Opinion No. 18-2108

July 11, 1918

BY: HARRY L. PATTON, Attorney General

TO: Honorable J. C. Gilbert, Roswell, New Mexico.

Owner of Land May Prohibit Fishing in Streams Thereon.

OPINION

I am in receipt of your letter of the 9th inst., asking for a construction of the Fish and Game Laws of this State. You inquire whether or not an owner of land, over and through which running streams pass, can legally prohibit fishing in such streams.

Section 2433, Codification of 1915, makes provisions for the owner or lessee of any enclosure, or pasture, to post his land and to forbid hunting and fishing thereon, when he shall desire to protect or propogate game or fish within the enclosure. Section 7, Chapter 101, of the Laws of 1915, provides that hunting or fishing license shall not entitle the holder thereof to hunt or fish within any licensed park or enclosure. Section 18, of the same Act provides that game and fish within a private preserve or park, shall be deemed the property of the licensee. I call attention to these sections, although you state in your letter that the owner of the land in the case which you have in mind, is not propogating fish in the waters thereof.

Under the laws of this country, the ownership of fish, while they are in a state of freedom, is in the State in its sovereign capacity, for the benefit of all its people in common. Notwithstanding such rule, in private waters, the exclusive right of fishing belongs to the owner of the soil beneath the waters. When a conveyance is made, all land covered by a non-navigable stream, passes to the grantee, unless the conveyance requires a different construction, and the owner of land has the exclusive right of fishing in the waters thereof. This is not upon the theory that the fish belong to the owner of the land, but that as the owner thereof, he has the right to forbid trespassing upon his premises.

It follows, that in my opinion the owner of land crossed by a non-navigable stream, has the right to prevent or forbid fishing thereon by other persons.