

Opinion No. 47-4974

January 8, 1947

BY: C. C. McCULLOH, Attorney General

TO: Mr. Elliott S. Barker, State Game Warden, Santa Fe, New Mexico

{*2} This will acknowledge receipt of your letter of recent date in which you request the opinion of this office as to whether a deputy game warden has authority to enter upon private land, without a warrant, for the purpose of looking out for game interest on such land and patrolling {*3} such areas to determine whether or not game is being taken illegally.

Section 43-224 of the 1941 Compilation provides as follows:

"The warden and every deputy warden throughout the state, and every sheriff and constable in his respective county, are authorized and required to enforce this act and seize any game or fish taken or held in violation of this act, and he shall have full power and authority, and it shall be the duty of every such officer, with or without warrant, to arrest any person whom he knows to be guilty of a violation hereof; and it shall also be the duty of such officer to open, enter and examine all camps, wagons, cars, stages, tents, packs, warehouses, stores, outhouses, stables, houses, barns and other places, boxes, barrels and packages where he has reason to believe any game or fish taken or held in violation of this act is to be found, and to seize the same. Any warrant for the arrest of a person shall be issued upon sworn complaint, the same as in any other criminal cases, and any search warrant shall issue upon a written showing of probable cause supported by oath or affirmation, describing the place or places to be searched or the persons or things to be seized."

By Section 43-111 of the 1941 Compilation, the State Game Commission is authorized and directed to make rules and regulations and to perform all other acts relating to game and fish and the carrying out of the purposes of the fish and game laws. This last section gives the State Game Commission broad powers in enforcing fish and game regulations.

There is no question that the ownership of game is in the state in its sovereign capacity (38 C.J.S. p. 3, Sec. 3); nor is there any question that the owner of land cannot kill wild game except in accordance with the game and fish laws of this state (24 Am. Jur. p. 374, Sec. 3.) State ex rel Sefico v. Heffernan, 41 N.M. 219, 67 P. (2d) 240.

It is also established that the state has power to enact such regulations as are necessary for the protection of the public right in game.

In 38 C.J.S., Sec. 7, page 5, the rule is stated as follows:

"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."

It should be noted, however, that game statutes must conform to constitutional limitations; in 38 C.J.S.. Sec. 8, p. 7, this rule is stated as follows:

"Statutes for the protection of game and regulating the right of taking it must, of course, come within the limitations imposed by the state and federal constitution, and are generally upheld on the ground of the police power of the state."

The particular constitutional provision which is pertinent to a determination of the question is Section 10, Article II of the New Mexico Constitution which provides that:

"The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause supported by oath or affirmation."

This constitutional provision has been strictly construed as a personal {4} guaranty against unreasonable searches and seizures of the persons, papers, homes and effects of the people of the State of New Mexico.

The question naturally arises as to whether or not the patrolling and enforcement of game laws on private land is an unreasonable search.

State courts have held that constitutional provisions similar to the New Mexico constitutional provisions against unreasonable search and seizure does not apply to open fields, canyons, pasture or waste places remote from human habitation, and that, consequently, the search could be made without a warrant. *State v. Evans*, 143 Ore. 603, 22 P. (2d) 496; *State v. Ladue*, 73 Mont. 535, 237 P. 495; *State v. Arnold*, 84 Mont. 348, 275 P. 757. See also 27 A.L.R. 732; 39 A.L.R. 828.

The provision of the Federal Constitution against unreasonable searches and seizures (4th Amendment) is almost identical with the unreasonable search and seizure provisions of the New Mexico Constitution (Sec. 10, Art. I), and the Federal Courts have held that a search of open fields does not come within the prohibition of the amendment. *Gracie v. U. S.*, 15 F. (2d) 644, Certiorari denied, 273 U.S. 748; 71 L. Ed. 872.

In view of the provisions of Sec. 43-224 of the New Mexico 1941 Compilation, which requires deputy game wardens to enforce the game laws, and in view of the statements of the general law on the matter and of the text of decided cases, it is my opinion that a

deputy game warden has authority to enter upon private land without a warrant, for the purpose of looking out for game interest on such lands and patrolling such areas to determine whether or not game is being taken illegally.

By: WILLIAM R. FEDERICI,

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