January 15, 2004

John Cooper, Secretary
South Dakota Department of Game, Fish and Parks
523 East Capitol Avenue
Pierre, South Dakota 57501-3182

OFFICIAL OPINION NO. 04-01

Conservation Officer's Entry Upon Private Land

Dear Mr. Cooper:

You have requested an official opinion from this Office regarding the following factual situation:

FACTS:

Currently, conservation officers enter privately owned open fields to conduct license checks and enforce other wildlife laws. They do so under the legal premise of the open fields doctrine.

Based upon the foregoing you have posed the following questions:

QUESTIONS:

1. Does a conservation officer's entry on privately owned land in the performance of wildlife law enforcement duties, without probable cause, reasonable suspicion, consent or permission from the landowner, or a search warrant, violate the Fourth Amendment to the United States Constitution or Article VI, Section 11 of the South Dakota Constitution?

2. Does such entry without probable cause, reasonable suspicion, consent of landowner or a search warrant constitute a trespass?

IN RE QUESTIONS:

Before answering your questions, I will discuss a conservation officer's statutory responsibilities and authority to act. The Department of Game, Fish and Parks (GF&P) "shall enforce the laws of this state involving the protection and propagation of all game animals, game birds, fish, and harmless birds and animals." SDCL 41-3-8. To do so, GF&P has the "authority to employ an adequate force of conservation officers." SDCL 41-2-11. The conservation officers are required to meet the education and training requirements of otherSouth Dakota law enforcement officers, and be certified as such. SDCL §§ 41-2-11, 41-15-10.1. Conservation officers are responsible for enforcing, inter alia, every state statute which pertains to game, fish, parks, forestry or boating. SDCL 41-15-10.1(2). One such statute requires all licensees to exhibit their license "at any time upon request of any person." SDCL 41-6-63. While enforcing this and other statutes identified in SDCL 41-15-10.1, conservation officers are law enforcement officers with the "same authority as any other law enforcement officer" (id.) including arrest. SDCL 41-15-10. In light thereof, it is my opinion that: (1) GF&P has statutory authority to manage and regulate hunting, fishing and trapping in South Dakota; and (2) conservation officers have a statutory mandate to enforce the state's wildlife laws and regulations.

IN RE QUESTION 1:

The Fourth Amendment to the United States Constitution says:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The constitutional issues your questions present were first addressed by the United States Supreme Court in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). In that case, the Supreme Court found, "[T]he special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields." Id. at 446. This is commonly referred to as the "open fields" doctrine.

Sixty years later, the Supreme Court reaffirmed this position in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The Oliver court upheld searches under the open fields doctrine involving the following two factual situations: The first situation involved two narcotics agents going to a farm after receiving reports that marijuana was being raised. Arriving at the farm, the agents drove past the farmhouse to a locked gate

with a "No Trespassing" sign. The agents walked around the gate and continued their investigation, finding a field of marijuana over a mile from the farmhouse. Oliver, 466 U.S. at 173. The second situation involved two police officers responding to an anonymous tip that marijuana was being grown in the woods behind a house. The officers entered the woods by a path between residences which they followed until reaching two marijuana patches fenced with chicken wire. Oliver, 466 U.S. at 174.

In upholding the searches, the Oliver court noted that

the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.

Oliver, 466 U.S. at 180 n.11 (citations omitted). Importantly, the Oliver court also noted that the Framers of the Constitution "would have understood the term 'effects' to be limited to personal, rather than real, property." Oliver at 177 n.7 (citation omitted). Relying on Hester, the Court ultimately concluded that the expectation of privacy in open fields is not an expectation that "'society recognizes as reasonable.'" Id. at 179. This, for one reason, is that "these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be." Id. In addition, "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." Id. The Court concluded, "In this light, the rule of Hester v. United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Oliver, 466 U.S. at 178.

Furthermore, the Oliver court also rejected the suggestion that when one takes steps to protect privacy, that this action will somehow create or establish legitimate expectations of privacy in an open field. Thus, erecting fences and posting "No Trespassing" signs around the property made no difference. This is because those steps usually do not totally bar the public from viewing into the open field in rural areas. Oliver, 466 U.S. at 179.

The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have

explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Oliver, 466 U.S. at 182-183.

Finally, the Supreme Court in Oliver refused to create a legitimate expectation of privacy based upon the common law tort of trespass. Finding that trespass extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interests, the Court held, "Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment." Oliver, 466 U.S. at 183-184.

Three years after Oliver, United States v. Dunn, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) again addressed the issue. Dunnnoted that "Oliver reaffirmed the precept, established in Hester, that an open field is neither a 'house' nor an 'effect,'" and, therefore, "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." Id. at 304 (citation omitted). While Dunn focused on the extent of a home's curtilage,[1] the Court noted, "Under Oliverand Hester, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields." Id. at 304.

In sum, the United States Supreme Court has consistently and repeatedly found that open fields are not entitled to protections afforded by the Fourth Amendment.

The Eighth Circuit Court of Appeals applied the "open fields" doctrine in United States v. McDowell, 383 F.2d 599 (8th Cir. 1967). The court held, "Under federal law the search of open fields without a search warrant is not constitutionally 'unreasonable,'" and found the same to be true even if the fields are construed to be part of a commercial enterprise. Id. at 603.

Other jurisdictions are in accord.[2] A United States Fish and Wildlife (USFW) Agent did not violate the Fourth Amendment by stopping a vehicle as it left a private hunting club and requesting to see hunting licenses. United States v. Wylder, 590 F.Supp. 926 (D. Or. 1984). A federal agent's entry without a warrant onto grounds of a private hunting club for routine inspection was held not invalid. United States v. Cain, 454 F.2d 1285 (7th Cir. 1972). A USFW Agent did not violate the Fourth Amendment by entering a field without a warrant to gain access to a pond.

Under the 'open fields' doctrine of Hester v. United States [citations omitted], a trespass does not, of itself, constitute an illegal search. The open fields around the barns not being an area constitutionally protected against a warrantless search, there was no 'search' in this case within the meaning of the Fourth Amendment.

United States v. Swann, 377 F.Supp. 1305, 1306-1307 (D. Md. 1974).

A Georgia statute that authorizes Department of Natural Resources rangers to stop boats for safety inspections without any articulable suspicion of illegal action did not violate the Fourth Amendment or limitations on suspicionless searches laid down by the United States Supreme Court in Delaware v. Prouse, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Peruzzi v. State, 567 S.E.2d 15 (Ga. 2002) (citing North Carolina v. Pike, 532 S.E.2d 543 (N.C. 2000); Schenekl v. Texas, 996 S.W.2d 305 (Tx. App. 1999); Maine v. Giles, 669 A.2d 192 (Me. 1996)). Closer to home, a Minnesota state conversation officer's warrantless entry into a hunting camp did not violate the Fourth Amendment regardless of probable cause. "If police or other law enforcement officers enter land which is found to be an open field, then the existence of probable cause is irrelevant and unnecessary." State v. Sorenson, 441 N.W.2d 455, 458 (Minn. 1989). More recently, the Minnesota Supreme Court held that a fisherman had no reasonable expectation of privacy in the areas of his open boat used to typically store or transport fish, and thus statutes allowing inspection without probable cause did not violate the Fourth Amendment. State v. Colosimo, 669 N.W.2d 1 (Minn. 2003).

Article VI Section 11 of the South Dakota Constitution is the state constitutional counterpart to the Fourth Amendment. Article VI Section 11 says:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized.

Our state Supreme Court is not required to follow the United States Supreme Court when deciding whether a search or seizure offends our state constitution.[3] However, the South Dakota Supreme Court has relied upon and adopted the federal open fields doctrine principles set forth in Hester, Oliver, and Dunn in applying South Dakota's constitutional counterpart to the Fourth Amendment. InState v. Vogel, 428 N.W.2d 272 (S.D. 1988), relying on the open fields doctrine, the Court upheld a law enforcement officer's search

through the windows of a house from 225 to 500 feet, aided with a zoom lens. In State v. Frey, 440 N.W.2d 721 (S.D. 1989), a deputy sheriff and conservation officer viewed animal carcasses for possible game violations with the aid of a twenty-power scope from an adjacent road. Their subsequent entry onto private property did not violate any expectation of privacy. The Court stated: "The constitutional protection against unlawful searches and seizures . . . does not extend to open fields." Id. at 726 (emphasis in original).

The decisions in Vogel and Frey strongly suggest that the South Dakota Supreme Court will continue to embrace the open fields doctrine when applying our state constitutional provisions under the factual situation you raised.[4] In fact, in the context of a highway game check, the South Dakota Supreme Court has pointed out that "[s]tops [based upon] probable cause would not satisfy the purpose of the [game] law[s] since the number of hunters is large and game officers few." State v. Halverson, 277 N.W.2d 723, 724 (1979). Wild animals are the state's property and citizens have an interest in conserving their wildlife. Id. Conservation officers have been charged by the Legislature with that task. See prior discussion.

As can be seen from the U.S. Supreme Court cases, the open fields doctrine is not unique to conservation officers or wildlife management. It applies to law enforcement across the board. However, wildlife management IS a unique area of law enforcement.

Therefore, it is my opinion that a conservation officer does not violate the South Dakota Constitution or the United States Constitution by entering privately owned lands, which constitute "open fields," without probable cause, reasonable suspicion, consent or permission, or a search warrant when performing his statutory duties. Such activity does not constitute an unreasonable search or seizure in violation of either the Fourth Amendment of the United States Constitution or Article VI, Section 11 of the South Dakota Constitution.

IN RE QUESTION 2:

You have also asked whether a conservation officer's entry on privately owned open fields, as defined above, in performance of his official duties without probable cause, reasonable suspicion, consent or a search warrant constitutes an illegal trespass under state law. The general answer to that question is NO.

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 1 misdemeanor.

By its terms, this statute does not apply to a person who is "privileged" to enter or remain. It is generally accepted:

A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority, in so far as the entry is reasonably necessary to such performance or exercise, only if all the requirements of the enactment are fulfilled.

. . . .

Conduct otherwise a trespass is often justifiable by reason of authority vested in the person who does the act, as, for example, an officer of the law acting in the performance of his duty. Thus, a law enforcement officer is privileged to commit a trespass if he is exercising his lawful authority and if he exercises it in a reasonable manner causing no unnecessary harm.

775 Am. Jur. 2d Trespass § 103 (Westlaw May 2003).

The South Dakota Supreme Court adopted the principles quoted above in State v. Cook, 319 N.W.2d 809 (S.D. 1982). Clearly, a conservation officer conducting game and license checks or investigating crimes within his statutory responsibility is an officer of the law acting in the performance of his duties. The South Dakota Supreme Court has found that "an officer of the law may ordinarily trespass when acting in the scope of his duty." Swedlund v. Foster, 2003 S.D. 8, ¶ 40, 657 N.W.2d 39. The Court has also stated:

The general rule is that: Conduct otherwise a trespass is often justifiable by reason of authority vested in the person who does the act, as, for example, an officer of the law acting in the performance of his duty.

Frey, 440 N.W.2d at 726 (citing Cook, 319 N.W.2d at 812).

Therefore, any law enforcement officer, including a conservation officer, may enter an "open field" in the performance of his statutory duties even though the officer lacks probable cause, reasonable suspicion, consent or permission, or a search warrant without committing a trespass.

CONCLUSION:

In light of all the above, it is my opinion that a duly sworn and certified or probationary conservation officer has the authority to enter privately owned "open fields," without suspicion, probable cause, consent or permission, or a search warrant to perform duties of conducting license checks and enforcing wildlife laws. Furthermore, such entry by a conservation officer does not constitute an illegal trespass.

Very truly yours,

LARRY LONG
ATTORNEY GENERAL

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[1] To determine if an area is curtilage and therefore given Fourth Amendment protection like a home, one has to find that the curtilage is intimately tied to the home itself. Four factors the United States Supreme Court has used to answer this question are (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby. Dunn, 480 U.S. at 301.

[2] The Nevada Attorney General has made very similar interpretations of the open fields doctrine. Nevada Attorney General Del Papa stated that a search warrant is not needed before an officer enters an open field. Op. Att'y Gen. Nev. 14 (1992).

[3] See, e.g., State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (limitation of holding recognized); State v. Hejal, 438 N.W.2d 820, 821 (S.D. 1989).

[4] Because the South Dakota Supreme Court has not recognized any greater protection than the federal courts have provided in this area, I believe Montana's interpretation of its unique privacy provision in the Montana Constitution is irrelevant to my discussion. See State v. Bullock, 901 P.2d 61 (Mont. 1995); see also State v. Romain, 983 P.2d 322 (Mont. 1999).