

# Background Information and Legal Issues Pertaining to the Open Fields Doctrine and Conservation Officers Conducting Compliance Checks on Private Lands

January 2011

## Questions and Answers

*Prepared by the Department of Game, Fish and Parks – Division of Wildlife*

**Q:** Some landowners contend that a conservation officer coming onto their property to contact hunters to conduct a license or game check is a violation of their 4<sup>th</sup> Amendment right to privacy granted by the US Constitution. Is this lawful and how does the constitutional right to privacy apply in this situation?

**A:** Yes, it is lawful for conservation officers to enter open fields of private land to conduct compliance checks to determine if hunters or anglers are properly licensed and abiding by other laws and regulations. The US Supreme Court has consistently ruled that the provisions of the 4<sup>th</sup> Amendment of the US Constitution, which affords citizens protection against unreasonable government intrusion, do not apply to activities that occur out-of-doors, in open fields. The US Supreme Court provided the following interpretation and resulting guidance in its 1984 "OLIVER DECISION": *"Open fields do not provide the setting for those intimate activities that the 4<sup>th</sup> Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities...that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, office, or commercial structure would not be. Government agents can cross fences and trespass without a warrant or reasonable suspicion because fencing and 'no trespassing signs' cannot change the non-private character of an open field."*

The Constitutional premise developed from a series of US Supreme Court decisions on this issue is called the "**Open Fields Doctrine**". This doctrine provides solid, legal guidance for citizens and law enforcement officers to clearly understand how the provisions of the 4th Amendment apply to the contacts and investigations conducted by law enforcement officers in open fields on private lands. In addition, state statutory law exempts certain persons who are deemed 'privileged' from being charged with trespass. Our courts have found that law enforcement officers, acting in the performance of their duties, fall into this category by reason of the authority vested in them to enforce the laws of the state.

**Q:** Can a conservation officer enter private land to perform compliance checks of licenses and game, even if the officer did not observe a violation of law prior to conducting the check?

**A:** Yes, our courts have repeatedly held that the federal and state constitutions and state laws allow this. Conservation officers, working on behalf of the citizens of South Dakota, conduct compliance checks to protect and manage fish and wildlife resources. When a person makes the voluntary decision to hunt, fish, or trap, they agree to comply with certain conditions spelled out through laws and regulations. One condition is that a person must purchase the necessary licenses each year. The person is also required to exhibit the license upon the request of any person, as provided in SDCL 41-6-63. This requirement is printed on all hunting and fishing licenses. By purchasing and signing their license, the person is agreeing to the condition that they will exhibit their license upon request of any person.

**Q:** Why are compliance checks of licenses and game so important?

**A:** Each year there are approximately 400 people who are cited for hunting, fishing or trapping without a license. If there were no compliance checks, the number of people who chose to hunt, fish or trap without a license would likely skyrocket due to the lack of accountability. Most people follow the law because it is the right thing to do. Compliance checks help ensure that all who chose to hunt, fish or trap follow the laws and regulations and are held to the same standard of accountability. This is a basic premise of the justice system in our country.

If the ability of conservation officers to conduct compliance checks on private lands were restricted in the manner proposed by some people, it would be exceedingly difficult to determine if a hunter, angler or trapper on private land had a proper license or was abiding by other important regulations, like bag limits. Compliance checks are akin to a radar gun to a Highway Patrol officer. Without a mechanism to detect possible violations of law, it would be impossible to ensure that hunters, anglers or trappers (or those who travel our highways) were abiding by the laws and regulations designed to protect these important resources. While many people voluntarily comply with the established laws and regulations, many others do so only because of the possibility that some enforcement

action could be taken for their failure to comply. Simply put, that is why there are penalty provisions for violations of law.

Compliance checks are also warranted, in part, because licenses provide operating revenue to the State of South Dakota to manage and protect the state's wildlife resources. In fact, no general fund tax dollars are used to manage fish and wildlife because of these license requirements. It is also important to note that South Dakota's fish and wildlife resources provide an enormous benefit to many sectors of the state's important tourism economy. Data from the 2006 US Fish and Wildlife Service National Survey of Fishing, Hunting and Wildlife-Associated Recreation, when adjusted for inflation, predicted that resident and nonresident upland game hunters alone spent \$219.8 million dollars in South Dakota in 2009.

Compliance checks are best described as inspections and are required under state law (SDCL 41-15-6). Inspections of game, without prior knowledge of a violation, are both lawful and necessary activities. Any bill introduced into the legislature which would attempt to diminish the state's authority and ability to inspect licenses and game will most certainly have a deleterious impact on the ability of Game, Fish and Parks to manage and protect our public wildlife resources.

**Q: Couldn't conservation officers ensure compliance with game and fish laws and regulations by simply checking hunters or anglers when they come off private land or travel on public roads? Wouldn't this still provide an effective deterrent to those who might not choose to follow the law?**

**A:** No. Most citizens would deem it unfair for conservation officers to conduct compliance checks on public lands or roads, but not on private lands, where hunters or anglers are harvesting the same public wildlife resources. It would be all but impossible for a conservation officer to determine whether or not someone was in fact lawfully hunting, fishing or trapping while on private land without actually contacting them when they were engaged in that activity in the field. Unless someone is in possession of game or fish while travelling along a public road, they do not need a hunting or fishing license to drive in a vehicle, even though they may appear to have been hunting.

**Q: Doesn't a landowner's private property rights include being able to control who comes onto their property?**

**A:** Landowners can control who comes onto their property, with some exceptions. Even trespass laws do not provide complete control without exception. These exceptions are clearly spelled out in state statutes and applicable case law such as that rendered under the Open Fields Doctrine. Private property rights are spelled out in case law as well, but many of the arguments about private property rights are perceptions rather than law. Individual landowners may have a different idea about what constitutes "private property rights". It is important to remember that what someone thinks is the law or their "rights" are not necessarily a legal interpretation of law.

Under state and federal law, wildlife has long been held as a "*public trust*" resource. In other words, fish and wildlife are not owned by an individual, but are held in trust for the benefit of the public at large. The State has been entrusted to regulate harvest and manage these resources through the Game, Fish and Parks Department. Hunting, fishing and trapping are highly regulated sports that require participants to be properly licensed and abide by regulations designed to sustain these important public resources. Conservation officers, as representatives of the people of our state, are charged with enforcing the laws and regulations enacted by the people, including conducting inspections of those being regulated. Without the ability to make contact with hunters, anglers or trappers, whether they're on public or private land, it would be impossible for conservation officers to do the job they were hired to do.

**Q: Why wouldn't legislation restricting the ability of conservation officers to come onto private land to conduct compliance checks be good public policy? Wouldn't this help improve relationships with landowners?**

**A:** Good communication between conservation officers and private landowners in South Dakota is important if we are to be successful in managing wildlife. Over the past several years, the Division of Wildlife has fully implemented the goals they outlined in an "Eight Point Communications Enhancement Plan". This plan was put together as a way to improve conservation officer communications with landowners and encourage relationship building in the communities these conservation officers serve. This plan was strongly endorsed by the Game, Fish and Parks Commission, the Governor's Office, the West River Issues Working Group and the Wildlife Issues Panel. Each week, our agency receives email communications and calls from our citizens making us aware of the positive interactions that take place between our conservation officer staff and the citizens we serve and it is our intent to sustain these outreach efforts to ensure this trend continues.

The 'open fields' bills introduced during previous legislative sessions would do little to promote communication between conservation officers and landowners and in large part, may create an impediment to the development of close working relationships. In addition, there are a number of problems with the restrictions set forth in these bills. First of all, the language suggested in these bills would cause a dramatic shift in past public policy and run counter to the guidance offered by state and federal courts and the South Dakota Attorney General's Office on this issue. Secondly, while it seems like a good idea to promote communication by requiring the conservation officers seek permission of the landowner prior to entering private lands, it would be almost impossible to determine ownership of some lands, and essentially impractical to locate landowners in many instances to seek permission. In some cases, there may be a dozen or more landowners who own land in a particular section. In other cases, landowners often times live many miles, and sometimes hundreds of miles away. It would be simply impractical for a conservation officer to gain permission in many instances, and there would be no other reasonable mechanism for conservation officers to perform their jobs.

Court rulings in Montana have largely resulted in the scenario set forth by this question (see question at the bottom of this page). According to Montana State Officials, communication between landowners and conservation officers has not prospered nor have important relationships between conservation officers and landowners in Montana improved. In fact, there is a strong feeling that these rulings have put a damper on communication between landowners and conservation officers as the officers apparently do not feel comfortable stopping by to visit.

**Q: Is it true conservation officer's have more authority than any other law enforcement officers?**

**A:** Absolutely not. In fact, conservation officers have less authority than nearly all other law enforcement officers in our state. All law enforcement officers are bound by the US Constitution and the 4<sup>th</sup> Amendment. The legal guidance as well as the exceptions granted under the Open Fields Doctrine apply equally to all law enforcement officers, including conservation officers. The authority granted to conservation officers in South Dakota is clearly spelled out in state law (SDCL 41-15-10.1).

**Q: Why is it that the Highway Patrol cannot randomly stop someone driving down the highway to check to see if they have a valid driver's license, but a conservation officer can stop a hunter to check for a license?**

**A:** This is due to a limited expectation of privacy one has inside their vehicle and specific court rulings that have narrowed the scope of exceptions to the 4<sup>th</sup> Amendment in the situation involving checks of driver's licenses. Courts have ruled specifically that a vehicle may not be stopped unless there is some reasonable suspicion of a violation. On the contrary, hunting, fishing and trapping are highly regulated activities, requiring specific, annual licenses and the adherence to specific regulations by those who participate in these activities. This activity is akin to someone operating a restaurant which is regulated by the state as well. Health inspectors regularly visit the premises of these types of businesses in order to protect the well being of the public who eat in these establishments. Similarly, Game, Fish and Parks is charged with the protection of a public resource and they also have been directed to conduct routine inspections or compliance checks to protect these resources. Contacts made by conservation officers occur in open fields, where the courts have clearly and repeatedly ruled a person does not have an expectation of privacy. The courts have stated that a conservation officer does not violate the SD Constitution or the US Constitution Opinion by entering open fields on private property for the purpose of performing their statutory duties.

**Q: Do any other states limit their conservation officer's authority to go onto the open fields on privately owned land?**

**A:** Yes, we are aware of five states (Montana, Vermont, Oregon, New York and Washington) that currently limit, to some extent, the ability of law enforcement officers to enter private land. These rulings then affect conservation officers as well. However, it is important to point out that the limits applied to a law enforcement officer's entry onto private lands in these states were brought about through court interpretations of their specific STATE constitutions. The respective STATE constitutions, in these situations, were interpreted to be broader and grant more privacy protection than our US Constitution. As specifically noted in 'footnote 4' of the Attorney General Official Opinion No. 04-01, this is not the case in South Dakota. Nor is it the case in all of the other states. We are not aware of any state legislature that has passed laws which specifically restrict conservation officers from entering private lands to perform their duties. It would seem highly inconsistent for a legislature to specifically pass laws to employ conservation officers to conduct specific statutory responsibilities for enforcing fish and game

laws, only to restrict them in their lawful ability to accomplish their statutory responsibilities in protecting the public's natural resources.

**Q: Does the "Open Fields Doctrine" apply to all GFP employees or just to conservation officers?**

**A:** The Open Fields Doctrine only applies to law enforcement officers. Therefore, it would only pertain to those employees of Game, Fish and Parks whose jobs are legally defined as law enforcement officers. Additional information on this subject can be found by reviewing the Department of Game, Fish and Parks Policy entitled "Requirements For Agency Employees Entry Onto Private Lands".

**Q: If a person (landowner or otherwise) is out walking or driving in an open field on private land, does that mean a conservation officer can enter onto that field and conduct an "inspection" or "search"?**

**A:** No. A conservation officer's privilege to enter private land stems from his duty and the exercise of his authority as granted by the legislature. He may enter private land to conduct a check of someone who appears to be hunting, fishing or trapping or to investigate a crime or other suspicious situation. If neither of these conditions exist, a conservation officer would not have reason to enter private land without permission to conduct a compliance check. It is important to note that Game, Fish and Parks has made specific provisions in department policy to further restrict the circumstances under which a conservation officer may enter private land. The policy spells out the specific requirements necessary for any conservation officer to enter private lands to conduct compliance checks.

**Q: If a bill was passed by the legislature and signed into law by the Governor which limited the ability of conservation officers to go onto private land to conduct compliance checks, would the new law conflict with existing statutory authority? How would this impact existing state laws and current GFP Commission rules authorizing inspection and/or search of fish and game cold storage facilities, shooting preserves, bait dealers, taxidermists, fur dealers or bird cleaning facilities?**

**A:** Yes, a bill that would restrict a conservation officer's ability to conduct compliance checks on private land would cause substantial conflict with several other statutes. In reviewing the wording of the 'open fields' bills which were previously introduced in the SD Legislature, passage of such a law such would prohibit conservation officers from conducting inspections of shooting preserves, bait dealers, taxidermists, fur dealers, bird cleaning facilities and fish and game cold storage facilities unless the operators of these facilities gave them explicit permission. This would clearly conflict with several existing state laws. Again, it would seem incongruous for state government to employ a group of employees who are trained specifically to enforce fish and wildlife laws, but create a situation in which they could only enforce laws if they first gained permission to enter the premises of those who were being regulated. This is totally inconsistent with the manner in which state government operates in all other venues where there is no, or a very limited, expectation of privacy.