

Opinion No. 17-2015

July 5, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. Theodore Rouault, State Game Warden, Santa Fe, New Mexico.

A New Mexico License s Required of Persons Fishing In the Elephant Butte Reservoir.

OPINION

I refer to the recent conversation between you and me, in which you stated that various persons, residents of the State of Texas, have been fishing in the waters of the reservoir of the Elephant Butte Dam, and that possibly other residents of this State have been indulging in such pastime. In view of the relation which the United States Government bears to this project, you inquire whether or not a license should be imposed upon persons who fish in the waters of this reservoir.

This is a reclamation project, provided for by Act of Congress, and the United States Government is the owner of the Dam, the reservoir, and the land upon which it is located, having acquired title, as I am advised, by purchase of condemnation. This territory is subject to the jurisdiction of the State of New Mexico unless same has been ceded by the State to the Federal Government. Article II, Section 8, of the Constitution of the United States confers authority upon Congress to exercise exclusive legislation "over all placed purchased by the consent of the legislature of the State in which the same shall be, for the relection of forts, magazines, arsenals, dockyards, and other needful buildings.

Pursuant to the Constitutional provision referred to, the legislature of the State of New Mexico, by Act of June 10, 1912, enacted the following legislation, which now appears as Sections 5562 and 5563, Codification of 1915:

5562. "The consent of the State of New Mexico is hereby given in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States to the acquisition by the United States, by purchase, condemnation, or otherwise, of any lands in this State required for sites for custom houses, courthouses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government."

5563. "Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands."

Does the Elephant Butte project come within the classification of "Custom houses, court houses, postoffices, arsenals, or other public buildings whatever? The Elephant Butte Dam and reservoir are evidently not included within this classification. If it is contemplated by the Act to include them at all, it must be by reason of the following clause, "and for any other purposes of the Government." By predecessor in office, Honorable Frank W. Clancy, in his opinion of September 2, 1914, addressed to the State Superintendent of Public Instruction, held that this clause could not be construed to cover the case of land acquired for reservoir or dam sites. He suggests that a familiar rule of law might be applied which would limit the "other purposes" to purposes of the same class, or of like character, to those enumerated, such as custom houses, court houses, etc. Mr. Clancy, in said opinion, also held that the land at the Elephant Butte Dam had all been acquired by the United States prior to the enactment of 1912, and prior to the establishment of our State Government, and that the same does not fall within the provisions of Sections 5562 and 5563, as no consent of the State was necessary to the acquisition of title by the United States by way of purchase of land to which the Government had already acquired title, and that there is nothing in the statute to show that it was intended to have a retroactive effect. He further holds that the sections of our statute referred to go further than the language of the Federal Constitution, which speak only of "forts, magazines, arsenals, dockyards, and other needful buildings." Mr. Clancy expresses my views in this opinion and I concur therein.

Section 2435, Codification of 1915, as amended by Section 7, Chapter 101, Laws 1915, prohibits the taking of any game fish in the State without first having procured a hunting license. The fees to be imposed by your office for hunting license, both for residents and nonresidents, are set forth in Section 2470, Codification of 1915, as amended by Section 13, Chapter 101, Laws 1915. The power of the State to regulate the taking of fish is based upon the theory that the fish in the waters of the State, as well as the game in the forests, belong to the people in their sovereign capacity, and are not subject to private ownership except in so far as the people may elect that they shall be. Unquestionably, under the statutes of this State, fish and game are the property of the public or of the State. Our statute makes exception in instances of parks, or lakes wherein the land is held by private ownership. In such instances, the owner of the land may procure license for maintaining such parks or lakes, and the taking of fish or game therefrom under the regulations prescribed in the statute. The statute authorizing such procedure is found in Sections 2482 and 2506, Codification of 1915. The provision of our statute with reference to the taking of fish from lakes on land held by private ownership can have no application to the Elephant Butte Reservoir, for, in my opinion, for such lake to come within the provisions of the statute, it must be of such nature that there is no communication between it and the public waters of the State. You may readily see that fish in the Rio Grande River beyond the reservoir, which are subject to the protection of the law, may easily enter the waters of the reservoir. In fact, they might accumulate there, where they might be taken with impunity by persons who were not required to pay a license. It has been held that, since there is an opportunity for fish to go from the fishery of one riparian owner to other waters over which the State has control, the State has an interest in the fish which enables it to make reasonable regulations as to their taking and this is but another statement of the rule that the fish

belong to the public. This may be illustrated further by an application of the law relative to killing game. If the State has no right to impose a license for the taking of fish in this reservoir, it would have no right to impose a license for the killing of game upon the adjacent land, which belongs to the Federal Government. Immediately outside of this reservation, the game of the State is protected by the State laws, but, as soon as it would cross the line, it might be killed by persons upon the reservation who had no license. Such game might likewise be killed out of season. Again applying this doctrine, such game as elk, mountain sheep, or antelope might be slaughtered upon the Government reservation, and the state would be powerless to afford protection. From these illustrations, the fallacy of a contention that the State has no right to exact a license for fish taken in these waters is very apparent.

My attention has been called to the letter written you by Mr. P. W. Dent, District Counsel for the United States Reclamation Service, which includes the Elephant Butte project. In his letter, contending against the exercise of the State's authority in this matter, he urges two reasons in support of his contention. He insists, first, that the Government is the absolute owner of this land, and, for that reason, has the control of same, to the exclusion of the State and the operation of State laws. If such contention is well founded the State has no jurisdiction as to the enforcement of the game and fish law upon forest reserves located within the State. The Government is likewise the absolute owner of more than 23,000,000 acres of public land within the State. Also, the Government is the owner of lands held and occupied by homestead entrymen until patent is issued. Considering the vast amount of land owned by the United States Government within the boundaries of this State, the contention urged in this particular is too absurd to require further discussion.

The other contention advanced by Mr. Dent is that various Texas water users hold the view that, the Lake being Government property for which they will ultimately pay, in part at least, they should be permitted to fish in the reservoir without payment of license and without molestation by the State authorities. If these Texas water users are correct in their claim that they have a property interest in the waters of the Rio Grande, they can come on up, and be joined by the waters users of this State of New Mexico, when the waters users of the two States may assume the same attitude with reference to the State of Colorado; and the water claimants of Texas, New Mexico, and the Republic of Mexico could fish in the waters of the Rio Grande in the State of Colorado in defiance of all game and fish laws and regulations. Again, the waters users of the Pecos, living in the State of Texas, may, with equal propriety, fish in the waters of that stream from the south line of the State of New Mexico to the head of the Pecos. If such rights should be upheld by the courts, a person with rights to the use of waters of the Missouri Rier in the State of Missouri would have unrestricted use of the waters of that river in some half dozen states. I dismiss this contention by saying that, if anything, it is more absurd than the other.

In my opinion, a license should be exacted from persons fishing in the Elephant Butte Reservoir, under the provisions of our statutes. I further recommend that those who fish in these waters without first having procured license should be vigorously prosecuted.

NOTE. -- The views expressed in the above letter were confirmed on August 3, 1917, in an opinion by the chief Counsel of the United States reclamation service.

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