



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

August 27, 1997

Mr. Andrew Sansom  
Executive Director  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744

Letter Opinion No. 97-079

Re: Applicability of criminal trespass statute,  
section 30.05 of the Penal Code, to actions of  
persons in boat in public water over submerged  
private property (RQ-916)

Dear Mr. Sansom:

You have asked this office a series of hypothetical questions regarding the applicability of the criminal trespass statute, section 30.05 of the Penal Code, to "situations involving fishing, hunting, and other activities taking place in a boat floating in public waters over privately-owned submerged property." Your concern, as we understand it, has to do with whether persons engaged in hunting migratory game birds from such boats who beach the crafts, anchor them, or tie them to duck blinds have thereby violated section 30.05. Based solely on the facts as presented in your hypotheticals, we conclude that none of the situations about which you ask constitutes such a violation.

It is well-established that boating in public waters is not a trespass, even though such waters may flow over submerged private property. *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935); Attorney General Opinions DM-169 (1992), H-68 (1973), M-1210 (1972). It is equally well-established that "the right to enjoy the water does not give the public the right to trespass on the property itself to gain access to the water." Attorney General Opinion H-68 (1973) at 2; accord, Attorney General Opinion DM-169 (1992) at 3.

Section 30.05 of the Penal Code defines the offense of criminal trespass thus:

- (a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
  - (1) had notice that the entry was forbidden; or
  - (2) received notice to depart but failed to do so.
- (b) For purposes of this section
  - (1) "Entry" means the intrusion of the whole body.

....

Penal Code § 30.05 (emphasis added).

The elements of the offense which must be pled and proved therefore “are that (1) a person, (2) without effective consent, (3) enters or remains on the property or in a building of another, (4) knowingly or intentionally or recklessly, (5) when he had notice that entry was forbidden or received notice to depart but failed to do so.” *Johnson v. State*, 665 S.W.2d 554, 556 (Tex. App.--Houston [1st Dist.] 1984, no writ ).

Your questions turn on the element of entry. In each of your hypotheticals—the beaching of the boat, its anchoring, and its tying-off—we are to presume that “[t]he boat is steered into position and [the action] is accomplished without leaving the boat.” For that reason, these actions do not constitute an entry onto private property for the purposes of section 30.05.

As we have noted, the definition of “entry” for this offense is a narrow one—the intrusion of the entire body onto the private property. This definition is far narrower than that for the other listed offenses in chapter 30 of the Penal Code. Thus, for both the offenses of burglary, section 30.02(b), and burglary of vehicles, section 30.04(b), “‘enter’ means to intrude: (1) any part of the body; or (2) any physical object connected with the body.” For the offense of burglary of coin-operated or coin collection machines, section 30.03(b), “‘entry’ includes every kind of entry except one made with the effective consent of the owner.”

The 1973 Practice Commentary to section 30.05 explains the distinction as follows:

“Entry” is defined more narrowly in Subsection (b)(1) for trespass than for burglary because trespass applies to all property and ordinarily will occur well before the trespasser nears a building. While it is an entry for burglary purposes to reach into a window or to probe in an opening with a stick, see Section 32.02(b), it is not trespass to reach through a fence or probe with a stick—to retrieve a hat, for example.

The hypotheticals you have presented do not involve a person intruding his or her entire body onto private property. Rather, they involve the intrusion of an object like the probing stick in the practice commentary—the boat itself, an anchor, a rope. Accordingly they do not come within the ambit of “entry” for the purposes of section 30.05(b)(1).<sup>1</sup>

We caution, however, that our response is narrowly tailored to these hypotheticals. Should the hunter in your hypotheticals, for example, step from the boat to the shore to retrieve a shot duck, the situation would be markedly altered. However, nothing in the first three questions as stated constitutes the offense of criminal trespass.

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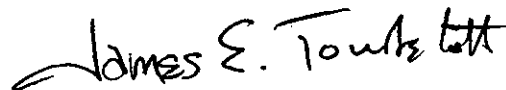
<sup>1</sup>You do not ask, and we do not consider, whether such acts, particularly if they damage private property, may nevertheless be grounds for civil liability.

Your final question is whether, in such situations, it would make any difference to our analysis that the person in the boat was engaged in some lawful pursuit other than hunting, such as photography. Generally speaking, it would not. In the situations already adverted to, of course, there is no criminal trespass. Were there such trespass, the fact that the trespasser's general purpose in being where he or she was was a legal one—as, for that matter, is hunting—would not be a defense. The only distinction which might obtain in that situation is that the offense of criminal trespass is heightened from a Class B to a Class A misdemeanor if “the actor carries a deadly weapon on or about his person during the commission of the offense.” Penal Code § 30.05(d). Accordingly, a duck hunter with his fowling piece might subject himself to a higher degree of liability than would a photographer with his camera.

### S U M M A R Y

A person boating in public waters over submerged private property who beaches the boat, anchors it, or ties it to a private duck blind without leaving the boat has not thereby intruded his entire body onto private property, and therefore has not committed the offense of criminal trespass as defined by section 30.05 of the Penal Code.

Yours very truly,



James E. Tourtelott  
Assistant Attorney General  
Opinion Committee