

OPINION
53-43

August 27, 1953(OPINION)

GAME AND FISH

RE: Jurisdiction Non-navigable Waters

You have requested an opinion defining the jurisdiction of the State Game and Fish Department insofar as it involves the matter of eradication and transplanting of fish in non-navigable waters in this state.

Although wild animals are the subject of private ownership because of their location upon lands of the person claiming them (47-0108, 5) the state has reserved the right to regulate and conserve all wild birds, fish and wild animals within this state (20-0102).

There is a similar division of property rights in non-navigable waters in this state. Non-navigable waters are subject to riparian ownership, yet such ownership is in turn, subject to certain rights of the state and other landowners to the beneficial use of water and the natural flow thereof. A riparian owner may not, for example, permit logs or trees to become lodged in a stream (61-0115).

It can thus be seen that ownership in both the fish and non-navigable water is not absolute, but subject to certain controlling action and the police power of the State North Dakota.

The Legislature has seen fit to give the State Game and Fish Department certain powers and duties, among which are:

Protect and propagate all game animals, birds, and fish, (20-0204, 4). Examine all waters of the state and wherever suitable waters are found, to plant fish, (20-0204, 6).

Protect any fish from being unduly depleted in any lake, (20-0205, 5).

Enforce any laws or regulations relating to game birds, game animals, fish and other wildlife, (20-0217, 1).

When deemed in the best interest of protected fish, to take from the waters of this state any such fish as buffalo, bullhead, sucker, etc., (20-0609).

Regulate and license use of fish houses on ice in any waters of this state, (20-0611).

Require and regulate the construction of fishways on any dam on any river, creek, or stream in this state, (20-0614).

It is my opinion that the State Game and Fish Department has authority to eradicate and/or transplant fish in any waters of this state when such is suitable and in the best interest of protected fish, and riparian owners may not interfere with such operation by denying a reasonable access to land and waters

necessary to carry out such a program and to enforce all laws relating to game and fish.

You have also requested an opinion concerning the matter of posting non-navigable water by a riparian owner to prevent public fishing thereon. As in the case of posting land to prevent hunting thereon (20-0115) the manner in which non-navigable water may be legally posted is a proper subject for control by the state under its police power, however, in the absence of a prescribed manner of posting, the riparian owner may use any reasonable method to prevent public trespass for fishing purposes.

ELMO T. CHRISTIANSON
Attorney General