

Official Opinion No. 81-36, Criminal trespass by hunters

October 9, 1981

Mr. Robert Arneson
State's Attorney
Hamlin County
Post Office Box 178
Hayti, South Dakota 57241

Official Opinion No. 81-36

Criminal trespass by hunters

Dear Mr. Arneson:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

A licensed hunter in South Dakota lawfully shoots and kills a pheasant or small game that subsequently falls on private property. The private property is conspicuously posted with signs stating 'No Trespass' and the landowner has previously orally informed the hunter not to trespass on his property. The hunter leaves his gun in the road ditch and walks, on foot, into the private property to retrieve his fallen game.

Based on the above facts, you have asked the following question:

QUESTION:

Is the hunter who enters the private property, in the above situation, violating the general criminal trespass statute, SDCL 22-35-6, or is the unarmed retrieval provision of the newly enacted SDCL 41-9-8 an affirmative defense to a charge of trespass under SDCL 22-35-6?

In South Dakota the title to wild animals and game is held by the state in trust for the public. SDCL 41-1-3. The Legislature has made provisions for the hunting of wild game during restricted periods by those duly licensed. Wild game in South Dakota, unlike England, is not, and has never been, the private property of individual

landowners. By killing, catching, or taking any game bird or game animal, in the manner provided by law, a person acquires a property interest in that game. Actual bodily seizure is not indispensable to the possession necessary to acquire a property right to game. Pierson v. Post, 3 Caines (N.Y.) 175, 2 Am. Dec. 264 (1808).

SDCL 22-35-6 provides:

Any person who, knowing that he is not privileged to do so, enters or remains in any place where notice against trespass is given by:

- (1) Actual communication to the actor;
- (2) Posting in a manner reasonably likely to come to the attention of intruders; or
- (3) Fencing or other enclosure which a reasonable person would recognize as being designed to exclude intruders;

is guilty of a Class 2 misdemeanor, but if he defies an order to leave personally communicated to him by the owner of the premises or by any other authorized person, he is guilty of a Class I misdemeanor.

The 1981 Legislature passed SDCL 41-9-8 which states:

In addition to the penalties provided for in § 41-9-7, any person who knowingly enters or remains on private property for the purpose of hunting, fishing or trapping, in violation of the provisions of § § 41-9-1 and 41-9-2, shall have his hunting, trapping or fishing privileges revoked for a period of one year following such conviction. If the person is the holder of a license to hunt, trap or fish, the court shall require the license holder to surrender and deliver the license to the court to be returned to the department of game, fish and parks. For the purpose of this section, the term 'guilty' shall have the same meaning as the term 'conviction' in § 32-12-53. Unarmed retrieval of lawfully taken small game from either private land or land controlled by the department of game, fish and parks or other public lands, may not constitute a crime or petty offense, provided that such retrieval of small game does not involve the use of a motor vehicle. This section may not be construed to limit the civil remedies available to any landowner. (Emphasis added.)

In the above-stated factual situation the hunter has been told not to enter the private property, plus the land is 'conspicuously' posted. It is obvious that if we limit our review of

South Dakota law to just SDCL 22-36- 6, the hunter who enters private land would be guilty of knowing trespass. But we must consider all statutes that deal with a specific activity.

SDCL 41-9-8 provides that a person is not guilty of hunting or fishing trespass if he has entered private land to retrieve lawfully taken game. It is clear that a conflict now exists in South Dakota law.

When general and specific provisions of a law are in conflict, the specific rather than general controls. Judd v. Lardin, 211 Minn. 465, 1 N.W.2d 861 (1942). Specific provisions of statutes control over general provisions which in its comprehensive sense would include matters embraced in the specific provision. Evanston YMCA Camp v. State Tax Commission, 369 Mich. 1, 118 N.W.2d 818 (1962). Specific provisions in a statute control general provisions, and provisions of a complete and specific act will prevail over the general language of another prior provision and if there is a conflict between different statutes as to the same subject matter, the latter statute prevails. Fink v. Cold Spring Granite Corporation, 262 Minn. 393, 115 N.W.2d 22 (1962). Finally, SDCL 2-16-16 provides:

All statutes, other than this code, enacted at the 1981 session of the Legislature shall be deemed to have been enacted subsequently to the enactment of this code, and if any such statute repeals, amends, contravenes, or is inconsistent with the provisions of this code, the provisions of the statute shall prevail.

In the factual situation given we are confronted with a hunting and fishing situation. It is my opinion that the specific statutes governing trespass of hunters and fishers would take precedence over the general criminal trespass law. It is clear that the specific hunting and fishing trespass law allows 'unarmed retrieval of lawful taken small game from either private lands or lands controlled by the department of game, fish and parks or other public lands, provided that such retrieval of small game does not involve use of a motor vehicle.' It is also important to note that SDCL 41-9-8 that allows for unarmed retrieval, was enacted subsequent to the general trespass law of SDCL 22-35-6. Therefore, it is my opinion, under SDCL 2-16-16, that the newly enacted statute takes precedence over the older code provision.

It is important, however, to note that when a person relies on a statutory justification for trespass, he must bring himself fully within its terms. 87 C.J.S. Trespass § 53. If a hunter expects to enjoy the statutory created exception to trespass he must comply strictly with the terms. A hunter:

1. Must shoot the bird in a lawful manner, in a lawful place.
2. Must be unarmed when he enters on private land.
3. Must be on foot.
4. Must be proceeding towards a downed game bird or small game animal.

Unarmed retrieval is a very narrow affirmative defense for trespass. Any hunter who does not meet the criteria listed above would have no statutory justification for entering private property. Hunters may not shoot game on private property from a road ditch or public property and then proceed on that private property to retrieve the game unlawfully taken. Neither may hunters enter private property under the pretext of looking for downed game in an effort to flush wild game from private property to a public right of way or public hunting area. Hunters must be very careful and responsible in exercising this limited privilege that SDCL 41-9-8 now provides.

It is my opinion that the hunter in the above-stated factual situation should not be charged with criminal trespass.

Respectfully submitted,

Mark V. Meierhenry
Attorney General