

Opinion No. 36-1379

June 8, 1936

BY: FRANK H. PATTON, Attorney General

TO: Mr. Elliott S. Barker, State Game Warden, Santa Fe, New Mexico.

{*120} This will acknowledge receipt of your recent letter asking our opinion as to the validity of proposed Regulation No. 67 of the State Game Commission. It appears that this Regulation attempts to accomplish the following things:

1. To make cotton-tail rabbits game animals in some twelve (12) counties in New Mexico and have them non-game animals in other counties.
2. To provide that in the twelve (12) counties wherein the rabbits are game animals, all persons, except farmers and ranchers, should have a license to kill rabbits.
3. To permit the killing of rabbits {*121} by holders of New Mexico bird licenses.

The proposed Regulation further fixes the manner of killing rabbits, the bag limit and the counties affected and prohibits the sale of rabbits.

It is our opinion that the State Game Commission does not have the authority to make rabbits game animals in certain counties and to have them as non-game animals in other counties. Chapter 117 of the Laws of 1931 gives the Commission the power to define game animals but we believe that in classifying any animal as a game animal that the classification must be general and apply throughout the state. The above mentioned law does give the Commission power to fix different seasons or to close seasons entirely in certain localities, but this power can not, in our opinion, be extended to permit the classification of certain animals as game animals in limited vicinities. The desired result might possibly be accomplished by declaring cotton-tail rabbits to be game animals throughout the state but to have a year around open season in such counties as the Commission should designate.

We do not believe that the Regulation as drawn exempting owners and lessees of non-urban lands residing thereon and members of their family from buying a license to hunt rabbits is a valid exemption or classification under the powers granted the Commission by law. Such a classification, if reasonable, would, in our opinion, have to be made by the Legislature itself. Attention is called, however, to Section 57-326 of the 1929 Code which provides in effect that the State Game Warden may grant permits to owners or lessees of land for the capture or destruction on their own land of any protected game doing damage to their cultivated property. It may be that under this section you or the State Game Commission could grant a blanket permit to land owners and lessees to permit them to kill cotton-tail rabbits on their own land where the rabbits were doing damage to their cultivated crops or property.

As pointed out above, the proposed Regulation authorizes holders of a bird license to kill rabbits. We do not believe that this authorization is valid under the existing laws. Section 57-217 of the 1929 Code, as amended by Chapter 123 of the 1935 Session Laws, provides that holders of a bird license shall be entitled to hunt game birds other than wild turkey during the open season therefor. Said law further provides that a general hunting and fishing license, a general hunting license or a big game license shall entitle persons to hunt game quadrupeds. We find nothing in the powers given the Game Commission to justify it changing the express provision of the law as to what game can be taken on each of the licenses mentioned. We are therefore of the opinion that the Commission is without power to provide by rule or regulation that holders of a bird license are entitled to kill rabbits in the event that rabbits are classified as game animals.

By J. R. MODRALL,

Asst. Atty. General