

Opinion No. 61-38

May 9, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas O. Olson, First Assistant Attorney General

TO: Mr. Fred Thompson, Director, Department of Game and Fish, P. O. Box 2060, Santa Fe, New Mexico

QUESTION

QUESTION

Are waters located on or flowing through private posted lands public waters such as may be stocked with fish raised in state fish hatcheries at state expense?

CONCLUSION

Yes.

OPINION

ANALYSIS

To answer the question you have raised necessitates an interpretation of the term "public waters" as used in the second paragraph of Section 53-1-8, N.M.S.A., 1953 Comp. This section in part provides authority for the State Game Commission "to establish and, through the State Game and Fish Warden, to operate fish hatcheries for the purpose of stocking public waters of the state * * *". We believe that the answer to this question is furnished by Section 2 of Article XVI of the New Mexico Constitution and by the case of **State ex rel. State Game Commission v. Red River Valley Company**, 51 N.M. 207, 182 P. 2d 421. Section 2, supra, states in part as follows:

"The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state."

Therefore, our Constitution makes it clear that the unappropriated water of every natural stream is public in nature. This is in contradistinction to artificial waters which are not public in character so long as they are confined to the property of the owner and creator of such waters. See **Hagerman Irrigation Company v. East Grand Plains Drainage District**, 25 N.M. 649, 187 P. 555.

Language of our Supreme Court in the **Red River Valley Company** case, supra, is helpful in determining at what point waters cease to be public in character. At page 224 of the New Mexico Reporter, the Court states as follows:

"It is all yet public water until it is beneficially applied to the purposes for which its presence affords a potential use; and as to some of it, as we have said, it is not contemplated that application to beneficial use in New Mexico is to be made at all. 'The water in the public stream belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose.' Snow v. Abalos, 18 N.M. 681, 693, 140 P. 1044."

Later, on that same page, the Court states:

"We must not confuse title to the land with that to water, certainly not to water which was not upon the land when the grant was made or when the confirmation by the Congress was affected; these are waters which have no relation to the land as it is affected by title to the latter. They are waters, which, for the most part, have their source on lands of others, or public lands far away, and are certainly waters 'of' a 'natural stream, perennial or torrential, within the state of New Mexico'. Art. XVI, Sec. 2, Constitution."

Then at page 225, the Court quotes with approval from the case of **Albuquerque Land and Irrigation Company v. Gutierrez**, 10 N.M. 177, 61 P. 357, as follows:

" 'The doctrine of the Common Law as to the private ownership of the water of public streams no longer exists in this Territory or the mountain states * * * **and no longer can there be such a thing as private ownership of the water of public streams in this Territory.**' (Emphasis ours)"

Applying the above construction of the constitutional provisions to the problem at hand, it becomes clear that the waters of our streams, whether perennial or torrential in nature, are public waters such as may be stocked by the Fish and Game Commission. It is clear that the waters are public even though the land over which they flow may be private in character and posted against trespassing. Such waters are public in character so long as they remain in the stream since no appropriator has a specific claim upon a specific drop of water but merely a right to divert and use water of a certain quantity for beneficial use from the total quantity within the stream.

In conclusion, therefore, it is our opinion that all waters of streams are public to the extent that they may be stocked by you irrespective of the question of whether the lands over which they run are private in character and are posted against public trespass. To the extent that this opinion is inconsistent with Opn. No. 57-319, dated December 16, 1957, the earlier opinion is overruled.