

Opinion No. 57-319

December 16, 1957

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

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

QUESTION

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Is it legally proper for the Department of Game and Fish to consider, as public waters within the meaning of Section 53-1-8, N.M.S.A., 1953 Compilation, municipal reservoirs and waters on Indian and military reservations where public fishing is permitted, but only on condition of payment of a fee (s) in addition to possession of a valid fishing license?

CONCLUSION

No.

OPINION

ANALYSIS

The provision of law which is involved is the second paragraph of § 53-1-8, supra, which provides:

"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:"

Our research discloses no case by our Supreme Court answering your question, nor do we find any other statute or statutes which answer your question. For purposes of the quoted provision it is our opinion ". . . public waters . . ." mean waters in which the public has the right, in fact, to fish, assuming always, of course that each person fishing is possessed of a valid fishing license and otherwise complies with New Mexico law.

But here we are confronted with the situation of where the municipality, Indian tribe or military authority imposes a condition (payment of fees), which would prohibit all public fishing, unless the condition was met. Under such circumstances, the waters involved could hardly be termed "public" within § 53-1-8, paragraph 2, supra. That the fees may be expended to improve or maintain the waters for fishing purposes is beside the point

because the free right of access in fact for fishing purposes is gone. Nor do we believe the amount of the fee, large or normal, is of any consequence.

We have given careful attention to State ex rel. State Game Commission v. Red River Valley Co., 51 N.M. 207, 182 P 2d. 421, but we find nothing therein which would conflict with our conclusion.

It follows that the waters in question can only be treated by you as private waters and you should hereafter proceed as instructed by this Department in Opinion of the Attorney General No. 57-246, dated September 26, 1957.