

No. 202

ANTELOPE, special fee to hunt unauthorized—ANTELOPE, hunting in any other county than Chouteau illegal—ANTELOPE, choosing hunters by lottery system illegal—

LOTTERY—FISH AND GAME

Held: The Fish and Game Commission has no authority to permit the hunting of antelope in any county of the state, save and except the County of Chouteau. The Fish and Game Commission has no authority to charge a special fee for the privilege of hunting antelope. The use of the lottery system to determine which hunters shall have the right to participate in a hunt is illegal.

August 9, 1941.

Dr. J. S. McFarland
State Fish and Game Warden
Capitol Building
Helena, Montana

Dear Dr. McFarland:

You have submitted the following:

“The Fish and Game Commission will discuss a proposed season to be held on antelope this fall at their next meeting August 9th.

“Since the desired kill will not exceed 400 antelope, it is necessary we allow only 400 permits for license holders to participate in the hunt. The customary procedure is to allow all license holders to send in their name who wish to take part in the special hunt, then the names will be chosen from a basket and the lucky ones will be entitled to enjoy the privilege of hunting antelope.

“There are two questions which I would like your opinion on:

“1. Does the Commission have the right to charge a special fee for the privilege of hunting antelope?”

“2. Is the lottery system, as mentioned above, legal for the department to use in determining which hunters shall have the right to participate in the hunt?”

At the outset, I am of the opinion the Fish and Game Commission has no authority under the law of our state to permit the hunting of antelope in any other county of the state, save and except the County of Chouteau, as will more fully hereinafter appear.

Section 3719, Revised Codes of Montana, 1935 provides:

“Any person who wilfully shoots or kills or captures, or causes to be shot or killed or captured, any moose, bison, buffalo, caribou, or antelope (and it is hereby made unlawful to kill any of said animals except as hereinafter stated), is guilty of a misdemeanor and shall be punished accordingly.”

After the enactment of said Section 3719, the legislature passed Section 3729.2, Revised Codes of Montana, 1935, which provides:

“Whenever antelope within the county of Chouteau, state of Montana, have increased in numbers to such an extent that, in the judgment of the state fish and game commission, their number should be reduced, and special or private property is being actually or materially damaged or destroyed, by said antelope in said Chouteau County, and written complaint of such damage has been filed by the owners or lessees of such property with the state fish and game commission, the said commission shall have the power and authority whenever, in its opinion, conditions warrant it, to take, kill, remove or dispose of

such animals or to permit the same to be taken, killed, removed, or disposed of under such rules, regulations, and conditions as it may prescribe and promulgate."

Other than Section 3729.2, Revised Codes of Montana, 1935, I find no law authorizing the fish and game commission to take, kill, remove, or dispose of antelope or to permit the same to be taken, killed, removed or disposed of in any county of the state.

Under the provisions of Section 3653, Revised Codes of Montana, 1935, prior to its amendment by Chapter 157, Laws of 1941, the Fish and Game commission had such powers as would enable it to open the season on antelope and other big game as described in Section 3719; however, by said amendment the commission was stripped of such power by the omission from said Chapter 157 of the following provisions contained in Section 3653 prior to its amendment:

"The statutes now governing such subjects shall continue in full force and effect, except as altered or modified by rules and regulations promulgated by the commission. . . .

"Said commission shall, in addition to the powers heretofore granted, have such other and further powers as may be necessary to fully carry out the purpose and intent of all the laws pertaining to fish, game, and fur-bearing animals, game and non-game bird propagation, protection, conservation and management of this act; . . ."

Answering question one, under the provisions of Section 3681, Revised Codes of Montana, 1935, an antelope is classed as a game animal. Therefore, in order to determine the question whether the Fish and Game Commission can charge a special fee for the privilege of hunting an antelope, we look to statutory provision to determine its right so to do.

Section 3685 provides for the fee to be charged for an "AA" license which entitles the holder thereof to pursue, hunt, shoot, kill, capture, take and possess any of the game animals of this state as authorized by this act. I do not find in the law relating to the killing of game animals any authority conferred upon the commission to charge a special fee, or any other fee whatsoever, other than the license fee provided for in this section—and, therefore, it is my opinion the Fish and Game Commission is without authority to charge a special fee for the privilege of hunting antelope.

To answer your second question in the affirmative would be to break down the precedent of the administration as established with reference to upholding the laws of our state pertaining to gambling and lotteries. This we cannot do. We are constrained to hold the proposed lottery system is illegal.

By our Supreme Court, in *State v. Hahn*, 105 Mont. 270, 72 Pac. (2nd) 459, and in *State v. Fox Missoula etc., Corp., et al.*, 110 Mont. 441, 101 Pac. (2nd) 1065, as well as in 38 C. J. 289, 17 R. C. L. 1222, and in numerous opinions rendered by this office a lottery has been defined to be:

"The offering of a prize; the awarding of the prize by chance, and the giving of a consideration for the opportunity to win the prize."

Section 11149 of the Revised Codes of Montana, 1935, provides:

"A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

And even under the provisions of Section 2, Article XIX of the Montana Constitution, it is provided:

"The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."

In the matter before us we have the question whether a department of our state government can conduct a lottery in violation of the provisions of said Section 11149 of the Revised Codes of Montana, 1935, whereby it would allow all license holders to send in their names who wish to take part in a special antelope hunt, then the names will be chosen from a basket, and the lucky ones will be entitled to enjoy the privilege of hunting antelope.

In *State v. Hahn*, supra, the game of "skill ball" was held to be a lottery. In *State v. Fox Missoula, etc., Corp., et al.*, supra, "bank night" conducted by theatres was likewise declared to be a lottery. And—in numerous recent Attorney General's opinions—"bingo," "keno," "screeno," "serialgram," the "dopesters' contest," and other like games and schemes have met the same fate. It now becomes necessary either to grant a special privilege to a department of our state government, permitting it to do that which the individual has been restrained from doing, or clamp down upon it with the same condemnation meted out to the former.

It may be that, like the king, the state can do no wrong. However, we do not think so. We feel the state is not entitled to a special privilege, or that it is all supreme for any and all purposes, or a privileged class to the extent that it can violate its own laws. On the contrary, we believe it should take its place and, rightly so, with the individual and be made to observe the laws that, by its legislature, it has seen fit to enforce upon the people of our state.

And along with this train of thought, it would appear to me that, of all persons, firms or corporations and the like, as well as state institutions and departments, the State Fish and Game Department of our state, which stands first, last and all the time for good sportsmanship and asks that all of its laws, rules and regulations be strictly adhered to and obeyed, should be the last to permit a lottery to be held to determine who shall be permitted to participate in a sporting event. If one be permitted to enjoy it, all should be accorded the equal right. It would likewise appear the state should be the one to set the example for others less informed and should by its very action symbolize good sportsmanship.

Under the laws of our state and our constitution the lottery is illegal and it is up to the people of the State of Montana—and all departments of our government—to uphold that law until such time when the people of this state shall by its vote annul it.

Sincerely yours,

JOHN W. BONNER
Attorney General