

WYOMING
GAME AND FISH DEPARTMENT

Dave Freudenthal, Governor




Terry Cleveland, Director

"Conserving Wildlife - Serving People"

August 25, 2004

MEMORANDUM

TO: Wyoming County Sheriffs, Wyoming County Attorneys, Wyoming Department of Agriculture

FROM: Terry Cleveland, Director 

COPY TO: Commission, Regional Wildlife Supervisors, Levi Martin, Gregg Arthur, Scott Talbott, Mike Ehlebracht, Russ Pollard, File

SUBJECT: A.G. Opinion – "Corner-Crossing"

The Wyoming Attorney General's Office recently issued an opinion (attached) that "corner-crossing" does not violate Wyoming Statute 23-3-305 (b). In order to be convicted of the Title 23 statute, a person must hunt or intend to hunt on private property without permission. Simply crossing the corner of private property to reach public lands does not fulfill this requirement.

"Corner-Crossing" may still be a criminal trespass under Wyoming Statute 6-3-303. Wyoming Game and Fish enforcement officers do not have the legislative authority to enforce this statute. Unfortunately, that leaves the Game and Fish in the position of referring reports of "corner-crossing" to the local sheriff's or county attorney's office.

Recent field contacts and the attached *Casper Star-Tribune* article suggest that hunters may have the idea that it is now legal to cross section corners to access previously inaccessible public lands.

TC/js
Attachments



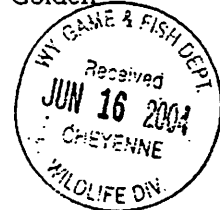
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June 8, 2004

Terry Cleveland
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Dear Mr. Cleveland:

You have asked for an opinion regarding the legal propriety of citing/prosecuting individuals under Wyo. Stat. Ann. § 23-3-305 for "corner-crossing" in light of the recent verdict in State v. Kearney, CT-2003-7175 (2nd Jud. Dist.).

BACKGROUND

On January 16, 2004, a non-jury trial was held before the Honorable Robert A. Castor. In lieu of testimony, the parties stipulated to the following facts:

1. On September 23, 2003, the defendant was archery hunting for elk in an area of northern Albany County, Wyoming;
2. The defendant was properly licensed to hunt elk in Wyoming at that time;
3. On September 23, 2003, the defendant hunted from one public section of land to another public section of land, by stepping across the corner created by the intersection of four sections of land;
4. The adjacent private land is owned by Serge Deliah and managed by Tom Spawn;

5. The defendant did not have permission of the owner or person in charge of the private land to hunt on or enter the adjacent private land;
6. The corner in question is marked by a surveyor's pin;
7. The defendant located the pin with the aid of a Global Positioning System (GPS) and in stepping over the corner did not step in or physically touch the cornering private land.

Brief of Plaintiff at 3, State v. Kearney, CT-2003-7175 (2nd Jud. Dist.).

The parties essentially characterized the issues as:

1. Whether or not the terms "enter" and/or "upon" included the act of passing through the airspace of another's private property; and
2. Whether Wyoming Statutes or common law property concepts address private ownership of airspace above the private property.

Written arguments were made to the court on both sides of the issues (including a brief filed by National Wildlife Federation as amicus curiae). Judge Castor found the defendant "NOT GUILTY of the charge of 'Trespass to Hunt' in violation of W.S. § 23-3-305(b)." Order (dated March 24, 2004).

Judge Castor's finding of "Not Guilty" has no binding effect on any court, even his own. Without findings of fact or conclusions of law, nothing can be gleaned from Judge Castor's ruling other than the state did not present enough evidence to prove, beyond a reasonable doubt, that Mr. Kearney "enter[ed] upon the private property of [another] to hunt, fish, or trap without the permission of the owner or person in charge of the property." Wyo. Stat. Ann. § 23-3-305(b).

DISCUSSION

Under Wyo. Stat. Ann. § 23-3-305(b), "No person shall enter upon the private property of any person to hunt, fish, or trap without the permission of the owner or person in charge of the property." The issue presented is whether a momentary presence in the airspace above private land in order to access public land to hunt violates Wyo. Stat. Ann. § 23-3-305(b)? However, the initial question that must be answered is whether, under Wyo. Stat. Ann. § 23-3-305(b), the legislature intended to prohibit *the act* of hunting, fishing, and

trapping on private land or did they intend to also prohibit the passing through private property to access hunting, fishing, and trapping on public land?

The Wyoming Supreme Court recently summarized the doctrine of statutory construction in In re Loberg, 88 P.3d 1045 (Wyo. 2004). The Court described the step-by-step process of ascertaining legislative intent with the following:

We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in *pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation. Moreover, we will not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions."

In re Loberg, 88 P.3d at 1048 (internal citations omitted).

Pari materia means "giving effect to each word, clause, and sentence so that no part will be inoperative or superfluous." Abeyta v. State, 42 P.3d 1009, 1012 (Wyo. 2002) (citation omitted). It is a tenet of statutory construction that a court "will not construe a statute in a manner which renders any portion meaningless or produces an absurd result." Id.

The plain and ordinary meaning of the phrase "enter upon the private property of any person to hunt, fish, or trap" involves an entry *for the purpose of* hunting, fishing or trapping. Further, the original 1939 statute read in full:

It shall be unlawful for any person to hunt, shoot, kill or attempt to kill from any public highway on to the enclosed lands of any other person, firm or corporation, any fur bearing animal, game animal, or bird of any description, or to enter upon the enclosed lands of any other person, firm or corporation, for the purpose of hunting, fishing or trapping, without first having obtained permission from the owner or person in charge of said lands. It shall be unlawful for any person or persons to fire any firearm from, upon, along, or across any public road or highway. Laws 1939 Ch. 65 sec. 48.

The core intent of that statute was to prohibit entering private land to shoot, kill or trap animals *on that private land*, or sidling up to the land, keeping both feet on public land, but again, killing, shooting or trapping animals on the private land.

That same impetus is behind the current version—Wyo. Stat. Ann. § 23-3-305(b). The evil Wyo. Stat. Ann. § 23-3-305(b) is designed to prevent is unauthorized hunting (or fishing or trapping) on private lands. This is especially evident when Wyo. Stat. Ann. § 23-3-305(b) is compared with Wyo. Stat. Ann. § 6-3-303. Under Wyo. Stat. Ann. § 6-3-303, a person is guilty under the general criminal trespass statute if “he enters or remains on or in the land or premises of another person, knowing he is not authorized to do so, or after being notified to depart or to not trespass.” Clearly, the defendant’s reason or purpose for trespassing, to hunt (or fish or trap), is the only substantive difference in the proscribed actions between Wyo. Stat. Ann. § 23-3-305(b) and Wyo. Stat. Ann. § 6-3-303.

In addition, to read Wyo. Stat. Ann. § 23-3-305(b) as also prohibiting a momentary entrance above private land would “enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions.” In re Loberg, 88 P.3d at 1048. Such a construction is not permissible. See id.

Accordingly, in order to be found guilty of Wyo. Stat. Ann. § 23-3-305(b), one has to, without permission, enter upon private property of another with the intent to hunt, fish, or trap on that private property.

However, that does not mean that “corner-crossing” is lawful. Assuming a person knows that adjoining sections are private property, a person who “corner-crosses” could be charged under Wyo. Stat. Ann. § 6-3-303. As stated above, a person is guilty of criminal trespass if “he enters or remains on or in the land or premises of another person, knowing he is not authorized to do so, or after being notified to depart or to not trespass.” Wyo. Stat. Ann. § 6-3-303.

So, the compound question remains: Does a landowner own the space above the land, and if so, does someone who merely passes through it violate Wyo. Stat. Ann. § 6-3-303?

The legislature has made it clear that “ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of flight described in W.S. 10-4-303.” Wyo. Stat. Ann. § 10-4-302. Further, the word “enter” is defined as:

-vt. 1. To come or go into; 2. To penetrate : pierce; 3. To introduce : insert; 4. To become a part of or an element in . . . -vi 1. To come or go in; 2. To gain entry . . . b. To be a part or component of . . . 8. To go upon in order to take legal possession of land

Webster's II New College Dictionary at 375 (1995). Clearly, the definition of "enter" is expansive enough to include penetrating an invisible plane. Accordingly, passing through the space above private property, knowing one does not have permission to be on that private property, may be a criminal trespass under Wyo. Stat. Ann. § 6-3-303.

CONCLUSION

"Corner-crossing" from one parcel of public land to another in order to hunt on that other public parcel, depending on the factual situation involved, may not be violative of Wyo. Stat. Ann. § 23-3-305(b) because, to be convicted, the statute requires a person hunt or intend to hunt on private property without permission. "Corner-crossing," however, may be a criminal trespass under Wyo. Stat. Ann. § 6-3-303. Once again, the factual circumstances would have to be examined to determine if a violation of Wyo. Stat. Ann. § 6-3-303 had occurred.

Sincerely,



Patrick J. Crank

Attorney General



Jennifer A. Golden

Deputy Attorney General



C. Levi Martin

Assistant Attorney General