

Opinion No. 57-246

September 26, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. Homer C. Pickens, Director, Department of Game and Fish, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Under Chapter 53-1-8, does the State Game Commission have the authority to stock catchable legal-size trout in private waters?
2. Does the law require the State Game Commission to charge a fee for fry and fingerlings stocked in private waters?
3. Can the State Game Commission stock trout in private waters where these waters are legally posted against public use?

CONCLUSIONS

1. No, but fry and fingerlings may be so stocked if an adequate consideration is taken, so long as the public policy of providing public recreation is not thereby thwarted.
2. Yes.
3. Fry and fingerlings may be so stocked, conditioned as stated in Conclusion No. 1.

OPINION

ANALYSIS

In our opinion one governing provision of law is the second paragraph of § 53-1-8, N.M.S.A., 1953 Compilation, which is as follows:

". . . To establish and, through the state game and fish warden, to operate fish hatcheries for the purpose of stocking public waters of the state, **and to furnish fish fry and fingerlings to stock private waters, receipts from such sources to go into the game protection fund;**. . ." (Emphasis ours.)

You will observe from such paragraph that there is authority in the Game and Fish Department to furnish fry and fingerlings to stock private waters, which authorization is

followed by a requirement, however, that the receipts from such sources are to go into the Game Protection Fund. Clearly, this seems to require that while the fry and fingerlings may be stocked in private waters, there must be a consideration for such stocking and a gift of the fry or fingerlings may not be made. We further advise that the consideration must be adequate, so as to cover, at least, the costs of the Game Department. By use of the terms "fry" and "fingerlings," it is our opinion that the Legislature thereby excluded the stocking of any fish larger than fry or fingerlings in private waters. Hence, the authorization to stock fish in private waters is limited to fry or fingerlings, and then for a consideration.

Insofar as stocking the fry and fingerlings in private waters which are lawfully posted against public fishing is concerned, we know of no provision of the law which would prohibit this except as hereafter noted. You will observe that the quoted paragraph of Section 53-1-8, supra, does not restrict the stocking in private waters to those private waters in which public fishing is permitted. Accordingly, we conclude that such stocking may be done so long as the policy announced in Section 53-1-1, N.M.S.A., 1953 Compilation, is not thwarted. Such section reads as follows, and clearly indicates that one policy of the law is to provide for public recreation:

"It is the purpose of this act and **the policy of the state of New Mexico** to provide an adequate and flexible system for the protection of the game and fish of New Mexico and **for their use and development for public recreation** and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico." (Emphasis ours.)

If then, stocking in private, lawfully posted water would not be to such an extent as to deprive the citizenry of a source of public recreation, we are of the opinion that it may be done, as above limited.

Since we are dealing with the disposition of public property, it is necessary that we treat of the statutes applicable thereto. In Opinion of the Attorney General No. 57-149 (Substitute), we held that a proposed lease, by your Department, of mine tailings was governed by the provisions of Section 53-4-3, N.M.S.A., 1953 Compilation, 1955 Supplement (now found in the 1957 Supplement). However, we do not believe such statute is here applicable by virtue of the fact that it relates only to the disposition of realty or interests therein. Here, personality is concerned.

Perhaps it could be argued that Section 6-1-8, N.M.S.A., 1953 Compilation, 1957 Supplement, as follows:

"Any department, commission, agency or institutional board of this state is hereby empowered to sell or otherwise dispose of real or personal property belonging to such state department, commission, agency or institution, subject to the approval of the state board of finance. The state comptroller shall have the power to credit any payment received from the sale of any such real or personal property to whatever fund of such

state department, commission, agency or institution as he deems appropriate. And the head of such department, or the president, or chairman of the commission, or the governing board of such agency or institution is hereby authorized to execute such deeds, leases, right-of-way easements, bills of sale or other documents necessary to convey all or any interest in said real or personal property, without warranty."

controls this situation.

True, it is later in point of time than the second paragraph of Section 53-1-8, supra, above quoted, which simply authorized sale of the fry and fingerlings, receipts to be credited to the game protection fund. However, if we are to say that Section 6-1-8, supra, controls over Section 53-1-8, supra, in this regard, then we must say that each time fry or fingerlings are proposed to be sold, the State Board of Finance must convene and pass on the matter. We are not willing to go so far, for it is a well recognized rule of construction that statutes should be construed in a beneficial way in order to prevent absurdity, hardship, injustice, and so as to favor public convenience. *Scott vs. United States*, 54 N.M. 34, 213 P. 2d 216. Furthermore, if Section 6-1-8 controls this situation, it would be by virtue of an implied repeal, to an extent, of Section 53-1-8, which is not favored. *State vs. Valdez*, 59 N.M. 112, 279 P.2d 868. Especially is this so in the instant question, because Section 6-1-8 is a general statute, whereas Section 53-1-8 is special; for a subsequent general statute will not be held to repeal by implication an earlier, specific statute, unless such construction is absolutely necessary to give effect to the subsequent general statute. *Levers et al., vs. Houston*, 49 N.M. 169, 159 P.2d 761. We do not believe that in this instance such construction is absolutely necessary.

This leaves us with the quoted paragraph of Section 53-1-8, supra, which we believe vests considerable discretion as to the terms of sale in the Commission, uncontrolled by Section 6-1-8, supra.