

**OPINION
68-83**

January 15, 1968 (OPINION)

Mr. Neil Thompson

State's Attorney

Ramsey County

RE: Game and Fish - Aerial Hunting - Restricted Areas

We are enclosing herewith copy of a letter of this office with regard to a township closing areas to hunting by this means. Similar principles would probably apply to any county action in the same field.

To briefly outline the statutory history on this matter please note the following:

Section 20-01-01, subsection 7, of the North Dakota Century Code, provides:

DEFINITIONS. In this title, unless the context or subject matter otherwise requires:

7. * * * 'Game animals' shall include big animals, as herein defined and mink, muskrats, and weasles;

* * * ."

Subsection 8 of said section 20-01-01 of the 1967 Supplement to the North Dakota Century Code provides:

'Big game' shall mean deer, moose, elk, big horn sheep, mountain goats, and antelopes; * * * ."

To this point it would appear that fox are not "game animals."

Section 20-01-07 of the North Dakota Century Code, prior to amendment, provided:

HUNTING FROM AIRCRAFT PROHIBITED - EXCEPTION. No person, while in flight in this state in any aircraft, shall intentionally kill or attempt to kill any bird or animal except as provided in section 20-01-08."

Section 20-01-08 of the North Dakota Century Code, prior to amendment provided:

HUNTING FROM AIRCRAFT - WHEN PERMITTED - REGULATED BY COMMISSIONER - BOND - WHEN REQUIRED, AMOUNT AND FORFEITURE. Wolves, coyotes, Canadian lynx, bobcats, and red or gray foxes may be hunted from aircraft in this state with the permission of the commissioner. Such hunting shall be subject to regulation by the commissioner, and he may require a person

seeking permission to hunt from an aircraft to post a bond in the sum of not more than five hundred dollars. Any bond required pursuant to the provisions of this section shall be payable to the state of North Dakota and shall be forfeited to this state if the person giving the bond is convicted of unlawfully hunting from an aircraft."

Current changes in these two statutes are shown in the 1967 Supplement to the North Dakota Century Code as follows:

20-01-07. HUNTING GAME FROM AIRCRAFT PROHIBITED. No person, while in flight in this state in any aircraft, shall intentionally kill or attempt to kill any game bird or game animal."

20-02-08. HUNTING FROM AIRCRAFT - WHEN PERMITTED - REGULATED BY COMMISSIONER - BOND - WHEN REQUIRED, AMOUNT AND FORFEITURE. Repealed by S.L. 1967, ch. 175, section 2."

As you will note, the commissioner's order, Xerox copy enclosed, exercised authority given in section 20-01-08 by closing certain counties to such aerial hunting. Repeal of the statute does away with the authority exercised in this regard.

We are not aware of any authority given any other body to exercise a similar power to close or open certain counties to such hunting.

We note also the provisions of section 20-01-04 of the 1967 Supplement to the North Dakota Century Code providing:

UNAUTHORIZED METHODS OF TAKING GAME BIRDS AND GAME ANIMALS. Except as otherwise provided in this title, no person, for the purpose of catching, taking, killing, or raising any game birds or game animals shall:

* * *

5. Discharge any firearm while in or on a motor vehicle."

Insofar as this statute refers specifically to methods of taking game birds and game animals, it would be difficult to apply same to animals not falling within the definition of game animals, as set out in the statutes previously quoted.

Under current statutes it would thus appear that certain aspects of aerial hunting are not forbidden by statutory provision; on the other hand, same is not, as provided in prior statutes, either authorized by statute or permitted by statute. Hunting of "game birds" and "game animals" from aircraft in flight is specifically prohibited.

We do note with interest the fact that section 20-01-15 of the North Dakota Century Code permits posting by landowners of notice that no hunting will be permitted on their land without designating whether such hunting be of game animals or birds or nongame animals or birds, though the prohibition of hunting on posted lands contained in section 20-01-17 of the North Dakota Century Code relates to hunting of "game" and "protected fur-bearing animals." We note further that

section 20-01-18 of the North Dakota Century Code, relating to commissioner and wardens need not enforce laws governing hunting on private premises, has been repealed. While such repeal does not establish a legislative mandate requiring the commissioner and wardens to enforce private posting of lands, it does indicate that the Legislative Assembly apparently has no objection to cooperation by these officials in the field.

In specific answer to your questions under current state of the law it would appear that landowners, as set out in the above-quoted statutes, and on the basis of their other rights as such landowners, are the only ones with the right to close specific areas to this method of hunting. Under current legislation in this field there is no point in speculating whether in any context an airplane might be considered to be a motor vehicle as the criteria, for the determination here would appear to solely depend on whether the object intended to be hunted is or is not properly classified as a game bird or a game animal; if the object of the hunt is a "game" bird or animal aerial hunting is forbidden.

HELGI JOHANNESON

Attorney General