

GAME AND FISH - Persons or corporations using, owning or building a dam in a river, creek or stream are required to operate fish hatcheries when all requirements of Sec. 8279 are reasonable. ✓

Jan 17 1933

January 16, 1933.

Hon. John H. Ross, Commissioner,
Fish & Game Department,
Jefferson City, Missouri.

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Dear Sir:

This office acknowledges receipt of your letter dated January 11, 1933 in which you state and make inquiry as follows:

"Section 8279, Laws of Missouri, 1931, page 228-9, reads as follows:

"It shall be the duty of any person, firm or corporation, owning, or using any dam existing, or which may hereafter be constructed across any river, stream, or creek in this state, to erect or cause to be erected and maintained in connection therewith a durable and efficient fishway, or such other device as the game and fish commissioner may deem necessary to enable the fish to have free passage up and down said waters at all times. Such fishway or device shall be of such kind and shall be placed, operated and maintained in such manner as will meet with the approval of the game and fish commissioner. Whenever in the opinion of the game and fish commissioner the height or character of the dam or the condition of the river or stream, makes the installation of such ladders or devices, thereon impractical or unnecessary, he is authorized to require the establishment and maintenance of a fish hatchery by such person, firm or corporation using said dam, for the purpose of stocking the waters above and below such dam. The fish and game commission may, at any time, take fish from said hatchery for distribution to the public waters of the state. Such hatchery to be operated under the supervision of the game and fish commissioner. Any person who shall violate any provision of this section, or who shall refuse to establish and maintain a fish hatchery in lieu of establishing a fishway, when requested to do so by the game and fish commission shall be deemed guilty of a misdemeanor and fined not less than \$100 nor more than \$300 for each thirty days that such person or corporation shall refuse to comply with such order."

(Hon. John H. Ross, Commissioner)

Please give me your official opinion as to whether or not this section of the law would require the person, firm or corporation using a dam where a fish hatchery is required to be constructed in lieu of a fish ladder, to operate said fish hatchery at his own expense, but under the supervision of the game and fish commissioner. In other words, whether the word "maintain" as used in said section implies the word "operation".

In reaching a conclusion as to the meaning of the above section and the intention of the law makers in enacting same, as well as the scope and effect of the section, we quote some of the cardinal principles to be applied to statutory construction. In

State ex inf. vs. Railroad, 238 Mo. 605

the Supreme Court of the State of Missouri with reference to the construction of the statute thereunder consideration at page 614 of the opinion, said:

"As we have already suggested, an important element in the construction of this and other statutes is the consideration of the conditions to which it is to be applied, and which its remedial provisions are designed to correct."

The Supreme Court of this state in

Spicer vs. Spicer, 249 Mo. 582

at page 599 further declared:

"Whenever consistent with reason, that construction which will make the statute operative should be applied. It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation if the language will permit, instead of treating them as meaningless." (2 Lewis' Sutherland on Stat. Construction (2 Ed.) Sec. 498.)

On the general principle of statutory construction, the case of

State ex rel vs. Robinson, 253 Mo. 371
at page 287 of the opinion holds:

"The General Assembly cannot enact a valid law without the minds of its members considering the things to which the law is to apply, for the legislative will is what becomes the law. In a broad, general sense we discern the legislative will by the words it has spoken through its enactments, the same as we would interpret the language of an individual."

(Hon. John H. Ross, Commissioner)

With these plain and simple rules of construction in mind, the purpose and intention of the Legislature in enacting the above section 8279 may be better understood by stating succinctly the requirements and provisions of the same, outlined as follows:

"Every person, firm or corporation owning or using any dam existing or which may be constructed across any river, stream or creek is required to erect and maintain in connection with the dam a durable and efficient fishway or other device as the Game and Fish Commissioner may deem necessary so as to permit the passage of fish up and down the water at all times. Such fishway or device shall be placed, operated and maintained so as to meet the approval of the Game and Fish Commissioner.

Whenever in the opinion of the Game and Fish Commissioner, the installation of such device or ladder above provided for is impractical or unnecessary, the Game and Fish Commissioner is authorized to require the person, firm or corporation required to erect and maintain the fishway or other device to establish and maintain a fish hatchery for the purpose of stocking the water above and below such dam.

After the establishment of such hatchery, the Fish and Game Commissioner may take fish from the hatchery for distribution to the public waters of the state, such hatchery to be operated under the supervision of the Game and Fish Commissioner.

A penalty is provided for the refusal to establish and maintain a fish hatchery in lieu of establishing a fishway when requested to do so by the Game and Fish Commissioner.

The Legislature evidently had in mind the patent fact that any dam existing or to hereafter constructed across a river, stream or creek would obstruct the free passage of fish up and down the water and to that extent affect the right of the public to the use of such in the waters of the state. That the Legislature has the right subject to constitutional restrictions to impose regulations and limitations for the protection and preservation of the right of the public in the fish in the waters within the state is beyond question. The Supreme Court of Missouri in

Haggerty vs. Ice Mfg. & Storage Co., 143 Mo. 239

having under decision a case where it was claimed game had been killed out of season, and referring to the general police powers of the state,

at page 344 of the opinion, said:

"This sovereign attribute and power as existent in the States of this Union has often been exercised by them by passage of laws in the most of these States, for the protection and preservation of game; and it seems never to have been called in question. Numerous adjudications attest this fact. In such cases the common ownership of game which otherwise would remain in the body of the people, is lodged in the State to be exercised like all other governmental powers in the State in its sovereign capacity to be exercised in trust for the benefit of the people and subject, of course, to such regulations and restrictions as the sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the state."

Even in the absence of a statutory requirement to that effect, a person or corporation building a dam across a stream within this state is required to keep open sufficient ways for the passage of fish. This is held in

State vs. Gilmore, 141 Mo. 506

at page 512 the Court saying:

"But aside from any statute on the subject, the general rule of law is that where a person is granted authority to build a dam for mill purposes, he does it under an implied obligation to keep open sufficient fishways for the passage of fish; and this is always the case unless such implied obligation is excluded by an express provision exempting the dam-builder from such implied obligation. Com. v. Essex Co., 13 Gray, loc. cit. 248, and cases cited."

The same rule is announced by the Supreme Court of the United States in

Holyoke Water Power Co. vs. Lyman, 82 U.S. 500, 21 Law Ed. 138

the court having under consideration a somewhat similar case to the one at hand, said:

"Laws of the kind, requiring the owners of dams across the rivers and streams of the state, to build fishways and keep them in repair, have been passed, in numerous instances, since the state Constitution was adopted, many of which are still in full force. Such laws usually require the owners of the dam to build the fishway at their own expense, and subject their doings in that behalf to the approval of some supervisory board or committee. ***
***Public rights, in all jurisdictions, are subject to legislative control, and it is settled law in Massachusetts

(Hon. John H. Ross, Commissioner)

and has been for a century and a half, including her colonial history, that the rights of fishery in such rivers as the Connecticut and Merrimac, even above the point where they are navigable for boats or rafts, and the right to erect and maintain dams to create water-power for mill purposes, are public rights and the owners of such rights are bound by such reasonable regulations as the state may make and ordain for their protection and enjoyment."

The state having the right to preserve the public property in fish by making reasonable rules and regulations with reference to the passage of fish up and down stream as applied to owners of dams therein, there is no reason why such regulations cannot be enforced or carried out by an official of the state, such as the Game and Fish Commissioner.

Adverting then to the provisions of Section 8279, the owner of the dam is required to erect and maintain an efficient fishway. This was required by the common law. Whenever the height or character of the dam or condition of the river or stream is such that the installation of the fishway is impractical or unnecessary, the Game and Fish Commissioner is authorized to require the establishment and maintenance of a fish hatchery.

The dam is built in the stream for the gain, or at least, convenience of the persons building it. The doing of that act brings into play the right of the state to protect its rights and in its right of protection as to fish, if the state reasonably concludes that the fishway provided by the dam builder does not protect its interest, then it would have the right to make such other reasonable provisions as would protect the interest of the state in that respect.

We think it is clear from a reading of Section 8279 that the Legislature intended to provide the State Game and Fish Commissioner with authority to cause the owners of dams across streams then existing or thereafter built, to build and maintain fish hatcheries where the fishway as provided in the dam is impractical or unnecessary, and by the use of the word "maintain" in the foregoing section is meant to establish and operate.

In the case of St. Louis S.W. Ry. Co. vs. Davy Burnt Clay Ballast Co., 273 S.W. 630, the Court of Civil Appeals of Texas, having under consideration the question of whether or not the acts of the plaintiff amounted to maintaining a railway, and in defining the word "maintain" at page 633 of the opinion, said:

"The word "maintaining", in common parlance, has a generally well-defined and accepted meaning, and it is to be assumed that the Legislature intended for that word, as used in article 1319, supra, to be so understood and applied. Webster's International Dictionary

(Hon. John H. Ross, Commissioner)

defines "maintain" to mean:

To hold or keep in any particular state or condition, to support, to sustain, to uphold, to keep up, to keep possession of, not to surrender, to continue, not to suffer to cease or fail, to bear the expense of.

We can well accept this definition as our guide, for, as said in the case of *Brenn v. City of Troy*, 60 Barb. (N.Y.) 417, 431:

Webster's (International) Dictionary ***
has become in effect a law book on questions of construction."

In *O'Connell vs. Kansas City*, 231 S.W. 1040 arose the question, the meaning of the word "maintain" in a suit on account of defective sidewalks. The court at page 1041 of the opinion dealing with the word "maintain" stated some of the general definitions as follows:

"The word 'maintain' does not mean to provide or construct, but means to keep up; to keep from change; to preserve (Worcester's Dict.); to hold or keep in any particular state or condition; to keep up (Webster's Dict.).

"In *Moon v. Durden*, 2 Exch. 21, it was said:

'The verb "to maintain"*****signifies to support what has already been brought into existence.'

Verdin v. City of St. Louis, 131 Mo. 26, 87, 33 S.W. 480, 494; *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 399, 56 S.W. 449, 451 (48 L.R.A. 285).

"The word 'maintain', used as a verb does not mean to provide or construct, but as defined by lexicographers, means to keep up, to keep from change, to preserve. Worcester's Dictionary. To hold or keep in any particular state or condition, to keep up. Webster's Dictionary.

"In the case of *Moon v. Durden*, 2 Exchequer R. 21, it was said: 'The verb "to maintain", in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence.'

So that from the foregoing definitions of the word "maintain" it would be sufficient in this case to include the operation of the hatchery, but that is not necessary in the case at hand, because the statute provides that a fishway shall be erected and maintained. The word "maintain" is used in its most active sense and further, the fishway or device shall be placed, operated and maintained so as to meet the approval of the Game and Fish Commissioner, and upon such fishway proving inadequate, the owner of the dam is required to establish and maintain a fish

(Hon. John H. Ross, Commissioner)

hatchery for the fixed purpose of stocking the water above and below such dam. This, of course, means stocking the water with fish, or it means putting fish into the water from the hatchery, and fish could not be propagated in the hatchery unless the hatchery was operated.

The Fish and Game Commission is entitled at any time to take fish from the hatchery for distribution to the public waters of the state, and further, the hatchery is to be operated under the supervision of the Game and Fish Commission and if it were operated within the meaning of the above section, the hatchery would be used for fish hatching purposes.

We are of the opinion that Section 8279 Laws of Missouri, 1931, page 238-9 requires the person, firm or corporation owning or using a dam where a fish hatchery is required to be constructed in a river, creek or stream in this state in lieu of a fishway to operate such fish hatchery at his or its own expense and under the supervision of the Game and Fish Commissioner when all of the requirements made under Section 8279 are reasonable.

Very truly yours,

GILBERT LAMB,
Assistant Attorney General

APPROVED:

Attorney General