

**Opinion No. 57-237**

September 24, 1957

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

**TO:** Mr. Walter R. Kegel, District Attorney, First Judicial District, County Court House, Santa Fe, New Mexico

**QUESTION**

QUESTION

Whether a tract of land which is not enclosed by fences may be posted under the terms of § 53-4-5, N.M.S.A., 1953 Compilation, so as to subject persons who enter for the purpose of hunting and fishing to the penalties therein provided.

CONCLUSION

No.

**OPINION**

ANALYSIS

The section cited in the question is the applicable statute which requires our interpretation and which reads as follows:

"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 conspicuous places on said premises, and by publication for three 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 days nor more than sixty days, or by both such fine and imprisonment in the discretion of the court."

It is to be observed that on its face the statute apparently contemplates two types of tracts of land, to-wit, an "enclosure" or a "pasture", and which might be said to lend some credence to the proposition that the Legislature, in using the word "pasture", had in mind an unenclosed or unfenced tract. For reasons hereinafter given, however, we do not believe that such would be a correct construction of the law.

You will observe that the statute requires posting of the notice against hunting or fishing in at least six conspicuous places on property. Now if the Legislature meant pasture to mean an unenclosed pasture, it would be somewhat difficult for the hunter or fisherman, when he encountered the posted notices, to resolve in his own mind what was the particular tract of land on which the hunting or fishing was prohibited. However, if we construe the statute as requiring a fenced pasture, then by simply ascertaining the particular tract by referring to the fences around the same, the hunter or fisherman could then be in a position to ascertain the limits of the land on which he was prohibited from hunting or fishing.

While the question at hand was not decided in *State v. Barnett, et al.*, 56 N.M. 495, 245 P. 2d 833, nevertheless the Court in that case gave what is now § 53-4-5, supra, a very strict construction inasmuch as it is clearly a criminal statute. In the opinion, our Court reasoned that by publishing a notice in the Spanish and English languages and the posting of hand bills in said languages in six conspicuous places on the premises the land owner could thereby put into operation on his property a penal statute which protects him against trespassers and which would, as a practical matter, make the game on his land his own, subject, however, to the game laws and regulations of the State Game Commission. In other words, an individual merely at his option could bring the criminal statutes into play.

Bearing in mind as above noted that this statute should be given a practical and workable construction, and more importantly, bearing in mind the decision of the Court in the Barnett case that this statute must be strictly construed, we are constrained to hold that the posted tracts must be fenced or otherwise enclosed before § 53-4-5 comes into operation, and without such enclosing or fencing, the statute is inapplicable.