



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

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July 30, 1954

Hon. Frank Ginzel  
County Attorney  
Mitchell County  
Colorado City, Texas

Opinion No. MS 144

Re: Application of State fishing  
laws to Lake Colorado City.

Dear Mr. Ginzel:

In your request for an opinion you posed substantially the following questions:

1. Are the fish in Lake Colorado City public property of the State of Texas under Article 4026, Vernon's Civil Statutes, or are they so confined as to be private property to which fishing and game regulations do not apply?
2. If the fish are public property, does that in itself give the public the right of fishery in the entire lake, as well as that portion owned by the city?
3. What is the effect of Senate Bill 432, Chapter 220, Acts of the 52nd Legislature, 1951, codified as Article 678j of Vernon's Penal Code, upon fishing in the lake?
4. If the water in the lake is "public water," so as to give the public the right to fish in the lake, would the fact that the lake bed land is owned in a proprietary capacity destroy the "public" character of the water which overlays the land?

Article 4026 provides:

"All fish and other aquatic animal life contained in the fresh water rivers, creeks, and streams and in lakes or sloughs subject to overflow from rivers or other streams within the borders of this State are hereby declared to be the property of the people of this State. . . ."

It will be noted that this article applies to all "rivers, creeks, and streams," not limiting itself to the navigable ones. Thus, even were it determined that Morgan's Creek, the source of Lake Colorado City, were nonnavigable, the fish in the creek would still be the property of the State. In Corpus Juris Secundum (Vol. 36, p. 858) it is said:

"This legislative power extends to fisheries in private or nonnavigable waters, which by the common law would be private property, at least where such waters are connected with other waters in which other persons have the right to fish. . . ."

This right of the State is based on the theory that fish are ferae naturae until reduced to possession by some person. Jones v. State, 119 Tex. Crim. 126, 45 S.W.2d 612 (1932); State v. Lipinske, 249 N.W. 289 (Wis. Sup. 1933). If the fish are confined in a pond without means of escape they have been subjected to such control as to make them private property. Jones v. State, supra; A. G. Opinions 0-2343, V-1516.

Whether the fishing regulations would apply, therefore, would depend on whether the fish had some means of getting out of the lake. Since your letter states that Morgan's Creek furnishes such an outlet at various times of the year, and there being a further outlet over the dam when the lake shall be full, it is our opinion that the fish in Lake Colorado City are property of the State and subject to regulation by the Legislature. The intermittent character of the outlet has been held by the weight of authority as being without legal consequence on this question. People v. Bridges, 31 N.E. 115 (Ill. Sup. 1892); State v. Lowder, 153 N.E. 399 (Ind. Sup. 1926); People v. Lewis, 198 N.W. 957 (Mich. Sup. 1924); Ray v. State, 132 So. 755 (Miss. Sup. 1931). Moreover, the Legislature has indicated its intent that this be so by providing that lakes or sloughs "subject to overflow" (certainly not necessarily a regular occurrence) from rivers or streams be considered public waters for this purpose. (Art. 4026)

In Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935, error dismissed) it was held:

". . . An abutting landowner whose field notes cross a non navigable lake and who, by virtue thereof, holds title to a specific portion of the bed of the lake, has a right to control that part of the surface of the lake above his land, including the right to fish in or boat upon the water, and that

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any use or interference therewith by another constitutes an infringement on his rights as such owner. . . ." (Emphasis added.)

The court goes on to construe Article 4026, supra, concluding that although the fish in the lake were public property by virtue of its provisions,

". . . It was never intended that thereby a stranger should have a right to enter upon the private property of another for the purpose of catching fish, although the fish until caught belong to the public. . . ."

As to the third question, Senate Bill 432, supra, makes it unlawful for any person to catch or take any type of fish from the waters of Lake Colorado City for the purpose of sale. It is clear from this the act recognizes only that the fish in the lake are property of the State and subject to its regulations. The act could not be construed as recognizing the lake to be "public waters," in the sense that the public would have a right to fish unrestrictedly upon it.

If it were to be ascertained that Morgan's Creek has an average width of thirty feet from cut bank to cut bank from its mouth to a point above the lake, the stream, and consequently the lake, would then be navigable. Art. 5302, V.C.S.; Heard v. Town of Refugio, 129 Tex. 349, 103 S.W.2d 728 (1937); A.G. Opinion O-156. The public would then have the right to fish in any part of the lake, regardless of who owned the bed of the lake. Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W. 2d 441 (1935). The answer to the fourth question, then, would be in the negative.

Yours very truly,

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