

**Opinion No. 47-4976**

January 14, 1947

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Rufus H. Carter, Jr. Asst. State Engineer Office of State Engineer Santa Fe, New Mexico

{\*5} We are in receipt of your letter of January 9, 1947, in which you state that the Game Department contemplates constructing small dams in various streams in the State for the purpose of creating pools in the stream to improve the fishing. You state that no diversions from the streams are contemplated. You ask our opinion as to whether it will be necessary for the Game Department to make application to appropriate such water.

Section 77-530 of the 1941 Compilation is as follows:

"Any person, association, or corporation, public or private, the state of New Mexico, or the United States of America, hereafter intending to construct a dam to impound the public waters of the state for any purpose, which dam exceeds ten (10) feet in height above the lowest natural ground surface elevation or impounds more than ten (10) acre-feet of water, shall comply with the provisions of this act applicable to the appropriation and utilization of water; providence, that this section shall not be construed to apply to stock dams whose maximum storage capacity does not exceed ten (10) acre-feet or to the construction of works designed solely for silt retention and which do not impound or divert water for beneficial use."

It is my opinion that this section sets up three exceptions under which it is not necessary to make application to appropriate public waters:

(1) if the dam does not exceed 10 feet in height above the lowest natural ground surface elevation and does not impound more than ten acre-feet of water; (2) if the dam is a stock dam and its maximum storage capacity does not exceed ten acre-feet, even though the dam is more than ten feet in height; and (3) if the construction of the works is designed solely for silt retention and does not impound or divert water for beneficial use, even though the dam is more than ten feet in height or impounds more than ten acre-feet of water.

By: ROBERT W. WARD,

Asst. Atty. General