

NATURAL RESOURCES COMMITTEE

The Natural Resources Committee was assigned one study during the 2019-20 interim. House Bill No. 1021 (2019) directed the Legislative Management to study access to public and private lands for hunting, trapping, fishing, and related issues, including trespass violations and penalties, and provide recommendations regarding a land access database with the capability of electronic posting. The bill also required the Information Technology Department (ITD) and the Game and Fish Department, at the direction of the Legislative Management, to establish a trial electronic posting project for up to three counties.

The committee was comprised of nine voting members and four nonvoting members. As provided in House Bill No. 1021, the voting members included two citizen members representing agriculture landowners, two citizen members representing sportsmen organizations, and five members of the Legislative Assembly including one member of the majority party in the House of Representatives, one member of the minority party in the House of Representatives, one member of the majority party in the Senate, one member of the minority party in the Senate, and one member from either party in either chamber to serve as the committee chairman. The nonvoting members included a representative of the North Dakota Association of Counties, the Agriculture Commissioner (or the commissioner's designee), the Director of the Game and Fish Department (or the director's designee), the Chief Information Officer (or the officer's designee), and a representative of the North Dakota State's Attorneys' Association.

The members of the committee were Senators Robert Erbele (Chairman), Jim Dotzenrod, and Dale Patten; Representatives Chuck Damschen and Gretchen Dobervich; citizen members Mr. David DeWald, Mr. Brian Schanilec, Mr. Joe Schettler, and Mr. John Weinand; and nonvoting members Mr. Jason Horning, Next General 9-1-1 Program Manager, North Dakota Association of Counties; Mr. Doug Goehring, Agriculture Commissioner; Mr. Terry Steinwand, Director of the Game and Fish Department; Mr. Dorman Bazzell, Chief Data Officer, Information Technology Department; and Mr. Ryan Younggren, Assistant State's Attorney, Cass County.

BACKGROUND

North Dakota Law Regarding Land Access for Hunters

North Dakota Century Code Sections 20.1-01-18 and 20.1-01-19 indicate private land is open to hunters to hunt, pursue game, and recover game, unless the land is posted in accordance with Section 20.1-01-17. To post land under Section 20.1-01-17, an owner or tenant of the land must place signs along the public highway or land giving notice that hunting is not permitted on the land. If the land is enclosed entirely by a fence, the owner or tenant must place signs at each gate to post the land. However, when an owner or tenant's efforts to post the land do not satisfy all the requirements, the land still is deemed posted if the owner or tenant's efforts "substantially complied" with Section 20.1-01-17 and notice against hunting or trespassing "is clear from the circumstances." Additionally, Section 20.1-01-22 makes it unlawful to hunt or pursue game in unharvested cereal or oilseed crops without the owner's or tenant's permission, regardless whether the land is posted. There is a legal presumption that an individual on legally posted land who is carrying a firearm or other weapon declared legal by a governor's proclamation entered the posted land to hunt or pursue game. Specifically, under Section 20.1-01-20, carrying the weapon on posted land is prima facie evidence the individual entered the land for one or both of those purposes.

Access to posted land for hunting or trapping is available if proper permission is granted under Section 20.1-01-18. If a hunter wishes to hunt on posted land, the hunter may request permission from a person legally entitled to give permission to hunt on the land. The permission does not need to be in writing. However, if a trapper wants to trap protected fur-bearing animals on posted land, the trapper must obtain written permission from the owner or operator of the land. Additionally, under Section 20.1-01-19, a person may enter posted land to recover game shot or killed lawfully on other land.

The requirements for hunting guides and outfitters differ from the requirements for hunters. Under Section 20.1-03-42, a hunting guide or outfitter is not permitted to operate on posted private land, certain land owned by the state or on which the Game and Fish Department pays "in lieu of" taxes, and certain federal land without informing the landowner and obtaining permission to provide outfitting or guiding services on the land. The permission may be provided orally. However, if a disagreement arises over whether permission was granted, there is a presumption permission was not granted unless the permission is in writing.

Hunting on posted land without permission is a strict liability offense under Section 20.1-01-18. An individual who hunts on posted land is guilty of the offense even if the individual does not know the individual is on posted land. An individual's mistaken belief about the facts or law are not relevant to the individual's culpability under the statute. Unlawfully hunting or pursuing game on posted land without permission is a Class B misdemeanor for a first offense and a Class A misdemeanor for a subsequent offense within a 2-year period. In addition, under Section 20.1-01-26, a court is required to suspend a defendant's hunting, trapping, or fishing privileges for at least 1 year for a first conviction, 2 years

for a second conviction, and 3 years for a third or subsequent violation. The court also may require the defendant to complete a hunter education course before obtaining a new license.

The Supreme Court clearly has held hunters are responsible for determining whether they are on posted land. In *State v. Mittleider*, 2011 ND 242 (N.D. 2011), the Supreme Court upheld a conviction for individuals who shot a deer on a wildlife refuge that was posted improperly. The individuals said they did not know they were on a wildlife refuge but knew a refuge was nearby. The Supreme Court said the individuals "could have determined the boundaries of the refuge before the deer was shot." Similarly, in *State v. Bandbord*, 2014 ND 228 (N.D. 2014), the Supreme Court upheld the conviction of a hunter who did not think he was hunting on posted land, and held "the illegal hunting statutes do place the burden upon the hunter to ensure that the land is open to hunting."

North Dakota Law Regarding Trespass

Trespass may be a civil or criminal offense. Criminal trespass is defined by statute, but civil trespass exists as a matter of common law recognized by courts. An individual found guilty of criminal trespass may be punished by fines and imprisonment, while an individual found liable for civil trespass may have to pay monetary damages to the owner or lawful occupant of the land on which the trespass occurred.

Civil trespass is not defined by statute. According to the Supreme Court, "[i]n North Dakota, civil trespass exists at common law . . . We have previously defined civil trespass as occurring "where a person 'intentionally and without a consensual or other privilege . . . enters land in possession of another or any part thereof or causes a thing or third person so to do.'"" *Gray v. Berg*, 2016 ND 82, 83 (N.D. 2016). A trespasser is liable to the property owner even if the trespasser does not cause harm to a legally protected interest. However, a property owner does not have a claim for civil trespass if the alleged trespasser did not interfere with the property, intend to enter the property without consent or privilege, or take an affirmative voluntary act to enter the property without consent or privilege. For example, in *Tibert v. Slominski*, 2005 ND 34 (N.D. 2005), the Supreme Court said a landowner did not have a claim of civil trespass against a grain company based on a mere anticipation the company's trucks would cause dust to settle on the landowner's property. The Supreme Court said the grain company had not interfered with the plaintiff's property.

Criminal trespass is defined by statute. Under Section 12.1-22-03, an individual who knows the individual is not licensed or privileged to do so is guilty of a felony if the individual enters or remains in a dwelling or highly secured premises. The individual is guilty of a misdemeanor if the individual:

- Enters or remains in or on a building, occupied structure, or storage structure, or separately secured or occupied portion of a building or structure;
- Enters or remains in a place enclosed as manifestly to exclude intruders; or
- Enters or remains in a place as to which notice against trespass is given by actual communication to the individual by the individual in charge of the premises or other authorized individual, or by posting in a manner reasonably likely to come to the attention of intruders if the name of the person posting the land appears on each sign in legible characters. Even if an authorized individual complies only substantially with the notice requirements, and notice against trespass is clear from the circumstances, an intruder is guilty of criminal trespass.

Under the statute, criminal trespass requires knowledge. An individual has to know the individual is not licensed or privileged to enter or remain on the property at issue to commit criminal trespass. However, an individual does not have to know the individual is committing a crime to be guilty of criminal trespass. The statutory definition of "knowingly" provides the basis for determining when an individual knows the individual is not licensed or privileged to remain on property. Under Section 12.1-02-02, a person acts knowingly if "when he engages in the conduct, he knows or has a firm belief, unaccompanied by a substantial doubt, that he is doing so, whether or not it is his purpose to do so." In *State v. Bertram*, 2006 ND 10 (N.D. 2006), the Supreme Court stated a person's knowledge depends on all the surrounding facts and circumstances and is a factual question that may be established by circumstantial evidence. Also, under the statutory definition of criminal trespass, an individual licensed or privileged to be on the property at issue is not trespassing. The Supreme Court has defined the terms "licensed" and "privileged". In *State v. Purdy*, 491 N.W.2d 402, 410 (N.D. 1992), the Supreme Court stated an individual is licensed to be on property "if the entry was consensual." In the same case, the court stated an individual is privileged to be on property if the individual "naturally may be expected to be on the premises often and in the natural course of his duties or habits" or the individual has "the freedom or authority to act and to use property."

Generally, an individual is not allowed to enter or remain on fenced property if the individual knows the individual is not licensed or privileged to be there. However, the Supreme Court held culpability for trespass on fenced property depends, in part, on the fence at issue. Under Section 12.1-22-03, "[a]n individual is guilty of a class A misdemeanor if, knowing that that individual is not licensed or privileged to do so, the individual . . . [e]nters or remains in any place so enclosed as manifestly to exclude intruders." The word "manifestly" is not defined by statute, so courts look to the plain,

ordinary, and commonly understood meaning of the word to determine its legal meaning, pursuant to Section 1-02-02. In *State v. Bearrunner*, 2019 ND 29 (N.D. 2019), the Supreme Court noted "[t]he word 'manifest' is defined as 'readily perceived by the senses' or 'easily understood or recognized by the mind: obvious.'"

According to the court, not all fences satisfy the requirements of Section 12.1-22-03:

A plain reading of the statute indicates the fence must be enclosed in a manner that obviously excludes intruders before an individual is guilty of trespass. Fences differ in size, materials of construction, and purpose. One fence may clearly communicate that trespassers are not allowed while another fence may not. Accordingly, whether a fence is so enclosed that it obviously excludes intruders is a finding of fact, not a matter of law . . . [W]e decline to hold as a matter of law that an open gate is an invitation to outsiders to gather on private property.

As a result, cases in which an individual is alleged to have trespassed criminally on fenced property will turn, in part, on what type of fence and gate are on the relevant property.

In 1990 the North Dakota Attorney General issued a legal opinion to Representative Dick Tokach regarding various types of trespass violations:

[The statute regarding trespass on enclosed [property] has been generally construed to involve an enclosure more substantial than a typical barbed wire fence. Barbed wire fences may be construed as utilized to keep livestock in a property rather than keeping people out of that property. Fences of the type which have generally been found to come within this section include chain link or other fences of similar height or mass which clearly evidence the owner's intent that access to that owner's property is not permitted. However, a prosecutor may determine that this section may apply depending upon the specific facts and circumstances of the individual case.

In contrast, in *Bearrunner*, the Supreme Court upheld the defendant's conviction for criminally trespassing on land enclosed by a barbed wire fence. Ultimately, juries must weigh the facts of any allegation of trespassing on fenced property to determine whether the enclosure manifestly excludes intruders.

House Bill No. 1293 (2017) created a new subsection to Section 12.1-22-03 to provide a noncriminal penalty for trespass. According to the legislative history of the bill, the new subsection was intended to reduce the burden on courts by allowing peace officers to cite some trespassers and fine the trespassers \$250 for a violation. Specifically, the subsection applies to an individual who knows the individual is not licensed or privileged to be in a location where notice is posted "in a manner reasonably likely to come to the attention of intruders." This language mirrors part of Section 12.1-22-03(3). As a result, an individual engaging in that activity is subject to a criminal penalty under subsection 3 and a noncriminal fine under the new subsection, subsection 4. Additionally, if the individual also is hunting, the individual is subject to a criminal penalty under Chapter 20.1-01.

Criminal trespass and hunting on posted land are separate offenses with separate elements and penalties. In some situations, a prosecutor may be able to bring charges against an individual under either the criminal trespass statute or the hunting on posted land statute. The Supreme Court held in *Bearrunner* "N.D.C.C. § 20.1-01-17 does not create an exception to N.D.C.C. § 12.1-22-03. Instead, it creates a separate offense imposing a separate penalty that includes the loss of hunting privileges."

Legislative History of Land Access Bill Draft in the 65th Legislative Assembly

During the 2019 legislative session, the House and Senate Agriculture Committees discussed many versions of Senate Bill No. 2315 in an attempt to amend access to private lands for hunting, trapping, and other purposes. Some of the versions changed the default status of unposted land to "closed" to hunters and others without permission to be on the property. Under these versions, land could not be entered without the landowner's permission. Some versions of the bill included provisions for one or more state agencies to develop and operate a database online or on another electronic platform, which would indicate which parcels of land are "open" or "closed" to hunters and others. In some versions, the database would have been developed based on geographic information system (GIS) data from counties. The database would have served as an electronic posting system, and, if one of these versions had become law, individuals would have had to check the database before entering another person's land. These versions of the bill also would have preserved landowners' option to physically post their land instead of using the online database. Many versions of the bill changed the penalties for trespassing as well. The legislative history of Senate Bill No. 2315 includes testimony from many members of the public both in support of and opposition to different versions of the bill. The bill ultimately failed; however, the study of the issues raised in committee hearings on Senate Bill No. 2315 was included in House Bill No. 1061.

Other States

In Minnesota, an individual may not enter agricultural land or posted land for outdoor recreation unless the individual has permission from the owner, occupant, or lessee, or the individual is on foot and retrieving either wounded game that was lawfully shot or a hunting dog under Minnesota Statutes Annotated Sections 97B.001 and 609.605(5).

In Montana, an individual is required to obtain permission from the landowner, lessee, or an agent of the landowner or lessee before entering land to hunt or trap under Montana Code Annotation Section 87-6-415. Montana's Department of Fish, Wildlife, and Parks operates a block management program, which includes publication of a guide identifying land where hunters may request free reservations for hunting through a landowner or the department. In return for allowing access to their land, landowners may receive free sportsmen's licenses, limited liability protection, livestock loss reimbursement, and compensation up to \$15,000. The program is funded by license fees collected by the department.

In South Dakota, an individual is required to have a landowner or lessee's permission to fish, hunt, or trap on private land under South Dakota Codified Laws Section 41-9-1.

TESTIMONY AND COMMITTEE CONSIDERATIONS

The committee discussed the need to bring landowners and sportsmen together to discuss land access issues in a productive, collaborative way. The committee discussed the need to hear the opinions and concerns of landowners and sportsmen, and find a common solution to the issues raised in the 2019 legislative session. The committee urged organizations representing landowners and sportsmen to provide input and testimony to the committee.

The committee received testimony from representatives of the Game and Fish Department regarding the number, types, and results of violations for trespass or hunting on posted land reported by the department's wardens over the past 5 years. Over that period, approximately 329 citations issued by the wardens for hunting on posted land resulted in court dispositions. Wardens also issued 131 citations for criminal trespass and 20 citations for noncriminal trespass. The wardens also reported an average of 111 complaints per year with the following outcomes:

- 35 percent resulted in prosecutions;
- 12 percent had unknown suspects;
- 16 percent resulted in the complainant declining to prosecute;
- 3 percent resulted in the prosecuted declining to prosecute;
- 6 percent resulted in a warning;
- 19 percent ended up not being legal violations; and
- 9 percent had unknown outcomes.

Most violations were committed by hunters who had not committed violations previously. Morton County had the highest number of incidents of hunting on posted land reported to the department, and was followed by Richland County, Emmons County, and Dickey County.

The committee received testimony from a representative of the Game and Fish Department regarding data and applications available to help develop an electronic posting database. The state is developing a GIS to collect and consolidate many types of data for state agencies. The GIS includes data regarding land parcels and landowners in some counties and can form the basis of an electronic posting database. Also, there are multiple electronic applications used by hunters across the country to identify land open for hunting which could be tailored to provide information to hunters from an electronic posting database in the state. The applications can be accessed on mobile devices in the field.

The committee received testimony from a representative of the Game and Fish Department regarding the percentage of land in the state represented in gratis hunting licenses. Under Section 20.1-03-11, these licenses are available for certain persons who own or lease land in the state, and the licenses permit hunting on the owned or leased land. If the owner or lessee is not an individual, the owner or lessee may obtain one license to be provided to an individual meeting certain qualifications. On average, approximately 12 million acres out of the 45.3 million acres in the state are represented by gratis licenses.

The committee received information from a representative of the Game and Fish Department regarding access to fishing locations. The department has easements or adjoining public land for the vast majority of lakes the department manages, and access to most fishing locations is free. It would cost tens of millions of dollars for the department to maintain winter access to all ice fishing locations.

The committee received testimony from a representative of the Department of Trust Lands regarding public access to trust lands. The department has had a policy regarding public access since 1983, and, at the time of the testimony, was in the process of adopting an administrative rule codifying the policy. The administrative rules were adopted and became effective on January 1, 2020. Under the policy, the public may access trust lands for recreational purposes unless the lands are properly posted by the department. However, vehicles may not be used on trust lands. In 2018, approximately 98 percent of trust lands were open to hunting.

The committee received information from representatives of the North Dakota Association of Counties regarding the willingness and abilities of counties to participate in a pilot program to evaluate the use of an online land access database providing electronic posting of land. Counties have been providing information to state agencies for the GIS. At the beginning of the biennium, 48 of the 53 counties had at least some GIS data regarding land parcels. However, only 20 of the 48 counties had all the necessary GIS data for an electronic posting database. There is considerable variation in the frequency of updates to counties' GIS land parcel data. Some counties' data are updated only annually in preparation for distribution of tax statements, and the infrequent updates could lead to incorrect ownership information or other errors in an electronic posting database. There also is variability in the resources counties have to collect and update parcel data. Some counties lack internal resources and contract with vendors for this work. Increasing the frequency of data updates could be costly for these counties. Richland, Ramsey, Slope, and McKenzie Counties were willing to participate in the electronic posting pilot program. House Bill No. 1021 allowed up to three counties to participate. The committee chose Richland, Ramsey, and Slope Counties so different parts of the state and different-sized counties would be represented.

The committee discussed the need for clarity and the ability to prosecute criminal trespass cases. The committee received information from a representative of the North Dakota State's Attorneys' Association regarding prosecutions of trespass cases and implications of potential changes to land access laws. No central database of trespass prosecutions exists. Courts generally set fines for hunting on posted land at around \$600 and do not send offenders to jail. Prosecutors sometimes charge individuals who hunt on posted land with trespass rather than hunting on posted land because the penalty for trespass does not include suspension of an individual's hunting license. According to the information, when a prosecutor is deciding whether to charge an individual with trespass, the prosecutor must consider whether the circumstances gave the individual notice the individual should not have been in the relevant location. Although House Bill No. 1021 authorized a pilot program to evaluate electronic posting, there are no penalties for hunting on land that is not physically posted, even if the land is posted in the electronic posting database.

The representative of the North Dakota State's Attorneys' Association also testified proving criminal intent for trespassing on electronically posted land may be difficult. According to the testimony, there would have to be a legal duty for the defendant to check the electronic posting database before entering the land, and the defendant would have to know the duty existed. The testimony noted the potential impacts on urban areas should be considered when drafting trespass and land posting statutes. The committee discussed wishing to continue permitting neighborly interactions, deliveries, and normal business operations in urban areas.

The committee discussed the need for a public information campaign regarding the pilot program. Representatives of landowner groups agreed to send communications to their members regarding the program and encourage participation in the pilot program. The Game and Fish Department and a representative of a sportsmen's organization agreed to provide information about the pilot program to hunters.

The committee discussed the need to evaluate the pilot program. The Information Technology Department and the Game and Fish Department agreed to identify the number of users of the land access database, and the Game and Fish Department agreed to survey users about the program.

The committee made decisions concerning several logistical considerations for the development of an online database for electronic posting and a mobile application for hunters to access the electronic posting information in the field. Representatives of ITD and the Game and Fish Department provided mock-ups of the database and application. The committee decided the database would reside on the Game and Fish Department's website. The Information Technology Department and the Game and Fish Department developed the database, which the committee approved on May 11, 2020. Landowners in the three counties participating in the pilot program could post land electronically in the database through July 15, 2020. At the final committee meeting, the Game and Fish Department reported 79 landowners used the database to electronically post 260 tracts of land representing approximately 38,000 acres. Hunters can access the electronic posting information on the Game and Fish Department's website or in the mobile application.

BILL DRAFTS

Study Continuation

The committee considered a bill draft to continue the study of access to private and public lands for hunting, trapping, fishing, and related issues, including evaluation of the electronic posting database and mobile application. The committee discussed the study language and concluded the language is broad enough to include consideration of trespass laws. The bill draft included the same list of criteria for committee membership as House Bill No. 1021 included.

Expanding the Criminal Trespass Statute and Making Names on Posting Signs Optional

The committee considered a bill draft expanding the definition of criminal trespass. The bill draft would have made entering or remaining on electronically posted land criminal trespass under the same conditions that make entering or remaining on physically posted land criminal trespass. The bill draft would have made entering or remaining on land outside city limits for recreational purposes a misdemeanor if the individual on the land is not privileged or licensed to be there. The bill draft also would have made including a landowner's name on a posting sign optional rather than mandatory.

Expanding the Criminal Trespass Statute and Requirements for Posting Land Against Hunting

The committee considered a bill draft to expand the definition of criminal trespass and revise the requirements for posting land against hunting. Under the bill draft, entering or remaining on electronically posted land would constitute criminal trespass in the same manner as entering or remaining on physically posted land. The bill draft provided including a landowner's name on a posting sign would be optional. The bill draft also clarifies that entering or remaining on property enclosed by any type of fence without license or permission to do so constitutes criminal trespass. This clarification arose from the committee's discussion of the North Dakota Supreme Court's language in *State v. Bearrunner*, 2019 ND 29 (N.D. 2019), indicating not all fences necessarily constitute enclosures "manifestly to exclude intruders." The bill draft allows landowners to post land physically or electronically in an electronic database maintained or authorized by the state and available to the public. The committee members representing sportsmen's organizations raised concerns about individuals illegally posting land if the requirement to include a poster's name were removed from the statute. The representatives of sportsmen's organizations also indicated hunters would be unable to contact a landowner to ask permission to hunt on posted land if signs did not include landowners' names. The committee discussed potential difficulty in proving the requisite intent if entering electronically posted land constituted criminal trespass. The committee revised the bill draft to remove the language making names on posting signs optional and language regarding electronically posted land in the criminal trespass statute.

Electronic Posting

The committee considered a bill draft regarding the requirements for posting land against hunting to include electronic posting. This bill draft would give landowners the option to post their land physically or electronically in an electronic database maintained or authorized by the state and available to the public.

RECOMMENDATIONS

The committee recommends a bill draft to continue the study of land access and related issues. The committee recommends a bill draft allowing landowners to physically or electronically post land and to include all fenced land in the criminal trespass statute. The committee recommends a bill draft to allow landowners the option of either physically or electronically posting land.