

**LETTER OPINION**  
**97-L-41**

April 23, 1997

Honorable Gary Nelson  
State Senator  
2970 158th Avenue SE  
Casselton, ND 58012

Dear Senator Nelson:

Thank you for your letter regarding deer depredation problems. Specifically you ask: whose responsibility is it to care for the deer; to whom do the deer belong; is the burden of caring for the deer to fall on the shoulders of the few, or is it the general responsibility of all citizens of the state; and how far can farmers and ranchers go in protecting against the destruction of their property.

I understand the importance of these problems to farmers and ranchers, especially because of the severe 1996-97 winter. In your letter you outline the concerns of farmers and ranchers about the welfare of the deer and their complaints relating to deer depredation such as deer eating or ruining livestock foodstuffs.

N.D.C.C. § 20.1-01-03 provides:

The ownership of and title to all wildlife within this state is in the state for the purpose of regulating the enjoyment, use, possession, disposition, and conservation thereof, and for maintaining action for damages as herein provided. Any person catching, killing, taking, trapping, or possessing any wildlife protected by law at any time or in any manner is deemed to have consented that the title thereto remains in this state for the purpose of regulating the taking, use, possession, and disposition thereof. The state, through the office of attorney general, may institute and maintain any action for damages against any person who unlawfully causes, or has caused within this state, the death, destruction, or injury of wildlife, except as may be authorized by law. The state has a property interest in all protected wildlife. This interest supports a civil action for damages for the unlawful destruction of wildlife by willful or grossly negligent act or omission. The director shall adopt by rule a schedule of monetary values of various species of wildlife, the values to represent the replacement costs of the wildlife and the value lost to the state due to the destruction or injury of the species, together with other material elements of value. In any action brought under this section, the schedule constitutes the measure of recovery for the wildlife killed or destroyed. The funds recovered must be deposited

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in the general fund, and devoted to the propagation and protection of desirable species of wildlife.

The state's ownership interests are thereby limited to "regulating the enjoyment, use, possession, disposition, and conservation" of wildlife and to "maintaining action for damages" for the "willful or grossly negligent" destruction of wildlife.

The primary method by which the state regulates wildlife population, including deer, is through the governor's proclamations which prescribe in what manner species of wildlife may be taken, in what numbers they may be taken, and in what places and times they may be taken and possessed pursuant to N.D.C.C. § 20.1-08-04. In trying to prevent crop damage or loss due to depredation, the Game and Fish Department has limited authority to:

1. Develop programs to alleviate depredations caused by big game animals pursuant to N.D.C.C. § 20.1-02-05(19)(c).<sup>1</sup>
2. Develop food plots "to further farmer-sportsmen relations and to enhance small and big game habitat" pursuant to N.D.C.C. § 20.1-02-16.3.

Nothing in the law allows Game and Fish to control the individual movements of wild big game animals or makes the state liable for their actions and habits. Specifically, N.D.C.C. § 32-12.2-02(3) provides:

Neither the state nor a state employee may be held liable for any of the following claims:

. . .

- g. A claim resulting from any injury caused by a wild animal in its natural state.

N.D.C.C. § 32-12.2-01(2) defines injury as "personal injury, death, or property damage."

Courts have consistently upheld the authority of states to regulate, protect and conserve wildlife resources under their police powers. Geer v. State of Connecticut, 161 U.S. 519 (1896); Leger v. Louisiana Dept. of Wildlife and Fisheries, 306 So.2d 391, 394 (La. App. 1975); State v. Rathbone, 100 P.2d 86, 91 (Mont. 1940); Barrett v. State, 116 N.E. 99,

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<sup>1</sup> The Game and Fish Department has developed programs to deal with deer depredation. I encourage you to contact the Department for information about these programs.

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101 (N.Y. 1917). But no liability results from such regulation. See Platt v. Philbrick, 47 P.2d 302, 304 (Cal. 1935).<sup>2</sup>

Farmers and ranchers must comply with hunting requirements in protecting against the destruction of their property. The law currently does not allow hunting permits to be issued for depredating deer. The only hunting season is provided for in the governor's proclamation pursuant to N.D.C.C. § 20.1-08-04. North Dakota protects big game animals pursuant to N.D.C.C. § 20.1-05-02, which provides:

No person may hunt, harass, chase, pursue, take, attempt to take, possess, transport, ship, convey by common or private carrier, sell, barter, or exchange any big game animal except as provided in this title.

N.D.C.C. § 20.1-01-02 defines "big game" as "deer, moose, elk, bighorn sheep, mountain goats, and antelope." In addition, the state is allowed to bring an action for damage "for unlawful destruction of wildlife by willful or grossly negligent act or omission." N.D.C.C. § 20.1-01-03. Therefore, state statutes prohibit farmers and ranchers from killing deer unless they have received a valid hunting license during the proclaimed deer hunting season.

A statute making it unlawful to molest or disturb any wild beaver was held to be a reasonable exercise of police power under the circumstances. Barrett v. State, 116 N.E. 99 (N.Y. 1917). The court stated that wherever wild animals are protected by law, injuries to property may occur, such as the destruction of crops by deer, but that no one may complain of such incidental injuries since it rests in the discretion of the Legislature whether more good than harm is done by according protection to wild animals. Id. A statutory prohibition on the use of steel traps or other like devices was held not

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<sup>2</sup> Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988)(damage to sheep by grizzly bears not compensable); Mountain States Legal Fdn. v. Hodel, 799 F.2d 1423, 1428-29 (10th Cir. 1986) (damage to crops by wild horse herds not compensable); Sickman v. United States, 184 F.2d 616, 618 (7th Cir. 1950) (trespass of wild animals in *ferae naturae* not compensable); Bishop v. United States, 126 F. Supp. 449, 452-53 (Ct.Cl. 1954)(damage to crops by geese not compensable); Moerman v. State, 21 Cal. Rptr.2d 329, 332-334 (Cal. App. 1 Dist. 1993) (damage caused by relocated elk not compensable); Collopy v. Wildlife Commission, 625 P.2d 994, 1000 (Colo. 1981) ("Landowners unquestionably possess a cognizable property interest in their crops and residues. It does not follow, however, that mere state ownership of wild game exposes it to liability for wild-life caused crop losses."); Leger, 306 So.2d at 394-95 (La. App. 1975) (state which owned deer in its sovereign capacity was not liable to farmer for damage to his sweet potato crop); Barrett, 116 N.E. at 102 (damage caused by relocated beavers not compensable).

unconstitutional on the ground that it restrained a person from protecting crops from destruction by rabbits and other animals. Greer v. State, 150 S.E. 839 (Ga. 1929).

Several state courts have held that killing depredating wildlife in defense of one's property may be an exception to the state's regulatory authority in certain limited circumstances. See Cross v. State, 370 P.2d 371 (Wyo. 1962) and cases cited therein.<sup>3</sup> This exception has been applied only in situations where the damage was particularly great. The use of this defense is heavily restricted. Under these cases, deadly force could be used in their state only if:

1. All other remedies have been exhausted.
2. Use of force is reasonably necessary and suitable.
3. The person can only use such force and means as a reasonably prudent person would use under like circumstances.

Cotton v. State, 17 S.2d 590 (Ala. Ct. App. 1944); State v. Ward, 152 N.W. 501 (Iowa 1915); Rathbone, 100 P.2d at 92.

States which previously may have allowed this defense under special circumstances have enacted legislation which requires reporting depredation problems and working with Game and Fish or the appropriate agency for technical assistance and furnishing of materials etc., in addition to some providing for special seasons, or approval to destroy by officials or permitted individuals, after investigation. Minn. Stat. Ann. § 97A.028; Ariz. Rev. Stat. § 17-239; Ky. Rev. Stat. Ann. § 150.105; Mont. Code Ann. § 87-1-225; N.H. Rev. Stat. Ann. § 207.26; Texas Parks and Wildlife Code Ann. § 43.151; Wash. Rev. Code Ann. § 77.12.260; Wisc. Stat. Ann. § 29.59; Wyo. Stat. Ann. § 23-1-901. A statute requiring that a permit be obtained before killing depredating wildlife has been held to be constitutional. See State v. Webber, 736 P.2d 220 (Or. Ct. App. 1987).

N.D.C.C. § 20.1-07-04 allows a landowner to catch or kill any wild fur-bearing animal that is committing depredations on that person's poultry, domestic animals, or crops. N.D.C.C. § 20.1-01-02(12) defines fur-bearing animals to include "mink, muskrats, weasels, wolverines, otters, martens, fishers, kit or swift foxes, beavers, raccoons, badgers, wolves, coyotes, bobcats, lynx, mountain lions, black bears, and red or gray fox." Deer, however, are defined as big game animals rather than fur-bearing animals. N.D.C.C. § 20.1-01-02(4).

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<sup>3</sup> The United State Constitution does not protect the right to kill wildlife in defense of property. The Ninth Circuit has held that the U.S. Constitution does not expressly or implicitly recognize a right to kill wildlife in defense of property. Christy v. Hodel, 857 F.2d at 1329. See generally Mountain States Legal Foundation, 799 F.2d at 1428 (no case recognizing such a right under the U.S. Constitution).

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The illegal taking or killing of deer is a strict liability offense. State v. Falconer, 426 N.W.2d 10, 12 (N.D. 1988). In North Dakota v. Clayton Donohue, Crim. No. 1989-CR (Griggs County, July 29, 1996), the state moved to suppress all evidence relating to the defendant's argument that he had a constitutional right to protect his property as a defense to a charge of illegal taking of deer. The court ruled that no evidence of the protection of property defense was admissible because the defendant had not made use of the materials and deer depredation programs made available to him by the Game and Fish Department nor taken other reasonable steps to protect his feed supplies from the depredating deer. After the court made this ruling, the defendant entered a plea of guilty to the illegal taking of deer. The defendant did not appeal this decision. There have been other recent criminal cases involving the illegal taking of deer, including a recent case in Burleigh County in which the landowner pled guilty to the illegal killing of over two dozen deer.

Our office has represented the Game and Fish Department in two recent lawsuits in which damages were sought against the state because of damages caused by depredating deer. Both of these cases were dismissed. In the most recent of these cases, Dennis Lee Haugen v. North Dakota Game and Fish Department, Civ. No. 3855 (Griggs County, May 30, 1996), the court dismissed the case because "[u]nder current statute, there is no mechanism to provide the Plaintiff with the relief he seeks." See p. 2 of the "Memorandum Decision & Order" attached to this letter.

In summary, there is no right to kill wildlife in defense of property under the federal constitution. Some western states have recognized a right to kill wildlife in defense of property under their state constitutions, but only under extreme circumstances, and states which have recognized such a right have all enacted statutes or regulations concerning when such a right may be exercised. The North Dakota Supreme Court has never addressed the issue of whether the right to kill wildlife in defense of property exists in North Dakota.

The Game and Fish Department has developed a program to deal with deer depredation under N.D.C.C. § 20.1-02-05(19). As noted by the district court in the memorandum decision in Dennis Lee Haugen v. North Dakota Game and Fish Department attached to this letter, the underpinning of successful game management is a triad of cooperation between the Game and Fish Department, our farmers and landowners, and our sportsmen. The Game and Fish Department and the Legislature must balance these interests in a way that protects both our wildlife resources and the rights of landowners. This is, of course, a very difficult task when we have a series of severe winters as we have had the last few years.

Sincerely,

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Heidi Heitkamp  
ATTORNEY GENERAL

lgw/vkk  
Enclosure