

**N.D.A.G. Letter to Henegar (April 24, 1986)**

April 24, 1986

Mr. Dale L. Henegar  
Commissioner  
North Dakota Game & Fish  
Department  
100 North Bismarck Expressway  
Bismarck, ND 58501-5095

Dear Commissioner Henegar:

Thank you for your letter dated April 10, 1986, in which you inquire as to whether or not N.D.C.C. § 20.1-05-05 would prohibit the Governor to declare, by proclamation, an extension of the white-tailed deer hunting season to one-half hour before sunrise each day.

N.D.C.C. § 20.1-05-05 provides:

20.1-05-05. PRIMA FACIE PROOF OF HUNTING OR ATTEMPTING TO HUNT BIG GAME ANIMALS UNLAWFULLY. Proof that a person possessing a rifle, shotgun, trap, snare, artificial light, or other implement or equipment useful in the taking or hunting of big game animals was found, between sunset and sunrise, in and about territory where big game animals are frequently and usually found, shall be prima facie evidence that he was hunting big game animals contrary to law.

N.D.C.C. § 20.1-08-04(1) requires that the Governor's order or proclamation issued pursuant to N.D.C.C. Ch. 20.1-08 prescribe, as to each species of big game, at what times such big game animals may be taken and possessed.

N.D.C.C. § 20.1-01-10 provides:

20.1-01-10. HOURS FOR HUNTING GAME BIRDS AND PROTECTED ANIMALS -- PENALTY. No person during the time elapsing between actual sunset of one day and one-half hour before sunrise of the next day, shall hunt, pursue, catch, shoot at, or in any manner molest any game bird or protected animal in this state. This section does not apply to the trapping of furbearing animals by the holder of a lawfully issued trapping license, nor to the taking of raccoon as permitted by section 20.1-01-08. The hours and manner of hunting upland game birds and protected animals may be restricted further by gubernatorial proclamation issued pursuant to chapter 20.1-08. Any person who violates this section is guilty of a class 1 noncriminal offense.

Pursuant to N.D.C.C. § 20.1-01-10, the North Dakota Legislature has prohibited hunting of protected animals between sunset and one-half hour before sunrise of the following day. The Governor's proclamation issued pursuant to N.D.C.C. Ch. 20.1-08 may restrict those hours. Based upon these statutory provisions, the Governor, by proclamation, may declare the big game season for white-tailed deer to commence one-half hour before sunrise.

Your specific concern is whether or not N.D.C.C. § 20.1-05-05 would prohibit the Governor, by proclamation, from declaring the time for hunting such animals to be authorized at one-half hour before sunrise.

I do not find N.D.C.C. § 20.1-05-05 to prohibit the Governor from authorizing hunting of white-tailed deer one-half hour before sunrise in his proclamation.

N.D.C.C. § 20.1-05-05 sets forth a rule of evidence which may be utilized in the prosecution of violators of the game and fish laws. Should a person be found in possession of the listed hunting equipment between sunset and sunrise, such possession will be "prima facie evidence" that such person was hunting big game animals "contrary to law." This statute does not limit the hunting of big game animals only between sunrise and sunset. It merely sets forth a rule of evidence which may be applied at the trial of an alleged violator of the game and fish laws.

"Prima facie evidence" is evidence which is competent and sufficient to justify a jury in finding a defendant guilty, provided that it does, in fact, satisfy the jurors of the defendant's guilt beyond a reasonable doubt. State v. Momberg, 103 N.W. 566 (N.D. 1905). Although this is not a conclusive presumption of the defendant's guilt, this statute does provide a basis for the conviction of a defendant, so long as the evidence proves the defendant's guilt beyond a reasonable doubt, absent contrary evidence presented by a defendant at his trial.

By its specific terms, N.D.C.C. § 20.1-05-05 is an aid in proof that the defendant was hunting big game animals "contrary to law." If the Governor has, in his proclamation, authorized the hunting of big game animals to commence each hunting day at one-half hour before sunrise, hunting during that period of time would be in accordance with law. The Governor's order and proclamation has the force of law. N.D.C.C. § 20.1-08-01. Possession of hunting equipment in an area where big game animals can be found between 30 minutes before sunrise and sunrise would be a legal activity and N.D.C.C. § 20.1-05-05 would have no application to that action of the hunter. If a person hunts big game animals in accordance with the Governor's proclamation, he is guilty of no offense, cannot be cited or arrested, and his conduct is lawful. N.D.C.C. § 20.1-05-05 would have application only in those instances when a person has been cited for a violation of the game and fish laws or the Governor's order or proclamation.

N.D.C.C. § 20.1-05-05 does not have to be changed by the North Dakota Legislature before hunting can be permitted one-half hour before sunrise. I would suggest, however,

that at the next legislative session, this statutory provision be amended to be in accordance with the provisions of N.D.C.C. § 20.1-01-10 which authorizes hunting of protected animals one-half hour before sunrise. N.D.C.C. § 20.1-05-05 could certainly be amended to read: ". . . between sunset and one-half hour before sunrise or such other time as prescribed in an order or proclamation issued pursuant to N.D.C.C. Ch. 20.1-08."

I hope that this letter is an adequate response to your inquiry.

Sincerely,

Nicholas J. Spaeth

ja