



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 13, 2022
TO Joint Judiciary Committee
FROM David Hopkinson, Staff Attorney
SUBJECT Topic Summary: Drones and Trespass

This summary provides background information on laws and regulations regarding drones and trespass as well the use of drones for hunting (and prohibitions thereof).

Approved Interim Topic

Priority No. 1: Trespass.

The Committee will receive reports and recommendations from stakeholders regarding Wyoming's law on trespass.

Background¹

Unmanned aircraft systems (UAS)², also commonly known as drones, are aircraft subject to regulation by the Federal Aviation Administration (FAA) to ensure safety of flight, and safety of people and property on the ground.³

¹ For a more detailed analysis of UAS laws and regulations please see the September 2020 report prepared by the U.S. Government Accountability Office (GAO), which can be found here: https://www.gao.gov/assets/B330570_Appendices.pdf

² 14 C.F.R. § 107.3 defines "unmanned aircraft" as an aircraft operated without the possibility of direct human intervention from within or on the aircraft. A "small unmanned aircraft" is an unmanned aircraft weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft.

³ 49 U.S.C. § 40103.

Congress's authority to regulate air traffic, and by extension UAS, stems from Article 1, Section 8, Clause 3 of the United States Constitution (the Commerce Clause), which states that Congress has the power "To regulate commerce with foreign nations, and among the several states, and with Indian tribes[.]". Using this authority, Congress began passing laws related to aviation beginning with the Air Commerce Act of 1926 and continuing through today.

Congress has vested the FAA with the authority to regulate the areas of airspace use, management and efficiency, air traffic control, safety, navigational facilities, and aircraft noise at its source.⁴ Congress first took action in 2012 to regulate civil UAS operations in the FAA Modernization and Reform Act (FMRA)⁵ and has continued to legislate in this area.⁶

Courts considering state or local regulation of airspace have ruled that the federal government occupies the field of aviation safety and the efficient use of national airspace and have generally struck down state and local aviation laws as "field-preempted".⁷ Field preemption means that the scheme of federal regulations is so pervasive as to make clear that Congress intended to leave no room for the states to supplement it.⁸ In 2015 the FAA produced a fact sheet that provides examples of laws that in its opinion generally would

⁴ 49 U.S.C. §§ 40103, 44502, and 44701-44735

⁵ FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332, 126 Stat. 11 (2012).

⁶ See, e.g., FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, 130 Stat. 615 (2016); FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (2018 FAA Reauthorization Act). See also National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1092(d), 131 Stat. 1283, 1610-1611 (2017).

⁷ See, e.g., City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973); Abdullah v. American Airlines, Inc., 181 F.3d 363, 371 (3rd Cir. 1999) ("it follows from the evident intent of Congress that there be federal supervision of air safety and from the decisions in which courts have found federal preemption of discrete, safety related matters, that federal law preempts the general field of aviation safety."); Montalvo v. Spirit Airlines, 508 F. 3d 464 (9th Cir. 2007); French v. Pan Am Express, Inc., 869 F2d. 1 (1st Cir. 1989); British Airways Board v. Port Authority of New York and New Jersey, 564 F.2d 1002 (2nd Cir. 1977). See also Flores v. Texas, 2017 WL 1397126 (S.D. Tex. 2017) (suit alleging federal field preemption of Texas Privacy Act's original "border exception," allowing unrestricted drone photography of persons and property within 25 miles of the U.S. border, dismissed on technical grounds).

⁸ See Pueblo of Pojoaque v. New Mexico, 863 F.3d 1226, 1235 (10th Cir. 2017)).

or would not be preempted based on caselaw interpreting federal laws and regulations.⁹ The fact sheet states that operational restrictions on flight altitude, flight paths, operational bans, regulating navigable airspace, and mandating equipment or training would likely be preempted, while police power laws such as land use, zoning, privacy, trespass and law enforcement operations would not.¹⁰

The legal limits on Congress's authority through the Commerce Clause to regulate UAS is not settled. In Huerta v. Haughwout the United States District Court for the District of Connecticut questioned (without deciding) the limits on this power, stating:

Congress surely understands that state and local authorities are (usually) well positioned to regulate what people do in their own backyards. The Constitution creates a limited national government in recognition of the traditional police power of state and local governments. No clause in the Constitution vests the federal government with a general police power over all of the air or all objects that leave the ground. Although the Commerce Clause allows for broad federal authority over interstate and foreign commerce, it is far from clear that Congress intends—or could constitutionally intend—to regulate all that is airborne on one's own property and that poses no plausible threat to or substantial effect on air transport or interstate commerce in general.¹¹

Furthermore, critics of the FAA's claims to regulate airspace down to the "lowest blade of grass" will often cite United States v. Causby, a case where the United States Supreme Court found that landowners own and have exclusive control over their "immediate reaches" of airspace.¹²

FAA Regulations

⁹ The Fact sheet may be found here: www.faa.gov/uas/resources/policy_library/media/UAS_Fact_Sheet_Final.pdf

¹⁰ Id.

¹¹ Huerta v. Haughwout, No. 3:16-cv-358 (JAM), 2016 U.S. Dist. LEXIS 92866, at *12-13 (D. Conn. July 18, 2016). (This case dealt with FAA's authority to subpoena information to investigate a private citizen's use of a drone equipped with a handgun and later a flame thrower (used to scorch a turkey carcass) for purposes of creating viral online videos. Despite questioning the FAA's authority, the court ultimately held that the FAA had authority to investigate the facts surrounding the drone.)

¹² United States v. Causby, 328 U.S. 256 (1946). See also the discussion beginning on page 19 of appendix I of the U.S. Government Accountability Office report in footnote 1 *supra*.

Regulations promulgated by the FAA known as "Part 107" include restrictions on how and where small UAS (those under 55 pounds including anything attached to the UAS) may fly.¹³ Without a waiver, the regulations include licensing requirements, a maximum flight altitude of 400 feet above ground level, flights only within visual line of sight and during daylight hours, and no flights over persons not participating in the operation of the UAS.¹⁴ Recreational flyers are not required to follow the Part 107 requirements, but have similar restrictions.¹⁵ All small UAS that weigh over 0.55 pounds must be registered with the FAA and display that registration on the UAS.¹⁶

FAA regulations for UAS over 55 pounds or for commercial purposes have strict requirements for licensing, inspection, and certification and are generally not available to the public absent an exemption.¹⁷

The FAA is in the process of finalizing regulations that will require remote identification (ID) systems to be in place on all drones registered with the FAA beginning September 16, 2023.¹⁸ The remote ID system will transmit a unique identifier for the drone, the drone's latitude, longitude, geometric altitude, velocity, and the location of the control station or take-off location.¹⁹

State Regulations

At least 44 states including Wyoming have enacted UAS related laws.²⁰ These laws commonly include defining what a UAS is, the use of UAS in law enforcement or other state agencies, how UAS can be used by the general public, and regulations for use of UAS in hunting.²¹

Trespass and Seclusion

¹³ 81 Fed. Reg. 42063 (June 28, 2016), codified at 14 C.F.R. Part 107.

¹⁴ 14 C.F.R. Part 107.

¹⁵ 49 U.S.C. 44809.

¹⁶ 14 C.F.R. Part 48.

¹⁷ 49 U.S.C. 44807.

¹⁸ See https://www.faa.gov/uas/getting_started/remote_id/ retrieved May 13, 2022.

¹⁹ Id.

²⁰ See <https://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx> retrieved May 12, 2022.

²¹ Id.

The regulation of UAS with respect to trespass is a matter that is still fairly unsettled. In 2018, the Uniform Law Commission (ULC) provided a model law draft to address trespass and initially created a model where any nonconsensual UAS flight below 200 feet would be deemed a trespass.²² After further consideration the ULC created a new draft in 2019 that created a trespass only if one uses a UAS to interfere with the use and enjoyment of the property.²³ Ultimately after criticism by property law groups the ULC declined to adopt the draft and tabled the issue.²⁴

The Restatement Second of Torts provides two potentially applicable civil-trespass provisions. Section 158 provides:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally[:]

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

Section 159 provides:

(1) Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the surface of the earth.

(2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,

(a) it enters into the immediate reaches of the air space next to the land, and

(b) it interferes substantially with the other's use and enjoyment of his land.

²² See ULC, Tort Law Relating to Drones Act, Draft (2018).

²³ ULC, Uniform Tort Law Relating to Drones Act, at 6-8 (2019).

²⁴ See, e.g., Letter from Industry Stakeholders to Comm'rs, Unif. L. Comm'n (June 14, 2019).

While either of these torts may be applicable in Wyoming,²⁵ W.S. 10-4-303 (part of the Uniform State Law for Aeronautics) prohibits flight of aircraft at a low altitude such that it interferes with existing land use. This statute specifically excludes unmanned aircraft under 55 pounds.²⁶ Read together with W.S. 10-4-304, which requires the Uniform State Law for Aeronautics to be construed to make uniform state laws on the subject of aeronautics in order to harmonize state laws with federal laws and regulations, it's possible a court would construe the common law trespass by aircraft tort as being precluded by this statute. A search of Wyoming case law did not provide a case on point to this question.

Wyoming courts recognize the common law tort of intrusion of seclusion.²⁷ This tort provides that "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."²⁸ This tort may be applicable to a UAS flying closely over private property.

At least four states have passed laws specifically related to trespass by UAS, and even more have passed laws related to UAS and invasions of privacy.²⁹

Hunting

At least 10 states have adopted legislation regulating the use of UAS in hunting activities.³⁰ Generally these statutes prohibit the use of UAS for hunting, fishing, and trapping.³¹ Several include prohibitions on using UAS devices to locate game.³² Michigan, Oregon, and Tennessee specifically prohibit the use of UAS to interfere with or harass an individual who is hunting.³³

²⁵ See Bellis v. Kersey, 2010 WY 138, ¶ 19, 241 P.3d 818, 824; See also Howard v. Aspen Way Enters., 2017 WY 152, ¶¶ 17-26, 406 P.3d 1271, 1276-78 for a discussion on the common law and torts in Wyoming.

²⁶ W.S. 10-3-303 and 10-1-101(a)(x).

²⁷ Howard v. Aspen Way Enters., 2017 WY 152, ¶ 30, 406 P.3d 1271, 1279

²⁸ Restatement 2d of Torts, § 652B

²⁹ See Appendix IV of the GAO September 2020 report in footnote 1 supra.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id. W.S. 23-3-306 has prohibitions on using aircraft to harass, pursue, hunt, shoot or kill Wyoming wildlife. The "aircraft" language was added in 2003. There is no definition

This summary is meant to provide a broad overview of UAS regulations relating to trespass and hunting. Please let me know if you would like more information or have any questions.

of aircraft and no Wyoming Supreme court cases determining whether the term "aircraft" applies to UAS.

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