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July 30, 1954
Letter Opinion
No. 54-196-L

Mr. John M. Hall or
Mr. Clifford Sorrells
Arizona Game and Fish Commission
Arizona State Building
Phoenix, Arizona

Re: Whether the Arizona Game and Fish Commission
has authority to close certain bodies of water
to the general public and during the same time
allow certain groups to fish.

Gentlemen:

Our statute Section 57-109, A.C.A. 1939, as amended, pro-
vides:

"57-109. Taking of game animals, birds
and fish.--

* * * * *

It shall be unlawful for any person ex-
cept by order of the commission to take
or attempt to take any fish * * *
(Emphasis supplied)

* * * * *

This seems to imply that such an order of the commission
referred to in your letter of July 16, 1954, would be within
its delegated powers, but in the case of BEGAY v. SAWTELLE,
(1939) 53 Ariz. 304, 88 P. 2d 999, a similar question arose in
regards to the denial of a license to Indians, and the Supreme
Court held:

* * * * *The legislature of Arizona may,
therefore, make such provision as it thinks
proper for the preservation and conservation
of the game animals and fish of the state,
by regulating the taking or killing and use
of any and all kinds of game in any part of
the state, and during any period, and upon

any reasonable terms, so long as such regulation does not deny due process of law and the equal protection of law guaranteed to all persons by the state and federal Constitutions. In so doing, the legislature may make classifications of persons in connection with the regulations, but such classification must have some reasonable relation to the subject and purpose of regulation, and cannot be arbitrarily and unjustly discriminatory. HARPER v. GALLOWAY, 58 Fla. 255, 51 So. 226, 19 Ann. Cas 235, 26 L.R.A. (N.S.) 794; 27 C.J., p. 946 et seq." (Emphasis supplied; italics capitalized)

It is well established that by reason of the state's control on fish within its limits, it is within the police power of the state subject to constitutional restrictions to impose by legislative enactment such restrictions and limitations on the catching of fish as may be reasonably necessary for the protection and regulation of the public's rights therein. This power is present to the extent of restricting the use of, or right of property in the fish if they are taken, and of obliging all citizens to conform to such regulations by inflicting penalties for the violation of them. The Arizona Constitution, Article 2, Section 13, reads as follows:

"§ 13. (Equal operation of laws.)--No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Arizona Constitution, Article 4, Section 19 provides:

"§ 19. (Local or special laws.)--No local or special laws shall be enacted in any of the following cases, that is to say:

* * * * *

13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

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As was said in HADDAD v. STATE, (1921) 23 Ariz. 105, 118, 201 P. 847, of an order by the Corporation Commission:

* * * * *

"We think that a law which provides a scheme for the grant of such privileges, which is fair and equal in its terms, should be upheld, and that--

'The constitutional mandate is satisfied if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced.'
STATE v. RICHCREEK, 167 Ind. 217, 119 Am. St. Rep. 491, 10 Ann. Cas. 899; 5 L.R.A. (N.S.) 878, 879, 77 N.E. 1085; PERKINS v. HEERT, 158 N.Y. 306, 70 Am. St. Rep. 483, 43 L.R.A. 858, 53 N.E. 18." (Italics capitalized)

It is also urged in the case of STEWART v. ROBERTS, 45 Ariz. 143, 149, 40 P. 2d 979, 982:

"* * * while every presumption is in favor of the validity of a statute, yet, when it clearly appears that on no reasonable theory could it contribute to the public health or safety, it is the duty of the courts to so decree and set it aside as unconstitutional."

Under the constitutional mandates above set forth, the Commission does not have the authority to the exclusion of others to permit one special class or classification of the public access to such waters merely on the basis of age and residence, thereby excluding the general public. Such an order would be unconstitutional, since the commission would be vested with an absolute discretion in the matter of who could fish, without any statutory limitation or policies by which to measure the limit of such discretion, and could grant special or exclusive privileges by immunities to one class, while withholding them from another. Although certain privileges may be granted some and denied others, under some circumstances, if they be granted or denied upon the same terms and if there exists a reasonable basis, it is the opinion of this office that the Arizona Game and Fish Commission does not have authority to make an order closing certain bodies of water to the general public and, during the same time, allow certain groups to fish, such groups being classified on the basis of age and residence.

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We hope that the foregoing information will be of
assistance to you.

Sincerely,

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Assistant to The
Attorney General

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