

Opinion No. 37-1663

June 4, 1937

BY: FRANK H. PATTON, Attorney General

TO: Mr. Gilberto Espinosa, Member State Game Commission Albuquerque, New Mexico

{*111} This is to acknowledge receipt of your letter dated June 2 wherein you present in substance the following fact situation: That on May 8, 1934, the State Game Commission entered {*112} into a contract (a copy of which contract you have submitted with your request) with the Middle Rio Grande Conservancy District, providing in general that the State Game Commission should stock the waters of the El Vado Reservoir or Lake in the interest of the sportsmen of New Mexico for the express purpose of keeping said reservoir or lake stocked with game fish to its reasonable capacity for the purpose of affording sport and diversion to all fishermen who might lawfully entitle themselves to take fish from said waters;

That the Middle Rio Grande Conservancy District has entered into a lease contract with the El Vado Fishing and Hunting Club, leasing to the El Vado Fishing and Hunting Club the concession rights on the El Vado Lake or Reservoir;

That the El Vado Fishing and Hunting Club has adopted certain rules and regulations, which have been approved by the Middle Rio Grande Conservancy District, purporting to regulate certain concession rights, a copy of which rules and regulations you have also submitted with your request.

The pertinent parts of said contract for the purpose of this opinion are as follows:

- (1) "Provided, said waters are open to the public generally for fishing, and the shore lines of the lake are kept open to use by the public for fishing from the banks, subject to the laws of the State of New Mexico and the rules and regulations of the State Game Commission."
- (2) "The party of the first part agrees that the said El Vado Reservoir or Lake shall, during regular established seasons, be open to the public generally for fishing, and that the public, subject to such restrictions, rules and regulations as the party of the first part may deem necessary and advisable, shall have free access to the shores and the waters of the lake over and through lands now belonging to the party of the first part by such ways, means and routes as the party of the first part may designate for such public use."
- (3) "The party of the first part reserves all boating, camp ground, hotel, and similar concession rights,"

In your request you quote the following portions of the rules and regulations adopted by the El Vado Fishing and Hunting Club and approved by the Middle Rio Grande Conservancy District:

(a) "If any boat is owned by more than one person the above permit shall include the right of actual owners thereof to **fish** upon said lake."

(b) "Daily **fishing permit** will be required for any person fishing from a boat owned by a private individual, except permittee and members of his family."

(c) "**Fishing** from the bank of the lake or the stream below the dam outside of the restricted area shall be free."

(d) "No person shall fish from the damsite or within three hundred feet of either end of the dam along the El Vado Lake."

The substance of your inquiry is whether the above quoted portions of said rules and regulations are valid regulations under the terms of the contract and under our general law.

To start with, all authorities are to the effect that the state holds title to wild game and fish in trust for the people. No individual has any title to such game or fish until he reduces it to lawful possession. See *State vs. Heffernan*, 41 N.M. 219, 67 P. (2) 240.

As trustee for the people, the state, through its legislature, for the protection of the game and fish of New Mexico and for the purpose of regulating their use and enjoyment for ^{*113} public recreation and food, enacted Chapter 117, Laws of 1931, vesting in the State Game Commission, an administrative branch of the executive department, the administration of our game and fish, and to this Commission is entrusted the duty of safeguarding this property in the interest of the public. *State vs. Heffernan*, supra. Excepting the right by the State Game Commission to define game birds, game animals and game fish, said Chapter 117, Laws of 1931, was upheld by our Supreme Court in *State vs. Heffernan*, supra, as a valid delegation of legislative power.

Assuming that under such delegated powers the Game Commission could properly enter into the contract that it did in this case with the Middle Rio Grande Conservancy District, the question presents itself as to just what rights the State Game Commission may contract away, and, further, just what rights, if any, were in fact contracted away by said Commission in the contract herein involved.

Said Chapter 117, Laws of 1931, delegated and vested in the State Game Commission the authority to make rules and regulations, etc., pertaining to game birds, animals and fish, and to establish seasons, bag limits, etc. However, that is as far as the legislature went. By said enactment, the State Game Commission was clearly not authorized, expressly or impliedly, to re-delegate any of its delegated powers to any private individual or corporation not under its immediate control and supervision. This fact is

here mentioned because the statutory laws of the state must be presumed to have been in the minds of the parties at the time this contract was entered into, and, no doubt, become pertinent in attempting to ascertain the intent of the parties.

We start out with the general proposition as follows:

"The power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated." 12 C. J. 845.

The state Game Commission could not, even if it had so intended, have gone beyond the plain scope of its duty and authority in contracting away any of its delegated powers or rights.

"The intention of a state in making a contract like that of a corporation, must be ascertained by the acts and declaration of its constituted authorities and agents acting within the **scope of their duties** ;" 24 R. C. L. 392.

Furthermore, if the contract should be subject to more than one interpretation, the one most favorable to the state must be taken.

"Where two or more interpretations equally reasonable are deductible from the language used in the contract or controlling statute, that one is to be taken which is most favorable to the state." 59 C. J. 184.

Considering all that has been heretofore mentioned, and considering the contract herein involved as a whole, said contract cannot be interpreted or construed as a re-delegation of any regulatory powers pertaining to fish by the State Game Commission to the Middle Rio Grande Conservancy District. The only express rights reserved to said Conservancy District are found in the following portions of the contract:

"The party of the first part reserves all boating, camp ground, hotel, and similar concession rights."

and the clause heretofore quoted under sub-paragraph (2) above:

"subject to such restrictions, rules and regulations as the party of the first part may deem necessary and advisable,"

must be construed as meaning the restrictions, rules and regulations ^{*114} pertaining to boating, camp ground, hotel, and similar concession rights, and no more.

Finally comes the determination of the propriety, legality or validity of the aforementioned rules and regulations adopted by the El Vado Fishing and Hunting Club as approved by the Middle Rio Grande Conservancy District.

To avoid reference to the forepart of this opinion, we herein again quote the pertinent portions of said rules and regulations:

(a) "If any boat is owned by more than one person the above permit shall include the right of actual owners thereof to **fish** upon said lake."

I agree with you that the foregoing rule, as written and adopted, clearly appears to be an attempt to grant a fishing privilege without any legal authority therefor.

(b) "Daily **fishing permit** will be required for any person fishing from a boat owned by a private individual, except permittee and members of his family."

The foregoing rule, as written and adopted, appears to be an attempt to make a charge for a fishing permit, and I again agree with you that the concessionaires have no such right to make a charge for a fishing privilege.

(c) "**Fishing** from the bank of the lake or the stream below the dam outside of the restricted area shall be free."

Although the foregoing rule is permissive and not restrictive in character, yet it is still an attempt to regulate fishing on the stream which is a matter exclusively for the State Game Commission.

(d) "No person shall fish from the damsite or within three hundred feet of either end of the dam along the El Vado Lake."

The foregoing rule might properly be held to be a proper regulatory measure of safety in order to permit the concessionaires to carry on their operations under the aforementioned reservation in the contract.

In conclusion, I will state that I further agree with you that the State Game Commission, being charged with the duty of regulating fishing in public streams and lakes of the State of New Mexico, is the proper body to oppose and not permit any individual agency to charge and collect fees for **fishing** privileges in the public waters of the state.

Trusting that the foregoing may be of some little assistance to you, I am

By FRED J. FEDERICI,

Asst. Atty Gen.