

Opinion No. 32-491

July 12, 1932

BY: E. K. Neumann, Attorney General

TO: Mr. Elliott S. Barker, State Game Warden, Santa Fe, New Mexico.

{*168} Your letter of July 8th refers to Sections 57-217 and 57-222 of the 1929 Compilation and you desire to know if under these sections a fishing license is required for fishing in so called private water in this state.

In the first place, by both our statutes (Sec. 151-101) and our {*169} Constitution (Art. 16, Sec. 2) all unappropriated waters of natural streams are declared to be public and subject to appropriation for beneficial use. These are both perennial and torrential.

This takes the place of the riparian system and rights of abutting land owners in so far as water rights are concerned.

Certainly, under paragraph 9 of section 57-217, a hunting or fishing permit or license confers no right to go upon private property without consent of the owner.

Can the owner then fish himself in a private lake or in a stream entirely upon his own property without a license and invite or permit his friends to do likewise?

Section 57-301 prohibits maintaining a park, enclosure, lake or body of water for the purpose of keeping or propagating for sale without a license for such park, lake, etc.

Section 57-308 gives the property rights in game and fish in such parks and lakes to the permittee under certain limitations and it would seem under this provision, that no additional license is to be required.

However, in Section 57-327 we find the following:

"It shall be unlawful for any licensee of a park of this state to sell at any time any game birds or game animals, or parts thereof, taken or killed within such park, except for propagating purposes, or for the licensee of any park or lake to sell at any time any trout taken therefrom; provided, however that any person owning or renting any property upon which is located a lake or other body of water, situated entirely on that person's land and having no inlet, outlet, or other connection with any public stream or other body of water may sell any trout taken from said lake or other body of water so located upon his or her property as hereinbefore set out, provided further that the owners or renters of all such lakes shall be licensed as provided by law."

Apparently, this section contemplates lakes and bodies of water which have not pursuant to law been licensed as private lakes, and it appears that in these instances

fishing licenses are required of the owners of the property and the lessees or the renters.

In the case of Schulte vs. Warren, 75 N. E. 786 it is held:

"There is no private ownership of wild game, but the exclusive right of every owner of land to kill and take game found from time to time on his land is indisputable. This was regarded at common law as property *ratione soli*, or, in other words, as property by reason of the ownership of the soil. While there can be no absolute property in animals *ferae naturae* while at liberty in their natural state, they become the property of the owner of the soil when killed or captured thereon, and the right to kill or capture them is exclusive in such owner. Whenever the owner's right is exercised, the animal killed or captured belongs absolutely to him, and he has a qualified property in game while on his own land. The title to wild game and birds in this state is in the state, as representing all the people, both by common law and by statute. But this is only true so far as such wild game or birds are capable of ownership. The ownership, such as it is, is not that of a proprietor, but of a trustee for the benefit of all the people in common. The general ownership is in the state for the use of the public; but, when wild game or fowl are upon the private grounds of an individual, a qualified or special right of property of the individual attaches to it, with the exclusive right to hunt, kill, or capture while there."

While the owners may have exclusive authority to take, kill and capture, yet the State in the exercise of its police power has the paramount right to regulate, and, we think, may require a license of such owner. His exclusive rights only protect him against trespassing and no one, even with a license to hunt or *{*170}* fish can legally go upon his property without his permission and consent.

By Frank H. Patton,

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