

Fish and Game—Game Fish—Smoked Fish—Possession.

Section 3694 R. C. M. 1921, as amended by chapter 77, laws of 1923, prohibits the possession by one person at any one time of more than twenty pounds net weight and one additional fish of any and all kinds of game fish.

C. A. Jakways, Esq.,
State Game Warden.
Helena, Montana.

December 5, 1924.

My dear Mr. Jakways:

Your letter was received requesting my opinion upon the question whether under section 3694, R. C. M. 1921, as amended by chapter 77, laws of 1923, the possession by one person of more than twenty pounds of game fish at a given time is an offense. You state that a certain person seeks to justify his possession of more than twenty fish on the ground that the fish were smoked.

The statute reads as follows:

"It shall be unlawful for any person to be in the possession of more than forty (40) fish in the aggregate or more than twenty (20) pounds net weight and one (1) additional fish of any and all kinds of game fish at any time."

This language is plain. It prohibits the possession by any person of more than a designated number and weight of fish of any kind of game fish *at any time*. That a game fish is still a game fish after being smoked appears to me to admit of no argument. A fish that has been caught, killed and placed in a basket is still a game fish and no change in its essential nature in that respect results from the process of smoking.

I have made a careful search for cases involving an identical statute and presenting a similar state of facts but have been unable to find any. However, the general principles involved in legislation of this character have been too well settled by the courts to admit of argument.

In the Kentucky case of *Nicoulin vs. O'Brien*, 189 S. W. 724, the court announced the rule as follows:

"It is within the police power of the legislature subject to constitutional restrictions to enact such general or special game laws as may be reasonably necessary for the protection and regulation of the public's right in its fish and game even to the extent of restricting the use of, or right of property in the game after it has been taken or killed. (*Geer vs. Ky.* 161 U. S. 529; *Wharton vs. Wise*, 153 U. S. 155 and other cases)."

In *State vs. Peabody (Me.)*, 69 Atl. 273, the Court held:

"The legislature is possessed with full power to control fisheries in this state by appropriate enactments designed to secure the benefit of this public right in property to all its inhabitants."

In *ex Parte Crosby*, 149 Pac. 989, the Supreme Court of Nevada said:

"The state has inherent power to enact laws to protect fish within its territory and may impose such conditions and limitations on the taking thereof as it sees fit."

In *Monroe vs. Withycombe*, 165 Pac. 227, the Supreme Court of Oregon held that:

"In the exercise of police power and for the welfare of all citizens the state can regulate, or even prohibit the catching of fish."

In *Hazen vs. Perkins (Vt.)*, 105 Atl. 249, the Court held:

"The general assembly in the exercise of the police power may adopt such measures within constitutional limits as it deems necessary for the preservation of such public property and the common rights therein."

In *Ex Parte Marinovich*, 192 Pac. 156, the California Court held:

"Within the limitations of the Constitution against discrimination, the legislature, for the protection of fish, may pass such laws as it deems wise."

See also the general discussion of this matter and authorities cited in 26 C. J., 626 and 627.

Authorities similar to the above might be multiplied indefinitely. They all involve the underlying principle that the legislature has full power and authority to impose any restriction not unconstitutional which it sees fit upon the taking possession or use of game fish. The Montana statute was clearly enacted for that purpose.

It is just as necessary to prohibit a person from possessing an excessive amount of game fish as it is to prohibit catching them in the first instance. The restriction is a reasonable one and in my judgment is amply supported by authorities, as well as being open to no possible misconstruction as to its meaning.

Very truly yours,

L. A. FOOT,
Attorney General.