



North Dakota Legislative Council

Prepared for the Natural Resources Committee
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BACKGROUND MEMORANDUM - LAND ACCESS STUDY

[Senate Bill No. 2036 \(2021\)](#) directs the Legislative Management to continue the 2019-20 interim study of access to public and private lands for hunting, trapping, fishing, and related issues authorized by Section 6 of House Bill No. 1021 (2019). The continued study must include the evaluation of the state's electronic land access database and online application developed during the 2019-20 interim and expansion of the database and application to all counties in the state. The database and application were developed under the direction of the 2019-20 interim Natural Resources Committee and were available for use in Richland, Ramsey, and Slope Counties as a pilot project. The database and application allow landowners to post their land electronically and allow hunters and others to identify which land is posted electronically. Representatives of the North Dakota Grain Growers Association, North Dakota Game and Fish Department, North Dakota Stockmen's Association, North Dakota Association of Realtors, North Dakota Wildlife Federation, North Dakota Soybean Growers Association, and interested stakeholders testified in support of continuing the study. The testimony indicated a desire to continue studying land access rights and enhancement and expansion of the electronic posting application and database.

The membership of the interim Natural Resources Committee is the same as during the 2019-20 interim. The voting members of the committee are five members of the Legislative Assembly representing both chambers and both political parties, two individuals representing agricultural landowners, and two individuals representing sportsmen organizations. The nonvoting members of the committee are the Agriculture Commissioner, the Director of the Game and Fish Department, the state's Chief Information Officer, and representatives of the North Dakota Association of Counties and North Dakota State's Attorneys' Association. The five nonvoting members may identify designees to serve on the committee in their places.

HUNTING ON POSTED LAND

North Dakota Century Code Chapter 20.1-01 governs access to land by hunters. 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. Under Section 20.1-01-18, individuals are prohibited from hunting or pursuing game on legally posted land unless they first obtain permission from the person legally entitled to grant permission. However, under Section 20.1-01-19, an individual may enter legally posted land to recover game shot or killed on land where the individual had a legal right to hunt.

To post land under Section 20.1-01-17, an owner of the land, or an individual authorized by the owner, must place signs along the public highway or land giving notice that hunting is not permitted on the land. The signs must be readable from the outside of the land and be at least 880 yards apart. If the land is entirely enclosed by a fence, the owner must place signs at each gate to post the land. [Senate Bill No. 2144 \(2021\)](#) established an alternative method for posting land. The bill amended Section 20.1-01-17 to allow an owner to post the land by designating the land as posted or closed to hunting in an online database or other electronic application maintained or authorized by the state and available to the public which identifies whether land is available to hunters. Finally, even if an owner's posting does not comply with the requirements of Section 20.1-01-17 but notice against hunting or trespassing "is clear from the circumstances," the land is deemed posted under Section 20.1-01-17 and an intruder is guilty of hunting on posted land. 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 of whether the land is posted.

Hunting on posted land without permission is a strict liability offense under Section 20.1-01-18. This means 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. There is a legal presumption 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 a weapon on posted land is prima facie evidence the individual entered the land for one or both of those purposes. This provision makes it easier to prosecute an individual with a

weapon for trespassing on posted land under Section 20.1-01-18 because a prosecutor does not need to prove the individual's purpose for being on the posted land.

Section 20.1-01-18 also requires trappers to obtain written permission before trapping protected fur-bearing animals on posted land. An individual who traps protected fur-bearing animals or hunts on posted land without permission is guilty of a Class B misdemeanor for the first offense and a Class A misdemeanor for a subsequent offense within 2 years. Section 20.1-01-26 also provides when an individual is convicted of hunting on posted land, the court is required to suspend the individual's hunting, fishing, and trapping privileges for a period of at least 1 year for the first conviction, 2 years for the second conviction, and 3 years for the third or subsequent conviction. The court also is required to determine whether the defendant must complete a hunter education course before obtaining a new hunting 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 convictions 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."

TRESPASS OFFENSES

In addition to statutes specific to hunters' access to land, there are general trespass statutes in the Century Code. 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

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 Elements and Definitions

Chapter 20.1-01 governs criminal trespass, which is defined under Section 12.1-22-03. Under Section 12.1-22-03, an individual who **knows** the individual is **not licensed or privileged** to do so:

- Is guilty of a Class C felony if the individual enters or remains in a dwelling or highly secured premises; and
- 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 by a fence or otherwise enclosed as manifestly to exclude intruders, unless the individual is a licensed hunter or angler who is lawfully hunting or fishing; or

Enters or remains in a place as to which notice against trespass is given by actual communication to the individual by the owner or an individual authorized by the owner 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. For example, an individual

walking up to a residential front door is not trespassing if there is no communication or indicia the individual should not be there. 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.

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 said an individual is licensed to be on property "if the entry was consensual." In the same case, the court said 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."

Criminal Trespass on Fenced Property

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. 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 by a fence or otherwise enclosed as manifestly to exclude intruders, unless the individual is a licensed hunter or angler who is lawfully hunting or fishing." In 2019, the Supreme Court held culpability for trespass on fenced property depends, in part, on the fence at issue. To address this issue, in 2021, the Legislative Assembly defined the word "fence" in the statute as "a permanent structure on nonurban, private property which is maintained and capable of containing livestock."

Criminal Trespass After Receiving Actual Communications

Under Section 12.1-22-03, if an individual in charge of the premises or another authorized individual tells an intruder not to enter the premises or to leave the premises, the intruder is on notice and must leave. If the intruder does not leave, the intruder is guilty of criminal trespass. To satisfy the elements of criminal trespass under this provision, a landowner must provide "actual communication" to the intruder either verbally or in writing. Even if a landowner or other authorized individual only "substantially complies" with this provision, as long as notice against trespass is clear from the circumstances, an intruder is guilty of criminal trespass. However, it is unclear what actions would constitute substantial compliance with the notice requirement.

Criminal Trespass on Posted Land

Section 12.1-22-03 prohibits an individual from entering or remaining on land posted in a manner reasonably likely to come to the attention of intruders. The statute also provides the name of the person posting the premises must appear on each sign in legible characters. As with the requirement to provide actual communication, a landowner or other authorized individual only has to "substantially comply" with the posting requirements, provided notice against trespass is clear from the circumstances. However, in *Interest of K. V.*, 2019 ND 255 (N.D. 2019), the Supreme Court found two "no trespassing" signs placed near the entrance to a heavy machine lot were insufficient to constitute posting for purposes of the criminal trespass statute because the signs did not include the name of the poster. The Supreme Court held signs without the poster's name do not substantially comply with posting requirements. The court did not provide guidance regarding what would constitute substantial compliance.

House Bill No. 1293 (2017) created Section 12.1-22-03(4) to provide a noncriminal penalty for trespass on posted land. According to the legislative history on the bill, Section 12.1-22-03(4) was intended to reduce the burden on courts by allowing peace officers to cite some trespassers and fine them \$250 for a violation. Senate Bill No. 2144 (2021) expanded this provision to apply also to an individual who knows the individual is not licensed or privileged to be in "a place enclosed by a fence." As a result, an individual engaging in that activity is subject to a criminal penalty under Section 12.1-22-03(3) or a noncriminal fine under Section 12.1-22-03(4). Additionally, if the individual also is hunting, the individual is subject to a criminal penalty under Chapter 20.1-01.

2021 LEGISLATION PROPOSED BUT NOT ADOPTED

The 2019-20 interim Natural Resources Committee recommended Senate Bill No. 2036 (2021) authorizing the continuation of the study, and the amendments to the posting of land and criminal trespass statutes adopted in Senate Bill No. 2144 (2021). The committee also recommended two bills not adopted during the 2021 legislative

session. Senate Bill No. 2037 (2021) would have allowed landowners to physically or electronically post land and would have included all fenced land under the criminal trespass statute. Senate Bill No. 2038 (2021) would have given landowners the option of either physically or electronically posting land. However, following the introduction of Senate Bill Nos. 2037 and 2038, members of the 2019-20 interim Natural Resources Committee decided to support Senate Bill No. 2144 instead of the bills recommended by the committee. As a result, both Senate Bill Nos. 2037 and 2038 failed to pass the Senate.

LAND ACCESS DATABASE AND APPLICATION

In addition to requiring the study of access to public and private lands for hunting, trapping, fishing, and related issues, Section 6 of House Bill No. 1021 (2019) required the Information Technology Department (ITD) and the Game and Fish Department to establish a trial electronic posting and hunter access information system pilot project in up to three counties in the state. The information system includes a database and a mobile application developed under the direction of the 2019-20 interim Natural Resources Committee and made available for use in Richland, Ramsey, and Slope Counties, which volunteered to participate in the project. The database and application allow landowners to post land electronically and allow hunters and others to identify which land is posted electronically. The pilot project included housing the database on the Game and Fish Department website; obtaining land parcel information from counties selected for the pilot project; developing an interactive map to denote hunting unit boundaries; educating county officials, landowners, hunters, and game wardens regarding the pilot project; and requiring participating landowners to designate land as open or closed to hunters in the pilot project.

The land access website and application for the pilot project were developed, owned, and operated by ITD, with assistance from the Game and Fish Department. The participating counties provided the necessary land parcel data to ITD and are responsible for updating the data. The land parcels are preloaded in the database and application. Landowners participating in the pilot project are required to create a profile, search county tax land parcels in the database, complete an application form prepared by ITD to claim their land parcels, and designate their land as open or closed for hunting in the application. The Information Technology Department authenticates the ownership of land parcels in the application. Landowners also have the ability to provide contact information in the application if they wish to allow hunters the ability to contact them to request permission to hunt on their land, but landowners are not required to provide the contact information. The database allows landowners to designate land only as open or closed.

Landowners and hunters access the electronic posting application created by ITD through the Game and Fish Department's online licensing system. Hunters may download and use the mobile application through the Game and Fish Department online licensing system on a personal mobile device to determine where they are located relative to a parcel of land that is of hunting interest, determine whether the parcel is open or closed for hunting, and print a map of the surrounding area. The pilot project received participation by 79 landowners in the three participating counties. The landowners designated approximately 38,000 acres as open or closed for hunting on 260 tracts of land through the pilot project application.

STUDY APPROACH

The interim Natural Resources Committee may wish to begin its study under Senate Bill No. 2036 (2021) by obtaining data and statistics from the counties that participated in the initial land access database pilot project to monitor and evaluate the progress of the project to date. The 2019-20 interim Natural Resources Committee discussed the possibility of expanding the land access database and application to the entire state after receiving feedback indicating all 53 counties in the state were willing to provide data for the project. As a result, the committee may wish to identify whether all counties in the state have data available for expansion of the land access database and application. The committee also may wish to receive testimony from a representative of the North Dakota Association of Counties regarding issues encountered by counties participating in the initial pilot project or by counties in obtaining data necessary for the expansion of the database and application. The committee also may wish to receive testimony from hunters and sportsmen regarding the use of the mobile application. Finally, the committee may wish to evaluate the effectiveness of communications regarding the use of the database to the hunters of the state.