

**OPINION
68-174**

October 24, 1968 (OPINION)

Mr. Wilbur Boldt

Deputy Commissioner

North Dakota Game and Fish Department

RE: Game and Fish - Proclamations - Purpose

This is in reply to your letter with regard to legality of a provision in the 1968 hunting proclamation.

You state that you have been asked by a county judge to ask our opinion concerning the legality of the wording in Section 3 of the 1968 hunting proclamation, "All bows must be unstrung at sundown each day and when in or on motor driven vehicles."

You state you are basing this regulation on section 20-08-03 of the North Dakota Century Code.

You ask that we give you our opinion regarding the legality of this regulation in the proclamation.

We are enclosing herewith a Xerox copy of an opinion of this office of date 12 April 1954 which comments generally on the legalizing of bow hunting in this state. Section 20-08-03 of the 1967 Supplement to the North Dakota Century Code which you cite provides:

CONTENTS OF GOVERNOR'S ORDER OR PROCLAMATION RELATING TO THE TAKING OF GAME BIRDS, FISH, AND GAME ANIMALS. An order or proclamation issued by the governor pursuant to the provisions of this chapter shall prescribe, as to each species of game birds, fish, or game animals named therein, the following:

1. In what manner the same may be taken;
2. In what manner the same may be taken and possessed and may limit such numbers by sex;
3. In what places the same may be taken; and
4. At what times the same may be taken and possessed.

The governor, in his order or proclamation, may provide for the number of big game permits or licenses to be issued for the taking of each species and the manner in which such permits or licenses shall be issued for the big game only. When a limited number of big game licenses are issued by lottery and the number of applicants is greater than the number of licenses to be issued, any applicant who is successful in obtaining such a license shall not be eligible to apply for a license to hunt the same species of big game for the five ensuing lottery years, except that owner operators or operators, living within

the boundaries of the legal open area shall be entitled to purchase one such license for each farmstead unit in each consecutive season."

We note also the provisions of section 20-03-10 of the North Dakota Century Code which provides:

LICENSE TO HUNT BIG GAME REQUIRED - SPECIAL PERMITS TO HUNT DEER - PENALTY. No person shall hunt, kill, take, or attempt to take in this state any big game without having a big game hunting license as prescribed in this chapter. In addition to the regular big game hunting license the governor by order or proclamation may authorize the issuance of special permits to hunt deer in certain restricted areas which he shall designate. The number of special permits issued shall be determined by order or proclamation of the governor and shall be issued to those applicants who first apply for such permits, until all the authorized permits have been issued. The fee for such permits shall be one dollar for both residents and nonresidents. No big game hunting license or special permit shall be sold to any person or purchased for any person under the age of fourteen years, but the age limitation herein prescribed shall not apply to applicants for big game licenses for hunting big game by bow and arrow during any open bow and arrow season. Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars and costs of prosecution, or by imprisonment in the county jail for not less than twenty days, nor more than thirty days, or by both such fine and imprisonment. Each violation of this section shall be a distinct and separate offense."

As you will note from Xerox copy of our previous opinion the legislature intended that the department through proclamation should be allowed to legalize bow hunting. This would appear to have legislative acquiescence as indicated by the later enactment of section 20-03-10 which in terms mentions licenses for hunting big game by bow and arrow during any open bow and arrow season, though we find no other specific mention by the legislative assembly of bow and arrow seasons.

The quoted provision would seem to be a regulation that could be justified on either a safety basis or on the basis of so "handicapping" the hunters as to keep the amount of game taken during a given season down to a reasonable quantity thus preserving the game supply.

However, it is an elementary principle of our form of government that the lawmaking power is vested in the legislative assembly. Thus as stated in the first paragraph of section 25 of the North Dakota Constitution as printed in the 1967 Supplement to the North Dakota Century Code:

Section 25. The legislative power of this state shall be vested in a legislature consisting of a senate and a house of representatives. The people, however, reserve the power, first, to propose measures and to enact or reject the same at

the polls; second, to approve or reject at the polls any measure or any item, section, part or parts of any measure enacted by the legislature.

* * * ."

We note the statement in 35 AM. Jur.2d. 673-674, Fish and Game Section 31 that:

The regulatory power of the state over fish and game within its boundaries may, to a certain extent, be delegated to a board or commission. Such board or commission may be vested with power to determine which brooks and rivers of the state are inhabited by fish of sufficient value to warrant the prohibition or regulation of the discharge of matter into them, or it may be authorized to lease natural oyster beds under state waters. Statutes prohibiting fishing in certain streams without a permit from a state commission, or empowering such commission to authorize the taking, at such time and in such manner as it may direct, of fish from a lake in which fishing is generally prohibited or to declare closed seasons upon the ascertainment of facts and conditions necessitating a closed season, have been sustained against objections that they amount to an invalid delegation of legislative power. Similarly, the legislature may delegate to a commission the power to stock streams or ponds with fish and to close them against fishing, even though the owners do not consent to such stocking and are thereby prohibited for such period from fishing in their private streams; and it may authorize the commission to reserve any waters of the state for the propagation of fish.

An act authorizing the county game commission to select and set apart land of the county as a game preserve is not an unlawful delegation of legislative power.

On the other hand, the legislature may not delegate its power to legislate or suspend laws, and an unqualified attempt to do so is unconstitutional. Hence, a statute conferring power on a commission to declare a closed season on fish, which might take precedence over any existing statute, is void as an unconstitutional delegation of the power to repeal statutes. And, similarly, when the legislature sets certain times within which the game commission may declare open season, an order by the commission closing the season for the entire year is unconstitutional as an attempt to suspend legislation by an administrative body."

We note also at 38 C.J.S. 5-7, Game Section 7 the following:

7. POWER TO PROTECT AND REGULATE. The state has power to enact such regulations as are necessary for the protection of the public's right in game.

By reason of the state's control over game within its limits, it is within the police power of the state legislature, subject to constitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection

of the public's rights in such game, even to the extent of restricting the use or right of property in the game after it is taken or killed. Such power may be at least partially delegated, by the constitution or by statute, to local governmental bodies, unless there is a constitutional provision to the contrary; and, where such power has been delegated, the regulation passed by the local body or board must be a reasonable one. This power to protect and regulate game cannot be delegated to an administrative agency, but, where the legislature prescribed the policy, it can delegate to an administrative agency the determination of questions of fact or the power to fix rules and regulations to carry out the legislative policy. A statute delegating authority to a state commission with respect to game has been strictly construed and, it has been held must be strictly complied with, as, for example, with respect to the declaration of a special season.

* * * ."

The legislative "policy" or administrative standards under which such proclamations are adopted is not clearly specified in the above quoted section 20-08-03 or 20-03-10. However we note the provisions of section 20-08-01 of the North Dakota Century Code as follows:

GOVERNOR MAY VARY STATUTORY OPEN AND CLOSED SEASON BY ORDER OR PROCLAMATION. Whenever the governor, after investigation and recommendation by the commissioner, finds:

1. That any species of game birds, fish, or game animals for which an open season is provided, are in danger of depletion or extinction, or when necessary for proper protection during the propagating period, he, by order, may provide protection for such species additional to that provided by law;
2. That any species of game birds, fish, or game animals have become sufficient in numbers to warrant an open season, or to be detrimental, or a nuisance to the farmers of the state, he, by order, may declare an open season thereon, or may extend the open season provided by law; or
3. That any species of fur-bearing animals have become sufficient in numbers to warrant an open season or have become a menace to other species of wildlife in the state, he, by order, may declare an open season thereon or may extend the open season provided by law."

We note that those administrative standards or statements of legislative policy do not include any provision as to safety of hunters or archers. On such basis to the extent the sentence you inquire about could not be justified as a "safety" measure. Assuming however that upon investigation and recommendation by the commissioner, the governor has found that the species of game birds, fish or game animals for which an open season has been provided, are in danger of depletion or extinction, or when necessary for proper protection during the propagating period, and that such regulation is appropriate to provide additional protection for such species

additional to that otherwise provided by law it would appear to be a valid regulation.

HELGI JOHANNESON

Attorney General