



## Montana Fish, Wildlife & Parks

TO: FWP Enforcement Division  
FROM: Dave Loewen, Enforcement Division Chief  
Becky Dockter, Chief Legal Counsel  
DATE: January 19, 2018  
RE: Corner Crossing History and Enforcement Direction

*[Handwritten signatures in blue ink: Dave Loewen and Becky Dockter]*

### CORNER CROSSING HISTORY

FWP has a long history of answering questions regarding corner crossing for access. In 2000, in response to a request from the Enforcement Division, the legal unit drafted a memo answering the question of whether it is legal to gain access to public land by crossing a corner to get there. The answer was that it is technically a trespass. Principles of property law and property ownership dictate that a landowner owns the airspace above the property; the boundary line of which extends up in a plane to the sky (with easements for air travel). Any attempt to cross that plane by crossing from one corner to another, would technically be a trespass. This continues to be the case today.

A recent Montana Supreme Court case, *Public Lands Access Assn. v. Brd. Of County Commissioners* (2014 MT 10), has been offered by some as an answer to what they believe is a continuing question on corner-crossing legality. The case does not venture into this arena. Rather, the Court rejected the landowner argument that the airspace above a river occupied by water is privately owned and not under the control of the private landowner. To argue otherwise would divest the state of title to waters it owns by virtue of article IX, §3(3), of the Montana Constitution. The court rejected this argument. Not only is this a different question than the legality of corner-crossing, the court did not find merit in the argument for water. See attached email memo by Bill Schenk, FWP Counsel.

In response to the 2000 legal memo, the Enforcement Division Chief Beata Galda, then issued a directive to field wardens to refrain from citing for corner-crossing because of the lack of prosecution by county attorneys:

*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. We propose that 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 refuse to issue a citation and 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.*

In 2012, Assistant Chief of Law Enforcement Mike Korn reaffirmed the previous directive, as follows:

*In light of this longstanding approach and until the time when there is either an Attorney General's opinion or legislation to address this, we will continue to follow these guidelines when addressing corner-crossing, with the exception of wardens, rather than landowners, should be the ones making the contact with the local county attorney. As wardens will have been the ones to have made contact with the individuals involved, this will provide the most complete information for a county attorney to make the determination on whether or not to charge an individual.*

#### ENFORCEMENT DIVISION DIRECTION

Unless there is clear evidence of hunting without permission or criminal trespass other than corner crossing, the direction set forth above will remain in effect until such time as legislation or other factors are established that require altering this approach. The exception to the guidelines above is that it is acceptable for wardens to either submit a report to the county attorney or advise the landowner to contact the county attorney based upon county specific protocols.