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OPINION COMMITTEE

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

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Attention: Opinions Committee

Re: Request for opinion regarding ownership of scientific breeder deer.

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 ownership status of deer held pursuant to a scientific breeder permit and the status of scientific breeder deer that are liberated. It is TPWD's position that, except as modified by the scientific breeder statutes, the common and statutory law regarding ownership of deer applies to deer lawfully held under a scientific breeder permit. It is also TPWD's position that a deer that is liberated from a scientific breeder facility returns to its natural state and may no longer be lawfully possessed, held in captivity, bought, sold or propagated under a scientific breeder permit.

Background

The Texas Parks and Wildlife Code states, "All wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state."¹ The term "wild" is defined as "a species, including each individual of a species, that normally lives in a state of nature and is not ordinarily domesticated."² Exotic livestock is excluded from the definition.³

Exotic livestock is defined as "grass-eating or plant-eating, single-hoofed or cloven-hoofed mammals that are not indigenous to this state and are known as ungulates, including animals from the swine, horse, tapir, rhinoceros, elephant, deer, and antelope families."⁴ Game animals, on the other hand, are defined as "mule deer, white-tailed deer, pronghorn antelope, desert bighorn sheep, gray or cat squirrels, fox squirrels or red squirrels and collared peccary or javelina."⁵

Scientific Breeder Statute

Chapter 43, Subchapter L of the Texas Parks and Wildlife Code authorizes TPWD to issue scientific breeder permits. A person with a valid scientific

¹ TEX. PARKS & WILD. CODE §1.011(a).

² TEX. PARKS & WILD. CODE §1.101(4).

³ TEX. PARKS & WILD. CODE §1.101(4);

⁴ TEX. AGRIC. CODE § 161.001(a)(4).

⁵ TEX. PARKS & WILD. CODE §63.001(a).

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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breeder permit is authorized to possess and hold white-tailed or mule deer in captivity,⁶ to buy and sell white-tailed or mule deer⁷ and to breed or propagate white-tailed or mule deer.⁸

A scientific breeder is prohibited from capturing white-tailed or mule deer from the wild.⁹ A scientific breeder may obtain deer only from another scientific breeder.¹⁰ In addition, a scientific breeder must obtain a purchase permit to purchase or sell white-tailed or mule deer.¹¹ A scientific breeder is prohibited from killing or hunting a deer held under a scientific breeder permit.¹²

Although Subchapter L provides for the regulation of the scientific breeder industry, it does not address the ownership of the deer held under a scientific breeder's permit. However, Subchapter L does state,

All white-tailed deer or mule deer and increase from the white-tailed deer or mule deer are under the full force of the laws of this state pertaining to white-tailed deer and mule deer, and those deer may be held in captivity for propagation in this state

⁶ See, e.g., TEX. PARKS & WILD. CODE §43.352 ("The department shall issue a permit to a qualified person to possess white-tailed deer or mule deer . . ."); §43.354 ("The application . . . must state the purpose of possession . . . of white-tailed deer or mule deer."); §43.355, ("The department shall . . . [specify] the number of white-tailed deer or mule deer that may be possessed . . ."); §43.357(a)(2) ("The holder of a valid scientific breeder's permit may . . . hold in captivity white-tailed or mule deer . . .").

⁷ See, e.g., TEX. PARKS & WILD. CODE §43.362(a) ("Only white-tailed deer and mule deer that are in a healthy condition may be sold, bartered, or exchanged, or offered for sale, barter, or exchange, by a scientific breeder."); §43.357(a)(2) (A scientific breeder may "sell . . . white-tailed or mule deer . . .").

⁸ See, e.g., TEX. PARKS & WILD. CODE §43.357(a)(1) ("The holder of a valid scientific breeder's permit may . . . engage in the business of breeding white-tailed deer . . ."); §43.357(a)(2) (A scientific breeder may "hold in captivity white-tailed deer or mule deer for the purpose of propagation or sale."); §43.359(a) ("A scientific breeder shall maintain an accurate record of white-tailed deer and mule deer . . . propagated . . ."); §43.364, ("White-tailed deer and mule deer may be purchased or received in this state only for the purpose of liberation for stocking purposes or holding for propagation purposes.")

⁹ TEX. PARKS & WILD. CODE §43.364(1).

¹⁰ 31 Tex. Admin. Code §65.611. Currently, a scientific breeder may also purchase deer from a legal out of state source. However, a rule change recently approved by the Commission would essentially prohibit the import of deer from an out of state source.

¹¹ TEX. PARKS & WILD. CODE §43.362(b).

¹² TEX. PARKS & WILD. CODE §43.364(2).

only after a scientific breeder's permit is issued by the department under this subchapter.¹³

This subchapter goes on to state,

In order that native species may be preserved, white-tailed deer and mule deer held under a scientific breeder's permit are subject to all laws and regulations of this state pertaining to white-tailed deer or mule deer except as specifically provided in this subchapter.¹⁴

The Texas Parks and Wildlife Commission (the Commission) is authorized to adopt rules regarding scientific breeder permits.¹⁵ These rules may address, among other things, "the recapture of lawfully possessed white-tailed deer or mule deer that have escaped from a facility of a scientific breeder."¹⁶

Discussion

It does not appear that the question of ownership of scientific breeder deer has been squarely presented to a court or to the Attorney General. However, in a 1994 opinion involving the unlawful taking of a white-tailed deer, the San Antonio Court of Appeals stated in dicta,

In the Parks and Wildlife Code the legislature has provided for scientific breeders of white-tailed deer. The Parks and Wildlife Department is authorized to issue permits to qualified persons to possess white-tailed deer for propagation, management, and scientific purposes. Among the privileges of the permit is the right of the scientific breeder to engage in the business of breeding white-tailed deer, and for that purpose to hold in possession and in captivity white-tailed deer for propagation or sale. The implication is that the scientific breeder may retain the proceeds of any sale . . . There may be other examples, but clearly while acting under permits from the State, the scientific breeder . . . would legally have qualified rights of ownership . . . of the white-tailed deer.¹⁷

Similarly, the case of *Wiley v. Baker* may also be instructive. At the time the case was decided, elk were considered game animals, as white-tailed and mule deer are today. In that case, a male elk escaped from C.B. Wiley's game farm and property and remained free for over a month. Tommy Baker

¹³ TEX. PARKS & WILD. CODE §43.364.

¹⁴ TEX. PARKS & WILD. CODE §43.366.

¹⁵ TEX. PARKS & WILD. CODE §43.357(b).

¹⁶ TEX. PARKS & WILD. CODE §43.357(b)(2); see, also, 31 Tex. Admin. Code §§65.601-65.613.

¹⁷ *State v. Barte*, 894 S.W.2d 34, 43 (Tex. App. San Antonio 1994, no pet.) (Citations omitted).

shot and killed the elk, mistaking it for a deer. Mr. Wiley sued Mr. Baker to recover the value of the elk.

In deciding in favor of Mr. Baker, the Tyler Court of Appeals looked to the common law and noted, "The common law provides that animals *feras naturae* belong to the state and no individual property rights exist as long as they remain wild, unconfined and undomesticated."¹⁸ The court went on to state,

The common law recognizes three exceptions to this rule: (1) animals that have been domesticated, (2) animals that demonstrate an intention to return, and (3) animals that, after their escape, are hotly pursued by their first owner.¹⁹

The court determined that none of the three exceptions was applicable and ruled that at the time the elk was shot, it was not the property of Mr. Wiley.

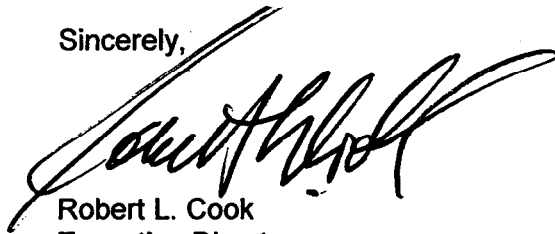
Conclusion

It is TPWD's position that, except as modified by Subchapter L, the common and statutory law regarding ownership of deer applies to deer lawfully held under a scientific breeder permit. Similarly, it is TPWD's position that once a deer is released from a scientific breeder facility, the permit holder may no longer lawfully possess, hold in captivity, sell or breed the deer.

Your consideration of this matter is appreciated. TPWD believes that several organizations and individuals may have an interest in this matter. As indicated below, those individuals are being provided a copy of this request for opinion. I understand that your office will provide these individuals the opportunity to submit briefs or arguments to your office regarding this matter.

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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Enclosure

¹⁸ *Wiley v. Baker*, 597 S.W.2d 3 at 5 (Tex. App.—Tyler 1980, no writ).

¹⁹ *Id.*, at 6 (Citations omitted).

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