

## NO. 37

**FISH AND GAME—FISHING ON POSTED LAND A  
TRESPASS—TRESPASS—CIVIL LIABILITY FOR  
ACTUAL DAMAGE—CRIMINAL OFFENSES**

- Held: 1. A fisherman going upon privately owned land for the purpose of fishing with rod and line is as much a trespasser as if he went upon the land for any other purpose, and may be held responsible in a civil action for the damage actually committed.
2. There is no statute of Montana making it a criminal offense to go upon the property of another for the purpose of fishing, even though the land be posted with a sign, "No Fishing."

March 4, 1941.

Mr. J. A. Weaver  
State Game Warden  
Fish and Game Commission  
Capitol Building  
Helena, Montana

Dear Mr. Weaver:

You have asked the following question:

"Will you kindly give me your opinion as to a trespass with the fishing rod and line on the premises of another? Should the trespasser be charged with a misdemeanor? We will assume that the premises are posted with a sign 'No Fishing.'"

In reply, I think it well to quote Sections 11481 and 11482, Revised Codes of Montana, 1935, in their entirety:

**"Section 11481. Malicious Injuries to Freehold.** Every person who wilfully or maliciously commits any trespass by either—

1. Cutting down, destroying or injuring any kind of wood or timber standing or growing upon the lands of another; or
2. Carrying away any kind of timber or wood lying on such lands; or
3. Maliciously injuring or severing from the freehold of another anything attached thereto or the produce thereof; or
4. Digging, taking or carrying away from any lot situated within the limits of any incorporated city without the license of the owner or legal occupant thereof, any earth, soil, or stone; or
5. Digging, taking or carrying away from any land in any cities of the State, laid down on the map or plan of said cities otherwise recognized or established as a street or alley, avenue or park, without the license of the proper authorities, any earth, soil or stone; or
6. Putting up, fastening, printing or painting upon any property belonging to the state, or to any city, county, town or village, or dedicated to the public or upon any property of any person without license of the owner any notice, advertisement or designation thereof, or any name of any commodity, whether for sale or otherwise, or any picture, sign or device intended to call attention thereto; or
7. Hunting, without permission, upon the enclosed premises of another; or
8. Destroying, defacing or injuring any door, window or other portion of any vacant residence or other building, or maliciously opening any closed door or window of such building, or entering therein or on without the consent of the owner, agent or tenant of such premises or by authority of law; is guilty of a misdemeanor."

**"Section 11482. Injuring Fences, Building Fires, and Hunting on Premises of Another When Forbidden.** Any person tearing down, breaking or injuring any fence or other inclosure, for the purpose of entering upon the land or premises of another without the consent of the owner or occupant; any person who shall build a fire upon the land or premises of another within any inclosure, or who shall sever from such land or premises any trees, grass, or other product thereof, or shall take therefrom anything attached or appurtenant thereto, without the consent of the owner or occupant; and any person who shall hunt upon any inclosed land or premises where there is posted in a conspicuous place a sign or warning reading, 'No hunting allowed on these premises,' or a sign or warning reading, 'No trespassing allowed on these premises,' without the consent of the owner, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than ten dollars, nor more than five hundred dollars, or imprisonment not exceeding six months in the county jail, or by both such fine and imprisonment; and shall also be liable to the person injured for all damages occasioned thereby."

Thus—under subdivision 7 of Section 11481, supra—every person who wilfully and maliciously commits any trespass by hunting, without permission, upon the enclosed premises of another, is guilty of a misdemeanor; and—under the provisions of Section 11482, supra—any person who shall hunt upon any enclosed land or premises where there is posted in a conspicuous place a sign or a warning reading, "No hunting allowed on these premises," or a sign or warning reading, "No trespassing allowed on these premises," without the consent of the owner, is guilty of a misdemeanor. But nowhere within either section is there any reference made to fishing on the premises of another and/or the classification thereof as a misdemeanor. Furthermore, I find no statute of Montana making it a

criminal offense to go upon the property of another for the purpose of fishing with rod and line, even though the land be posted with a sign, "No fishing." However, in the case of *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328, our Montana Supreme Court held in effect that:

Fishing in a non-navigable stream the bed of which is privately owned without permission of the owner, or going upon the banks thereof and thus destroying grasses or willows, constitutes trespass, the owner of the land having the exclusive right to take the fish while in the waters of the stream within his land.

The exclusive right of . . . fishing on land owned by a private individual is in the owner of the land, or in those who do so by permission, as his guests, or by his grant.

One who enters upon private land to fish from a pond thereon and in a stream flowing therefrom is a trespasser, since the right to fish therein belongs exclusively to the owner.

In the case of non-navigable streams, the right to fish is an incident of the owner of the land. While the public has a general ownership in animals wild by nature, including fish, and all members of the public have equal rights to pursue and take the same, the right to fish is separate from the right to go upon or use the property upon which the stream is situated, and does not excuse the trespass committed by one going upon private property without permission or authority to do so. Consequently, the going upon privately owned land for the purpose of fishing with rod and line is as much a trespass as going upon the same for any other purpose.

As hereinbefore stated, I find no statutes of Montana making it a criminal offense to go upon the property of another for the purpose of fishing with rod and line, even though the land be posted with a sign, "No fishing." The liability of one going upon the lands of another for the purpose of fishing is a purely civil one and such person can only be held for the damage actually committed. Therefore, it is my opinion:

1. A fisherman going upon privately owned land for the purpose of fishing with rod and line is as much a trespasser as if he went upon the land for any other purpose, and may be held responsible in a civil action for the damage actually committed.

2. There is no statute of Montana making it a criminal offense to go upon the property of another for the purpose of fishing even though the land be posted with a sign, "No fishing."

Sincerely yours,

JOHN W. BONNER  
Attorney General