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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

May 9, 2002

The Honorable John Drummond
Senator, District No. 10
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Columbia, South Carolina 29202

The Honorable Arthur Ravenel, Jr.
Senator, District No. 34
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The Honorable Glenn McConnell
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The Honorable Phil Leventis
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The Honorable John Kuhn
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The Honorable Robert Waldrep
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The Honorable John Courson
Senator, District No. 20
P. O. Box 142
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Gentlemen:

You have requested an opinion as to the question of whether "South Carolina wildlife, particularly deer, belong to all citizens of our state, and, therefore, must be permitted to roam free without being impounded by fences over which they are unable to jump?"

Law / Analysis

This Office has noted previously that

> [t]he right of the individual to take title to fish and game is a qualified one in that it is a privilege granted by the State, and may be taken away or limited as the State sees fit.

Op. Atty. Gen., August 12, 1992, quoting 1970 Op. Atty. Gen. No. 2809. S.C. Code Ann. Section 50-1-10 states that

> (a)ll wild birds, wild game, and fish, except fish in strictly private ponds and lakes and lakes entirely segregated from other waters or held and grown in bonafide aquaculture operations are the property of the State.

Section 50-1-10 appears to be merely declaratory of the ancient common law doctrine that all wild animals belonged to the State as a whole, not to any one person. This doctrine of ferae naturae is well discussed in State v. Bartee, 894 S.W.2d 34 (1994) where it is stated that

> ... the common law provides that animals ferae naturae belong to the state and no individual property rights exist as long as the animals remain wild, unconfined, and undomesticated. Jones v. State, 119 Tex. Crim. 126, 45 S.W.2d 612, 613-14 (1931); Wiley v. Baker, 597 S.W.2d 3, 5 (Tex. Civ. App. - Tyler 1980, no writ). Unqualified property rights in wild animals can arise when they are legally removed from their natural liberty and made the subject of man's dominion. Jones, 45 S.W.2d at 614. This qualified right is lost, however, if the animal regains its natural liberty. Wiley, 597 S.W.2d at 5.

This same theme is well expressed in 3A C.J.S. Animals § 8 at 478 - 79 (1973), where, in addition, it is stated:

> Whether one has secured a property right to an animal ferae naturae will be determined by whether the animal has been reduced to possession, and not by its habits. If the person who reduces an animal from the wild state does so in compliance with the law, he gains ownership of it; otherwise, its ownership remains in the state. A wrongful reducing to possession of creature ferae naturae cannot form the basis of ownership.

894 S.W.2d at 41.

Based upon the foregoing authorities, wild animals, such as deer, generally belong to the State of South Carolina and all the citizens thereof unless an individual reduced the animal to possession in compliance with the law. Thus, it must be determined what existing statutes regulate the fencing of wild animals such as deer

I have located a recent statute which addresses the issue of fencing in deer. Section 50-11-100, enacted in 2000, provides as follows:

> (A) It is unlawful to construct a new enclosure which prevents or materially impedes the free range of the deer being hunted. For purposes of the definitions herein, "prevents or materially impedes" means erecting a fence in excess of six feet in height from ground level for the express purpose of corralling wild game for hunting purposes.

(B) A person who violates a provision of this section is guilty of a misdemeanor and, upon conviction, must be fined not less than one thousand dollars nor more than two thousand five hundred dollars or imprisoned for not less than one year nor more than three years, or both. The hunting and fishing privileges of a person convicted under the provisions of this section must also be suspended for two years. In addition, the court in which a person violating this section is convicted may order that restitution be paid to the department of not less than one thousand five hundred dollars for each animal taken in violation of this section and shall be ordered to remove the enclosure.

(C)(1) All owners or leasees of property which have enclosures which prevent or materially impede the free range of the deer being hunted must register with the department within thirty days after the effective date of this section, provided the enclosure is an existing, completed enclosure in that the construction of the enclosure is wholly complete in every respect and requires no further labor or material to erect or complete the construction of the enclosure thirty days after the effective date of this section.

(2) Except as provided in item (3), after an enclosure is registered with the department, the owner may expand but may not decrease the enclosed area. The owner may make repairs necessary for the care and maintenance of the enclosure.

(3) Expansion of a registered enclosure of less than seven hundred acres is limited to an aggregate of up to fifteen percent of the area of the enclosure as of the time the enclosure was registered. Expansion of a registered enclosure of seven hundred acres or more may not exceed an aggregate of four hundred acres.

(D) It is unlawful to hunt deer with dogs in an enclosure registered with the department pursuant to Section 50-11-100(C)(1).

(E) It is unlawful to construct any mound, platform, or other device designed to allow animals into an enclosed area.

(F) If any term or provision of this section is declared unconstitutional, illegal, or unenforceable by a court of competent jurisdiction, the remainder of this section is severable and remains in full force and effect.

In other words, the General Assembly has recently enacted legislation which prohibits the construction of new fences more than six feet high from ground level which are built "for the express purpose of corralling wild game for hunting purposes." Owners or lessees of property "which have enclosures which prevent or materially impede the free range of the deer being hunted "must register with DNR within 30 days after the 2000 Act (No. 353) went into effect. (June 14, 2000). The benefit of this grandfather provision, however, is contingent upon the enclosure being wholly completed at the time the referenced Act took effect. The General Assembly has allowed an enclosure registered with DNR to be expanded but not decreased. However, expansion of a registered enclosure of less than 700 acres "is limited to an aggregate of up to fifteen percent of the acre of the enclosure" at the time of registration with DNR. Expansion of a registered enclosure of an area greater than 700 acres may not exceed an aggregate of 400 acres. No deer hunting with dogs is allowed in an enclosure registered with DNR.

To my knowledge, no court in South Carolina has ruled upon the constitutionality of Section 50-11-100. Section 50-11-100, of course, must be presumed to be constitutional. Only a court could declare the Act, or any part thereof, to be invalid. In enacting the fence statute, the Legislature specifically stated that if "any term or provision" of the Act is "declared unconstitutional, illegal or unenforceable by a court of competent jurisdiction," the remainder ... is severable and remains in full force and effect." By way of information, I would note that at lease one court in another jurisdiction has upheld a prohibition against the erection of fences for the protection of deer to be constitutional. See, Dept. of Community Affairs, 664 So.2d 930 (Fla. 1995).

I trust the foregoing is responsive to your question.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an