VOLUME NO. 38 OPINION NO. 68

WILDLIFE - Game farms, wild game enclosed therein, necessity for removal;
WILDLIFE - Game animals, ownership;

MONTANA CODE ANNOTATED - Sections 87-4-401, 87-4-501, et seq.

HELD: Where the fence of a game farm permittee under section 87-4-401, et seq., MCA, encloses native wild big game animals, these animals remain the property of the State and may be hunted and taken only in compliance with state law. The State has no responsibility to remove the wild game animals from the enclosure.

25 February 1980

Robert F. Wambach, Director
Department of Fish, Wildlife & Parks
1420 East Sixth Avenue
Helena, Montana 59601

Dear Dr. Wambach:

You have requested my opinion on the following question:

> Where the fence of a game farm permittee under section 87-4-401, et seq., MCA, encloses native wild big game animals, is the permittee or the State responsible for removal of those animals from the enclosure?

In addressing this question we do not write on a clean slate. The Big Horn Game Ranch near Hardin, Montana, has been engaged in a series of controversies with the department over the last few years. Both a prior Attorney General's Opinion (Vol. 36, No. 112) and an unreported district court opinion (Boyce v. Montana Fish and Game Commission, No. 8529, Thirteenth Judicial District) held that the State is precluded from regulating the hunting of privately-owned animals within the farm.

The present issue does not concern these privately-owned animals, but rather indigenous wild deer populations which were living within the approximately 19,000 acres of the farm when it was fenced. Big Horn apparently intends to stock the farm with privately-owned big game animals and then to allow them to be hunted. The Department has issued a game farm permit to Big Horn for all big game species except deer because of the indigenous population trapped within the fence. There have been several unsuccessful efforts to remove these animals from the farm, including a special hunting season. Big Horn argues that it is the

State's responsibility to remove these animals by live trapping, hunting or otherwise, and that if this is not accomplished within a reasonable time the State must be deemed to have abandoned its ownership claim to them.

Part of the problem with these issues stems from the applicable statutes. Section 87-4-401, MCA, requires a game farm permit from the director of the Department before "engaging in the business or occupation of propagating, owning and controlling game animals (except buffalo)...." That section further provides for the issuance of a permit once the land involved has been fenced "so that no wild or public animals of like species can mix with those confined." There is nothing else specifically provided in the code to answer the questions raised here. By contrast, the Legislature has provided for private bird shooting preserves (§ 87-4-501 et seq., MCA), requires a license to hunt thereon (§ 87-4-504, MCA), and has set hunting seasons (§ 87-4-521, MCA). Any game animals on a shooting preserve may be hunted only in accordance with applicable license, season and bag limits (§ 87-4-527, MCA).

This regulatory precision is absent from the game farm statutes and no implementing regulations have been adopted by the Department. In fact the game farm statutes do not even expressly provide that the privately-owned animals confined therein may be hunted. Section 87-4-401, MCA, speaks only of "propagating, owning and controlling" the animals, although the assumption at this point by all concerned seems to be that ownership and control includes hunting and killing.

Our Supreme Court, and the courts of other states, have clearly defined the limits and extent of state powers with regard to wild game animals. In State v. Rathbone, 110 Mont. 225, 100 P.2d 86 (1940), the Court noted the values of wild animals and held (110 Mont. at 242):

> Wild game existed here long before the coming of man. One who acquires property in Montana does so with notice and knowledge of the presence of wild game and presumably is cognizant of its natural habits.

It is further clear that the ownership of wild animals is in the State, held in its sovereign capacity for the use and benefit of its people. Rosenfeld v. Jakways, 67 Mont. 558, 562, 216 P.2d 776 (1923); State ex rel. Visser v. Fish and

Game Commission, 150 Mont. 525, 530, 437 P.2d 373 (1968). Wild game is not subject to private dominion to any greater extent than the Legislature sees fit to prescribe within the limits of the Constitution. Herrin v. Sutherland, 74 Mont. 587, 601, 241 P. 328 (1925); Rosenfeld, supra; Visser, supra. Montana recognizes both sovereign ownership and the police power as ample bases for wildlife regulation. State v. Jack, 167 Mont. 456, 460, 539 P.2d 726 (1975). Section 70-2-112, MCA, provides:

> Wild animals by nature are the subjects of ownership, while living, only when on the land of the person claiming them or when tamed or taken or held in the possession or disabled and immediately pursued.

This does not, however, give a landowner the right to take wild game without regard to law. It merely authorizes him to protect those animals, while on his property, from invasion by another not authorized to be there. Herrin v. Sutherland, supra. See also State v. Mallory, 83 S.W. 955 (Ark. 1903). No individual acquires any title to any wild animal until he reduces it to lawful possession. Krenz v. Nichols, 222 N.W. 300, 303 (Wis. 1928); Geer v. Connecticut, 161 U.S. 519, 529 (1896).

Thus it is clear that the wild deer now enclosed by Big Horn's fence are the property of the people of the State of Montana; that they are subject to regulation for the common good and for the protection of the animals; and that Big Horn can acquire no ownership interest therein except in compliance with law. The game farm statutes provide no such method for acquiring ownership and, in fact, mandate that wild and privately-owned animals not be allowed to mingle. (§ 87-4-401, MCA.)

Thus Big Horn and its owners and guests will encounter a quandry if Big Horn introduces privately-owned deer onto the farm for purposes of hunting them. As long as the only animals that are killed are privately-owned, no problems arise. However, if one of the confined wild deer is killed, the hunter must be in compliance with applicable license, season and bag limits or risk prosecution.

Several alternatives are open. First, all deer hunting on the farm could be done in compliance with State law. Then the successful hunter could shoot either a private or a wild deer. Second, the privately-owned deer could be conspicu-

ously marked or banded so that a hunter could easily distinguish them. These deer could be hunted by Big Horn as it saw fit. This alternative would work the first year, but thereafter a question would arise as to the ownership of offspring which might be the offspring of a wild deer and a privately-owned one. It would be impossible to determine the parentage. Third, Big Horn could refrain from introducing privately-owned deer onto the farm until the wild population had been removed by hunting in compliance with State law or otherwise. Removal of the wild deer has been attempted to some extent already. It should be noted in this regard that nowhere has there been found any support for the propositon that when a game farm permittee encloses an area of land with a game-proof fence, the burden is upon the State to do whatever is necessary to remove the wild game animals. The Department can and should cooperate in any reasonable way possible by scheduling special seasons, or by live trapping and transplanting where the terrain and the Department's budget and personnel limitations will allow. In large areas containing rugged terrain, an immediate removal requirement would be practically impossible for the Department to fulfill. The benefits from the farm itself and from the game farm statutes flow primarily to Big Horn. If a removal requirement is to be imposed upon the Department, it is the Legislature that must do so. There likewise will probably always be some lingering doubt as to whether all wild animals had been removed both because of the size and terrain of the area involved, and because of the possibility of breaks in the fence which would allow wild animals into the enclosure. Reasonable satisfaction by the Department that all wild game animals have been removed is the most that can be workable.

Another cooperative alternative could involve an agreement between the Department and Big Horn as to how many wild deer were entrapped on the farm. Big Horn could agree to never reduce the herd below this number. Thereafter the "wild herd" base figure could be periodically reduced by hunting in compliance with State law or by trapping and transplanting.

The selection of one of these alternatives, or of another, is upon the permittee. The wild game animals existed upon the land long before the existence of the farm, and Big Horn had actual and constructive knowledge of this fact before the fence was erected. It is the responsibility of Big Horn, or its client hunters or both, to take whatever steps are necessary to insure that wild game animals on the farm

are taken only in compliance with State law, or that they are removed or not taken at all.

THEREFORE, IT IS MY OPINION:

> Where the fence of a game farm permittee under section 87-4-401, et seq., MCA, encloses native wild big game animals, these animals remain the property of the State and may be hunted and taken only in compliance with state law. The State has no responsibility to remove the wild game animals from the enclosure.

Very truly yours,

MIKE GREELY
Attorney General