

Opinion No. 86**Fish and Game Wardens—Confiscation of Firearms Used in Illegal Taking of Game, Fur Bearing Animals, Fish or Game Birds**

Held: State Fish and Game Wardens do not have the authority to seize and confiscate firearms used in the illegal taking of game, fur bearing animals, fish or game birds.

December 8, 1958

Mr. Anthony F. Keast
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Keast:

You have requested my opinion on the following questions:

1. Do State Fish and Game wardens have authority to seize and confiscate firearms used in the illegal taking of game, fur bearing animals, fish or game birds, as set forth in Section 26-110, RCM, 1947?

2. Does a justice of the peace have authority to seize and confiscate firearms used in the illegal taking of game, fur-bearing animals, fish or game birds?

3. If either a State Fish and Game warden or a justice of the peace has the authority to seize and confiscate firearms, as outlined above what disposition is to be made of firearms so confiscated?

The portion of the statute apparently authorizing the warden to seize and confiscate firearms is set forth in Section 26-110, RCM, 1947 which provides in part that:

"The warden shall have authority . . . 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 the taking of game and fur bearing animals, fish or game birds illegally, and to hold the same subject to law or the orders of the State Fish and Game Commission . . ."

In the case of *Heiser vs. Severy*, 117 Mont. 105, 158 Pac. (2d) 501, the legality of this confiscation statute was questioned, but the Supreme Court deferred passing on this aspect of the law in favor of other questions. In the recent case of *Shipman vs. Todd*, 131 Mont. 365, 310 Pac. (2d) 300, it was held that Section 26-110, *supra*, does not apply to the confiscation of **game** which was illegally possessed but

legally taken. There have been no other Montana cases on this subject.

It is clear that the state has the power to punish a violation of its game laws by forfeiture of the apparatus used in the illegal taking of game. (See generally, 24 Am. Jur. "Game and Game Laws", Sec. 29, p. 393) Since confiscation involves a summary taking of property, important constitutional questions are presented. (Sec. 27, Art. III, Mont. Const.)

As a general rule, the courts sustain the validity of a statute providing for the confiscation of certain devices which have little or no value unless used illegally. (See cases annotated in 17 ALR 574) If, however, the device is one that has value when used lawfully it is generally held that the Legislature has no power to order summary forfeiture through confiscation merely because the device was put to an unlawful use. In *People vs. One 1941 Chevrolet Coupe*, 222 Pac. (2d) 473, it is said:

"There can be no forfeiture of property without notice to the owner and a hearing at which he can be heard, except in a few cases of necessity, i. e., property kept in violation of law which is incapable of lawful use. Where the property is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard."

See also, *McConnell vs. McKillip*, 71 Neb. 712, 99 N.W. 505; *State vs. Robbins*, 124 Ind. 308, 24 N.E. 978; 12 Am. Jur. "Constitutional Law", Sec. 678, page 359.

Viewed in this light it is my opinion that the "devices" referred to in Section 26-110, *supra*, are those devices which have little or no value unless used illegally, and do not include an object such as a hunting rifle. To otherwise interpret this section would raise serious constitutional objections to its validity. (See *State ex rel. Rich vs. Garfield County*, 120 Mont. 568, 188 Pac. (2d) 1004; *Phillipsburg vs. Porter*, 121 Mont. 188, 190 Pac. (2d) 676; 27 Opinions of the Attorney General No. 38.)

It is therefore my opinion that State Fish and Game wardens do not have authority to seize and confiscate firearms used in the illegal taking of game, fur bearing animals, fish or game birds, as provided by Section 26-110, RCM, 1947.

As the result of the opinion on question number one, it is not necessary that I answer your remaining questions.

Very truly yours,
FORREST H. ANDERSON
Attorney General