

VOLUME NO. 36**Opinion No. 112**

FISH AND GAME — License to hunt private game animals; FISH AND GAME — Game farms and shooting preserves; Sections 26-104, 26-104.3, 26-201, 26-202, 26-202.4, 26-229, 26-307, 26-1201, 26-1208, 26-1209, 26-1601, 26-1607, 26-1610, 26-1611, 67-203, 82A-103(9), 82A-112, 82A-2001, 82A-2004(5), Revised Codes of Montana 1947.

HELD: The Montana Fish and Game Commission does not have the authority to regulate the hunting and killing of privately owned deer, elk, antelope and big horn sheep on a private game ranch through the imposition of licensing requirements on individual hunters, the declaration of open and closed seasons, and bag limit restrictions in the absence of any definitive statutes, rules or regulations.

December 7, 1976

Mr. James E. Seykora
Big Horn County Attorney
P.O. Box 551
Hardin, MT 59034

Dear Mr. Seykora:

You have requested my opinion on the following question:

Does the Montana Fish & Game Commission have the authority to regulate the hunting and killing of privately owned deer, elk, antelope and big horn sheep on a private game ranch through the imposition of licensing requirements, the declaration of open and closed seasons, and bag limit restrictions?

The factual situation which prompted your request for my opinion appears to be as follows: a landowner desires to fence in approximately nineteen thousand (19,000) acres of land with a Department of Fish and Game approved eight foot high game-proof fence; to the extent possible, all naturally located game animals found within this enclosure would be removed by lawful means; deer, elk, antelope, and big horn sheep would be purchased from an out-of-state source and released within the enclosure; ownership in the land, animals and game farm permit, if approved, would be joint in the members of a non-profit corporation; as the population of these confined animals increased, the members

of the non-profit corporation would be allowed to hunt, shoot, kill and possess the carcasses of these animals for their own use and enjoyment; the State Fish and Game Commission has indicated that it intends to enforce its licensing requirements, closed season and bag limit restrictions on this particular type of operation contrary to the wishes of the members of the proposed non-profit corporation.

The Montana State Fish and Game Commission, hereinafter referred to as "Commission", was created by section 82A-2001, R.C.M. 1947, and by section 82A-2004(5), R.C.M. 1947, was designated as a quasi-judicial board for the purposes of section 82A-112, R.C.M. 1947. Section 82A-103(9), R.C.M. 1947, defines the term "quasi-judicial function" and provides, *inter alia*, that the Commission may, in its adjudicatory capacity, interpret, apply and enforce existing rules and laws; grant or deny privileges, rights or benefits; issue, suspend or revoke licenses, permits and certificates; determine rights and interests of adverse parties; evaluate and pass on facts; order action or abatement of action; and do any other act necessary to the performance of its quasi-judicial function. Of significance, is the Commission's authority to interpret, apply and enforce existing rules and laws.

The existing laws pertinent to this opinion that the Commission is required to interpret, apply and enforce are found in Title 26, chapters 1 through 18, R.C.M. 1947. Section 26-104, R.C.M. 1947, provides, in part:

- (1) The commission shall supervise all the wildlife, fish, game, game and nongame birds, and waterfowl, and the game, and fur-bearing animals of the state. It possesses all powers necessary to fulfill the duties prescribed by law....
- (2) It shall enforce all the laws of the state respecting the protection, preservation and propagation of fish, game, fur-bearing animals and game and nongame birds within the state.
- (3) ...
- (4) ...
- (5) ...

Section 26-104.3, R.C.M. 1947, provides, in part:

- (1) The commission may fix seasons, bag limits, possession limits, and season limits; open or close, shorten or lengthen seasons on any species of game, bird, fish, or fur-bearing animals as defined by section 26-201,....
- (2) ...
- (3) It may divide the state into fish and game districts, and create fish, game, or fur-bearing districts throughout the state. It may declare closed season for hunting, fishing, or trapping in any of those districts, and later may open those districts to hunting, fishing, or trapping.
- (4) ...
- (5) ...

Section 26-202, R.C.M. 1947, provides, in part:

It shall be unlawful and a misdemeanor ... for any person to pursue, hunt, trap, take, shoot, or kill or attempt to trap, take, shoot, or kill, any game animal, ... or to have, keep or possess within this state, any game animal, ... or parts thereof, except as herein provided or shall be provided by the state fish and game commission, or for any person to pursue, hunt, trap, take, shoot or kill, or attempt to trap, take, shoot or kill, any game animal, ... except at the places and during the periods and in the manner herein defined or shall be defined by the state fish and game commission, or for any person to pursue, hunt, trap, take, shoot or kill, or attempt to trap, take, shoot or kill, any game animal, ..., **without first having obtained a proper license or permit from the commission to do so.** (Emphasis supplied)

Section 26-202.4, R.C.M. 1947, grants to the Commission authority "to make, promulgate and enforce" rules and regulations to "accomplish the purpose of this act."

Section 26-229, R.C.M. 1947, requires any applicant for a license to hunt game animals in Montana to first obtain a wildlife conservation license.

Section 26-307, R.C.M. 1947, provides in part:

- (1) ...
- (2) It shall be unlawful and a misdemeanor for any person to kill more than one game animal of any one species, in any one license year, unless the killing of more than one game animal of such species has been authorized by regulations of the fish and game commission.
- (3) It shall be unlawful and a misdemeanor for any person during the closed season on any species of game animal, ... to take, hunt, shoot, kill or capture any such game animal...

All of these statutes make it quite clear that the Legislature has granted the Commission a great deal of authority with which to discharge its duties and responsibilities. The conflict that arises concerns the duty and authority of the Commission to supervise and regulate "any species of game" versus the rights that a private person may acquire in "any species of game". The Montana Supreme Court has held:

...ownership of wild animals is in the state, and these animals are not subject to private ownership except insofar as the State shall choose to make them so. So long as constitutional limitations are not infringed, the Legislature may impose such terms and conditions as it sees fit on the acquiring of ownership of these wild animals. **State ex rel. Visser v. Fish & Game Comm.**, 150 Mont. 525, 437 P.2d 373 (1968), quoting **Rosenfeld v. Jakways**, 67 Mont. 558, 216 P. 776 (1923). Also see **State v. Jack**, 32 St. Rptr. 858, 539 P.2d 726, 728 (1975).

However, the Montana Legislature has enacted several statutes that purport to give a degree of ownership and control over game animals to private persons other than through the obtaining of a hunting license and otherwise lawfully killing such animals. One such statute is section 67-203, R.C.M. 1947, which provides:

Animals wild 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.

The Montana Supreme Court had an opportunity to construe section 67-203, *supra*, in **Herrin v. Sutherland**, 74 Mont. 587, 241 P. 328 (1925), and held that the property right that a land owner may acquire in wild animals, while living, is a qualified right; a right to protect them from harassment and invasion by persons not authorized to be on the land owner's property. **Herrin** also cites **State v. Mallory**, 73 Ark. 236, 3 Ann. Cas. 852, 67 L.R.A. 773, 83 S.W. 955 (1904), for the proposition:

...that when wild game or fowl are upon the private grounds of an individual, a qualified right of property in the individual attaches to it, with the exclusive right to hunt, kill and capture it ,

It is apparent that the property right in game animals that a property owner acquires pursuant to section 67-203, *supra*, is a right to exclude others from his realty and to enjoy the exclusive right to hunt, kill and capture those animals under such terms and conditions as the Legislature or the Commission may prescribe. The right acquired is a right to exclude other persons; not a possessory right unless some other act of the Legislature confers such a right.

Section 26-1601, et seq., R.C.M. 1947, provides for the operation of privately owned shooting preserves limited to not more than one thousand two hundred eighty (1280) contiguous acres. At the present time only "artificially propagated pheasants, quail, chukar partridges, turkeys and such other species as the ... commission may add from time to time." may be hunted on a shooting preserve. As an aside, the phrase "and such other species" is probably limited to game birds vis-a-vis game animals under the doctrine of **ejusdem generis**. **Burke v. Sullivan**, 127 Mont. 374, 265 P.2d 203 (1954). However, section 26-1610, R.C.M. 1947, does provide for the "harvesting" of wild game animals on a shooting preserve but only:

...in accordance with applicable game and hunting laws pertaining to open seasons, bag and possession limits, and so forth, as are established regularly by the Montana fish and game commission....

The hunting of game birds on a shooting preserve is limited to those persons who have obtained a valid game bird license. Section 26-1611, R.C.M. 1947. However, the length of the shooting season is set by section 26-1607, R.C.M. 1947, and is generally longer than that provided for the hunting of game birds by the general public in areas other than a shooting preserve.

In contrast to the shooting preserve statutes, section 26-1201, et seq., R.C.M. 1947, provides for the "propagating, owning and controlling" of game animals (except buffalo), game birds, fur-bearing animals, and for the operation of "roadside menageries or zoos". The ownership of wild animals obtained by capture and their offspring used or exhibited in roadside menageries "remain in the State of Montana." Sections 26-1208 and 26-1209, R.C.M. 1947.

Section 26-1201, R.C.M. 1947, authorizes "(a)ny person or persons, firm, company or corporation" to propagate, own or control game animals (except buffalo) after first obtaining a game farm permit from the Commission. Deer, elk, antelope and big horn sheep are all game animals as defined by section 26-201, R.C.M. 1947.

Section 26-1201, *supra*, does not define the terms or conditions that may be imposed on the ownership or operation of a game animal farm other than a fencing requirement. Nor are any guidelines offered as to how game animals may be harvested or, indeed, if they may be harvested at all. The Commission also has not promulgated any rules or regulations governing this particular type of game farm operation. However, your question and underlying factual data indicate that the proposed owner(s) or non-profit corporation members plan to harvest game animals on a game animal farm by hunting, shooting and killing them. These facts patently suggest that, in fact, a shooting preserve is contemplated even though no statutory authorization exists for such a preserve under the provisions of section 26-1601, *et seq.*, *supra*. Can the same method of harvest be employed on a game farm?

Absent any statutes, rules or regulations to the contrary, there is no prohibition in existence which would prohibit the harvesting of privately owned game animals on a section 26-1201 game farm in the manner proposed without complying with normal hunting license requirements and seasonal and bag limit restrictions.

State, Wyoming Game and Fish Commission v. Fordyce, 503 P.2d 1198 (1972), involved a similar operation to the one proposed here. **Fordyce** had fenced some eight hundred acres with a game proof fence and had stocked his enclosure with elk purchased from the State of Wyoming. The lower court had enjoined the State from interfering with **Fordyce's** ownership of his elk. On appeal the State argued that the fish and game laws:

...disclose the intent of the legislature that no person shall take, kill, hunt, pursue, possess, sell, transport, or destroy elk in the State of Wyoming except as the law provides, e.g., **by hunting after obtaining proper license**; (Emphasis supplied) **Fordyce** at 1199.

The Supreme Court of Wyoming held that the Game and Fish Commission had "not issued any reasonable rules" to deal with this type of situation even though it had the apparent authority to do so. Therefore,:

...the commission cannot without proper rules and determination thereunder affect and control animals in private ownership. **Fordyce** at 1201.

In **Cozy Pines Hunting Preserve, Inc. v. Fish and Game Div.**, 208 A.2d 164 (N.J. 1965), the court held that a hunting license was not required to hunt domesticated privately owned deer in a private hunting preserve but here again a statute specifically addressed itself to this type of situation.

The facts in **Fordyce**, *supra*, are similar to those presented here. The Montana Fish and Game Commission has not promulgated any rules or

regulations governing the harvesting of game animals on a game farm nor has the Legislature enacted any controlling statutes.

THEREFORE, IT IS MY OPINION:

The Montana Fish and Game Commission does not have the authority to regulate the hunting and killing of privately owned deer, elk, antelope and big horn sheep on a private game ranch through the imposition of licensing requirements on individual hunters, the declaration of open and closed seasons, and bag limit restrictions in the absence of any definitive statutes, rules or regulations.

Very truly yours,

ROBERT L. WOODAHL
Attorney General