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ATTORNEY GENERAL OPINION NO. 80-251

Mr. Richard G. Oliver
Wilson County Attorney
Wilson County Courthouse, Room 201
Fredonia, Kansas 66736

Re: Forestry, Fish and Game--Fish and Game--Killing of Deer in Defense of Property

Synopsis: A qualified right to protect property emanates from §18 of the Bill of Rights of the Kansas Constitution. Such a right is an affirmative defense which may be raised by a defendant charged with the unlawful killing of a deer. However, in order to justify the killing of a deer out of season or contrary to law, there must be substantial injury to property, and the landowner should present evidence that he has exhausted other remedies provided by law. Additionally, the burden will rest upon the property owner to demonstrate that the killing was, in all respects, reasonable.

The qualified right to protect property from damage by game animals does not authorize a property owner to take possession of a deer killed in defense of property. Cited herein: K.S.A. 1979 Supp. 32-104, 32-104b, K.S.A. 32-107, 32-110a, K.S.A. 1979 Supp. 32-156, 32-158, 32-164, 32-178, 32-179, K.S.A. 32-212, K.S.A. 76-459; Kan. Const., Bill of Rights §18; K.A.R. 23-2-5 and 23-2-7.

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Dear Mr. Oliver:

You request our opinion as to whether a landowner may legally kill a deer in defense of his property (growing crops). Although this question previously has been addressed by this office in Attorney General Opinion No. 64-20, we believe that a more thorough discussion of the subject is justified, particularly in light of later statutory enactments and amendments.

At the outset, it should be noted that there is no statutory provision which specifically authorizes the killing of a deer in defense of property. Deer are declared to be "game animals" in the state of Kansas, and it is unlawful to kill such animals "at any time or by any means or manner or in any number unless and except as permitted by regulations made and adopted by" the Kansas Fish and Game Commission. K.S.A. 32-110a. The legislature has declared that it is the policy of the state to "protect and propagate" game animals of the state, K.S.A. 32-212, and that the title to all wild animals (not held by private ownership, legally acquired) shall be in the state of Kansas. K.S.A. 32-107. These statutory provisions are merely recognition of the common law principle that wild game within a state belong to the people in their collective sovereign capacity, and that the right to reduce wild animals to possession is subject to the control of the law-giving power. See Geer v. Connecticut, 161 U.S. 519 (1896); State v. McCullagh, 96 Kan. 786 (1915).

Other state statutory provisions establish, somewhat repetitiously, state control over the hunting of wild animals, in general, and the killing of deer, in particular. K.S.A. 1979 Supp. 32-104 provides that no person shall hunt, shoot, kill, molest, or take any game animal without having in his or her possession a license issued to himself or herself for the calendar year in which the hunting is done. K.S.A. 1979 Supp. 32-104b specifies that the owner of any land (or his or her immediate family domiciled with him or her) may hunt on such land without a license. K.S.A. 1979 Supp. 32-156 provides, in part, that:

> "It shall be lawful for any person holding a valid state hunting license, or person exempt from having a hunting license, and during the proper legal open season, to hunt and kill wild game animals . . . with a gun not larger than a ten gauge; except deer . . . which can be hunted, killed and taken only by such means and in such manner as permitted by [fish and game] commission rule and regulation."

Pursuant to K.S.A. 1979 Supp. 32-164, the Kansas Fish and Game Commission may, under certain conditions, establish by regulation "open seasons" in which game animals may be hunted and killed, and may also establish the number of game animals that may be taken, killed, or possessed as the legal bag limit for any one calendar day and for the open season. K.S.A. 1979 Supp. 32-178 grants regulatory authority to the Fish and Game Commission in relation to "deer seasons" and provides, in part, as follows:

> "The forestry, fish and game commission, after giving consideration to the number of deer . . . in the state and the conditions affecting the same and after determining that the same may be taken in limited numbers without jeopardizing the future supply, may by regulation open a season, in the state of Kansas or in any part or area of the state . . . for the pursuing, hunting and taking of deer . . . ."
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> "Further, the commission is authorized to and shall establish by regulation the legal means and manner for the taking of deer . . . and the number of the same which can be legally taken and possessed, and shall limit by regulation and permit the number of persons who are privileged to pursue, hunt, and take such game in any area opened to such hunting."

Pursuant to K.S.A. 1979 Supp. 32-179, the Fish and Game Commission is authorized to issue (to persons holding valid state hunting licenses) special permits and game tags pertaining to the hunting, taking, and possessing of deer. The permits and tags are to be issued "only in such number as the commission deems advisable considering the number of game and the conditions affecting the same," and fifty percent of such permits and tags must be issued to resident owners and resident tenants of farm lands, with the remaining fifty percent going to residents of the state of Kansas not applying for a landowner-tenant permit. The statute further requires that the permit state the number and sex of deer which may be killed by the permittee, and states that the permit must be in possession of the permittee while hunting and the same must be shown to any sheriff, deputy sheriff or state game protector upon demand. With regard to any deer killed, the statute provides as follows:

> "The permittee shall permanently affix the game tag to the carcass of any such game immediately after killing and thereafter, if required by rules and regulations adopted by the fish and game commission, the permittee shall immediately take such killed game to a check station designated in the regulation where a check station tag shall be affixed to the game carcass if the kill is legal. The tags shall remain affixed until the carcass is consumed or processed for storage, and it shall be unlawful for any person to possess a carcass of a deer . . . taken in Kansas, without a game tag attached to the same, and without a check station tag attached to the same if required and provided by the commission." (Emphasis added.)

Pursuant to the regulatory authority granted by K.S.A. 1979 Supp. 32-178 and 32-179, the Fish and Game Commission has adopted regulations (K.A.R. 23-2-5 and 23-2-7) which provide for archery and firearm deer seasons. K.A.R. 23-2-7 imposes bag limits for firearm permittees and prescribes boundaries of the various deer management units for which permits are granted. K.A.R. 23-2-5 enumerates the season dates, bag limits for archery permittees, legal equipment, and procedures for applying for permits. The last-cited regulation also imposes the following conditions-precedent to the lawful possession of a deer carcass:

> "Permittees must have in their possession a carcass tag whenever hunting deer. The carcass tag shall be dated and signed by the successful permittee and shall be permanently affixed to the hock of the carcass. The legal definition of a "processed deer" is a deer that has been cut up and wrapped for freezer storage and human consumption. Any deer meat in possession must be accompanied by a permit, carcass tag, or accidental deer kill tag furnished by the fish and game commission. In the event legally acquired deer meat is given to another, either the permit, carcass tag or accidental deer kill tag must accompany such meat, or a written notice must accompany the meat which shall include the donor's name, address and permit, carcass tag, or accidental deer kill tag number. The hunter will not have legal possession of the deer carcass until it is properly and securely tagged."

The foregoing statutory and regulatory provisions evince a clear legislative scheme to restrict the killing of deer, except in accordance with such provisions; and as is stated above, we are unaware of any specific statutory or regulatory provision which permits the killing of deer in defense of property. However, the legislature has recognized the problem of destruction of property by wild animals in some respects. The material destruction of property and insufficiency of the "natural food supply" are conditions which the Fish and Game Commission must consider in establishing open seasons and bag limits for game animals. K.S.A. 1979 Supp. 32-164. Further, K.S.A. 1979 Supp. 32-158 specifies that the protection afforded to furbearing animals "shall not prevent owners or legal occupants of land from killing any animals found in or near buildings on their premises, or when destroying property." Pursuant to K.S.A. 1979 Supp. 32-156, certain wild birds which have become "destructive to property or growing crops" may be exterminated. Finally, the legislature has established a statewide educational program for the control of damage caused by wildlife, which program provides instruction to farmers and ranchers in effective methods of controlling damage caused by wildlife, and supplies materials (at cost) to individuals for use in damage control. K.S.A. 76-459 et seq.

Although there is no statutory or regulatory provision which permits the killing of deer in defense of property, it is our opinion that a qualified right to protect property emanates from §18 of the Bill of Rights of the Kansas Constitution, which section provides as follows:

> "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

As the above-quoted section indicates, all persons shall have a remedy, by due course of law, for "injuries suffered in property." In our judgment, the constitutional right to a remedy for "injuries" or damage to property implies a qualified right to protect property. Such an implication was drawn by the Supreme Court of Wyoming in the construction given to the "due process" clause of that state's constitution. Cross v. State, 370 P.2d 371 (Wyoming, 1962).

The extent of the qualified right to protect property from damage by game animals has not been considered by the appellate courts of this state. However, the issue has been adjudicated in several states other than Kansas, and a review of those cases reveals that the right is subject to certain restrictions and limitations.

In State v. Ward, 152 N.W. 501 (Iowa, 1915), a large herd of deer, consisting of 150 to 200 animals, were utilizing Pottawattamie County, Iowa, for herding and living purposes. No ordinary, lawful fence was sufficient to keep the herd off farms, and the deer roamed at will, eating such crops as they liked. For many years, these deer had "eaten up or trampled down more or less of defendant's standing grain," and the defendant had driven them away many times. However, they always returned, and had destroyed his crops "to the amount of hundreds of dollars."

The defendant shot a deer while it was "eating fodder" on his property. He claimed that he was acting to protect the property, but the trial court found him guilty of unlawfully killing a deer.

On appeal, the Supreme Court of Iowa reversed the conviction. The court noted that the deer was actually engaged in the destruction of defendant's property at the time of the killing, and stated as follows:

> "The right of defense of person and property is a constitutional right (Art. 1, §1, Const. Iowa), and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing." 152 N.W. at 502. (Emphasis added.)

In State v. Burk, 195 Pac. 16 (Washington, 1921), the defendant was charged with unlawfully killing an elk. A herd of elk had killed one calf and severely injured another in past incidents on the defendant's property, and the defendant had driven a herd of elk off his property on three occasions on the night of the killing. When the elk was shot, the herd was running through the defendant's corn field and potato patch, "knocking down and trampling upon the crops." The court, citing State v. Ward, supra, held as follows:

> "The reasonable necessity rule is the one which must control in a case of this character. Doubtless, circumstances might arise where the court might be justified in holding, as a matter of law, that the testimony failed to show such reasonable necessity, such as killing of elk solely because of past damages done by them, or because of a simple trespass without any material damage done or reasonably threatened. But here, according to the testimony offered, these same elk

> had recently several times been trespassing, and had done actual and material damage; several times appellant had driven them from his premises. At the time he shot, they were in his corn, eating it and knocking it down, and trampling on his other crops. It cannot be said that this testimony was, as a matter of law, insufficient. It was for the jury to determine its sufficiency." 195 Pac. at 10.

The court also stated that "a stronger showing would have to be made by one undertaking to justify his violation of the law in defense of his property, than he would be required to make in defense of his life." Id.

In State v. Urban, 245 N.W. 474 (S. Dakota, 1932), the defendant was charged with shooting a pheasant out of season. The court, citing the Burk and Ward cases, supra, stated as follows:

> "Certainly even if it be assumed that a killing reasonably necessary to defense of property is justifiable, nevertheless it is not every trifling, casual, occasional, or technical destruction of property which would justify respondent in taking the matter into his own hands and violating the statutes of this state upon the theory that he was justified in so doing by a constitutional right of protection of property." 245 N.W. at 476.

In Maitland v. People, 23 Pac. 116 (Colorado, 1933), the constitutionality of statutes creating "deer refuges" was considered. The court stated that " whenever legislative protection is accorded game, some harm usually is done to some person as an incident to such protection," but that "such incidental injuries are not sufficient to render the protecting statute unconstitutional."

In Cook v. State, 74 P.2d 199 (Washington, 1937), it was held that the state "has the absolute right to maintain its game and wild animals upon any and all private lands, and in that act there is no element of trespass or taking." 74 P.2d at 201.

In State v. Rathbone, 100 P.2d 86 (Montana, 1940), the defendant was charged with killing an elk out of season. The evidence showed serious and substantial damage to the defendant's ranch, amounting to at least $2,250 per year. At times, the defendant had counted as many as 350 elk feeding and grazing on his 4,000 acre ranch.

The migrating herd of elk was believed to consist of 2,200 to 3,000 animals. The court described the damage suffered by the defendant as follows:

> "The principal items of damage are consumption of pasture and other forage reserved for livestock, injury to the turf curtailing the productiveness of hay and other natural grasses growing on the ranch lands, serious and costly destruction of fences caused by the attempts of the elk to jump over the fences and either becoming entangled in the wires or breaking through them. Also, serious damage has resulted annually in that the presence of the elk interferes materially with normal ranching operations since they constantly threaten to destroy necessary reserves of winter and spring feed for domestic animals, their presence makes it necessary to interfere with the normal work of the ranch in order to drive them away, damage to the fences requires interruption of ranching operations, and, finally, the disturbance caused by the elk themselves and driving them off the ranch excites domestic livestock which are injuriously affected thereby." 100 P.2d at 89.

The court noted that it was impossible to keep the elk away by fencing, and that the cost of patrols to drive them away would be prohibitive. It also was conceded that the defendant had "attempted to obtain relief from the invasions of elk by peaceful means and without resort to force" by making numerous complaints and protests to the state fish and game commission, but such complaints did not result in any alleviation of the problem.

In discussing the defense of justified protection of property, the court stated that "a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse." 100 P.2d at 93. It was held that defendant had made a sufficient showing to make the question of justification one for the jury,

> "subject to the rule that before the defendant can resort to force in protecting his property from wild animals, (1) he must have exhausted all other remedies provided by law; (2) the use of such force must be reasonably necessary and suitable to protect his property; and (3) he must use only such force and means as a reasonably prudent man would use under like circumstances." 100 P.2d at 93.

It was also stated that "each case must be decided on its particular facts," and that the question of sufficiency of justification, as well as its truth or falsity, is for a jury to determine. 100 P.2d at 93, 95.

In Cross v. State, supra, the defendant was charged with unlawfully shooting two moose. He admitted killing the moose out of season and at a time when he did not possess a license or permit, but alleged that the killing was done in defense of property. A migrating herd of moose, which herd consisted of 125 to 200 animals, followed natural water courses on to defendant's land each year. They grazed on defendant's land during winter months, and returned whenever they were driven away. The damages suffered by defendant were of the same character as those described in State v. Rathbone, supra, and ranged annually from $1,500 to $4,000.

The defendant had, for many years, sought the assistance of the state fish and game department in controlling the problem. He had also expended considerable sums of money in hiring "riders" and airplanes to drive away the moose. All the efforts were unsuccessful.

The court cited with approval the Rathbone case, supra, and stated that "all the cases agree" that before wild game may be killed, it must be reasonably necessary to protect one's property. The court also approved the holding of Rathbone that a court will not "undertake to state under what particular facts a killing of a wild animal would be justified," and stated that "before a defendant can resort to force in protecting his property from wild animals protected by law he should use every remedy available to him before killing such animals." 370 P.2d at 379. Considering the stipulated facts of the case at the bar, the court reversed the judgment against the defendant and directed the complaint be dismissed.

Finally, in another case involving the killing of wild game in defense of property, State v. State Fish and Game Commission, 438 P.2d 663 (Montana, 1968), it was held that the protection of property does not justify a killing where there is no material damage. The court stated that evidence of "a few tufts of grass eaten and a small amount of pawing in a swampy area" does not constitute material damage. The court quoted with approval 38 C.J.S. Game §10, as follows:

> "However, the injury to property by wild animals must be of considerable extent to warrant killing out of season or contrary to law; a mere trespass is insufficient."

The court also noted that no one may complain of incidental injuries that may result from state protection of wild animals. 438 P.2d at 667.

As the above-cited authorities indicate, there must be substantial injury to property to justify a killing out of season or contrary to law. Although the question of sufficiency of justification is, in most cases, for a trier of fact to determine, it is clear that a mere trespass or trifling destruction of property will be insufficient. Additionally, as the Rathbone case, supra, indicates, a landowner may use only "reasonable force" after exhausting other remedies provided by law. In this state, such remedies would include seeking the assistance of Fish and Game personnel and state extension specialists in wildlife damage control. See K.S.A. 76-459 et seq.

Finally, it should be recognized that the qualified right to protect property from damage by game animals does not authorize a property owner to take possession of a deer killed in defense of property. Neither the statutes of this state (see K.S.A. 1979 Supp. 32-179 and K.S.A. 32-110a, above) nor the regulations of the Kansas Fish and Game Commission (see K.A.R. 23-2-5, above) provide for the lawful possession of a deer killed in defense of property.

Very truly yours,

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