰The district may not, of course, exact a fee for the permit. *See supra* text accompanying notes 22-25 (determining that district has no authority to collect fees). We presume that the fishing guides and fishing tournaments are business enterprises, as the district suggests. This opinion does not address noncommercial guiding or informal tournaments or contests where no money is involved.

power on another entity. Neither the act nor the Water Safety Act,⁴¹ for example, gives the department conflicting authority.

Similarly, we believe Parks and Wildlife Code section 31.092(c) authorizes the district to limit the number of boats that may participate in a fishing tournament, but only if the district has found that the limitation is necessary to protect the public safety. Section 31.092(c) authorizes the district to regulate “the operation . . . of boats” if the district deems the regulation “necessary for the public safety.” In our opinion, the district’s limitation on the number of boats that may participate in a fishing tournament does not conflict with any other provisions of the Water Safety Act,⁴² nor with any other statute of which we are aware. The limitation does not, for instance, infringe upon the statutory specifications of requisite equipment, speed limits, or age requirements for motor-boat operators. We emphasize, however, that the district must find the limitation necessary for the public safety. Whether the district reasonably has made that determination is beyond the scope of the opinion process, but the issue is appropriate for judicial review.

⁴¹Parks & Wild. Code ch. 31.

⁴²*Id.*

S U M M A R Y

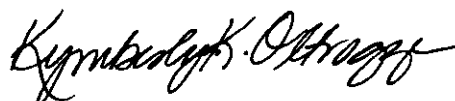
A water conservation and reclamation district holds the waters, bed, and piscatorial inhabitants of a lake created by damming a navigable waterway in trust for the people of Texas.

The Franklin County Water District is unauthorized to collect a fee for the privilege of operating as a fishing guide on Lake Cypress Springs or for holding a fishing tournament on the lake.

To the extent of inconsistency between the Wildlife Conservation Act, Parks and Wildlife Code chapter 61, and Water Code section 51.127(4), the Wildlife Conservation Act prevails. Thus, the Texas Parks and Wildlife Department has sole authority to regulate the taking and possession of fish, such as the periods of time when one may take or possess fish and the means, methods, and places for taking or possessing fish. Water District rules that purport to regulate the means of taking fish are *ultra vires*.

Nevertheless, the Franklin County Water District may regulate business privileges on the lake. Accordingly, district rules that require fishing guides and the organizers of a fishing tournament to obtain a permit are, on their face, within the district's jurisdiction (although the district may not exact a fee for the permit). Finally, the district may limit the number of boats that participate in a fishing tournament if the district has found that the limitation is necessary to protect the public safety.

Yours very truly,



Kymerly K. Oltrogge
Assistant Attorney General
Opinion Committee