

FISH AND WILDLIFE - Authority of landowner to restrict permission to hunt;  
PROPERTY, REAL - Private landowner's right to restrict permission to hunt;  
TRESPASS - Exceeding permission to hunt as;  
MONTANA CODE ANNOTATED - Sections 45-2-101(53), 45-6-201, 45-6-203, 87-1-102(1), 87-3-304;  
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 144 (1978).

HELD: A hunter who has been given permission to enter onto private property to hunt only for a specific kind of big game animal and who exceeds that permission by hunting another kind of animal may be charged with failure to obtain the landowner's permission.

2 June 1986

James W. Flynn, Director  
Department of Fish, Wildlife, and Parks  
1420 East Sixth Avenue  
Helena MT 59620

Dear Mr. Flynn:

You have requested my opinion on a question which I have restated as follows:

If a hunter is given permission to enter onto private property to hunt only for a specific kind of big game animal, may the hunter be charged with criminal trespass to property or failure to obtain landowner's permission if he exceeds that permission by hunting another kind of animal?

Your letter states that there is some confusion among landowners as to the extent of their right to control hunting on their land. This question has confronted game wardens and others who must decide whether, for example, a hunter who has been given explicit permission to hunt on posted private land for a cow elk may be charged with an offense if he hunts a bull elk or a deer.

Every landowner has an exclusive common-law right to kill or capture game on his own land, subject to the regulatory action of the State in the preservation of all game for the common use. See 35 Am. Jur. 2d Fish and Game § 16. The Montana Supreme Court has long recognized this right; in Herrin v. Sutherland, 74 Mont. 587, 241 P. 328 (1925), the Court held that the exclusive right of hunting on land owned by a private individual is in the owner of the land or in those who have a right to be there by his permission.

The landowner's right to control hunting on his property is protected in Montana by two statutes. The violation of either of these statutes may be charged as a criminal offense, even though the landowner may also have a separate civil remedy as well.

First, section 45-6-203(1)(b), MCA, states that a person commits the offense of criminal trespass to property if he knowingly "enters or remains unlawfully in or upon the premises of another." Criminal trespass to property is a misdemeanor and may result in a fine not exceeding \$500, imprisonment in the county jail for any term not exceeding six months, or both. § 45-6-203(2), MCA.

The term "premises" is defined to include any real property. § 45-2-101(53), MCA. A person enters or remains unlawfully in or upon any premises "when he is not licensed, invited, or otherwise privileged to do so." § 45-6-201(1), MCA. The privilege to enter or remain upon land is extended by the explicit permission of the landowner or other authorized person and may be revoked at any time by personal communication to the entering party. Ibid.

The second statute requires hunters to obtain the permission of the landowner, lessee, or their agents before hunting big game animals on private property. § 87-3-304, MCA. Violation of this statute is also a

misdemeanor; the penalty may be a fine of not less than \$50 or more than \$500, imprisonment in the county jail for not more than six months, or both. § 87-1-102(1), MCA. I have previously held that section 87-3-304, MCA, was not repealed or affected by enactment of the criminal trespass statutes. 37 Op. Att'y Gen. No. 144 at 602 (1978).

Assuming that the private property has been posted in substantial compliance with section 45-6-201(2), MCA, and is therefore considered closed to public access unless explicit permission to enter is given by the landowner or his authorized agent (section 45-6-201(3), MCA), both section 45-6-203, MCA, and section 87-3-304, MCA, require a hunter to obtain the landowner's permission prior to hunting big game animals on the landowner's private property. A hunter who fails to obtain permission may be charged with a violation of either statute. The landowner has the right to refuse permission completely. He may, however, give limited permission to the hunter to hunt at certain times, in certain areas of the property, or for certain kinds of animals.

If the landowner gives a hunter explicit permission to hunt only for a specific kind of big game animal, he has extended to the hunter what is known as a "license" to hunt that kind of animal on his property. A license is the authority to do a particular act which, without the license, would be unlawful.

Generally, a license must be exercised only in the manner and for the special purpose for which consent was given. If the permission given is exceeded, the landowner may revoke the privilege to enter or remain upon his land by personal communication to the hunter. § 45-6-201(1), MCA. However, the hunter does not commit the offense of criminal trespass to property unless he stays on the land after the landowner or some other authorized person has notified the hunter to leave. See Criminal Law Commission Comments to § 45-6-203, MCA. I am guided by the Commission's view that criminal trespass is committed only if the offender, immediately prior to entry, receives oral or written notice that such entry is forbidden, or he remains on the land after being notified to leave.

Nevertheless, the permission granted to a big game hunter by the landowner, lessee, or their agents under section 87-3-304, MCA, is permission not only to enter or remain upon private land but also to hunt big game animals. If the landowner has given the hunter explicit permission to hunt only for a specific kind of big game animal, the hunter violates section 87-3-304, MCA, by exceeding the permission given and hunting another kind of animal. Such a hunter would be subject to prosecution under section 87-3-304, MCA.

THEREFORE, IT IS MY OPINION:

A hunter who has been given permission to enter onto private property to hunt only for a specific kind of big game animal and who exceeds that permission by hunting another kind of animal may be charged with failure to obtain the landowner's permission.

Very truly yours,

MIKE GREELY  
Attorney General