



Attachment 1 3/14/18

**IDAHO DEPARTMENT OF FISH AND GAME**

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To: The Senate Resources and Environment Committee  
Testimony of Sharon W. Kiefer, Idaho Department of Fish and Game  
House Bill 658

Chairman Bair and Committee:

I appreciate the opportunity to discuss our assessment about technical aspects of House Bill 658. The Fish and Game Commission has no policy position at this time beyond monitoring the bill. A copy of my testimony is in your folder.

Fish and Game recognizes the challenge of creating new trespass law that meets landowner expectations for improved outcomes in regard to their private property rights, an expectation that is warranted. Landowners have articulated that the current framework of trespass is not working. The key issue for consideration is whether this bill will advance effective outcomes that landowners expect.

I am not going to speak to the amendments to Civil Trespass (I.C. 6-202) found in Section 2 beginning on page 2, but will focus on the revisions to Title 36 and the interrelationship with revisions to Title 18.

Generally, law enforcement must prove the elements of a crime beyond a reasonable doubt. The bill changes the current prescriptive notice requirements for paint and signs to a framework that uses a less-defined standard where a landowner must post in a manner that puts a "reasonable person" on notice of private land. For some landowners, that burden will be lighter and for others, much heavier.

Under Section 9 (page 12) and Section 11 (page 15), Fish and Game Code Title 36 would no longer have a stand-alone definition of trespass in violation of warning notices or failing to depart the real property of another after notification. Instead, the definition of Title 36 trespass would say that no person shall enter the real property of another and shoot any weapon or enter for the purposes of hunting, retrieving wildlife fishing or trapping in violation of section 18-7008. As a result, the Title 36 definition of trespass would link back to criminal code.

So, let's hop over to section 18-7008 beginning on page 6 to understand what trespass in Title 36 now means. Title 18 is the Crimes and Punishments title of Idaho Code.

The "Acts" constituting criminal trespass are the backbone of Fish and Game's or other law enforcement ability to determine a crime has been committed. In this bill, a person commits trespass when he enters and remains on private property without permission (defined on page 7), knowing or reason to know his presence is not permitted. The bill provides four descriptions for which a person has reason to know his presence is not permitted, which I will speak to shortly.

While the bill defines enter on page 6, it does not define “remains.” To constitute the crime of trespass under the bill, a person must both “enter” and “remain” without permission. If people enter without permission but do not “remain,” their conduct does not appear to constitute trespass under the bill. Similarly, if people enter with permission, their actions do not appear to meet the bill’s elements of trespass, even if they “remain” if permission is revoked. Will landowners and law enforcement take a similar and consistent view of “enters and remains”? For example, Title 36-1603 in this bill says: No person shall enter the real property of another and shoot any weapon or enter such property for the purposes of hunting, retrieving wildlife, fishing or trapping in violation of section 18-7008, which then says a person commits criminal trespass when he enters and remains on the real property of another without permission. Does the crime of trespass under Title 36 to apply to a hunter who enters property without permission to take game and then leave the property? The desired outcome of determination and prosecution of an unlawful act may be uncertain.

The proposed descriptions of notice for which a person has reason to know their presence is not permitted would change the current prescribed criteria for providing notice in Title 36-1603; two of the five descriptions in current law are cultivated lands or land posted with No Trespassing signs. Further, the current descriptions are not applied under a reasonable person standard, it is a more straightforward threshold – no person shall enter without permission.

Per my previous reference Section 6 of the bill takes a different approach in 18-7008 for giving “notice that demonstrates to a person that property is private and one should not enter without permission.” These four descriptions of notice requirements are found on page 7, lines 12-30.

The reference to cultivated land as notice is consistent with current Titles 18 and 36 notice. Depending on the circumstance of the private property, which the landowner has to evaluate, there are several new options of notice that a person must recognize as a reason to know their presence is not permitted:

- Property reasonably associated with a residence or place of business.
- Property that is fenced or enclosed such that a reasonable person would know it is private property.

In recognition of the intermix of private and public property, both fenced and unfenced that is ubiquitous in Idaho, lines 15-24 provide additional posting requirements for private property that adjoins or is enclosed within public lands that improve the likelihood that a reasonable person would recognize the delineation of a private property boundary. If the property adjoins or is enclosed within public lands, the fence line adjacent to the public land must be posted with conspicuous no trespassing signs or bright orange or fluorescent paint at the corners of the fencing adjoining public land and at all navigable streams, roads, gates and right of way entering the private land, and is posted in a manner that a reasonable person would be put on notice that it is private land. I underscore “and posted in a manner that a reasonable person would be put on notice.” We understand the landscape will be an important factor in the posting necessary to meet

the standard for a “reasonable person” to be put on notice it is private land – the posting to meet this standard for a parcel of grassland will be very different than the posting for a parcel of heavy timber. Landowners will need to analyze whether posting meets the ability for a reasonable person to see it.

- In a similar manner, unfenced and uncultivated property must be posted with conspicuous “no trespassing signs” at the same points as fenced land above, and again, posted in a manner that a reasonable person would know it is private land. The landowner will need to evaluate their posting to uphold the “reasonable person would know” standard to advance outcomes of prosecution for trespass that they desire.

With the bill’s reliance on notice to a reasonable person, landowner posting decisions will directly influence the ability of law enforcement officers, including our conservation officers, to credibly determine a violation has occurred and present solid cases to a prosecutor.

Permission has always been the hallmark of private property entry and continues to be so. “Ask First” is a key lesson to all of our new hunters through Hunter Education and we emphasize this message in media and our regulation brochures. However, we would change that message to “Get Written Permission First” to comply with H 658 because asking is not enough. Section 18-7008 provides a definition of permission that specifies that written authorization is the default construct of permission and must include the signature of the owner or agent, the name of the person getting permission, the dates, and a general description of the property (page 7, lines 1-5).

In Section 11, page 16, lines 3-13, Fish and Game is directed to provide permission forms that include space for this information and to make them available at our offices, on our website and at sheriff’s offices. We already provide permission slips that landowners can use as a matter of convenience, which will require slight modification particularly to include the general description of the property. However, we do not find this customer service requirement burdensome and it is certainly not unreasonable to work with our sheriffs to make the forms available.

More important is the standard - having written authorization is now the default to demonstrate that you aren’t trespassing on someone else’s property when you are outside an obvious business setting or not accompanied by a landowner. If a landowner doesn’t provide written permission with the elements defined in Section 18-7008, a person’s presence has to be within one of the categories listed in lines 25-44 on page 9 (examples include a license, lease, or other legal authority).

This construct of detailed, signed written authorization may erode neighborly practices of verbal permission because responsible private land users will want written authorization. Landowners busy with farming and ranch operations or other pursuits may not have time for putting permission in writing that they would have otherwise been willing to give.

While keeping neighborly ways, one still has to distinguish an “invitee” encountered on private ground without written permission and an unauthorized individual. Let’s say nephew Phil is on Uncle Joe’s property without a permission slip. Phil illegally kills an elk on Uncle Joe’s

property that a witness reports and a Conservation Officer investigates. Uncle Joe is out of town, and the officer is not able to reach him. Does the officer take Phil's word that Uncle Joe said "come any time," or cite Phil for criminal trespass in addition to the illegal possession of elk? There's potential for second guessing either decision even once the officer is able to contact Uncle Joe. This scenario illustrates why landowner involvement will remain crucial to law enforcement determination about who does and does not have authorized permission to enter.

The bill includes additional requirements for the department to publicize to our license buyers information about owner's rights and sportsmen's duties. We have performed that responsibility for a long time and believe we can meet the prescriptions of this bill. But, Fish and Game outreach probably won't impact persons who are not Fish and Game license buyers – such as motorized persons doing cookies in a cultivated field or campers leaving fire rings and trash behind on private woodlands. Our assumption is that the new remittance language for fines in violation of section 18-7008 found on page 12 (lines 4-9), which apportions 25% to the Idaho Rangeland Resources Commission for expanding education programs, creates an expectation for that state agency to be responsible for educating those who don't connect with Title 36.

And speaking of fines, I want to point out that lines 1 and 2 of 36-1603 in Section 11 on page 16 state that any violation of this section subjects the violators to penalties in section 36-1402(e), which as you can see in Section 9 on page 13, lines 15-28, is the license revocation penalty. License revocation is a longstanding penalty for trespass in the act of hunting, fishing, or trapping. The bill would also make this a penalty for posting public lands as privately owned.

Singling out the revocation penalty from the other Fish and Game code penalties may also create confusion that could be avoided by deleting the Remedies subsection lines 1-2 and page 16. However, if these lines remain, the Department would not interpret them to make license revocation the **exclusive** penalty for violating section 36-1603. Fish and Game would proceed with the understanding that other Title 36 provisions would still apply in combination with the license revocation, such as fines, seizure of animals taken in the act of trespass, and revocation in states that participate in the wildlife violator compact.

Contrary to assertions about juveniles being treated differently for criminal trespass pursuant to the Juvenile Correction Act (Title 20, Chapter 5), that act does not apply to juveniles who commit a crime under Title 36. However, note that lines 1-21 on page 14 of current law that describes the allowance for a magistrate to have discretion for license revocation for a first-time hunting violation offender under the age of 21.

I want to point out that this bill upholds navigable stream public access rights, found in 36-1601.

Thank you for the opportunity to offer our understanding of how the criminal act of trespass for hunters, anglers, and trappers would be defined, noticed, enforced and fined pursuant to House Bill 658 compared to existing statute, as well as how expectations of Fish and Game responsibilities would change.