

**Opinion No. 74**

**Offices and Officers—Civil Office—Fish and Game Department—  
Director of State Fish and Game Department—Game Wardens—  
Const., Sec. 7, Art. IX**

**Held: That the position of Director of the State Fish and Game Department is a public office; and, the requirements of Section 7, Article IX, of the Montana Constitution are applicable to any person appointed to this position.**

September 19, 1958

State Fish and Game Commission  
State of Montana  
Helena, Montana

Gentlemen:

You have requested my opinion with respect to the State Fish and Game Director of the State of Montana, and the applicability of Section 7, Article IX, of the Montana Constitution to that position.

Section 7, Article IX, of the Montana Constitution is as follows:

No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States and who shall not have resided in this State at least one year next before his election or appointment.

In order for the Section to apply to the position of State Fish and Game Director it must be determined that that position is that of a civil or military office in the State of Montana.

The Montana State Supreme Court established the controlling criteria in the determination of whether a position constitutes a civil office, in the case of *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411. The Court, after an exhaustive examination of authorities determined that five elements are indispensable in any position of public appointment in order to make it a public office of a civil nature. They are as follows:

1. It must be created by the Constitution or by the Legislature, or created by a municipality or other body through authority conferred by the Legislature.

2. It must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public.
3. The powers conferred and the duties to be discharged must be defined directly or implied by the Legislature or through Legislative authority.
4. The duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office created or authorized by the Legislature and by it placed under the general control of a superior officer or body.
5. It must have some permanency and continuity and not be only temporary or occasional.

In addition, an officer may take and file an official oath before the Commission or other written authority and give an official bond, the latter being required by proper authority.

The above entitled case has been followed by many later decisions including *State ex rel. Nagle v. Sullivan*, 98 Mont. 425, 426; 40P(2d) 995; *State ex rel. Nagle v. Page*, 98 Mont. 14; 37P(2d) 575; *State ex rel. Holt v. District Court*, 103 Mont. 438, 63P(2d) 1026; *State ex rel. Dunn v. Ayers*, 112 Mont. 120, 113 P(2d) 785; *State ex rel. Ryan v. Norby*, 118 Mont. 283, 165 P(2d) 302; and *State ex rel. Bonner v. District Court*, 122 Mont. 464, 206 P(2d) 166.

Consequently, we must look to the duties of the State Fish and Game Director to determine whether that office has the five indispensable criteria set forth in the Barney case.

The duties of the State Fish and Game Director are set out in Section 26-106, RCM, 1947.

"Section 26-106. State Fish and Game Director—Qualifications—Powers—Duties. The State Fish and Game Commission shall appoint and employ a State Fish and Game Director. He shall be a person having experience, special training and skill in wildlife protection, conservation, and management. He shall be the Secretary of the State Fish and Game Commission, attend the meetings of said Commission, and keep a record of all of its transactions, and shall make and keep an inventory, showing the description and value of all property owned by the State and under the administration of said Commission. He shall be the administrative agent of the State Fish and Game Commission, custodian of the property and records of the Fish and Game Department, and shall maintain his office at the seat of the State Government. He shall devote all of his time to his official duties, and such powers and duties which are now or may hereafter be by law conferred upon and delegated to the State Fish and

Game Director. His powers and duties shall include those of a State Game Warden hereinafter enumerated. He shall be subject to the supervision and control of said Commission and may be removed from office by said Commission only for neglect of duty, incompetency or other good cause, and after full hearing on verified charges filed at least twenty (20) days before said hearing. The Director shall have the authority, by and with the consent of the Commission, to establish such Department divisions and to employ the necessary personnel that may be needed to conduct the work of the Department. The State Fish and Game Director shall be paid a salary fixed by the Commission and approved by the State Board of Examiners, and shall be allowed his actual and necessary traveling expenses while away from the seat of government upon official business connected with his office, but in no one (1) year shall he be allowed as expenses a sum in excess of Two Thousand (\$2,000.00) Dollars, the same to be paid upon proper vouchers from the Fish and Game Fund of the State."

It is seen that his powers and duties include those of a State Game Warden so that the duties of the State Fish and Game Director likewise include those duties set forth in Section 26-110, RCM, 1947. Section 26-111, RCM, 1947, indicates that the State Fish and Game Director must qualify for his duties by taking an oath of office and supplying the Secretary of State with a bond in the amount of \$2,000.00.

It is immediately clear from the examination of the Sections above cited that the position of State Fish and Game Director was created by the Legislature of the State of Montana, the original enactment being Chapter 193 of the Laws of 1921.

Going to the third criteria, the powers and the duties are defined directly by Legislative authority as contained in the statutes above cited. The position has permanency and the Director can only be removed after notice and hearing, which is generally conceived to be one of the concomitants of public office, as is indicated in the cases previously cited.

The question remains as to whether the State Fish and Game Director possesses a delegation of the portion of the sovereign power of government and whether the duties are performed independently and without control of a superior power other than the law. Examining Section 26-106, it is seen that the State Fish and Game Director there generally acts by and with the consent and approval of the Fish and Game Commission. Were those powers alone to be considered, it could be said that the State Fish and Game Director was a mere employee in that he did not possess a delegation of the sovereign power of government, nor did he perform duties independently and without the control of a superior power.

In addition to the duties prescribed in Section 26-106, RCM, 1947, the State Fish and Game Director has the powers and duties as a

State Game Warden. Those duties are set forth in Section 26-110, RCM, 1947, hereinafter set forth, sub-sections 2, 3, 4 and 5 thereof:

(2) It shall be their duty to see that the laws of the State of Montana and the laws, orders, rules and regulations of the State Fish and Game Commission with reference to the protection, preservation and propagation of game and fur-bearing animals, fish and game birds are strictly enforced.

(3) It shall be their duty to see that all those who hunt, fish, or take game, or fur-bearing animals, game birds or fish have necessary licenses.

(4) They shall have authority to serve subpoenas issued by any court for the trial of offenses against any of the fish and game laws of the State; they shall have the authority to make a search, when they have reasonable cause to believe that any of the game, fish, birds, or quadrupeds, or any parts thereof, have been killed, captured, taken or possessed, in violation of the laws of this State, and without search warrant, to search any tent not used as a residence, boat, car, automobile or other vehicle, box locker, basket, creel, crate, gamebag or other package and contents thereof to ascertain whether any of the provisions of the laws of this State or the rules and regulations of the Fish and Game Department for the protection, conservation or propagation of game and fish or game birds or fur-bearing animals have been violated, and with a search warrant to search and examine the contents of any dwelling house or other building, to seize and confiscate all game, fish, game birds, and fur-bearing animals or any parts thereof, possessed in violation of the law, or the orders, rules and regulations of the Commission, or showing evidence of illegal taking, and seize and confiscate all devices used in taking of game and fur-bearing animals, fish or game birds illegally, and to hold the same subject to law or the orders of said State Fish and Game Commission; to arrest without warrants any persons committing in their presence any offense against the Fish and Game Laws of the State of Montana, or against any orders, rules and regulations of the Commission violation of which has been made a misdemeanor by the provisions of this Act, and to arrest without warrant any person who they have reasonable and probable cause to believe has committed any such offense and to take such person immediately before a magistrate having jurisdiction of the same, and to exercise such other powers of peace officers in the enforcement of the Fish and Game laws of the State, and the orders, rules and regulations of the Commission, or of judgments obtained for the violation thereof, not herein specifically provided.

(5) It shall be their duty at all times to assist in the protection, conservation and propagation of fish, game, and fur-bearing animals, game and non-game birds, and to assist in the planting,

distributing, feeding and caring for fish, game and fur-bearing animals, and game and non-game birds; it shall be their duty when ordered by the State Fish and Game Commission, to assist in the destruction of predatory animals, birds, and rodents; it shall be their duty to do and perform all other duties prescribed from time to time by the State Fish and Game Commission, to make a monthly report to said Commission correctly and truthfully informing the said Commission of just what each said State Fish and Game Warden has done during each day of the preceding month, with regard to the enforcement of the Fish and Game Laws of this State, showing where his duties called him, and what he was called upon to do, and said report shall contain any pertinent recommendations said Deputy may see fit to make.

The above duties indicate clearly that Wardens have been delegated a portion of the sovereign police power. The Wardens are enforcement officers for the protection of the general public and its property. They have, among other things, the power of arrest, the power to subpoena, the power to search and the power to destroy certain animals in the interest and the protection of the public welfare. The Supreme Court in the case of *Aleksich v. Industrial Accident Fund* 116 Mont. 127, 151 P(2d)1016; holds that a police officer is a public officer. The powers of a police officer such as a city policeman are very similar and parallel to those of a Warden and it is generally held that the holders of these positions are public officers. The State *ex rel. Anderson v. Fousek*, 91 Mont. 448, 8 P(2d) 791; *State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940. In the *Anderson* case the courts stated, with reference to policemen:

"That 'they are guardians of the public safety and directly chargeable with the enforcement of the Laws.' Their duties concern the public directly and are imposed by public authority and not by contract. These are primary factors pointing to the conclusion that they are public officers and not mere servants or agents."

Similar language can be found in the *Quintin* case. Upon examination of the portions of the statutes set forth, it is apparent that the duties to be performed are performed independently without control of any superior, sovereign police power to be performed in and for the general welfare.

It is therefore my opinion that the position of State Fish and Game Director is a public office and that the requirements of Section 7, Article IX, of the Montana Constitution are applicable to that office.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General