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Hunting, Wildlife Sanctuaries
Wildlife Sanctuaries Hunting

12 M.R.S.A. § 2101
12 M.R.S.A. § 2107

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6-12-78

TO: Maynard Marsh, Commissioner Dept. of Inland Fisheries &
Wildlife
FROM: Cabanne Howard Assistant Attorney General
SUBJ: Regulation of hunting in wildlife sanctuaries

You have asked several questions as to the extent of your powers to permit and regulate hunting in wildlife sanctuaries, as established by 12 M.R.S.A. §2101. Specifically, you have asked whether you have the authority to establish a special open season on deer in such sanctuaries; and if so, whether participation in such a season may be limited to a certain number of hunters or to residents of the town in question; whether a hunter killing a deer under such a program would be prevented from killing another deer during the regular open season; and whether an owner of land in a sanctuary may prohibit hunting on his land, notwithstanding the establishment of a special open season. Our answer to these questions are that, as Commissioner, you do have the authority to establish by regulation a program to regulate the deer population in wildlife sanctuaries, which program may include issuance of a limited number of special hunting permits. However, the issuance of such permits must not be done in an unconstitutionally discriminatory manner (such as limiting them to town residents), and would not entitle their recipients to kill more than one deer per year or to violate the trespass laws of the State by entering lands where hunting is prohibited by private owners.

To understand the basis of these conclusions, some discussion of the general statutory scheme of the Commissioner's rulemaking powers is required. Generally, under 12 M.R.S.A. §1960, the Commissioner is empowered to enact "rules necessary for the proper administration, enforcement, implementation and interpretation of any provision of law that he is charged with the duty of administering." The only exception to this power is that the Commissioner cannot alter by rule the content of any statutory

* / Since some of the statutes involved herein have been amended effective July 1, 1978, and since this opinion is being issued within a few weeks of that date, the amendments to the statutes in question will be treated as if currently in force.

provision, unless specifically authorized to do so. 1A Sutherland, Statutory Construction §31.02(1972). Thus, for example, in the case of the hunting laws, the Commissioner could not by regulation establish a moose hunting season, since the Legislature has determined by statute that there shall be a perpetual closed season on moose, 12 M.R.S.A. §2467, and there is no provision authorizing the Commissioner to alter this provision by rule. See, e.g., 12 M.R.S.A. §2552, authorizing the Commissioner to alter by rule the statutorily fixed dates for open season for fishing.

Like the hunting of moose, the hunting of deer in the State is specifically governed by statute. 12 M.R.S.A. §2353 establishes the general open season on deer for the entire State and grants the Commissioner only limited powers to shorten it. In addition, the section establishes numerous special closed and open seasons, and specifically makes it "unlawful for any person to hunt deer after he has killed and registered one during the open season of that calendar year." The Commissioner, therefore, cannot be said to have any general authority to establish additional open seasons for the hunting of deer, nor can he authorize any hunter to kill more than one in any calendar year.

The Commissioner does have special authority, however, with regard to the regulation of wildlife sanctuaries. 12 M.R.S.A. §2144 specifically empowers him to enact rules regulating the "public use" of such areas and 12 M.R.S.A. §2107 contemplates an exemption from the hunting prohibition in sanctuaries contained therein for activities authorized under Section 2155. It thus appears that, in the case of wildlife sanctuaries only, the Legislature has granted the Commissioner the power to permit the hunting and killing of wild animals, including deer, without regard to the general provisions on open and closed seasons. It would seem, therefore, that he could establish a program for the killing of deer in a particular sanctuary, provided he does so by rule, following the procedures of Subchapter II of the Administrative Procedure Act. 5 M.R.S.A. §§8051-8058.

The only general legal restriction on the content of such a rule would be that, in the words of Section 1960, it must be "reasonable." Therefore, if the rule were to be, as suggested, that a limited number of people will be permitted to hunt for a limited number of excess deer for a limited period of time, there would have to be some rational basis for each of these provisions. It would, thus, have to be demonstrated to the Commissioner's satisfaction that there was an excess number of deer in the sanctuary, and that limiting the number of hunters to be allowed to reduce the excess was a reasonable way to accomplish that objective.

This is not to say, however, that there are not other specific legal and constitutional restrictions on the content of the rule, three of which are raised by your question. First, in limiting

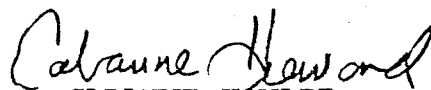
eligibility for the special permit, the Commissioner cannot employ distinctions which are without rational basis and would, therefore, violate the Equal Protection Clauses of the United States and Maine Constitutions. It would appear that limiting eligibility to residents of the town in question might run this risk, since ownership of the deer of the State is held in trust by the State for the benefit of all its people, and there is no local conservation interest which might justify the exclusion of non-residents to the town from access to the resource, as may the case, for example, with certain kinds of relatively immobile marine life. See, e.g., State v. Norton, 335 A. 2d 607, 614-15 (Me. 1975); State v. Alley, 274 A.2d 718 (Me. 1971); cf. Massey v. Apollonio, 387 F. Supp. 373 (D. Me. 1974).

Second, the existence of the power of the Commissioner to establish a special season for deer hunting in a wildlife sanctuary could not be interpreted as a grant of authority to permit a hunter to violate the rule of Section 2353 limiting him to one deer per calendar year. The reason for this is that the former power deals with the establishment of seasons, while the latter is concerned with restrictions on individual hunters; one cannot, therefore, be considered to be an exception to the other, since they deal with different things.

Finally, the establishment of a special open season in a sanctuary cannot be found to somehow abrogate a private property owner's right to prohibit trespassers, including hunters specifically, from entering upon his property, any more than the establishment of a general hunting season in Section 2353 would do so. The fact that the State regulates hunting does not mean that private landowners are obliged to permit such activity on their property any more than they are obliged to permit any otherwise lawful activity to be engaged in thereon. See generally, 35 Am. Jur. 2d, Fish and Game, §16 (1967); 38 C.J.S., Game, §4 (1943).

In short, while the Commissioner may by rule permit regulated hunting in a wildlife sanctuary, he may not exclude non-residents from the program, permit the taking of more than one deer per calendar year by any hunter, or authorize a violation of the trespass laws. I hope this satisfactorily answers your question.

Sincerely,



CABANNE HOWARD

Assistant Attorney General
Chief, Natural Resources

CH/clh