LETTER OPINION
99-L-15

January 25, 1999

Mr. Walter M. Lipp
Sheridan County State's Attorney
PO Box 456
McClusky, ND 58463-0456

Dear Mr. Lipp:

Thank you for your letter asking me to interpret N.D.C.C. § 20.1-01-21, which states:

> No person may hunt or pursue game upon the premises of another, within four hundred forty yards [402.34 meters] of any occupied building, without consent of the person occupying such building.

The statute expressly prohibits hunting within 440 yards of an occupied building, with two exceptions. The first is the "landowner exception." This allows a person to hunt on his or her own land even if doing so is within 440 yards of another's occupied building. The second exception is the "consent exception." This allows hunting if an "occupier" consents to hunting within 440 yards of his or her building.

You ask if the "landowner exception" includes a "public lands exception." In particular, you ask whether a member of the public hunting on public land is entitled to the "landowner exception."

For the reasons stated below, it is my opinion that while the statute isn't a model of clarity, a hunter on public land is not required to obtain the consent of the person occupying a building located within 440 yards of the hunter. Thus, there is a "public lands" exception to the statute's hunting prohibition.

The objective of statutory interpretation is to ascertain legislative intent. Zueger v. Workers Compensation Bur., 584 N.W.2d 530, 533 (N.D. 1998). This is to be initially done by looking at the statute and construing its words in their plain, ordinary, and commonly understood sense. Id. Only if a statute is susceptible to different but reasonable meanings is it ambiguous allowing the use of extrinsic aids to construe it. Id.

The phrase "upon the premises of another" in the statute raises a question whether a member of the public on public land is "upon the

premises of another." While citizens do not have an interest in public land that resembles anything like fee title, citizens do have some kind of interest in public land, whether the land is owned by the federal government or by the state.

The Supreme Court has stated that "[a]ll the public lands of the nation are held in trust for the people of the whole country." Light v. United States, 220 U.S. 523, 537 (1911). The state of North Dakota "holds the navigable waters, as well as the lands beneath them, in trust for the public." United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976). While our state Supreme Court has not made a similar ruling for other state land, if presented with the question it would surely find that the state doesn't hold land as a private proprietor but holds it for the benefit of the people. Our territorial court remarked that the proposition that public land is held in trust for the people is "so plain that no argument in support of it is necessary." Treadway v. Schnauber, 46 N.W. 464, 467 (Dak. Terr. 1875).

This citizen interest in public lands raises at least a legitimate question whether a citizen is "upon the premises of another" when hunting on public land. Because of the general public's interest in public land, while on public land a citizen may not be on land "of another" but on his or her "own land" in a collective or broader sense. Thus, the scope of N.D.C.C. § 20.1-01-21 is unclear. This allows the use of interpretive aids to decide if the statute's "landowner exception" includes a "public lands exception."

Agency interpretation can aid understanding a statute. "The interpretation of an agency charged with the administration of an Act is entitled to weight in construing the Act." Effertz v. Workers Compensation Bur., 525 N.W.2d 691, 693 (N.D. 1994). According to your letter, the Game and Fish Department interprets the statute to contain a "public lands exception." Indeed, the department has informed my office that it has "always" interpreted the statute to exclude public lands from its hunting prohibition. "The legislature is presumed to know the construction of its statutes by the executive departments of the State and the failure to amend the statute indicates legislative acquiescence in that construction." Id. Not only is the Legislature presumed to know how the Game and Fish Department has interpreted the statute, on occasion legislative committees have been expressly told of this interpretation.

During the 1983, 1989, and 1991 legislative sessions there were, for one reason or another, efforts to amend the statute. Although none

of the amendments passed, the subject of public lands sometimes arose in committee discussions.

In 1983 a bill sought to remove from the statute the phrase "upon the premises of another." The Game and Fish Department recognized that this would subject hunting on public land to the consent of the person occupying a building within 440 yards of the public land. It expressed its concern about such a result. Hearing on S.B. 2441 Before the Sen. Nat. Resources Comm. (Feb. 10, 1983) (Statement of Chuck Schroeder, Game & Fish Dep't) ("The proposed changes would establish a legal mechanism that could be used to limit hunting on both private and public lands"). The Senate failed to pass the bill. 48th Legis. Ass. Journal of the Senate 990 (Feb. 18, 1983).

In 1989 a bill sought to add trapping to N.D.C.C. § 20.1-01-21's prohibition. The public lands issue arose during the bill's initial hearing and several persons stated that a hunter on public land, even if within 440 yards of an occupied building, did not need the occupier's consent to hunt. Hearing on H.B. 1491 Before the House Nat. Resources Comm. (Feb. 2, 1989) (Statements of Rep. Nelson and Jim Collins, Cass County Wildlife Club). When the Game and Fish Department was asked about this matter, a representative expressly stated that the statute contains an exception for hunting on public land. Id. (Statement of Paul Schadewald, Game & Fish Dep't). During the Senate committee hearing the Game and Fish Department representative stated: "People like to build houses next to these public land areas and they're public hunting lands. The areas are still open. Because it's public land the public can hunt on them." Hearing on H.B. 1491 Before the Sen. Nat. Resources Comm. (Feb. 17, 1989) (Statement of Paul Schadewald, Game & Fish Dep't). This bill failed to pass the Senate. 51st Legis. Ass. Journal of the Senate 1046 (Mar. 9, 1989).

In 1991 a bill proposed to amend N.D.C.C. § 20.1-01-21 by extending its coverage from "occupied building[s]" to "occupied building[s] or any farmstead, whether the farmstead is occupied or not." During the committee hearing the public lands subject was briefly mentioned. Although the quality of the recording of the hearing is poor, Senator Wogsland appears to state that there is a public lands exception to the statute. Hearing on S.B. 2256 Before the Sen. Nat. Resources Comm. (Jan. 24, 1991). In response, the Game and Fish Department didn't express any disagreement with Senator Wogsland's understanding but did express a concern that the exception might be compromised if the bill were to become law. Id. (Statement of Lloyd Jones, Dir., Game & Fish Dep't). The bill failed to pass the Senate. 52nd Legis. Ass. Journal of the Senate 460 (Feb. 13, 1991).

Consequently, besides the presumption of legislative knowledge of agency interpretation, on at least a handful of occasions legislative bodies were expressly informed of the Game and Fish Department's interpretation of the statute. The Legislative Assembly's failure to amend the statute indicates that the lawmakers acquiesced with that agency interpretation of the statute. See Effertz v. Workers Compensation Bur., 525 N.W.2d at 693.

The long-standing, agency interpretation of the ambiguous phrase, "upon the premises of another," together with the Legislature's acquiescence in that construction of the statute, leads me to conclude that the hunting prohibition of N.D.C.C. § 20.1-01-21 does not apply to public lands.

Sincerely,

Heidi Heitkamp
Attorney General

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