

**Opinion No. 43-4347**

July 29, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Honorable John J. Dempsey, Governor of New Mexico, Santa Fe, New Mexico

You have requested me to determine whether or not the Red River Valley Company has a right to prohibit fishing in certain parts of the Canadian arm of the Conchas Dam.

In determining this question, I have found three instruments which must be considered in determining this question. One is an agreement made the 13th of November, 1935, by the Red River Valley Company and the State of New Mexico.

Part 1, Paragraph I of this Agreement provides:

"1. The right, privilege, authority and easement, to build, construct, maintain **and use a dam and reservoir** of the size, dimensions, construction and type contemplated by the plans of the United States National Emergency Council No. 192, Project 201, and to flood and impound water on, and to take and use construction materials from that certain tract of land in San Miguel County, New Mexico, described by metes and bounds as:" (Emphasis ours.)

Pursuant to the above mentioned Agreement, a conveyance was made May 8, 1936 which, so far as the particular area now concerned, conveyed "the right, privilege, power and easement to overflow on account of the construction, maintenance and operation of the Conchas Dam on the South Canadian area, and to flood and impound water on \* \*

\*"

Page 16 of the Conveyance (c) **Two** provides:

"The Grantor, its successors and assigns, at all times shall have the right to use the area affected by said easement for all purposes not inconsistent with the prior rights of the Grantees."

This clause corresponds to a similar clause in the original agreement.

In view of the foregoing, it is now noted that the only right which the Red River Valley Company conveyed on the upper arm of the Canadian River was the right to overflow and to flood and impound water on such land. Neither the State nor the Federal Government has any other right in connection with the use of any part of this land other than to impound water on the same. However, the water itself clearly does not belong to the Red River Valley Company, but does belong to the State of New Mexico, subject, however, to the rights of the Federal Government. Therefore, at this point, it would seem that if a fisherman should proceed up the lake in a boat which would not touch the

bottom of the lake, and if such fisherman did not go upon the shore, he certainly would not be trespassing on any land owned by the Red River Valley Company. See 22 Am. Jur., Fish and Fisheries, Section 8, wherein it is stated:

"Thus, also, one person may own certain waters, without any interest in the soil; in such a case, the fishing privileges presumptively follow the ownership of the **waters.**"

We now consider the above quoted clause in the Conveyance to determine what effect it has upon the matter. If the word "exclusive" had been inserted before the word "right" and after the word "the" it would be clear that this paragraph would unambiguously provide that a fisherman could not be licensed by the State, or the United States, to have boats on the area affected by the easement, since such purposes are not directly connected with the right to impound water, but are an incident of the use of the water itself, and not of the impounding. However, the word "exclusive" was not used, and therefore this particular paragraph would appear to be interpreted to mean that the Grantor has reserved, by such paragraph, the right to use the area affected by said easement for such purposes as boating and fishing, but has not reserved the "exclusive rights" to use the area, and therefore the State has retained, since it was not reserved, the right to allow the public to use this area for fishing.

(See Page 2 of the Agreement wherein it is specified that the Grantee may **use** the reservoir.) The case of Bradley v. South Carolina Phosphate and Phosphatic River Mining Co., 3 Fed. Cas. 1165, 1166 held:

"The expression 'the right,' as used in Acts S. C. March 1, 1870, which gives and grants to designated persons "the right to dig, mine, and remove," for 21 years, from the beds of navigable waters within the jurisdiction of the state, the phosphate rocks and deposits contained therein, and which requires the grantee to pay the state a specified sum per ton for every ton removed, cannot be held to grant an exclusive right, so as to prevent the State from granting similar rights and powers to others."

It is, however, conceivable that this paragraph could also be interpreted to reserve to the Grantor the exclusive right to use the area, even though the word "exclusive" was not specifically used.

That the matter is not free from doubt is shown by the fact that the United States of America and the Red River Valley Company entered into an Indenture on the 25th day of January, 1940, whereby the Red River Valley Company conveyed certain land to the United States of America to be used for recreational purposes, and also specifically conveyed the right to use for fishing, boating, bathing and any other recreational purposes the water area of the Conchas reservoir, except the portion in the upper Canadian River. It is significant to note that the necessity of authorization from the Red River Valley Company was apparently not considered free from doubt, because of the following language used in the paragraph concerning fishing rights:

"\* \* \* provided, however, that nothing contained in this paragraph number Two shall in any manner diminish or modify the reservations and conditions attached to the grant of flowage easement by the aforesaid deeds \* \* \*"

I regret that I am unable to give you a more definite opinion on this matter, but due to the foregoing discussion, I believe that it is apparent that it is impossible to construe these contracts and **definitely** state that the state may permit fishing, or that the Red River Valley Company may prohibit fishing in certain parts of the Conchas Lake.

However, it would seem strange to find that although the United States had spent about \$ 15,000,000 of public money in creating the lake, that a private corporation could prohibit fishing by the public on the public's own water, even though the land of the company was not, in fact, touched. This could be properly considered under equitable principles by a Court in construing the conveyances.

Hoping that the foregoing is of some benefit to you, I am

By HARRY L. BIGBEE

Asst. Atty. Gen.