

Opinion No. 59-57

June 3, 1959

BY: FRANK B. ZINN, Attorney General

TO: State Game Commission State of New Mexico Box 2060 Santa Fe, New Mexico.
Attention: Fred A. Thompson, Director

Levying of fee for sanitation and maintenance by municipality does not change character of municipally owned Bonito Lake as public water and the lake may be stocked at state expense.

OPINION

{*86} This is written in reply to your recent request for an opinion on the following question:

Will the levying of a "recreation" fee by the city of Alamogordo as a prerequisite to any individual's use of the municipally-owned Bonito Lake for recreational purposes, be compatible with the provisions of Section 53-1-8, N.M.S.A., 1953 Compilation, insofar as the statute authorizes the free stocking of fish by the State Game Commission in "public waters" of the state, where the fees charged by the municipality are intended to cover and will be used only for supervising, cleaning and recreational purposes at the Bonito Lake area?

It is my opinion that a small charge by a municipality sufficient to cover sanitation and maintenance expense for recreational purposes does not change the character of a lake from that of "public waters" and it may be stocked by the State Game Commission at state expense.

The State Game Commission is authorized by virtue of Section 53-1-8, N.M.S.A., 1953 Compilation:

". . . To establish and, through the state game and fish warden, {*87} to operate fish hatcheries for the purpose of stocking public waters of the state, and to furnish fish fry and fingerlings to stock private waters, receipts from such sources to go into the game protection fund; . . ."

The above-quoted portion of the statute is controlling as to the question in this instance and, under the language of the statute, the State Game Commission may establish and operate fish hatcheries for the "purpose of stocking the public waters of the state. . . ." The term "public waters" as used in the statute, in my opinion, is synonymous with the definition of public waters given by the New Mexico Supreme Court in the case of *State ex rel. State Game Commission v. Red River Valley Co.*, 51 N.M. 207, 182 P. 2d 421, where the Court stated:

". . . All of our unappropriated waters from 'every natural stream, perennial or torrential, within the state of New Mexico' Article 16, Section 2, New Mexico Constitution, are public waters. These waters belong to the public until beneficially appropriated. And since the right to fish in public waters, by the test of any rule, is universally recognized it cannot be said that the right to fish and to use the unappropriated public waters in question is less secure in the public because we determine their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect . . ."

The Court, in the **Red River Valley Co.**, case, supra, also stated that:

". . . if waters flowing in these . . . perennial streams . . . can be said to be public water prior to the construction of the dam, they are no less after the construction and when a large volume of water from the two streams has been artificially impounded. . . ."

Following the language of the court in this case, it is my opinion that the waters of a municipality as a governmental agency for the use of the public, are "public waters" within the contemplation of the legislature, despite the fact that the municipality may levy a small charge or fee for the purpose of defraying the costs of maintaining the area and providing sanitary facilities for persons using the area for recreational and fishing purposes, or to supervise the area. In such instance, the fee would serve only to reimburse the municipality for actual and necessary costs incident to maintaining, cleaning the area and providing sanitary facilities. The amount of the fee would be a material factor in such instances and the purpose for which it was levied. However, a fee imposed in a reasonable amount to cover the actual, necessary and reasonable costs of supervising the area, cleaning the surrounding area and maintaining health and sanitation facilities, would not divest the lake itself from the character of "public water." Such fees, in my opinion, must be intended to cover only the aforementioned expenses, and cannot be extended to cover the privilege of fishing upon such waters in addition to the state requirement of possession of a valid fishing license from the state of New Mexico.

Where it is determined as a fact that the municipality is holding the property in its governmental capacity for the benefit of all the public and with the express intention that the property is to be utilized by the public as a recreational area, waters located thereon, it follows are "public waters" within the meaning of Section 53-1-8, and may be stocked by the State Game and Fish Department without expense to the municipality, even though a small fee is imposed by the municipality for the purpose of maintaining the area, cleaning up the property, supervising the land and providing sanitary facilities.

Under the facts and the specific {*88} question herein posed, the waters of Bonito Lake are "public waters" within the meaning of Section 53-1-8, N.M.S.A., 1953 Compilation, and the fee contemplated would not constitute a legal impediment preventing the State Game and Fish from legally stocking the waters at state expense.

It should be noted that this opinion should not be construed as holding that the language of Section 53-1-8, N.M.S.A., 1953 Compilation, permits the department to stock the waters on Indian and Military reservations located within the state, free of any charge, where such lands are open to public fishing only on condition of the payment of a fee. The distinguishing factor in such case is that Indian and Military reservations are not instrumentalities of the State of New Mexico, and the lands adjacent thereto are not subject to state control as are the lands of the municipalities. This is true, even though the waters running through such property are "public waters" as declared in the **Red River Valley Co.**, case, supra. In such instance, the general public would be trespassing upon land not open to the free access of the public. Similarly, the New Mexico Supreme Court in **State v. Red River Valley Co.**, supra quoted with approval the language in **Nekoosa-Edwards Paper Co. v. Railroad Comm.**, 201 Wis. 40, 228 N. W. 144, 229 N. W. 631, and stated in part:

". . . The small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks."

The fact situation here distinguishes the question from that considered in former Attorney General's Opinion No. 57-319.

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