



TO: Rep. Jason Kropf
CC: Sen. Findley/Rep. Owens
House Judiciary Committee Members
FM: Shaun Robertson, President GCFB
DT: 02/19/2023
RE: HB2688

Background

As unmanned aircraft systems (a.k.a. “drones”, used here and throughout for convenience) have become cheaper, technology has improved, and as Oregon’s population and outdoor uses have expanded, both the potential for- and actual conflicts-between drone operators and private landowners has grown.

A quick internet search of drones and “_____” (insert words/phrases such as hunting/scouting, game retrieval, shed antler collection, and even potential illicit behaviors such as Native American artifact collection; *see* attachments) on websites and social media returns thousands of examples where drones are being used potentially in conflict with private property rights and other laws.

In Grant County, we have had examples where drones surveilling horseback riders trailing cattle across private land have created serious risk of injury to animals and riders. I have personally witnessed drone video footage of persons harassing and attempting to herd elk on private land and every fall, hunters complain on social media of drone observation of both hunters and wildlife. Other states have substantially refined the drone privacy laws to protect landowners from unwanted and unwarranted collection of information used in third-party complaints and litigation.

Easing the ability of landowners to protect themselves from unwelcome invasions of their property and clarifying the exceptions to those protections for law enforcement is just one step in addressing a complex scope of issues and intersection of multiple laws, but an extremely important one nonetheless.

Affected Statute

837.380 Action by owner of real property; Attorney General. (1) Except as provided in subsections (2) and (3) of this section, a person who owns or lawfully occupies real property in this state may bring an action against any person or public body that operates an unmanned aircraft system that is flown over the property **without the permission of the property owner or occupier** [if:

(a) ~~The operator of the unmanned aircraft system has flown the unmanned aircraft system over the property on at least one previous occasion; and~~

(b) ~~The person notified the owner or operator of the unmanned aircraft system that the person did not want the unmanned aircraft system flown over the property.]~~

...

(4) A person may not bring an action under this section if the flight of the unmanned aircraft system over the property is authorized under ORS 837.320, 837.335 or 837.340

Intent of the Requested Change

Presently, in order for a landowner to bring an action against a “person” operating a drone over private property, first, the person must operate the drone “...in a manner so as to intentionally, knowingly or recklessly harass or annoy the owner or occupant of the privately owned premises” (ORS 837.370(1)), and secondly, the operator must have done so previously. Landowners are not only required to discover the identity and contact information of the operator but also to notify them in writing that the use of the drone over their property was unwanted.

While a law constructed in this manner may work, for example, in a residential subdivision where the operator (such as a neighbor) is known to the complainant and the number of violations are more readily observable, the statute creates a near impossibility for rural landowners who are confronted with a vast and remote landscape and relative high numbers of unknown drone operators (such as public land users).

In addition, the virtual impossibility of meeting the current discovery requirements along with the statute allowing what amounts to a “free pass” for at least the first transgression eliminates any disincentive to “trespass” with a drone as exists within Oregon’s physical trespass statutes¹.

The intent of the requested changes is to: 1) remove nearly impossible discovery conditions; 2) bring the airspace “trespass” statute more in line with the physical trespass statute; 3) create an effective disincentive to aerial trespass; and 4) clarify the exceptions for law enforcement.

Questions

1. Won’t this prohibit the use of drones by law enforcement, emergency services, or public bodies in the course of their work, or private persons using drones commercially?

¹ E.g., a landowners right to sue for liquidated and other damages civilly, in addition to the State’s criminal charges, for physical trespass. Sportsmen particularly, openly acknowledge that the landowner’s rights to protect themselves and seek remedies under Oregon law create a substantial disincentive to trespass where frequently the State’s penalties may be (but not always are) relatively minor in comparison.

No, for at least the following reasons:

- a) The use of drones by law enforcement is specifically excluded from the restriction in ORS 837.370 and the proposed new subparagraph (4) amendment to 837.380 precludes a landowner from bringing an action against law enforcement's use of drones, including in emergencies; and
- b) 837.380(3) specifically exempts drone use for "commercial purposes" in compliance with FAA authorizations and:
 - 1) Oregon statute requires "public bodies" to register their use of drones with the Oregon Dept. of Aviation, who, in turn, requires public bodies to register each drone with the FAA;
 - 2) the FAA defines commercial use as 'anything other than recreational use' and requires each commercial drone operator to obtain a "part 107" certification authorization.

2. Aren't there other statutes that prohibit harassing wildlife?

Yes, but there appears to be potential problems with those statutes. First, those are crimes against the state and not against the private landowner whose resources are being directly impacted (e.g., shed antlers, native American artifacts, habitat security and privacy) and to whom those resources have significant value. Secondly, it is uncertain whether the commercial collection of wildlife information (e.g., locations, habits, etc.) is unlawful if it is not in conjunction with the act of hunting.

3. Doesn't the "privacy" statute protect private landowners (as per the ORS 837.380(3) reference to ORS 30.831)?

Apparently not, except in very limited circumstances since ORS 30.831 refers only to invasion of personal privacy of a sexual nature. The drone privacy laws of some other states are much more well advanced in their definition and protection of "privacy" (see examples below).

Other States

Other states (see also, [National Conference of State Legislatures, Current Unmanned Aircraft State Law Landscape](#)) have approached drone use over private property in varied, often mixed, ways such as addressing specifically the protection of the airspace over private property or by restricting the collection and use of information (e.g., photographs) collected over private property or by defining only the allowable uses (e.g., emergency or only with permission) and excluding all others.

California Civil Code (2023) [Link to Code Section \("Ctrl+Click" to follow link\)](#)

1708.8(a) A person is liable for physical invasion of privacy when the person knowingly enters onto the land or into the airspace above the land of another person without permission or otherwise commits a trespass in order to capture any type of visual image, sound recording, or

other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. [emphasis added]

[along with exception, definitions, penalties]

South Dakota Codified Laws (2023) [Link to Code Section \("Cntrl+Click" to follow link\)](#)

[50-15-5](#). *Eavesdropping--Violation of privacy--Misdemeanor.*

No person may, except as authorized by law, intentionally use a drone to photograph, record, or otherwise observe another person in a private place where the person has a reasonable expectation of privacy.

[50-15-6](#). *Trespassing--Drone--Misdemeanor.*

No person may, except as authorized by law, land a drone on the real property or the waters of a landowner who owns the real property beneath the water body, without the landowner's consent.

[with exceptions for law enforcement, emergency services, and commercial uses]

Florida Criminal Statutes (2022)

A person, a state agency, or a political subdivision as defined [internal citation omitted] may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

[along with exceptions, the right of private landowners to initiate civil action against persons and government agencies and seek injunctive relief and damages, and limitations on the collection and use of data]

Issues with Other Relevant Oregon Statutes

1. Use of drones in the case of emergencies is currently limited specifically to "law enforcement" (ORS 837.335), which is defined as those entities who employ "peace officers" or prosecute offences and does not appear to include other emergency units such as fire (ORS 133.005) although those other uses could be, presumably, considered "commercial" users.
2. There are few limitations on the data collected through the use of drones, excepting law enforcement's (see ORS 837.310 through 837.345), even though there is a statutory requirement for public bodies to establish policies and procedures for the collection, retention

and use of information gathered through their use of drones and for the public body to publish their policies (ORS 837.362). Fortunately, some Oregon agencies and others have developed internal controls that require reasonable and appropriate conditions for the use of drones over private lands (*see for example*, ODFW's or the Scappoose Fire District's drone policies). However, those are policies, rather than laws, and, therefore, are susceptible to revision at any time

3. The privacy statute, at least that referred to in the drone statute, seems far too limited in scope given the nature and scope of what-and how-information may be collected from private land (*see attachment "What Does a Drone See at 400-feet"*)
4. Numerous terms and phrases used in the statute either lack definition or are only defined or used elsewhere (i.e., in other statute or in agency rule but not statute) and there is uncertainty whether they apply to drones (e.g., "public body aircraft"). Examples include "commercial", "intentionally", "recklessly", "harass", and "annoy". Developing additional, distinguishing definition (e.g., "public body drone") may be helpful.

[Attachments](#)

Google search results: "drone to move elk", "drone to hunt shed antlers", "drone to hunt native American artifacts"

What a Drone Sees at 400-feet