



charging the fishermen by the pound of fish caught and removed. His reason for changing the fishing privilege to the sale-by-pound method was that during the year 1951 fishermen killed numerous fish by throwing back smaller catches and keeping the five biggest fish they could catch."

Based upon this fact situation you ask whether the taking of fish from this private lake is subject to the laws of the State of Texas, particularly Articles 933<sup>1</sup>/<sub>2</sub>a, 933<sup>1</sup>/<sub>2</sub>b, 933<sup>1</sup>/<sub>2</sub>c and 933a, Vernon's Penal Code, and Sections 1, 2 and 3 of Article 4032b, Vernon's Civil Statutes.

The articles in question are as follows:

Article 933<sup>1</sup>/<sub>2</sub>a, V.P.C.:

"From and after the expiration of the closed season on rainbow trout as provided in Section 1 of this Act ~~Art. 933<sup>1</sup>/<sub>2</sub>~~ it shall be unlawful for any person to take, possess, sell or barter any rainbow trout from any of the fresh waters of Texas during the months of January, February, March, April and May of each year, which months shall constitute a closed season on rainbow trout."

Article 933<sup>1</sup>/<sub>2</sub>b, V.P.C.:

"It is hereby made unlawful for any person to take or have in his or her possession any rainbow trout from any of the fresh waters of Texas, of a less length than fourteen inches, or to take and have in his or her possession more than five rainbow trout during any one day."

Article 933<sup>1</sup>/<sub>2</sub>c, V.P.C.:

"It is hereby made unlawful for any person to sell, barter, or offer for sale or barter any rainbow trout taken from any of the fresh waters of Texas."

Article 933a, V.P.C.:

"It shall be unlawful for any person, firm or corporation, or their agents, to

buy or sell, or offer for sale, or offer to buy, or have in his or their possession for sale, or to carry, transport or ship for the purpose of sale, barter or exchange, any fresh water crappie or bass within the State of Texas.

"Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine in any sum not exceeding one hundred dollars, and each sale or shipment or act in violation hereof shall constitute a separate offense."

Article 4032b, V.C.S.:

"Section 1. It shall be unlawful for any resident of this State to fish in any of the fresh waters of this State, outside of the county of his residence and adjacent counties thereto, without first having procured from the Game, Fish and Oyster Commission, or one (1) of its bona fide employees, or a county clerk or an authorized agent, a resident fishing license, the fee for which shall be One Dollar and sixty-five cents (\$1.65). Of this amount, the officer issuing same shall retain fifteen cents (15¢) as his fee for collecting same. No fee or license of any kind shall be required of a person for the right to fish in the county of his residence and counties adjacent thereto except as provided in Sec. 3 of this Act.

"Sec. 2. It shall be unlawful for any person who is a non-resident of this State, or any person who is an alien, to fish in the fresh waters of this State without first having procured from the Game, Fish and Oyster Commission, or one of its bona fide employees, or a county clerk or an authorized agent, a non-resident fishing license, the fee for which shall be Five Dollars and twenty-five cents (\$5.25). Of this amount, the issuing officer shall retain twenty-five cents (25¢) as his fee for collecting same. Provided that such non-resident may fish in said waters under a five-day license, the fee for which shall be One Dollar and sixty-five cents (\$1.65), and which shall be valid for only five

(5) consecutive days, including day of issuance, the date of which shall be stated thereon. The issuing officer shall retain fifteen cents (15¢) of said amount as his collecting fee.

"Sec. 3. No person under seventeen (17) years of age shall be required to possess any of the licenses provided for in this Act. No resident fishing license shall be required of a resident citizen of this State who holds a commercial fishing license issued in this State. Provided that all residents of this State over the age of seventeen (17) years shall hold a resident fishing license when using artificial bait or lure. Provided further that all residents of this State over the age of seventeen (17) years shall hold a resident fishing license when using live bait outside of the county of his residence."

In Jones v. State, 45 S.W.2d 612 (Tex. Crim. App. 1931), it was determined that the game and fish laws of this State are not intended to interfere with an owner's control over fishing in privately owned ponds of the character which you describe. In respect thereto, the court said at page 614:

"In Corpus Juris, vol. 26, p. 624, citing many authorities and precedents, the following is stated: 'But the legislature cannot interfere with the fishing privileges of the owners of private ponds having no communication through which fish are accustomed to pass to other waters.'

"Apparently the game laws of this state are so framed as to recognize the limitation just mentioned. Article 951, P.C.1925, reads thus: 'It shall be unlawful for any person to catch any fish in the fresh waters of this State, with any seine or net other than minnow seine, not exceeding twenty feet in length, or to drag any seine, except such specified minnow seine, or to set any net, in the fresh waters of this State during the months of March and April, or to fish with any artificial bait of any kind in the fresh waters of this State

during the months of March and April. Any person violating any of the provisions of this Article shall be deemed guilty of a misdemeanor and shall be upon conviction fined a sum of not less than twenty (\$20.00) dollars nor more than one hundred (\$100.00) dollars. This article shall not apply to any artificial lake, pond or pool, owned by any person, firm, corporation, city or town, that does not have as its source of water supply a river or creek or is not subject to overflow from a river or creek.'

"Articles 931 and 933, upon which the prosecution is founded, and article 951, just quoted, are all parts of the Game Law, and must be construed together. When so construed, the exception in article 951, italicized above, apparently would operate to protect the appellant against a conviction in the present instance. Article 951 apparently legalizes the catching of fish of all kinds in private waters. The appellant, having legally caught the fish described in the evidence in private waters in which the state had no interest, could not be guilty of an offense by having the fish in his possession."

In an opinion on motion for rehearing in the same case (45 S.W.2d 614) the court stated:

"It seems to the writer that in no clearer language than that found in articles 925 and 951 could it be expressed that it was not the legislative intent to place restriction on the owners' control over fishing in privately owned ponds, as distinguished from fresh water streams and lakes as defined in article 926 of the Penal Code."

Therefore, in view of the basis for the Court of Criminal Appeals' interpretation of the fish and game laws of the State, we feel that Articles 933 $\frac{1}{2}$ a and 933 $\frac{1}{2}$ b, Vernon's Penal Code, and sections 1, 2 and 3 of Article 4032b, Vernon's Civil Statutes, do not apply to the taking of fish from the lake which you have described in your request, and specifically that the owner's price-per-pound system of charge is not necessarily in conflict with Articles 933 $\frac{1}{2}$ c and 933a, Vernon's Penal Code. This system of charge if applicable solely to the privilege of fishing is no more than a method by which

the owner controls fishing in his private lake, and as said above, the game and fish laws when construed together indicate the legislative intent to exempt the owner's control over fishing in private lakes or ponds which do not communicate with public waters from the scope of these laws.

SUMMARY

The taking from a privately owned artificial lake of rainbow trout which were stocked in the lake from sources outside the State is not subject to the provisions of Articles 933<sup>1</sup>/<sub>2</sub>a, 933<sup>1</sup>/<sub>2</sub>b and 933<sup>1</sup>/<sub>2</sub>c, Vernon's Penal Code, or Sections 1, 2 and 3 of Article 4032b, Vernon's Civil Statutes, where the lake does not have as its source of water supply a river or creek and is not subject to overflow from a river or creek. A fee charged for the privilege of fishing in such lake based on the number of pounds of fish caught is not a purchase, sale, barter or exchange, within the meaning of Articles 933<sup>1</sup>/<sub>2</sub>c and 933a, Vernon's Penal Code, of the types of fish named therein.

APPROVED:

Ned McDaniel  
State Affairs Division

E. Jacobson  
Reviewing Assistant

Charles D. Mathews  
First Assistant

MR/ee/rt

Yours very truly,

PRICE DANIEL  
Attorney General

By *Milton Richardson*  
Milton Richardson  
Assistant