

Opinion No. 58-194

September 23, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F Pyatt, Assistant Attorney General

TO: Honorable Levi L. Turner, Member, House of Representatives, Colfax County, Raton, New Mexico

QUESTION

QUESTIONS

1. May the lessee of state land post the same against hunting and fishing?
2. If an owner of private land posts the same against hunting and fishing, does this automatically deprive the said owner of these activities?
3. What is the procedure for legal posting?

CONCLUSIONS

1. Yes, but not in conflict with any lawful action taken by the Commissioner of Public Lands.
2. No.
3. See Opinion.

OPINION

ANALYSIS

Throughout this opinion, we have assumed you have reference to posting under Sec. 53-4-5, providing:

"Whenever the owner or lessee within any enclosure or pasture in the state of New Mexico shall desire to protect or propagate game birds animals, or fish within said enclosure or pasture he shall publish notices in both English and Spanish, warning all persons not to hunt or fish within said enclosure or pasture, which notices shall be by hand bills posted in at least six (6) conspicuous places on said premises, and by publication for three (3) consecutive weeks in some newspaper of general circulation in the county wherein said premises are situated. After the publication and posting of such notices it shall be unlawful for any person to enter upon said premises or enclosure for the purpose of hunting or fishing, or to kill or injure any birds, animal or fish within such

enclosure or pasture at any time without the permission of such owner or lessee, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars (\$ 50.00) nor more than one hundred dollars (\$ 100.00) or by imprisonment for not less than thirty (30) days nor more than sixty (60) days, or by both such fine and imprisonment in the discretion of the court."

which, as you will observe, accords the right to owners as well as lessees.

In Opinion of the Attorney General No. 818, rendered October 17, 1934, the Honorable E. K. Neumann held that a lessee of state land, under what is now 53-4-5, could post the same against hunting and fishing, since the statute contained no exception. With this general proposition, we are in accord.

Your attention is respectfully directed to opinion of the Attorney General No. 57-237, dated September 24, 1957, wherein we held 53-4-5 can only be made operative as to tracts of land which **are enclosed**. This we did in part because of the very strict construction placed by the Court on the statute in **State v. Barnett**, 56 N.M. 495 245 P. 2d 833, the Court saying:

"While the owner of land may prohibit one from hunting wild game thereon, such hunting is not a criminal offense except as made so by statute. By virtue of the posting statute above set out it is provided after the publication and posting of the notices it is then an offense punishable by a substantial fine or jail sentence or both, for one to hunt on such land without the consent of the owner. In other words, by publishing a notice in English and Spanish, and the posting of handbills, in English and Spanish in six conspicuous places on the premises, the owner puts in effect on his property a penal statute which protects him against trespassers and, in practical effect, **makes the game on his land his own, subject to the game laws and regulations of State Game Commission.**

(3) We are committed to the doctrine that criminal statutes must be strictly construed. *State v. Armijo*, 19 N.M. 345, 142 P. 1126; *State v. Couch*, 52 N.M. 127, 193 P. 2d 405. Such is also the rule of the common law. There is more reason for the rule here where a private citizen may, at his option put in force a criminal statute on his land. Reason dictates that when he is granted such privilege he must strictly follow the statutory prerequisites to bring the statute into play." (Emphasis supplied)

Assuming, however, full and strict compliance with 53-4-5, as interpreted, we do not hold that a lessee of state land could, in all cases, post under the statute. Sec. 53-4-5, insofar as this problem is concerned, must be read in the light of the peculiar nature of the land involved. It must be borne in mind that under the Enabling Act, our Constitution, and statutes based thereon, the complete dominion and control over state lands is vested in the Commissioner of Public Lands. See **Burguete v. del Curto**, 49 N.M. 292, 163 P. 2d 257, and authorities therein cited. In short, the lessee of state lands, even if he acts strictly in accordance with 53-4-5, could not do so in a manner in conflict with a duly taken action of the Commissioner. Any other interpretation could cause 53-4-5 to

clash with the organic law. Any such interpretation must be avoided when possible.
State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P. 2d 205.

In conclusion as to your first question, we give an affirmative answer so long as the posting would not in any way be at variance to any lawful action of the Commissioner of Public Lands.

Your second question involves private land. You ask if posting is duly accomplished, does the land-owner thereby deprive himself of hunting and fishing privileges on these lands? Referring to the emphasized language from the **Barnett** opinion above, we think the answer is in the negative. The owner, or those permitted by him to do so, could still hunt or fish so long as done in accordance with the game and fish laws and lawful game fish regulations.

Turning to your third question, the procedure for publication is self-contained in 53-4-5, quoted in full by us. It must be strictly followed.