

VOLUME NO. 37

OPINION NO. 144

GAME AND FISH - Hunting on another's land; TRESPASS -  
Hunting as; REVISED CODES OF MONTANA, 1947 - Sections  
26-303.3, 94-6-201(1), 94-6-203.

HELD: Montana's criminal trespass statutes, section  
94-6-201(1) and 203, do not repeal or affect  
section 26-303.3, which makes it unlawful to hunt  
big game animals on private property without  
permission.

24 May 1978

J. Fred Bourdeau, Esq.  
Cascade County Attorney  
Cascade County Courthouse  
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested my opinion on the following question:

Do Montana's criminal trespass statutes, section  
94-6-201(1) and 203, supercede section 26-303.3,  
which makes it unlawful to hunt big game animals  
on private property without permission?

A person is guilty of criminal trespass if he knowingly  
enters or remains unlawfully...on the [land] of another."  
Section 94-6-203. He enters or remains unlawfully when he  
does do so without privilege, but he acts with privilege  
"unless notice is personally communicated to him by an  
authorized person or unless such notice is given by posting

in a conspicuous manner." (Emphasis added). Section 94-6-201(1). Criminal trespass is a misdemeanor and may result in a fine of \$500 or 6 months imprisonment in the county jail, or both. Section 94-6-203(2).

The fish and game statute, section 26-303.3, provides as follows:

Every resident and nonresident must have obtained permission of the landowner, lessee or their agents before hunting big game animals on private property.

Violation of this statute is also a misdemeanor and the penalty is, a fine of not less than \$50 or more than \$500, imprisonment in the county jail for not more than 6 months, or both. Section 26-324.

Section 26-303.3 has not been expressly repealed, and must be given effect unless it was repealed by implication. In order for enactment of the trespass statutes to have worked a repeal by implication, it must appear that these statutes are plainly and irreconcilably in conflict with the fish and game statute. Montana-Dakota Utilities Co. v. City of Havre, 109 Mont. 164, 171, 94 P.2d 660 (1939). The statutes must relate to the same subject and have the same object in view. Id. See also Holly v. Preuss, 34 St. Rptr. 445, 447-448 (1977).

Those conditions are not met here. The trespass statutes prohibit unauthorized entry or presence on the premises of another. The essence of the crime is the unauthorized entry or presence itself. This was not the case under prior Montana law:

[Section 94-6-203] substantially expands prior law by making individuals criminally liable for knowing trespass. Under former law trespass was not criminal unless the trespasser did some prohibited act, such as hunting, building fires or injuring the realty, and it was these acts, not the trespass itself, which constituted the criminal conduct.

Crowley, Montana Criminal Code, 1973, Annotated, Annotator's Note 232. See section 94-3308 [repealed, Laws of Montana (1973), ch. 513, sec. 32].

The reason for making entry or presence, without more, a criminal act was to deter violence. People v. Hoskins, 5 Ill.App.3d 831, 284 N.E.2d 60 (1972). As the code annotator's note explains: "Previously since mere trespass was not an offense a landowner could not call in peace officers and was, as a result, often placed in a situation in which his only remedy was self help." Id., at 233.

The privilege contained in section 94-6-201(1) is therefore by its express language and logic, a limited one. It is simply coextensive with the substantive crime of trespass, i.e., it grants no more than the trespass statute prohibits.

In this regard the privilege does not conflict with the fish and game statute. The conduct prohibited by section 26-303.3 is unauthorized hunting, not trespass. The entry or presence while hunting is not prohibited, but rather the affirmative act of hunting itself. This conduct is an interference with the private property owner's exclusive right to hunt on his property, Herrin v. Sutherland, 74 Mont. 587, 599, 241 P. 328 (1925), which is a property right separate and distinct from his right to prohibit trespass. Because the statutes do not relate to the same conduct, there is no conflict upon which a repeal by implication can be premised.

THEREFORE, IT IS MY OPINION:

Montana's criminal trespass statutes, section 94-6-201(1) and 203, do not repeal or affect section 26-303.3, which makes it unlawful to hunt big game animals on private property without permission.

Very truly yours,

MIKE GREELY  
Attorney General