

September 30, 1960

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Mr. Wendell G. Swank
 Assistant Director
 Arizona Game and Fish Department
 Capitol Annex Building
 Phoenix, Arizona

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ARIZONA ATTORNEY GENERAL

Dear Mr. Swank:

In answer to your letter of September 30, 1960,
 we have prepared the following material for your consideration
 in answer to your question propounded as follows:

"Is it legal for the Arizona Game and Fish
 Department to remove the fish in San Carlos
 Reservoir by the use of fish toxicants?"

We believe the following statutes are pertinent:

"A.R.S. § 17-201 (A)

The laws of the state relating to wildlife
 shall be administered by the game and fish
 department. * * * "

"A.R.S. § 17-102. Wildlife as state property;
exceptions

Wildlife, both resident and migratory,
 native or introduced, found in this state
 except fish and bullfrogs impounded in
 private ponds or tanks or wildlife and
 birds reared or held in captivity under
 permit from the commission, are property of
 the state and may be taken at such times,
 in such places, in such manner and with
 such devices as provided by law or rule of
 the commission."

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"A.R.S. § 17-231 (B)

The commission may:

* * *

5. Remove or permit to be removed from public or private waters fish which hinder or prevent propagation of game or food fish, and fish so taken may be disposed of in such manner as it may designate.

6. Purchase, sell or barter wildlife for the purpose of stocking public or private lands and waters, and may take at any time in any manner wildlife for research, propagation and restocking purposes, or for use at a game farm or fish hatchery.

7. Enter into agreements with the federal government, other states or political subdivisions of the state, and with private organizations for the construction and operation of facilities, and for management studies, measures, or procedures for or relating to the preservation and propagation of wildlife, and expend funds for carrying out such agreements."

"Take" is defined under the meaning of this article in A.R.S. § 17-101 (A)(15):

"'Take' means pursuing, shooting, hunting, killing, capturing, snaring, netting, placing or using any net or other device, or trapping wildlife."

Thus it appears that the Game and Fish Department, being charged with the duty of administering the laws of the state concerning wildlife and being granted the responsibility for the care and control of all wildlife, the manner of taking is left, by statute, entirely to the discretion of the department, and it is noted that the definition of "take" includes the word "killing" and there is no limitation put on poisoning or the use of other toxic materials. It is obvious, of course, that in carrying

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out such a program the department would necessarily conduct such program in a manner so as not to endanger or harm other animal or human life and so as not to pollute the water. This obligation is specifically put upon the department in A.R.S. § 17-237:

"The commission is authorized to bring suit in the name of the state against any person, corporation, or government agency, to restrain or enjoin the person, corporation, or government agency from discharging or dumping into a stream or body of water in the state any deleterious substance which is injurious to wildlife."

This case presents an additional problem due to the fact that the San Carlos Reservoir is exclusively within the boundaries of the San Carlos Apache Indian Reservation. Through treaties with the Indians and by the establishment of reservations, the exclusive right to hunt and fish upon them has been retained by the Indians.

In United States v. Sturgeon (27 Federal Cases, Case No. 16413), the court gave consideration to the rights of the Indians of the Pyramid Lake Indian Reservation in Nevada to fish in the waters of a lake inside the boundaries of their reservation and held:

"The president has set apart the reservation for the use of the Pah Utes and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing ground for the Indians. The lines of the reservation have been drawn around it for the purpose of excluding white people from fishing there except by proper authority. It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law."

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See also, United States v. Winans, 198 U.S. 371;
Alaska Pacific Fisheries v. United States, 248 U.S. 86;
and State v. Johnson, 249 N.W. 285.

In conclusion, it is the opinion of the Attorney General that the laws of the State of Arizona authorize the Game and Fish Department to remove the fish by the use of toxicants but that the removal of fish from the San Carlos Reservoir will have to be done with the consent of the Tribal Council of the San Carlos Apache Indian Reservation.

It is our understanding that a fish propagation program has been carried on in the reservoir by the State Game and Fish Department and we would, therefore, assume that some sort of consent giving the Game and Fish Department jurisdiction has been granted. We would further assume that the dam creating the reservoir was constructed by the San Carlos Irrigation District with some sort of agreement as to jurisdiction over the water with the Tribal Council or their representatives, and it is possible that as a result of such agreement the Game and Fish Department may have derived its consent through the San Carlos Irrigation District. However, this is a question of fact to be determined, and the conclusion remains that unless consent in this particular case is given, the Game and Fish Department cannot encroach on the rights of the Indians on their reservation.

Respectfully submitted,

WADE CHURCH
The Attorney General

JOHN VANLANDINGHAM
Assistant Attorney General

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