



La Merced de Los Pueblos de Tierra Amarilla

P.O. Box 484, Tierra Amarilla, NM 87575

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Mike Slone, Director
Department of Game of Game and Fish
1 Wildfire Way
Santa Fe, NM 87507

Dear Director Sloane:

Thank you for your response to our letter. Given your response, perhaps you are correct that there has been a misunderstanding on the maintenance issue that we can easily resolve. The language that you proposed in your most recent changes to the draft deed was as follows:

“Subject to Grantee’s assumption of ownership and maintenance responsibilities of all existing infrastructure ***within the properties boundaries*** of the conveyance described as Tract B above, provided that . . . (3) Grantee’s assumption of responsibility for ensuring ***maintenance of water delivery infrastructure from Laguna del Campo to La Puente Ditch*** in the event improvements are made to Laguna del Campo by the Grantee, now or in the future;”

The first part of this seemed to track with our mutual understanding because it said “within the property boundaries”. But the second part seemed to contradict that by referring to “maintenance of water delivery infrastructure **from Laguna del Campo to La Puente Ditch.**” It sounded to us like the deed was imposing a maintenance responsibility on the Merced that would physically extend from Laguna del Campo to all the way to La Puente Ditch. The language seemed to indicate that this responsibility might not exist immediately but would come about in the event improvements were made to Laguna del campo. All of us read that sentence this way.

Now I understand from your latest letter that you did not intend this, since you indicated that “there is no expectation that the Land Grant would be responsible for ‘maintenance’ outside the boundaries of the property”. That is the key point and so we are in agreement on that key point, contrary to what we thought when we first read it.

I think we can resolve this if we adjust that second part so that it is absolutely clear that the maintenance obligation of the Merced does not physically extend “from Laguna del Campo to La Puente Ditch”. Otherwise future community members or

decision makers might interpret it in the way that we interpreted it at first. I think it would be wise of us to remove any apparent contradiction or any chance for misinterpretation. We would suggest this language:

“Subject to Grantee’s assumption of ownership and maintenance responsibilities of all existing infrastructure within the properties boundaries of the conveyance described as Tract B above, provided that . . . (3) **in the event improvements are made to Laguna del Campo by the Grantee, now or in the future, in such a way that the outlet structure needs to be redesigned and/or rebuilt, Grantee will bear the responsibility and cost for such restoration within the boundaries of the deeded property; as used in this paragraph “restoration” means maintaining the level of operation of the outlet that presently exists at the time this deed is executed;**”

In addition to the issue raised above, there is one additional concern that La Merced de Los Pueblos de Tierra Amarilla would like addressed prior to finalization of the deed. In the revised Quit Claim Deed with the State Game Commission edits dated 1.27.23, the Commission removed a provision in the third “subject to” paragraph, which we requested, that referred to the stocking of the pond by the Department of Game and Fish. The specific language removed as it appeared in our recommendation is underlined and highlighted in yellow below:

Subject to the land being publicly accessible on a seasonal basis for lawful fishing without additional fees other than those required to purchase a valid New Mexico fishing license from the Department of Game and Fish and those reasonable parking fees charged by Grantee, and for other lawful recreational purposes, and vehicle access for public fishing to be limited to the existing parking area on the northwest side of the dam, provided that (1) this paragraph shall not be construed to prohibit Grantee from closing public access to the land during times when fishing is not feasible for reasons of resource management or for reasons of construction, maintenance or improvements to the land or the pond; and (2) this paragraph shall only apply during times when the New Mexico Department of Game and Fish has stocked the pond; and

La Merced has looked into this issue and has determined several things. First, a New Mexico Attorney General Opinion concluded that a public entity that that owns a water facility and that imposes “a small charge . . . sufficient to cover sanitation and maintenance expense for recreational purposes” may still be stocked by the Game and Fish Department without expense to the public entity. The Attorney General reasoned that such a charge to cover the actual and necessary sanitation and maintenance expenses does not divest the water body from the character of

“public water” and therefore the Game and Fish Department is able to stock the waters at state expense. We have attached the Attorney General Opinion (No. 59-57) for your reference.

Second, La Merced de Los Pueblos de Tierra Amarilla believes the inclusion of the yellow-highlighted language in some form is critical for several reasons. First, without this language, as currently written the obligation to provide **free** fishing to the public will be mandated regardless of whether the Department of Game and Fish stocks the lake or not. This means that the Merced de Los Pueblos de Tierra Amarilla will be required to stock the lake at its own expense to allow for free public fishing and it will not have any ability to recoup the cost for such stocking. The Commission and the Department have made it explicitly clear that they do not want to provide any funds now or in the future for the Land Grant to help with the operation of the lake.

It is important to remember that in 2017 the Game Commission, which has a multi-million-dollar annual budget, sought to breach the dam and close the lake permanently because it did not want to pay for improvements required to comply with required dam safety regulations. Those improvements were estimated to be in approximately \$7 million. When met with public outcry from citizens throughout New Mexico the Game Commission’s solution was to transfer the property to the Tierra Amarilla Land Grant, along with all the obligations to repair the dam on its own. The Land Grant, whose annual budget is in the tens-of-thousands of dollars, has in good-faith continued to work towards a successful transfer of the property to keep the fishery open to the public. However, by removing the stocking provision requested by the Land Grant, it appears that the Commission wants to impose an additional unfunded mandate for a public fishing lake which the Commission itself was unwilling to bear. While the Land Grant is not opposed to keeping the lake open to the public for fishing, requiring that the lake remain open to the public for **free** fishing, even if not stocked by the Department, does not provide the Land Grant opportunity to recover any costs for maintaining fish in the lake at its own expense.

Finally, the “other lawful recreational purposes” language is so broad that without the stocking provision the Land Grant is concerned with the liability of keeping the lake open if or when the Department does not stock it. In conversations during negotiations, you indicated that there is a state statute that provides general immunity for land-owners who open their property to the public for lawful hunting and fishing. The Land Grant is concerned that if the Department does not stock the lake with public fish this additional safeguard from a tort suit would be waived and expose the Land Grant to additional risk. We have been in contact with the Risk Management Division (RMD) of the General Services Department concerning tort liability coverage and have learned that the general coverage offered by RMD would not cover lake and therefore the land grant will need to seek additional coverage. We believe the law protecting access for public fishing would help lower any such coverage costs. Therefore, the Land Grant respectfully requests that the Commission insert the suggested language proposed by the Land Grant (see below).

Given all this, we believe the provision should be edited as follows:

Subject to the land being publicly accessible on a seasonal basis for lawful fishing without additional fees other than (a) those required to purchase a valid New Mexico fishing license from the Department of Game and Fish and (b) any fees required to cover actual and necessary costs incident to maintaining and cleaning the facility and providing sanitary facilities, and those reasonable parking fees charged by Grantee, ~~and for other lawful recreational purposes, and with~~ vehicle access for public fishing to be limited to the existing parking area on the northwest side of the dam, and for other lawful recreational purposes, provided that (1) this paragraph shall not be construed to prohibit Grantee from closing public access to the land during times when fishing is not feasible for reasons of resource management or for reasons of construction, maintenance or improvements to the land or the pond; and (2) this paragraph shall not apply to prohibit Grantee from including a fish-stocking charge during times when the New Mexico Department of Game and Fish has not stocked the pond; and

The new language in the middle of the paragraph is taken directly from the Attorney General Opinion.

La Merced would be happy to meet with you or attend a future meeting of the Commission to discuss our concerns and request if this will help move us towards a successful transfer of the property.

Respectfully,



Steve Polaco,
President

7-1-2024

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.

By Hilton A. Dickson, Jr.

First Assistant Attorney General

Lyle E. Teutsch, Jr.

Assistant Attorney General