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OPINION COMMITTEE

RQ-0116-GA

October 8, 2003



FILE # ML-043287-03
I.D. # 43287

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
Attention: Opinions Committee

Re: Request for opinion regarding regulation of hunting.

Dear General Abbott:

Pursuant to section 402.042 of the Texas Government Code, the Texas Parks and Wildlife Department ("TPWD") requests an opinion from your office regarding the exclusivity of TPWD's authority to regulate hunting in Texas. TPWD's question is as follows: May a city, county, or other local governmental entity prohibit hunting when the Parks and Wildlife Commission has declared an open season in that locality? Specifically, may the city of Galveston by ordinance prohibit the hunting of sandhill cranes in the city?

Regulation of Sandhill Crane Hunting

The Texas Wildlife Conservation Act (also known as the Uniform Wildlife Regulatory Act or "the Act") places on the Texas Parks and Wildlife Commission ("the commission") the duty to regulate hunting and fishing in the State of Texas. The Act is now codified as Chapter 61, Parks and Wildlife Code. The purpose of the Act is "to provide a comprehensive method for the conservation of an ample supply of wildlife resources on a statewide basis to insure reasonable and equitable enjoyment of the privileges of ownership and pursuit of wildlife resources." TEX. PARKS & WILD. CODE §61.002.

The commission is charged with establishing hunting regulations. Specifically,

The commission shall regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in or from the places covered by this chapter. The commission shall regulate the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in or from the places covered by this chapter.

TEX. PARKS & WILD. CODE §61.052. Similarly,

The commission shall provide open seasons for the hunting, taking, or possession of game animals, game birds, or aquatic animal life if its investigations and findings of fact reveal that open seasons may be safely provided or if the threat of waste requires an open season to conserve game animals, game birds, or aquatic animal life.

To manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations.

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Take a kid
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TEX. PARKS & WILD. CODE §61.053. In fact, hunting game birds is prohibited unless authorized by the TPW Commission:

Except as permitted under a proclamation issued by the commission under this chapter, no person may hunt, catch, or possess a game bird or game animal, fish, marine animal or other aquatic life at any time or in any place covered by this chapter.

TEX. PARKS & WILD. CODE §61.021. Game birds include wild sandhill cranes. TEX. PARKS & WILD. CODE at §64.001.

Furthermore, the Parks and Wildlife Code authorizes the commission to “provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds and may delegate that authority to the executive director.” TEX. PARKS & WILD. CODE §64.022. Migratory game birds include sandhill cranes. TEX. PARKS & WILD. CODE §64.021(1).

For many years, the commission has annually enacted regulations declaring an open season on sandhill cranes in large areas of the state. The regulations also specify, among other things, the manner, means, and weapons that may be used to hunt sandhill cranes and limits on the number of sandhill cranes that may be killed. 31 Tex. Admin. Code §65.317(c), §65.318(3).

City of Galveston Ordinance

Effective March 13, 2003, the City of Galveston enacted an ordinance stating,

- (a) It shall be unlawful to hunt the Sandhill Crane, by firearms or any other means, whether on public or private property, within the city.
- (b) A violation of this section shall be a class C misdemeanor, and upon conviction shall be punishable by a fine not to exceed five hundred dollars (\$500.00). A culpable mental state is not required, and need not be proved for an offense under this section.

Galveston City Code, Sec. 24-20; Ord. No. 03-019, §2, 3-13-03. The enactment of this ordinance has raised the issue of the authority of a local governmental entity to prohibit hunting.

Exclusivity of Authority to Regulate Hunting

In a 1975 opinion, your office concluded that an incorporated city may not adopt fish size and bag limits which differ from those imposed by the commission under the Act. Op. Tex. Att’y Gen. No. H-613 (1975). This opinion noted that “the legislature had conferred on the Parks and Wildlife Commission the authority to prescribe the ‘manner in which *wildlife resources* may be lawfully taken” and that the commission had exercised that authority by imposing size and bag limits on certain categories of fish. *Id.* (Emphasis added.) *Wildlife resources* would include wild birds such as the sandhill crane. TEX. PARKS & WILD. CODE §61.005(1).

In 1998, your office issued a letter opinion stating that a water district "may not attempt to regulate any of the matters over which the [Act] gives [TPWD] exclusive jurisdiction." Op. Tex. Att'y Gen. LO-98-064 (1998). Your office went on to state that under the Act, TPWD had "has sole authority to regulate the taking and possession of fish, such as the periods of time when one may take or possess fish and the means, methods, and places for taking or possessing fish. Water District rules that purport to regulate the means of taking fish are *ultra vires*." *Id.* Similar reasoning would apply to the regulation of hunting, since the Act expressly applies to game animals and game birds, as well as aquatic animal life.

Similarly, in a 1999 opinion, your office determined that a home-rule city may not prohibit the killing of feral pigeons because the Parks and Wildlife Code specifically provides that feral pigeons (also known as feral rock doves or *Columba livia*) may be killed at any time. Op. Tex. Att'y Gen. No. JC-0048 (1999); TEX. PARKS & WILD. CODE §64.002. This determination was based on the well-established proposition that a city may not by ordinance forbid what a statute allows.

The legislature has delegated to the commission the authority to regulate hunting of sandhill cranes on a statewide basis. The commission has declared an open season on sandhill cranes in Galveston County during late December and early January, and established a daily bag limit of two sandhill cranes in Galveston County. 31 Tex. Admin. Code §65.317(c), §65.318(3)(C). Contrary to the commission's regulations, the Galveston city ordinance purports to close the state-established open season on sandhill cranes, to establish the period of time (never) when one may hunt sandhill cranes, and to reduce the bag limit on sandhill cranes from two to zero. The ordinance improperly attempts to prohibit what state law allows.

The Galveston city ordinance is also invalid because it purports to prescribe a lesser punishment than that fixed by state law for the same unlawful act. *See*, Op. Tex. Att'y Gen. No. JC-0460 at p. 5 (2002). As noted above, the commission regulation pertaining to the hunting of sandhill cranes was adopted under authority of Chapters 61 and 64 of the Parks and Wildlife Code. The regulations, read in conjunction with section 61.021 of the Parks and Wildlife Code, provide that sandhill cranes may not be lawfully hunted except during the open season in December and January. The legislature has provided that violation of such a regulation is a Class C Parks and Wildlife Code misdemeanor, punishable by a fine of \$25 to \$500. TEX. PARKS & WILD. CODE §61.901(a), §64.027, §12.406. The Galveston city ordinance provides that a person who hunts sandhill cranes in violation of the ordinance can be punished by a fine of up to \$500. There is no minimum fine established by the ordinance. In effect, the ordinance has improperly negated the minimum fine established by the legislature for hunting sandhill cranes during the closed season.

The Galveston city ordinance also invalidly dispenses with a culpable mental state, when the legislature has provided that a culpable mental state is an element of the offense in a prosecution for unlawfully hunting sandhill cranes. The Parks and Wildlife Code does not expressly provide for a culpable mental state in a prosecution for unlawfully hunting sandhill cranes. *See*, TEX. PARKS & WILD. CODE §61.901(a), §64.027. However, Section 6.02 of the Texas Penal Code provides that a culpable mental state is required unless the statute in question plainly dispenses with any

mental element. Section 6.02 is included in the part of the Penal Code that applies to offenses defined by other laws, including the Parks and Wildlife Code. TEX. PENAL CODE §1.03(b). The Parks and Wildlife Code does not plainly dispense with a culpable mental state in a prosecution for unlawfully hunting sandhill cranes. TEX. PARKS & WILD. CODE §61.901(a), §64.027. (In contrast, see Sections 66.019(c) and 66.021(c) of the Parks and Wildlife Code, which do plainly dispense with a culpable mental state.) Therefore, a culpable mental state is an element of the offense in a prosecution for unlawfully hunting sandhill cranes. In effect, the Galveston city ordinance attempts to negate an element of the crime, which has been established by the legislature.

Although TPWD has sole authority to regulate hunting, some local governmental entities may be able to regulate the discharge of firearms within their jurisdictions. For example, various statutes provide that they do not affect the ability of a city to regulate the discharge of firearms under another law. *See, e.g.*, TEX. LOC. GOV'T CODE §229.001(b)(2); TEX. LOC. GOV'T CODE §43.002(c). Similarly, a county may prohibit the discharge of firearms on lots that are 10 acres or smaller and are located in a subdivision in an unincorporated area of the county. TEX. LOCAL GOV'T CODE §235.022. Although the Water Code purports to allow some special districts to regulate fishing and hunting, your office previously determined that this portion of the Water Code has been repealed by the Act. Op. Tex. Att'y Gen. No. LO-98-064 (1998).

Opinion Request

It has been TPWD's position that the sole authority to regulate hunting in Texas has been delegated to the commission and TPWD by the Texas Legislature. As a result, it has been TPWD's position that a city, county or other local governmental entity may not regulate hunting in Texas. TPWD therefore seeks your opinion regarding the authority of a city, county, or other local governmental entity to regulate hunting in Texas, and specifically the validity of the Galveston ordinance.

Your consideration of this matter is appreciated. If you have any questions or comments, please do not hesitate to contact Ann Bright, TPWD General Counsel, at (512) 389-8558 or by email at

Sincerely,



Robert L. Cook
Executive Director

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