

N.D.A.G. Letter to Henegar (June 10, 1991)

June 10, 1991

Dale L. Henegar
North Dakota House of Representatives
2421 Avenue C East
Bismarck, ND 58501

Lloyd Jones, Commissioner
Game & Fish Department
100 North Bismarck Expressway
Bismarck ND 58505

Dear Representative Henegar and Commissioner Jones:

Thank you for your letters of April 1, 1991, and April 3, 1991, in which each of you has requested an opinion as to whether a section of the Governor's proclamation is legal. The proclamation in question provides:

Nonlicensees -- No elk or moose licensee hunting in the field during the elk or moose season may be accompanied by a nonlicensee carrying a firearm or a bow and arrow. A nonlicensee is a person not having a elk or moose license for the same season and unit as the person with the license.

This proclamation further restricts the number of elk and moose that are allowed to be killed, the locations, dates and times of hunting, the type of weapons allowed, the clothing allowed to be worn by hunters and other limitations and requirements. I note that this proclamation does not govern all big game hunting.

The first issue raised is whether the Governor has statutory authority to issue such a proclamation. Governor's proclamations relating to game and fish are covered by N.D.C.C. ch. 20.1-08. N.D.C.C. § 20.1-08-02 authorizes the governor to open or close seasons on big game, small game, fish, or furbearers after investigation and a recommendation by the game and fish commissioner. Such orders or proclamations must prescribe which species of big game, small game, fish, or furbearers they apply to and must state in what manner the animals may be taken, in what numbers and times they may be taken and possessed, and in what places they may be taken. N.D.C.C. § 20.1-08-04(1).

N.D.C.C. § 20.1-08-04.6 authorizes the governor to issue proclamations concerning the hunting of elk including prescribing the manner of elk hunting. N.D.C.C. § 20.1-08-04.2 authorizes the governor to do the same with regard to moose hunting. "Hunt" or "hunting" is defined in N.D.C.C. § 20.1-01-02(17) as:

[S]hooting, shooting at, pursuing, taking, attempting to take, or killing any game animals and game birds; searching for or attempting to locate or flush any game animals and game birds; luring, calling, or attempting to attract game animals and game birds; hiding for the purpose of taking or attempting to take game animals and game birds; and walking, crawling, or advancing toward wildlife while possessing implements or equipment useful in the taking of game animals or birds.

N.D.C.C. § 20.1-03-13 prohibits hunting any big game animal without an appropriate big game hunting license. It is a reasonable reading of this section and the definition of "hunting" to conclude that "a nonlicensee carrying a firearm or a bow and arrow" while accompanying "an elk or moose licensee hunting in the field during the elk or moose season" falls within the statutory proscription on unlicensed hunting. The statute, for example, requires a license for anyone "advancing toward wildlife while possessing implements or equipment useful in the taking of game animals or birds." Based upon the statutes mentioned, the governor has the authority to prohibit hunting with a governor's proclamation.

Not only must the Governor have substantive authority to issue a proclamation, he must also follow proper procedures when issuing it. Any order or proclamation issued by the governor pursuant to N.D.C.C. ch. 20.1-08 has the force of law. N.D.C.C. § 20.1-08-01. This proclamation in question provides all required information and was published as required by N.D.C.C. § 20.1-08-05 in mid-March, 1991 in all counties affected by the proclamation. It is my opinion the proclamation was properly issued according to N.D.C.C. ch. 20.1-08, and has the "force of law."

The final issue raised is whether the proclamation is unconstitutional. Two constitutional challenges which might be raised to defeat the proclamation are whether the state may constitutionally regulate the taking of game and whether the proclamation impermissibly infringes on the constitutional right to bear arms.

The North Dakota Supreme Court has not addressed the issue of whether it is a proper exercise of the state's police power to regulate the taking of game. However, other courts have concluded that a state may regulate the taking of game under their police power. State v. Morrison, 341 N.W.2d 635 (S.D. 1983); State v. Suess, 52 N.W.2d 409 (Mn. 1952); People v. Zimberg, 33 N.W.2d 104 (Mi. 1988). I believe the North Dakota Supreme Court would follow this line of cases because it has concluded the state may protect fish and game as an exercise of the state's sovereign power. State v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972). It is my opinion that the Governor's proclamation controlling moose and elk hunting is a reasonable and valid exercise of the state's police power.

The specific constitutional issue raised in Commissioner Jones' letter is whether the Governor's proclamation impermissibly infringes upon the federal or state constitutional right to bear arms.

The second amendment to the United States Constitution provides:

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

The United States Supreme Court has held that this amendment is a limitation only upon the power of congress and the national government, and not upon that of the state. Presser v. Illinois, 116 U.S. 252 (1886); Application of Atkinson, 291 N.W.2d 396 (Minn. 1988); State v. Friel, 508 A.2d 123 (Me. 1986), cert. denied, 107 S.Ct. 156 (1986). Therefore, the federal constitutional right to bear arms is not infringed in this case by the Governor's proclamation.

The N.D. Const. art. I, § 1 states in pertinent part:

All individuals are by nature equally free . . . and have certain inalienable rights, among which are . . . to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

(Emphasis supplied).

The right to keep and bear arms is not absolute but subject to reasonable regulation under the state's police power. State v. Ricehill, 415 N.W.2d 481 (N.D. 1987). Here the state constitution protects the right to bear arms for many purposes, but contains certain limitations as exemplified by the words "lawful hunting." The regulation at issue here is one that defines "lawful hunting."

As concluded previously, the Governor's proclamation is a reasonable and valid exercise of the State's police power. It is therefore my opinion that the Governor's proclamation does not impermissibly infringe upon the state constitutional right to bear arms.

Sincerely,

Nicholas J. Spaeth

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