



STATE OF KANSAS

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August 30, 1979

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ATTORNEY GENERAL OPINION NO. 79-196

Mr. Fred Warders
Assistant Director
Kansas Fish and Game Commission
Box 54A, Rural Route 2
Pratt, Kansas 67124

Re: Forestry, Fish and Game--Fish and Game--Sale and
Shipment of Fur-Bearing Animals, their hides,
pelts or furs

Synopsis: In accordance with long-standing administrative interpretations of the Kansas Fish and Game Commission, K.S.A. 1978 Supp. 32-104 must be construed to permit a nonresident to legally sell furs, regardless of where legally taken, to a licensed Kansas fur dealer, provided said nonresident is in possession of a trapping license issued to such person by his state or residency.

* * *

Dear Mr. Warders:

You request our opinion on the position of the Fish and Game Commission, which position has been adhered to for the past twenty-five years, that it is permissible for nonresidents to sell furs in Kansas, regardless of where legally taken, provided they are in possession of a trapping license issued by their respective state of residency.

K.S.A. 1978 Supp. 32-104 provides, in part, that "[i]t shall be unlawful for any person or persons to sell or ship or offer for sale or shipment any fur-bearing animals or hides,

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pelts or furs without first having in his or her possession a trapping license issued to such person for the calendar year." K.S.A. 1978 Supp. 32-104a provides, in part, that "it shall be unlawful for any nonresident to trap in Kansas."

It should first be noted that the construction placed upon the above statutes by the Kansas Fish and Game Commission, with the apparent acquiescence of the legislature as well as those affected thereby over a period of twenty-five years, should be given great weight, and may even be entitled to controlling significance. Cities Service Gas Co. v. State Corporation Commission, 192 Kan. 707, 714 (1964). In this regard, we are unable to state that the Commission's construction of K.S.A. 1978 Supp. 32-104 as requiring only a trapping license from the person's state of residency in order to legally sell or ship fur-bearing animals or their hides is clearly erroneous. This is particularly true where the alternate construction, i.e., that the legislature intended to restrict the privilege of sale or shipment to those possessing Kansas trapping licenses, possibly would violate the Commerce Clause of the United States Constitution, as discussed below.

It is generally held that statutes or regulations regarding the possession, transportation, or sale within a state of fish or game taken outside of the state are a valid exercise of the police power and are not unconstitutional as an interference with foreign or interstate commerce. 92 A.L.R. 1267. The basis for such holding is that wild game belongs to the state in its sovereign capacity in trust for the whole public, and that any right of property acquired therein by capture and possession is a qualified right only, and subject to all reasonable limitations imposed for the protection and preservation of such game. Id. As noted in one case, fish and game taken within the jurisdiction of a state and those taken without the state are indistinguishable, and statutes restricting the transportation of fish and game into the state tend to effectuate the policy of a state by rendering evasion of its fish and game laws less easy. Bayside Fish Flour Company v. Gentry, 297 U.S. 422 (1935).

There is also federal statutory authority which empowers states to control the importation of wild animals or parts thereof. 16 U.S.C.A. §667e, a part of the Lacey Act, provides as follows:

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"All dead bodies, or parts thereof, of any foreign game animals, or game or song birds the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Despite the Lacey Act and the authorities cited above, it remains doubtful whether a state may absolutely forbid the importation of fish and game from other states. As stated in 35 Am Jur.2d Fish and Game §42:

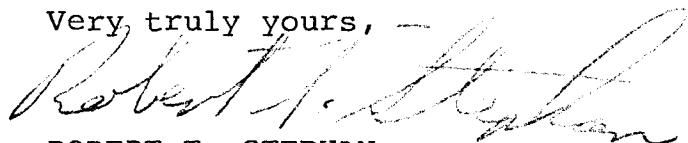
"While it may be that the state has no authority absolutely to forbid the importation of fish from other states, it may, as a means for the effective enforcement of its own statutes, forbid the sale or possession of fish for sale within the state during a closed season, even though the effect of such legislation is to prohibit the sale of fish imported from other states."

A construction of K.S.A. 1978 Supp. 32-104 and K.S.A. 1978 Supp. 32-104a which would prohibit nonresidents from selling or shipping fur-bearing animals or their hides, pelts or furs would clearly prevent importation of such fur-bearing animals or their parts, even during an open season in the State of Kansas. A statute should, if reasonably possible, be so construed as to uphold its constitutionality. Addington v. State, 199 Kan. 554, 559 (1967). In light of the doubtful validity of such a construction

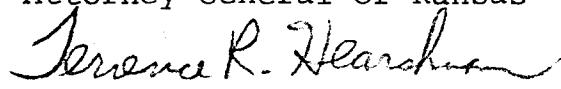
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under the Commerce Clause, as discussed above, and the long-standing administrative interpretation to the contrary, it is our opinion that a nonresident possessing a trapping license issued by his state of residency may sell furs in the State of Kansas.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm