A CENTURY OF CONSERVATION
1901 2001
Montana Fish, Wildlife & Parks

INTEROFFICE MEMORANDUM

May 7, 2001

TO: Warden Captains, Sergeants, and Wardens

FROM: Beate Galda

SUBJECT: Corner crossing – Trespass law

Attached is a legal opinion on crossing over a property corner in a checkerboarded ownership where a person is lawfully on public ground and steps across diagonally to another public parcel. As you will note, there is no Montana law directly addressing corner crossings. Because the amount of contiguous land where two properties meet at a corner is only a point, it is impossible to cross that point without infringing on the airspace above the other ownerships. Under common law, a landowner has control over the space above his land, at least to a distance where planes are allowed to fly across the property, and over the space below the surface as well. Thus stepping across the corner is technically a trespass although the adverse effect on the adjoining land holdings is de minimus.

As a department we cannot advise the public that corner crossings are lawful, and we should advise people who ask that there is no right of access across corners and they should obtain permission to cross from one of the adjoining landowners. We do, however, have discretion whether or not to issue citations. **If a person crosses the corner where two publicly owned parcels meet or where the person has permission to be on the two parcels that meet only at the corner, we will not issue a citation (unless there are other circumstances supporting a citation) and should refer the landowner who complains of trespass to the county attorney.** I am informed that at least one county attorney who considered this issue chose not to file charges. Since the law is technical and the effect on the property being crossed is minimal, it should be the local county attorney who decides whether or not to file charges.

c: Mark Earnhardt, John Ramsey, Kevin Clader, Legal Unit, and Michael Downey

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Montana Fish, Wildlife & Parks

MEMORANDUM

TO: Beate Galde
Michael Downey

FROM: Becky Engstrom
Legal Counsel

DATE: January 31, 2001

RE: Trespass/Crossing Corners

Becky Price and I have looked into the issue of crossing corners of property and how the Department should treat this situation. Attached is a legal memorandum, written by Becky Price, Paralegal, outlining the issues in detail. I agree with and incorporate that memo by reference here.

Because of the checkerboard nature of the granted lands from the Federal Government, it is conceivable to have a problem of access to state lands that are surrounded by private lands. The problem arises when a hunter cannot access public land without stepping across the corners from public land to public land.

This is, technically, a trespass. Although there is no concise law on the issue presented, a landowner is entitled to her land and the space above it. Essentially then, a trespass occurs when one steps over the crossing lines of adjacent property. Although the surface boundaries of the property are never crossed, the plane extending upward from the property line is crossed and therefore, this is a trespass.

It is our position from a legal standpoint that the Department should not get into a position of encouraging this type of action by hunters. Although there may be an argument about the de minimus nature of the trespass, the only thing needed to prove trespass is the actual trespass itself. We do not want to get into the position of encouraging illegal activity.

However, it may be in the best interest of the Department to make a policy decision on issuing NTA's for this type of action. If the action is limited to simply crossing corners at corner sections of the property and there is nothing more to it than that, the Department could instruct wardens not to issue citations.

However, it seems as though the situation is never quite that clear. We are not making a decision on those situations where the trespass becomes more problematic. Where there is something more than just crossing the corners of the property, the situation is clearly a trespass and subject to prosecution.

In order to facilitate discussion about this subject, I propose that we meet in the next couple of weeks. I am available 2/5-2/7 and 2/12-2/14.

Please call Brandi x4594 and she will coordinate our calendars to schedule a meeting.

MEMORANDUM

TO: Bob Lane

FROM: Becky Price

DATE: October 30, 2000

RE: Research on Question Pertaining to Corner Crossings on Private Land

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ASSIGNMENT

I was asked to review the cases provided and conduct any other research I believed was necessary to analyze the question: Is it a trespass for a hunter to step across a corner of private property to access public land?

ISSUES

1. Is stepping across a corner of private property to access public land a trespass?

2. Could stepping across a corner section of private land to access public lands be construed as hunting on private land under Mont. Code Ann. § 87-2-304?

3. Does the Unlawful Inclosures Act of 1885, 43 U.S.C.S. §§ 1061-1066, allow hunters or other recreators to step across corners of private property to access public land?

BACKGROUND

This question arises because of the large amount of public land which is landlocked by privately owned land and is not accessible to the public. During the western expansion of the 1800's, Congressional decisions and policies granted land to railroad companies and homesteaders. The Congressional plan granted railroads odd-numbered blocks of land, 640 acres each, in a checkerboard pattern. The government gave away the even numbered blocks through the Homestead Acts. As settlers moved west where the climate was drier, the government changed its policy and allowed homesteaders to acquire up to 2560 acres so that cattle production would be possible. However, what the government did not realize was that the large land units would eventually block access to federal public lands.

In recent years, some landowners whose lands bar access to landlocked lands benefit from not allowing public access across their property. Recently, some ranchers have started to sell hunts on their lands which can also include the contiguous landlocked public lands. If full public access was allowed to the landlocked lands, the ranchers selling hunts could be economically impacted, contributing to ranchers' opposition to allowing hunters or other recreators to access landlocked lands by stepping across corner sections. Merry J. Chavez, *Public Access to Landlocked Lands*, 39 STAN. L. REV. 1373 at 1378 (1987).

The question posed to the legal unit regarding landlocked lands was posed in a recreational access context. Department personnel want to know if citizens hunting, fishing and otherwise recreating can step across either corner sections or a corner section to access the landlocked public lands.

ANALYSIS

1. Is stepping across a corner of private property to access public land a trespass?

Under Montana law, a trespass occurs when, "...[a] person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when he is not licensed, invited, or otherwise privileged to do so." Mont. Code Ann. § 45-6-201. When common law principles of property law are applied to the statute, it appears that stepping across a corner of private property to access public may be a technical trespass.

In the discussion of the question about a hunter, for example, stepping across a corner section of privately owned property, a few of the basic rules at common law need to be examined. First, a hunter stepping over private property does not actually make contact with the property. However, a basic common law principle is "... an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath." *United States v. Causby*, 328 U.S. 256 at 259 (1946), quoting *Butler v. Frontier Telephone Co.*, 79 N.E. 716 (N.Y. App. Div. 1906). In *Herrin v. Suthlerland,* 74 Mont. 587 (1925), the Montana Supreme Court found that even though the defendant was standing on the land of a third party when the defendant fired a shotgun over the plaintiff's property, a trespass had been committed. The court, quoting Blackstone, stated " The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath." *2 Blackstone's Com. 18.* The *Herrin* case has been reversed in regard to its stream access holding, but not this trespass

holding. According to Montana law and common law, stepping over privately owned property without license or invitation to do so is technically trespass because the individual has entered the private property by stepping over it.

For a Montana citizen to be issued a criminal citation, intent must also be considered. Mont. Code Ann. § 45-6-203 states that a person commits the offense of trespass to property, "...if the person knowingly: (a) enters or remains unlawfully in an occupied structure; or (b) enters or remains unlawfully in or upon the premises of another." In recent cases the Montana Supreme Court has interpreted this statute rigidly. For example, in *State of Montana v. Blalock*, 232 Mont. 223 (1988), the defendant was convicted of criminal trespass when he drove his vehicle past a gate post on a dirt road to investigate some structures he thought looked like beehives. After satisfying his curiosity, the defendant immediately left the property, causing no actual damage to the property owner. A fluorescent orange rectangular sign 12x 5 was mounted on the gate post. Both parties agreed that the defendant did not know that the fluorescent orange marker constituted legal notice of no trespassing. Finding no merit in the defendant's argument that his ignorance of the meaning of the fluorescent orange marker showed that the defendant did not have the requisite mental intent to knowingly enter the land unlawfully, the Court stated:

> It is well recognized in Montana that one need not form the intent to commit a specific crime or to intend the result that occurred to be found guilty of knowingly committing a crime....[I]gnorance of the law has never been a defense in Montana. Since no argument has been made that the sign at the relevant entry was not in accordance with the posting statute, we will assume for the purposes of this issue that Blalock had legal notice that the land that he entered was off limits to trespassers. *Blalock at 225*.

As illustrated by *Blalock*, courts do tend to interpret the law of trespass strictly. The defendant's trespass conviction was upheld, although the defendant did not damage the property owner other than being on the property owner's land without permission. The trespass itself was

enough to satisfy the conviction. The following, discussing the tort of trespass, explains the rationale for this strict interpretation:

> In the early law, emphasis was placed upon the criminal aspect of willful trespasses, as a breach of the peace or a wrong to the state. Compensation to the injured victim was of secondary importance. 1 HARPER & JAMES, TORTS § 1.8, P.25.

Similarly:

> The law, on the face of it, looks harsh but, trespass was so likely to lead to a breach of the peace that even unwitting and trivial deviations on to another person's land were reckoned unlawful. WINFIELD ON TORTS (4th ed.) p. 305.

However, in tort cases, the courts have sometimes refused to recognize a trespass because the intrusion was so insignificant. In *Amphitheaters, Inc. v. Portland Meadows,* 198 P.2d 847, (Or. 1948), the court declined to find a trespass when light from a newly constructed race track interfered with the showing of movies at an outdoor theatre. Rather, the theatre was advised to shield itself from the light. The court in *Martin v. Reynolds Metals Co.* 362 P.2d 790 (Or. 1959), while finding for the plaintiff on a trespass issue, elaborated on insignificant trespasses:

> There are adjudicated cases which have refused to find a trespass where the intrusion is clearly established but where the court has felt that the possessor's interest should not be protected. Thus it has been held that the flight of an aircraft over the surface of plaintiff's land does not constitute a trespass unless the intrusion interferes with the present enjoyment of property. *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Circ. 1936). … [W]hen inquiry is made as to whether the plaintiff's interest falls within the ambit of trespass law, the courts look at the interference with the plaintiff's use and enjoyment of his land to determine whether his interest in exclusive possession should be protected, and the two torts (nuisance and trespass) coalesce…
>
> But there is a point where the entry is so lacking in substance that the law will refuse to recognize it, applying the maxim *de minimis non curat lex. Id* at 795.

As mentioned, these trespass cases involved torts, not criminal trespass. It is unknown if a court might disregard very minimal intrusion in a criminal trespass case. Hunters or other recreators stepping across property marked according to Mont. Code Ann. § 45-6-201 might be charged

criminally with trespass. While the entry onto private land is very minimal and la... should not be damaged in any way, the *Blalock* case illustrates that the Montana Supreme Cou... interprets criminal trespass strictly.

2. *Could Stepping Across a Corner of Private Land to Access Public Lands be Construed as Hunting on Private Land Under Mont. Code Ann. § 87-2-304?*

Another wrinkle to these issues is added when Mont. Code Ann. § 87-3-304 is considered. This statute requires hunters to ask permission to hunt on private land, whether or not it is posted. Hunting is defined in Mont. Code Ann. § 87-2-101 (8):

> "Hunt" means to pursue, shoot, wound, kill, chase, lure, possess, or capture or the act of a person possessing a weapon, as defined in 45-2-101, or using a dog or a bird of prey for the purpose of shooting, wounding, killing, possessing, or capturing wildlife protected by the laws of this state in any location that wildlife may inhabit, whether or not the wildlife is then or subsequently taken. The term includes an attempt to take by any means, including but not limited to pursuing, shooting, wounding, killing, chasing, luring, possessing, or capturing.

Stepping across a corner section of private property to pursue game is technically an entry onto private property while hunting. Individuals hunting on private land, whether or not it is posted, might be found to be hunting without permission, although they may not be trespassing. A department publication states the following:

> If a hunter shoots, however, game on property where he has permission to hunt, but the game crosses onto property of another before it dies, the hunter must obtain permission to retrieve the game because he does not have permission to hunt on neighboring property. Similarly, a hunter may not shoot game on one property and carry it across another property without permission since the retrieval is part of the hunt.
>
> The law does not address precisely when the hunt is concluded. Hauling an animal is still part of the hunt. Beata Galda, *Trespass Issues,* ENFORCEMENT NEWSLETTER V.1, Issue.2 , September 2000.

Hunters stepping across corner sections would be entering on private property, albeit briefly. A hunter with game returning from a hunt and stepping across a corner section is still considered to be hunting. Possibly, a hunter could be cited for hunting without permission. However, the intrusion is so minimal a court might not uphold a citation under these facts. How the Montana Supreme Court would decide a case of a hunter stepping across a corner section to access public land if that hunter was cited with hunting without permission is difficult to determine from available case law.

4. *Does the Unlawful Inclosures Act of 1885, 43 U.S.C.S. §§ 1061-1066, allow hunter or other recreators to step across corner of private property to access public land?*

The minimal intrusion on property caused by a recreators stepping across a corner section balanced with the Unlawful Inclosures Act of 1885, 43 U.S.C.S. §§ 1061-1066 (UIA) could provide a basis for a department decision not to issue a criminal trespass or hunting citation in the case of a recreator stepping across corner sections of private land. However, the strict statute limiting hunter access to private lands and the strict interpretation of the trespass statute makes a written departmental policy which advises hunters that they may access public lands by stepping over private property owner's corner sections risky.

Unlawful Inclosures Act (UIA) § 1061 prohibits inclosures of public land by individuals with no claim or color of title to the land acquired in good faith. This act was passed in 1885 in response to cattlemen illegally fencing off public lands to prevent farmers from settling on these

lands. The United States Supreme Court has used the UIA to force landowners to remove fences which block access to public lands.

A landowner who prohibits entry onto his property for the sole purpose of blocking access to public lands may be in violation of the UIA. *United States v. Golconda Cattle Co.*, 196 F. 240 (1912) stated regarding the UIA, "The act declares however, that 'all inclosures of any public lands' made without claim or color of title are unlawful..." In *Camfield v. United States*, 160 U.S. 518 (1897), the government filed an action to force a property owner to remove a fences which blocked public access to 20,000 acres of public land. One reason the public land was so easily blocked was the checkerboard pattern of ownership. The *Camfield* Court regarded the fence as a nuisance and decided that the government had a right to abate the nuisance by ordering removal of the fence. The Court upheld the district court and court of appeals holding that the purpose of the UIA was an appropriate exercise of police power to prevent private landowners from erecting fences that close off public access from public lands. A property owner posting his land against trespassers for the sole purpose of blocking access to public land possibly might be regarded as creating a nuisance or violating the statute by unlawfully inclosing public land.

In recent years, the United States Supreme Court has not always determined the UIA to apply to the controversy when public access has been involved. The Court in *Leo Sheep Co. V. United States*, 440 U.S. 668 (1979) decided that the UIA did not apply to the issue of whether or not the government could clear a road across the plaintiff's land to provide access to hunting and fishing on public lands. This case also involved lands with a checkerboard pattern of ownership. In deciding that the UIA did not apply, the *Leo Sheep* Court considered the history which prompted the passage of the UIA - range wars. After declining to apply the UIA, the Court viewed *Leo Sheep* in the property law context and decided that the government did not have an

implied easement by necessity over private property to government lands that would allow building of a public road. Instead, the Court stated that the government had the tool of condemnation available through which it could, by providing just compensation to the owner, build a public road to access the recreation sites.

However in *Bergen v. Taylor* 848 F.2d 1502 (10th Cir. 1988) *cert. denied* 488 U.S. 980 (1988), the United States Supreme Court let stand an appeals court decision applying the UIA to force the defendant to remove portions of a fence on private land that prevented antelope from accessing critical winter range on public land. The Court stated, "[a]ll Lawrence has lost is the right to exclude others, including wildlife, from the public domain – a right he never had." The 10th circuit applied *Camfield, supra,* in deciding that, whether or not the defendant intended to close off public lands by construction of the fence, the fact that he did close off the lands violated the UIA. The checkerboard pattern of ownership was also involved in this case.

In applying *Camfield, Leo Sheep,* and *Bergen* to the issue of recreators being permitted, under the UIA, to access public lands by stepping over corner sections of private land, it is difficult to come to any hard and fast conclusions. *Leo Sheep* makes it clear that no permanent access routes, such as roadways, can be acquired unless the land is condemned and the owner compensated. *Bergen* points out that the UIA remains federal law and was amended in 1984, uses the UIA to stop inclosures that blocked wildlife from accessing their habitat on public lands, and extends the UIA to apply to wildlife. Possibly, a court could find that a recreator stepping across corner sections of private land posted against trespassing to access blocked public lands is protected from a criminal trespass citation by the UIA. However, a court might also advise the state to condemn and compensate the landowner for a recreational easement in a contested case.

CONCLUSION

Stepping across private property at corner sections is a technical trespass if the area is marked against trespassing or if the landowner has expressly denied an individual permission to enter, according to Mont. Code Ann. § 45-6-201. The amount of entry is so slight when stepping across a corner section that a hunting without permission citation seems unwarranted, although how a court would decide either a trespass case or a hunting without permission case with these facts is not known. No cases on similar facts were found.

Another question is whether or not a court would consider the amount of intrusion in a criminal case in deciding whether a trespass or hunting without permission violation had occurred. Courts sometimes look at amount of intrusion in tort cases, but this aspect may or may not be considered in a criminal case.

While under *Leo Sheep* a government agency could not demand that private property owner open a road or allow a public thoroughfare unless condemnation and compensation occurred, *Bergen* indicates that the UIA is still considered effective. How the Montana Supreme Court or a federal court would apply the UIA to these facts is another unknown. A hunter accessing federal land by stepping across unmarked corner sections of private land should be considered hunting within trespass law. However, how a court would decide a case with these facts based on the hunting without permission law is another question to which case law does not provide an answer.