

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 96

HIGHWAYS - "No Trespassing" notice along unfenced private property lying adjacent to county road;
TRESPASS - Use of "No Trespassing" notice on unfenced property lying adjacent to public road;
MONTANA CODE ANNOTATED - Section 45-6-201.

HELD: Private property that is unfenced along public roadways may not be closed to public access through the use of orange markings placed on posts located where the road enters the private property.

13 July 1988

Wm. Nels Swandal
Park County Attorney
Park County Courthouse
Livingston MT 59047

Dear Mr. Swandal:

You have asked my opinion on the following question:

May "No Trespassing" notices be placed within a county road right-of-way on the posts of a fenceline that lies perpendicular to the road and delineates private property that a landowner desires to close to public access?

Your opinion request evolved through the interaction of three groups: landowners who desire to post their property in compliance with the revised criminal no-trespassing statute, § 45-6-201, MCA; sportsmen who desire enhanced public access and claim the "No Trespassing" signs mislead the public; and Park County officials who seek to settle the dispute while protecting the integrity of the county road right-of-way.

The county roads in question are public rights-of-way that run through private property that is unfenced along the roadway. Occasionally the roadways cross a property line that divides two parcels held in separate

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ownership. On these property lines the landowners erect fences, often in conjunction with stock gates across the road surface. The fences separate one grazing field from another, but the county road that bisects the open pasture is otherwise unfenced along its route.

The owners of these pastures have adopted an easy method of posting their fields closed to trespassing. Upon the assumption that the point at which the public road crosses the fenceline and cattle grate is an access point, the owners have painted orange the posts on either side of the grate. This assumption is based upon the revised criminal trespass statute, § 45-6-201, MCA. That statute provides that orange paint on fence posts may be used to give notice of no trespassing. The statute contains several requirements that must be met before property is considered closed. One such requirement is that each "normal point of access" must be posted with the proper amount of orange paint. Apparently, the landowners have attempted to convey to motorists that the property on either side of the road, following the orange marking, is closed to the public.

The immediate problem with this practice of posting is that orange paint on either side of an entry through a fenceline typically indicates that all property beyond the marking is closed to access. On similar facts the Montana Supreme Court recently upheld the criminal trespass conviction of a motorist who inadvertently drove down a road through a gate marked with orange paint. State v. Blalock, 45 St. Rptr. 1008, ___ P.2d ___ (1988). The landowners in your request are unable to convey through their orange marking that a motorist may cross the fenceline, enter the next field, stay on the roadway and not actually trespass. As the sportsmen's group has brought to your attention, this form of posting will likely mislead the public.

The landowners' intent here is clear. Unfortunately, the liberal posting requirements of the revised criminal trespass statute were not designed for application to the present situation. I doubt that the Legislature anticipated or contemplated the factual situation of an unfenced public right-of-way crossing fields that landowners wanted closed. The points of access for these fields actually run the entire length of the unfenced public road. The situation simply does not lend itself to easy and unambiguous posting.

Landowners who desire the result of effective posting without additional fence construction must therefore pursue alternatives to orange markings. One alternative would be to place a conspicuous sign on the roadway's

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edge upon entering the private property stating "Private Property, No Trespassing Next _____ Miles." Another alternative would be to place conventional "No Trespassing" signs at regular intervals along the private property bordering the road. In any case, the present practice of painting the posts adjoining the roadway at a fenceline is a misapplication of the notice provisions of section 45-6-201, MCA. The misapplication not only fails to legally close the adjacent property to trespassing but also inhibits the public's use and enjoyment of the road.

THEREFORE, IT IS MY OPINION:

Private property that is unfenced along public roadways may not be closed to public access through the use of orange markings placed on posts located where the road enters the private property.

Very truly yours,

MIKE GREELY
Attorney General