



**Draft Report for
Public Comment**

Comments due Aug. 28, 2020
Email: jkolman@mt.gov
Subject: SJ30 Wildlife Location

SJ30: WHERE ARE THEY NOW? STUDYING THE RELEASE OF FISH AND WILDLIFE LOCATIONS

July 2020

Environmental Quality Council

Joe Kolman & Joe Carroll

FINAL REPORT TO THE 67TH MONTANA LEGISLATURE

2019-2020

ENVIRONMENTAL QUALITY COUNCIL MEMBERS

Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. The members of the Environmental Quality Council, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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This report is a summary of the work of the Environmental Quality Council, specific to the EQC's 2019-2020 Senate Joint Resolution No. 30 study as outlined in the Council work plan. This report highlights key information and the processes followed by the EQC. To review additional information, including audio minutes, and exhibits, visit the EQC website: www.leg.mt.gov/eqc

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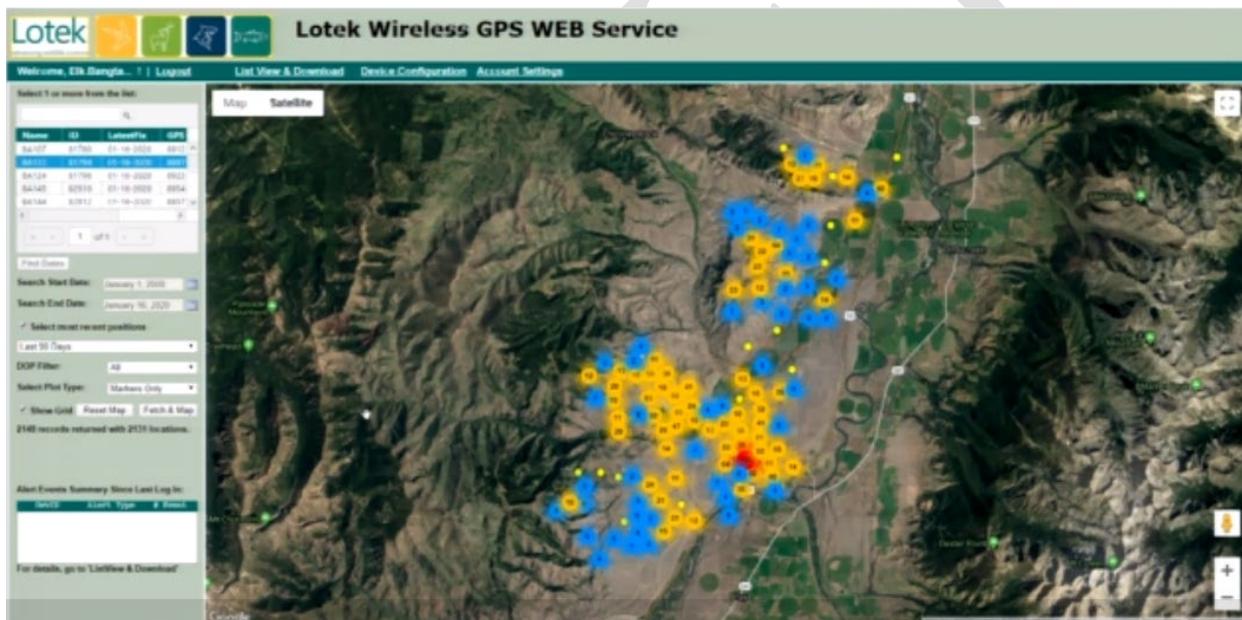
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WHERE ARE THEY NOW?

ON THE GROUND

At about 9 a.m. January 16, 2020, cow elk #107 grazed in the Bangtail Mountains west of Livingston. Just a few hours later, within the comfortable confines of the state capitol, her whereabouts from that morning stroll are projected onto a computer screen for the world to see. Not just the general vicinity of where she was that day, but thanks to a global positioning satellite (GPS) collar, *exactly* where she was at 9 a.m. Everyone could also see exactly where she was every hour on the hour for the last 90 days.

Twelve cow elk in the area are fitted with GPS collars as part of a research project. They are some of the nearly 1,200 animals, including bears and wolves, tracked by the Department of Fish, Wildlife, and Parks. Satellite tracking is less expensive and more accurate than tracking animals by air and more timely than older radio collar technology.



While exact location data are important for those managing fish and wildlife and others, there is concern that in the wrong hands such information could be used to illegally harm fish and wildlife.

The 2019 Legislature passed [Senate Bill No. 349](#), which established criminal penalties for a person who obtains “exact coordinate location data” from the Department of Fish, Wildlife, and Parks and uses the data or transfers it to another person who uses the data to “in a way that harms, harasses, or kills fish or wildlife.”

However, the new law does not address the release of the information itself. That was the impetus for [Senate Joint Resolution No. 30](#) also passed by the 2019 Legislature. The study resolution asks the EQC conduct research and debate into whether or how the state could protect fish and wildlife location data, including den and nest sites, spawning locations, congregation areas, courtship display grounds, and harvest locations.

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ON THE BOOKS

While other states and entities limit the disclosure of certain hunting and wildlife information, Montana's constitution provides a fundamental right to examine government documents. This right is balanced against the demands of individual privacy, competing constitutional rights, and certain other exceptions.

Article II of the Montana Constitution is the Declaration of Rights. Section 9 provides:

Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The Montana Supreme Court describes the right to know as a fundamental right that has created "a constitutional presumption that every document within the possession of public officials is subject to inspection."¹

Courts apply strict scrutiny to government actions that infringe on fundamental rights. For a statute to pass strict scrutiny, the government must show that the statute is:

- for a compelling state interest;
- closely tailored to achieving only that interest; and
- the least onerous way to achieve that interest.²

The Montana Supreme Court explains that the delegates at the 1972 Constitutional Convention cautioned "that the right to know is not absolute," and "would be subject to interpretation and considered together with other constitutional rights and existing laws."³

In addition to the individual privacy consideration, the presumption for disclosure may be overcome by:

- competing constitutional provisions;⁴
- attorney-client privilege and work-product privilege⁵ (documents demonstrating a lawyer's mental processes);
- the state police power (a health/safety/welfare exception, e.g. for ongoing criminal investigations)⁶; and



¹ Nelson v. City of Billings, 2018 MT 36, at P17.

² See Pfof v. State (1985), 219 Mont. 206, at 222.

³ Nelson, at P18 and P19.

⁴ Id.

⁵ Nelson, at P30.

⁶ Nelson at P19.

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- a government integrity exception (for "certain functions of government in securing property for the operation of government to serve the citizen."⁷).

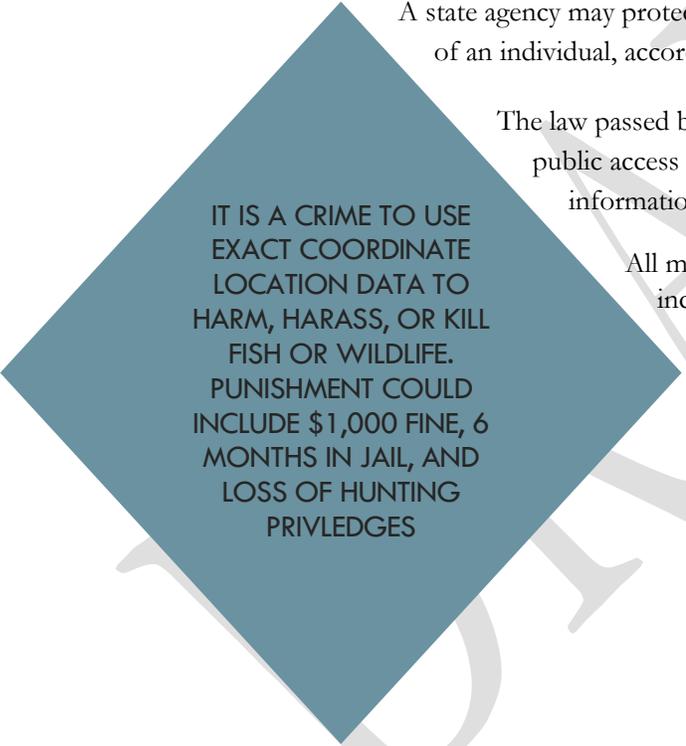
The Montana Supreme Court also holds that a government agency can assert the privacy interest of another.⁸A privacy interest requires that the individual have a subjective or actual expectation of privacy and that society is willing to recognize that expectation as reasonable.⁹

The framework for public record requests followed by DFWP and other agencies is set in law. Section 2-6-1003(1), MCA, states ". . . every person has a right to examine and obtain a copy of any public information of this state." It provides exceptions for public safety and historical records. Section 2-6-1006, MCA, requires agencies to respond in a timely manner by making the information available or providing an estimate of time and fees it will take to fulfill the request. If an agency denies an information request, it must provide a written explanation, and the requester may file a complaint in District Court, pursuant to 2-6- 1009, MCA.

A state agency may protect information it maintains that is personal information of an individual, according to 2-6-1502, MCA.

The law passed by the 2019 Legislature, 87-6-222, MCA does not limit public access to information, but rather limits the use or misuse of information obtained.

All manner of information is requested from the DFWP, including location data. The EQC examined [two years of requests](#) as part of the study.



IT IS A CRIME TO USE EXACT COORDINATE LOCATION DATA TO HARM, HARASS, OR KILL FISH OR WILDLIFE. PUNISHMENT COULD INCLUDE \$1,000 FINE, 6 MONTHS IN JAIL, AND LOSS OF HUNTING PRIVLEDGES

⁷ Nelson, at P21, quoting Montana Constitutional Convention, Verbatim Transcript, March 7 1972, pp. 1677-78, 1680.

⁸ Belth v. Bennett, 227 Mont. 341, at 345.

⁹ See, Montana Human Rights Div. v. Billings, 199 Mont. 434, at 442.

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LIMITS BY OTHER GOVERNMENTS

State	Information Limits
Alaska	prohibition on public disclosure of radio telemetry frequencies ¹⁰
Nevada	requires a formal data request process for some fish, wildlife, and habitat location information ¹¹
Oregon	presumption against disclosure of sensitive fish, wildlife and plant data, including radio frequencies used in telemetry studied. Disclosure is allowed: <ul style="list-style-type: none">• if public interest requires;• to tribal governments; or• for management or scientific reasons to government agencies, public utilities, colleges and universities, or to landowners to whom the information pertains¹²
Washington	substantially like Oregon ¹³
Wyoming	Game and Fish Department may deny inspection of sensitive wildlife location data "which could be used to determine the specific location of an individual animal or group of animals" ¹⁴
U.S. Geological Survey	may apply restrictions of access to threatened or endangered species data that has not been generalized or aggregated ¹⁵
New South Wales	protects sensitive endangered species locations from disclosure to third parties ¹⁶
Parks Canada	prohibition on use of radio receivers to track collared animals in Banff National Park, Kootenay National Park and Yoho National Park. ¹⁷

¹⁰ Alaska Administrative Code [93.040](#).

¹¹ **Error! Main Document Only.** Nevada [Department of Wildlife](#)

¹² Rule 350-012-0008, [Public Records Exempt from Disclosure](#).

¹³ RCW [42.56.430](#). [Fish and Wildlife](#)

¹⁴ [W.S. 16-4-203\(b\)\(viii\)](#).

¹⁵ [Data Management](#), USGS.

¹⁶ [Sensitive species data policy](#), NSW Government.

¹⁷ Parks Canada, [Restricted Activity](#).

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LEGISLATIVE PROPOSAL

EQC staff twice met with stakeholders to discuss possible legislation related to the dissemination of fish and wildlife data. Those involved included Sen. Jill Cohenour, who sponsored SB349 as well as other related legislation in 2019, representatives of the DFWP, State Library, Montana Newspaper Association, Montana Wildlife Federation, and the Montana Petroleum Association.

The draft adds language to the current location statute at 87-6-222, MCA that clarifies how the department may respond to a request for location information. Upon such a request, the department shall provide the information at a less than exact scale, or buffered. For example, using the data from cow elk #107, the department could provide her whereabouts by showing the square mile sections she traveled through over a period. Or take the centroid of all the pinpoint locations and show it as a buffered area.



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