Landlocked: A Call to End the Legal Ambiguity Plaguing Corner Crossing on Public Lands

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I. INTRODUCTION

> "Keep this great wonder of nature as it now is . . . keep it . . . for all who come after you, as one of the great sights which every American if he can travel at all should see."—Theodore Roosevelt[1]

Our outdoor heritage is guided by the public lands legacy established by President Theodore Roosevelt. That spirit of stewardship and

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1. President Theodore Roosevelt, Address at the Grand Canyon (May 6, 1903) (transcript available at https://www.americanrhetoric.com/speeches/teddyrooseveltgrandcanyon.htm).

conservation persists today as a prominent feature of the American identity, despite existing alongside a seemingly contradictory spirit of capitalism, private ownership, and private enterprise.[2] Today, 840 million acres—more than one-third of the United States—is public land.[3] State governments manage 200 million of those acres.[4] The remaining 640 million acres are managed by various federal government agencies, with the Bureau of Land Management (BLM) overseeing the largest share.[5]

These public lands are owned by and reserved for the benefit of the people.[6] And yet, millions of these acres are inaccessible to the public. Congress's decision in the 1800s to facilitate westward expansion by arranging land in a "checkerboard" pattern of alternating private and public ownership left certain public land parcels completely surrounded—"landlocked"—by private parcels.[7] The extent of the landlocked public lands problem was largely unknown until recent advancements in GPS technology revealed a harsh truth: 16.43 million acres of public lands across twenty-two states are landlocked with no permanent legal means of access.[8] Together, these landlocked public parcels make up two percent of all public land; an area larger than the state of West Virginia.[9]

This checkerboard pattern of land ownership creates tension between private property rights and public rights to access. Some outdoorsmen and women have long believed that where two public parcels physically touch at the corner, the landlocked land can be accessed by stepping across the adjoining corners without touching private land

2. Steve H. Hanke, *Public Lands: America's Great Anomaly*, INDEP. INST. (Oct. 6, 2022), independent.org/news/article.asp?id=14299.

3. *What Are Public Lands in the U.S.?*, PUBLIC LANDS, publiclands.com/blog/a/public-lands-in-the-united-states (last visited Apr. 5, 2023); *see also* Ray Rasker, *Public Land Ownership in the United States*, HEADWATERS ECON. (June 17, 2019), headwaterseconomics.org/public-lands/protected-lands/public-land-ownership-in-the-us/.

4. What Are Public Lands in the U.S.?, *supra* note 3.

5. CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2021).

6. *Off Limits, But Within Reach: Unlocking the West's Inaccessible Public Lands*, THEODORE ROOSEVELT CONSERVATION P'SHIP & ONX 2, onxmaps.com/wp-content/uploads/2020/12/onX_TRCP_West_Federal_Landlocked_Report.pdf (last visited Apr. 6, 2023) [hereinafter *Off Limits, But Within Reach*].

7. John W. Sheridan, Comment, *The Legal Landscape of America's Landlocked Property*, 37 UCLA J. ENV'T. L. & POL'Y 229, 230-32 (2019).

8. *Inaccessible Public Lands*, THEODORE ROOSEVELT CONSERVATION P'SHIP, trcp.org/unlocking-public-lands/ (last visited Apr. 5, 2023).

9. *See State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU (Dec. 16, 2021), census.gov/geographies/reference-files/2010/geo/state-area.html.

(popularly known as "corner crossing").[10] The legality of corner crossing, however, is ambiguous. Although no state has expressly outlawed corner crossing, many discourage it.[11] The courts have not filled the gap left by state legislatures. Although the practice of corner crossing has existed since the creation of checkerboard land in 1862, neither the U.S. Supreme Court nor has any State Supreme Court taken on the issue of whether corner crossing constitutes trespass.

Even without a controlling case to substantiate its guidance on the subject, the BLM nonetheless suggests that corner crossing is illegal.[12] Further complicating matters, even where local law enforcement agencies have discretion to cite corner crossers with criminal trespass, these agencies are reluctant to do so.[13] This constellation of conflicting federal guidance, state law, and local policy combined with a lack of insight from the courts, leaves the fate of members of the public seeking access to the recreational opportunities afforded to them by the public lands system, at best, uncertain. At worst, their actions are criminal. Public lands are owned by the American people and managed by public agencies, but access to landlocked public lands is guaranteed to no one except neighboring private landowners and those with their permission to cross.[14]

This tension between recreationalists and private landowners is higher today than it has ever been. One reason for that tension is the number of recreationalists seeking access to public lands is at an all-time high.[15] In 2021, BLM-managed lands received more than 80 million recreation-related visits.[16] In addition, innovations in GPS technology

10. Ben Ryder Howe, *It's Public Land. But the Public Can't Reach It*., N.Y. TIMES (Nov. 26, 2022), nytimes.com/2022/11/26/business/hunting-wyoming-elk-mountain-access.html.

11. *Id*.; *see also* "Corner Crossing," Wyo. Att'y Gen. Op. (June 8, 2004), wyoleg.gov/InterimCommittee/2019/01-2019060313-04Trespass-CornerCrossing.pdf (explaining that "corner-crossing" may constitute criminal trespass under Wyoming statute).

12. Press Release, Bureau of Land Mgmt., Access Tips for Hunting on BLM Lands (Aug. 29, 2013), blm.gov/press-release/access-tips-hunting-blm-lands; *see also* Hunting, BUREAU OF LAND MGMT., https://www.blm.gov/visit/hunting (last visited Nov. 27, 2023).

13. Angus M. Thuermer, Jr., *Corner Crossing Video: 'Do They Realize How Much Money My Boss Has?'*, WYOFILE (Mar. 1, 2022), wyofile.com/corner-crossing-video-do-they-realize-how-much-money-my-boss-has/ [hereinafter Thuermer, *Video*].

14. *The Corner-Locked Report*, ONX, onxmaps.com/onx-access-initiatives/corner-crossing-report (last visited Apr. 5, 2023); *see also Inaccessible Public Lands*, *supra* note 8.

15. *See The Economics of Outdoor Recreation*, HEADWATERS ECON., headwaters economics.org/wp-content/uploads/Rasker-Economics-of-Recreation-3-11-19.pdf (last visited Apr. 7, 2023) (visitation to BLM lands increased by fifteen percent between 2010-2018).

16. Derrick Henry, *Outdoor Adventure Seekers on Public Lands Generate Economic Benefits*, BUREAU OF LAND MGMT. (Feb. 23, 2023), blm.gov/blog/2023-02-23/outdoor-adventure-seekers-public-lands-generate-economic-benefits.

allow users to pinpoint their location in relation to property boundaries with unprecedented precision.[17] Improved information leads to increased public access, but also means that visitors are now showing up in places where landowners are not used to encountering them, potentially increasing the frequency of trespass charges. Lastly, ranchers faced with increased economic hardship are selling their properties to uber-wealthy, out-of-state entrepreneurs who are more concerned than their predecessors about the impact of corner crosses on the value of private ranching enterprises.[18] This creates a hostile, sometimes violent dynamic between locals used to a culture of permissive corner crossing and landowners unfamiliar with those customs.[19]

Public lands access is central to the American West identity and has inspired an outdoors culture that relies on such access. This culture is so strong that three-quarters of westerners decline to sacrifice public lands in the face of economic hardship.[20] The importance of public lands to westerners is also demonstrated by a finding that over ninety-five percent of westerners use their public lands at least annually, and more than half use them even more frequently.[21] This recreationalist culture is eroded where public lands and their accompanying hiking, camping, fishing, and hunting opportunities are circumscribed behind private property. In one study, half of all respondents identified insufficient access as a factor that diminished their enjoyment of hunting or otherwise discouraged their participation in the activities public lands provide.[22]

There are economic implications to the deterrent effect of reduced access, particularly for rural communities. Studies show that rural counties with the highest share of federal public lands have higher rates of employment and personal income growth than counties with lower shares of public land. [23] Local economies benefit directly when public

17. *Off Limits, But Within Reach*, *supra* note 6.

18. *See* Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373, 1380 (1987); *see also* Kathleen McLaughlin, *Class War in the American West: The Rich Landowners Blocking Access to Public Lands*, GUARDIAN (Jan. 21, 2018), theguardian.com/environment/2018/jan/21/public-land-battle-private-landowners-montana.

19. *See* Chavez, *supra* note 18, at 1373 (a hunter who paid $50 for a Wyoming game tag to hunt deer on public land was threatened by ranchers to either pay $100 or they would turn him in for trespassing); *see also* McLaughlin, *supra* note 18 (a ranch owner new to the area shot and killed his neighbor for repeatedly challenging the ranch owner's access-blocking actions).

20. Sheridan, *supra* note 7, at 235 (referencing a study showing seventy-four percent of westerners are opposed to selling off public lands to decrease budget deficits).

21. Sheridan, *supra* note 7, at 235.

22. *Off Limits, But Within Reach supra* note 6.

23. Sheridan, *supra* note 7, at 235.

lands are readily available because these lands attract entrepreneurs, tourists, and outdoors enthusiasts looking to buy permits and use the area for recreation.[24] If recreationalists are disincentivized from purchasing permits due to lack of access, these economies are put at risk. The amount at stake is significant: the outdoor recreation economy is an $887 billion industry.[25]

Despite the support public lands access seems to garner from locals and the economic advantages associated with broader access, a critical mass has failed to affirmatively legalize corner crossing in western states due to conflicting support for private property rights. The legislative history of many western states exemplifies this conflict. Montana, for example, attempted to pass a bill in 2013 that would have decriminalized corner crossing.[26] It received strong support from Democrats and recreationalists but was rejected by the Montana House.[27] Four years later, Montana proposed but also failed to pass essentially an opposite bill that sought to impose a $500 fine and six months imprisonment for anyone caught corner crossing.[28]

At the federal level, the BLM has struggled to resolve the access problem. The multiple-use mandate makes it challenging for BLM, when faced with organized groups of recreationalists, ranchers, and other private interest groups all with conflicting interests, to craft a solution that fulfills its obligations to all stakeholders.[29] For example, the BLM could use the power of eminent domain to facilitate public access, but this option is inefficient and expensive.[30] Presumably, through eminent domain the government could buy easements across private properties to create access routes to landlocked lands, but this solution would require BLM to identify, generate, negotiate, and purchase millions of individual easements—an extremely costly and slow endeavor. A system that relies on discretionary large-scale eminent domain power would mean the

24. *Id.*

25. *Off Limits, But Within Reach*, *supra* note 6.

26. Rich Landers, *Montana House Votes Down "Cutting Corners" Public Land Access Bill*, SPOKESMAN-REVIEW: OUTDOORS BLOG (Feb. 19, 2013), spokesman.com/blogs/outdoors/2013/feb/19/montana-house-vote-down-cutting-corners-public-land-access-bill/.

27. *Id.*

28. H.R. 566, 65th Leg., Reg. Sess. (Mont. 2017), leg.mt.gov/bills/2017/BillPdf/HB0566.pdf; *see also* Brett French, *Report: 8.3m Acres of Public Land in Limbo Due to Questions Over Legality of Corner Crossing*, SPOKESMAN-REVIEW (June 19, 2022), spokesman.com/stories/2022/jun/19/report-83m-acres-of-public-land-in-limbo-due-to-qu/.

29. Chavez, *supra* note 18.

30. *Sheridan*, *supra* note 7, at 240 (explaining that the Fifth Amendment permits the government to acquire property for public uses if it provides the owner with fair compensation).

forcible seizure of land from landowners with the public potentially bearing the cost. In other words, the expansive use of eminent domain as a solution to the corner crossing problem is likely to be unpopular with everyone.

To fill the gaps left by state legislatures, the federal government, and the courts, affected stakeholders have sought various collaborative solutions to the corner crossing problem.[31] The Unlocking Public Lands program in Montana, for example, provides an annual tax credit to landowners who provide access across their property to "locked" public land for hiking, birdwatching, fishing, hunting, and trapping.[32] Outdoors advocates have lobbied to utilize the funds set aside by the Great American Outdoors Act to support information-based programs that digitize and disseminate easement records and other public access information.[33] Some access-conscious private landowners have created easements, purchased specific private tracts, or swapped land with the federal government to open up ingress routes to public land.[34]

But these solutions all fall short because they depend on cooperation from landowners to voluntarily grant permission to access public lands on a case-by-case basis. Many landowners simply decline to sell private lands or easements or opt out of programs designed to incentivize support for expanded public access.[35] As long as solutions rely on the good will of individual private landowners, the corner crossing problem will never be solved, and recreationalists will continue to face uncertainty as to whether they are risking criminal and civil penalties by corner crossing. Securing broad access to the public lands promised to the American people and central to our recreational heritage requires a definitive legal rule establishing that corner crossing to reach otherwise inaccessible public land does not constitute trespass.

This Comment examines the current state of the corner crossing problem and analyzes the possible legal resolutions and their consequences. Part II offers a case study of *Iron Bar Holdings, LLC v. Cape et al.*, an emerging case that has drawn national attention as the first to squarely address the corner crossing problem.[36] Part III offers a

31. *WY BHA Carbon County Corner Crossing Issue Statement*, BACKCOUNTRY HUNTERS & ANGLERS, backcountryhunters.org/wycorner_crossing (last visited Apr. 6, 2023).

32. *The Corner-Locked Report*, *supra* note 14.

33. *Inaccessible Public Lands*, *supra* note 8; *see also* Howe, *supra* note 10 ("[N]o one's going to grant access out of the goodness of their heart.").

34. *Sheridan*, *supra* note 7, at 231.

35. *Id.*

36. *See* Iron Bar Holdings, LLC v. Cape, No. 22-CV-67-SWS, 2023 WL 3686793 (D. Wyo. May 26, 2023).

historical explanation of checkerboarding and discusses the legal legacy it left behind. Part IV discusses the legal doctrine of trespass how and it bears on corner crossing. Part V considers the viability of the possible legal outcomes that could be applied to a case like *Iron Bar*. The Comment concludes with a call to adopt a legal resolution to the corner crossing problem.

II. THE KING OF THE HILL

Annie Proulx, Wyoming local and author of *Brokeback Mountain*, once described Elk Mountain as "a formidable and huge presence" arising suddenly from the rugged alpine climate of Carbon County, Wyoming.[37] Known for its scenic beauty and abundant wildlife, Elk Mountain is home to aspen groves, sagebrush meadows, and herds of wild elk; a paradise for any outdoors enthusiast but particularly hunters.[38] The problem? You can't get there without breaking the law.

Like much of the Western United States, Carbon County is subject to a pattern of land ownership where parcels are divided into alternating squares of private and public ownership—like squares on a checkerboard.[39] The only way to access a public parcel "landlocked" entirely by private parcels is to cross at the corner where the two public parcels touch.[40] To avoid trespassing on private land, corner crossers, like checker pieces, step across the corner of one public parcel to the other in a diagonal fashion.[41] Corner crossing, neither legal nor expressly illegal, unestablished in statute and untested in the crucible of litigation, is a practice that centuries of hunters and landowners have been left to navigate on their own.[42] In many cases, recreationalists relied on neighborly good will to reach landlocked public land, or else steered clear altogether.[43] For most of history, this informal system of landowner-granted permission was sufficient to avoid conflict. That is, until four

37. Howe, *supra* note 10.

38. Joseph D. Fenicle, *Corner Crossing*, AMERICAN SURVEYOR (Feb. 9, 2023), Ameri surv.com/2023/02/09/corner-crossing/.

39. *The Corner-Locked Report*, *supra* note 14.

40. Howe, *supra* note 10.

41. *Id.*

42. Will Walkey, *Corner Crossing Lawsuit is the Latest Fight Over Mountain West Land Access*, WYOMING PUBLIC MEDIA (Sep. 23, 2022), wyomingpublicmedia.org/open-spaces/2022-09-23/corner-crossing-lawsuit-is-the-latest-fight-over-mountain-west-land-access ("It's never been firmly established either in statute or through litigation. [We see this case] as an intentional effort to . . . get a determinative legal determination of whether or not corner crossing is legal.").

43. *Id.*

hunters stepped over the corner of Elk Mountain Ranch and turned the status quo on its head.

In October 2021, four hunters traveled from Missouri to Wyoming to hunt elk.[44] Elk Mountain, aptly named, was the desired choice. But there was an issue: the areas of Elk Mountain open to the public were all landlocked by private land and thus inaccessible without corner crossing.[45] The group was able to locate a corner accessible from public roads where two parcels of BLM land touched using OnX, an app which allows users in the wilderness to see what might otherwise be invisible: their position in real time relative to property lines.[46] The group hiked until they found a twenty-nine-inch tall, two-inch-wide metal BLM pipe marking the corner access point.[47] Had it not been for the two "NO TRESPASSING" signs posted alongside the stake, it would have been easy to miss.[48]

The signs were placed there by Fred Eshelman, a North Carolina pharmaceutical mogul, hunter, and owner of 22,041 acres of private lands encompassing most of the public land on Elk Mountain.[49] According to the listing, within the listed property was an additional 11,000 acres of landlocked public lands.[50] The real estate company included these acres in the total area description and assured that the ranch owner would have exclusive access to them.[51] Mr. Eshelman acquired the property and developed Elk Mountain Ranch in 2005 as part of a larger strategy to purchase ranch properties throughout Wyoming and convert them into private hunting enterprises.[52] Locals pejoratively nicknamed him the "King of the Hill."[53]

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44. Howe, *supra* note 10.

45. Angus M. Thuermer, Jr., *Corner Crossers: Ranch Owner Broke Federal Access Law*, WYOFILE (Aug. 23, 2022), wyofile.com/corner-crossers-ranch-owner-broke-federal-access-law/.

46. Howe, *supra* note 10.

47. Fenicle, *supra* note 38.

48. *Id.*

49. *Id.*

50. Real Estate Listing for Elk Mountain Ranch, CHICKERING CO., chickeringco.com/portfolio-item/elk-mountain/ (last visited Apr. 6, 2023) (describing the property as encompassing "51+" sq. miles, an area equivalent to approximately 33,000 acres).

51. *Id.*; *see also* Fenicle, *supra* note 38; *see also* Defendants' Brief in Support of Motion for Summary Judgment at 3, Iron Bar Holdings, LLC v. Cape, No. 22-CV-67-SWS, 2023 WL 3686793 (D. Wyo. May 26, 2023) [hereinafter Defendants' Brief].

52. Angus M. Thuermer, Jr., *Corner-Cross Landowner Gave Millions to Conservatives, Conservation*, WYOFILE (Mar. 12, 2022), wyofile.com/corner-crossing-landowner-gave-millions-to-conservatives-conservation/ [hereinafter Thuermer, *Conservatives*].

53. Fenicle, *supra* note 38.

The four hunters approached the corner prepared. The group erected a ladder, the legs of which stood on the public land, clearing the five-foot "No Trespassing" signs by six inches.[54] The hunters scaled the ladder one by one without setting foot on the private ranch property.[55] After a few days of hunting, the ranch manager pursued the group and filed a trespass report.[56] The County Sheriff and the local game warden responded to the report but did not cite the hunters on the scene.[57] It was their agencies' policy, they explained, not to issue citations for corner crossing.[58] Their position was based on the Wyoming Attorney General's 2004 opinion, which stated that corner crossing may constitute criminal trespass, but only at the county prosecutor's discretion.[59] "We will write it up," they said, "but the County Attorney will not prosecute for corner crossing."[60]

But prosecute she did. When County Attorney Ashley Mayfield Davis received the officers' report, she ordered a deputy to charge the men with criminal trespass, a misdemeanor offense carrying a $750 fine.[61] A criminal trial in Carbon County Circuit Court ensued.[62] At issue was whether the hunters trespassed when they stepped from one parcel of public land to another at the four-corner intersection of two private parcels—without physically touching the private land.[63] Under Wyoming statute 6-3-03, a person is guilty of criminal trespass "if he enters or remains on or in the land or premises of another person, knowing he is not authorized to do so . . . ."[64] Ms. Davis argued that the hunters "entered" Mr. Eshelman's land when their bodies, which are indisputably bigger

54. Howe, *supra* note 10.

55. *Id.*

56. Defendants' Brief, supra note 51, at 12; *see also* Thuermer, *Conservatives*, *supra* note 52.

57. Defendants' Brief, supra note 51, at 12; *see also* Sam Lungren, *Inside the Wyoming Corner Crossing Case Everyone is Watching*, MEATEATER (Dec. 15, 2021), themeateater.com/conservation/public-lands-and-waters/inside-the-wyoming-corner-crossing-case-everyone-is-watching [hereinafter Lungren, *Inside the Case*].

58. Thuermer, *Video*, *supra* note 13.

59. *See* "Corner Crossing", Wyo. Att'y Gen. Op. (June 8, 2004), wyoleg.gov/InterimCommittee/2019/01-2019060313-04Trespass-CornerCrossing.pdf

60. Thuermer, *Video*, *supra* note 13; *see also* Defendants' Brief, *supra* note 51, at 13.

61. Lungren, *Inside the Case*, *supra* note 57.

62. Angus M. Thuermer, Jr., *Jury Finds Four Corner-Crossing Hunters Not Guilty of Trespass*, WYOFILE (Apr. 29, 2022), wyofile.com/jury-finds-four-corner-crossing-hunters-not-guilty-of-trespass/ [hereinafter Thuermer, *Hunters Not Guilty*].

63. Angus M. Thuermer, Jr., *Corner Crossing: Hunters Challenge Public-Land Access Issue in Court*, WYOFILE (Dec. 27, 2021), wyofile.com/corner-crossing-hunters-challenge-public-land-access-issue-in-court/.

64. WYO. STAT. ANN. § 6-3-303 (1973).

than the corner point, crossed private airspace.[65] The jury found the hunters not guilty of trespass but the judge made it clear that the verdict was not intended to bear on the broader legality of corner crossing.[66]

That would have been the end of the matter. However, Elk Mountain Ranch owner Iron Bar Holdings, with Mr. Eshelman as its manager, sued the four hunters in Carbon County District Court for civil trespass seeking $7.5 million in damages.[67] That amount was based on a twenty-five percent devaluation of the Elk Mountain Ranch.[68] The attorney for the hunters successfully transferred the case from state jurisdiction to the U.S. District Court for Wyoming where federal public access laws were thought by the defense to hold more sway.[69] The hunters are arguing that the interpretation of trespass law proffered by Iron Bar violated the Unlawful Inclosures Act, which generally prohibits landowners from fencing people out of public property.[70]

The *Iron Bar* case, from its earliest stages, has attracted a flood of media attention. Some local and state news sources have been following the story for over two years, since before the criminal trial, publishing headlines like "Inside the Wyoming Corner Crossing Case Everyone is Watching" and describing the case as one that could possibly set precedent.[71] NGOs and industry groups such as the Wyoming Chapter of Backcountry Hunters & Anglers (BHA) and the Wyoming Wool Growers Association have gotten involved, each of whom filed amicus briefs. [72] A GoFundMe set up by BHA to raise money for the hunters' defense has

65. Thuermer, *Hunters Not Guilty*, *supra* note 62.

66. Sam Lungren, *What the Wyoming Corner Crossing Verdict Means for Hunters*, MEATEATER (May 2, 2022), themeateater.com/conservation/public-lands-and-waters/what-the-wyoming-corner-crossing-verdict-means-for-hunters [hereinafter Lungren, *The Verdict*].

67. Defendants' Brief, *supra* note 51, at 13-14; *see also* Angus M. Thuermer, Jr., *Judge Transfers Corner-Crossing Trespass Case to Federal Court*, WYOFILE (Apr. 1, 2022), wyo file.com/judge-transfers-corner-crossing-trespass-case-to-federal-court/ [hereinafter Thuermer, *Judge Transfers*]; *see also* Angus M. Thuermer, Jr., *Ranch Owner: Corner-Crossing Damages Could Exceed 7m*, WYOFILE (Sep. 2, 2022), wyofile.com/ranch-owner-corner-crossing-damages-could-exceed-7m/.

68. Fenicle, *supra* note 38.

69. Thuermer, *Judge Transfers*, *supra* note 67.

70. *Id*.; Defendants' Brief, *supra* note 51, at 23-24; *see also* Memorandum from the Wyo. Legis. Serv. Office on Wyoming State Trespass Law (May 3, 2022), wyoleg.gov/Interim Committee/2022/01-2022052302-01TopicSummaryTrespass.pdf.; 43 U.S.C 1063.

71. Lungren, *Inside the Case*, *supra* note 57.

72. Brief for Backcountry Hunters & Anglers as Amicus Curiae Supporting Defendants, Iron Bar Holdings, LLC v. Cape, No. 22-CV-67-SWS, 2023 WL 3686793 (D. Wyo. May 26, 2023); Brief for Wyoming Wool Growers' Association et al. as Amici Curiae Supporting Plaintiffs, Iron Bar Holdings, LLC v. Cape, No. 22-CV-67-SWS, 2023 WL 3686793 (D. Wyo. May 26, 2023).

raised over $116,000.[73] The *Iron Bar* case has received national coverage in major news publications, including the *New York Times*[74] and the *Wall Street Journal*.[75] It is the subject of multiple podcasts[76] and hunting blogs.[77] The extent of the discussion raised by this case prompted the Wyoming legislature to select corner crossing as an interim topic between sessions, suggesting that new bills to address trespass law may be imminent.[78]

The level of engagement this case has attracted makes it clear that a system of "neighborly good will" and finger crossing in hopes that the state will not prosecute corner crossers can no longer be sustained in today's shifting era of Western land ownership.[79] The King of the Hill does not reign alone: Mr. Eshelman is just one of many wealthy out-of-state entrepreneurs purchasing old ranches in areas where hunting access was once generally permitted, converting them into tightly controlled private hunting experiences, charging upward of $10,000 for a single elk, and blocking access to neighboring public lands in the process.[80] Checkerboarded lands are not going anywhere and the problems they create are only worsening. Corner crossing is an issue with the urgent need for legal clarity, and the *Iron Bar* case may be the opportunity so many have been waiting for to provide that clarity. But to understand whether a legal rule is viable or would be effective requires backtracking into the origins of checkerboarding.

73. *Corner Crossing Legal Fee Fundraiser*, GOFUNDME, gofundme.com/f/corner-crossing-legal-fee-fundraiser (last visited Apr. 6, 2023).

74. Howe, *supra* note 10.

75. Michael Allen, *The Hunters, the Landowner and the Ladder That Triggered a Wyoming Showdown*, WALL ST. J. (Nov. 10, 2022), wsj.com/articles/hunting-land-access-dispute-wyoming-11668094125.

76. Andrew McKean, *Want to Understand the Corner-Crossing Issue? Listen to These Podcasts by Randy Newberg*, OUTDOOR LIFE (Mar. 7, 2022), outdoorlife.com/conservation/podcasts-corner-crossing-issue/.

77. Alex Robinson & Dac Collins, *Why Not Legalize All Corner Crossing in the West?*, OUTDOOR LIFE (May 25, 2022), outdoorlife.com/conservation/why-not-legalize-all-corner-crossing-in-the-west/.

78. Lungren, *The Verdict*, *supra* note 66.

79. Howe, *supra* note 10.

80. *Id.*

III. A CHECKERED PAST

A. The Union Pacific Act

Today's access problem is rooted in the history of landlocked federal lands.[81] The story begins with the discovery of gold in California in 1848, which led to the California gold rush and a sharp increase in Western settlement.[82] Congress, prompted by the need for a link with California during the Civil War, adopted this desire to expand west and began pursuing options for constructing a transcontinental railroad.[83] But building such a railroad was considered too risky and too expensive for the private sector alone and private investors would not move without tangible government inducements.[84] Concerned that directly subsidizing a private railroad would be unconstitutional, Congress instead passed the Union Pacific Act of 1862 (UPA), which granted public land to the Union Pacific Railroad for each mile of track it laid.[85]

The UPA created a railroad right-of-way that stretched from Nebraska to California.[86] The land surrounding the rail line was distributed in "checkerboard" blocks one square mile in size.[87] Odd-numbered blocks were granted to the railroads and even-numbered blocks were retained by the federal government.[88] Congress did not plan to retain the government-owned blocks indefinitely; they planned to sell them after the tracks were laid, at which point their value was expected to double due to their proximity to the completed rail line.[89] Congress would then recover the cost of the land it had granted away.[90]

The assumption that the lands retained in the checkerboard pattern would eventually end up in private hands proved incorrect.[91] The federal government found that it could not sell the lands because those looking to settle the West mostly could not afford to buy the expensive tracts along the railroad lines.[92] Anxious to dispose of the even-numbered parcels, the

81. Chavez, *supra* note 18, at 1375.
82. Leo Sheep Co. v. U.S., 440 U.S. 668, 670 (1979).
83. Chavez, *supra* note18, at 1376.
84. *Id*.
85. *Leo Sheep Co*., 440 U.S. at 671-72.
86. Chavez, *supra* note 18, at 1376; *see also* 12 STAT. 489; *see also Leo Sheep Co*., 440 U.S. at 676.
87. Chavez, *supra* note 18, at 1376.
88. *Id.* at 1376-77 (explaining that the UPA granted railroad companies a total of 130 million acres of public land).
89. *Id.* at 1377-78.
90. *Id.* at 1377-78.
91. *Id.* at 1378.
92. *Id.*

government resorted to giving some of them away through the Homestead Act.[93] The federal government kept the remaining parcels, which today are lands under BLM management.[94] The drafters of the UPA did not predict that the federal government would retain so much public land, nor did they anticipate that thirty years after the passage of the UPA, Union Pacific would go bankrupt and lose many of their land parcels to private parties.[95] The unintended consequence of these events was millions of acres of public parcels locked inside private parcels, creating the problem of public access that is still with us today.

B. The Homestead Act and the Unlawful Inclosure Act

The "beneficial use" theory of property law recognizes that the person who applies labor to an unclaimed natural resource in a manner that results in a beneficial use should be entitled to ownership of that resource.[96] When the U.S. government set their sights on westward expansion, they faced the challenge of incentivizing homesteaders to settle west, where resources like tillable soil and water were scarce. The government used beneficial use as the legal mechanism to transfer ownership of public land and natural resources to individual citizens.[97] With the passage of the Homestead Act of 1862, Congress offered 160 acres of land in fee simple to each willing settler for free, provided the settler homesteaded and cultivated the land for five consecutive years.[98] This structure was designed to resolve the problem created by the UPA, where settlers previously unable to afford the federally-owned parcels could obtain a property right by putting the land to productive use.

Like the UPA, the Homestead Act failed to adequately support westward expansion. Those who were settling west were often ranchers, shepherds, and cowboys looking to capitalize on grazing resources.[99] But ranches located in the arid west required a minimum of several thousand acres of rangeland to be sustainable; far more than the 160 acres the

93. *Id.*; *see also* 43 U.S.C. §§ 161-64 (1970) (repealed 1970).

94. Chavez, *supra* note 18, at 1378.

95. Randal O'Toole, *150 Years of Boondoggles*, CATO INSTITUTE (May 10, 2019), cato.org/blog/150-years-boondoggles.

96. Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 ENV'T L. 481, 485-86 (2006).

97. *Id.* at 486.

98. *Id.* at 487; *see also* 43 U.S.C. §§ 161-64 (1970) (repealed 1970).

99. Stimpert, *supra* note 96, at 482.

Homestead Act promised.[100] To combat the space problem, settlers adopted a custom of open range grazing where livestock were permitted to graze on adjacent open rangeland.[101] The Supreme Court formally upheld this policy in *Buford v. Houtz*, holding that due to congressional inaction in the face of many years of open range grazing customs, those who owned livestock had an implied license to graze cattle on unfenced federal public lands.[102]

The affirmation of open range policy was a disaster. Ranchers resorted to violence, intimidation, and fraud to maintain control of the open range.[103] The advent of barbed wire in the 1870s also made it possible to fence large areas of public rangeland.[104] Ranchers erected fences on both private and public land, enclosing the rangelands for their exclusive use.[105] Congress responded with the Unlawful Inclosures Act of 1885 (UIA).[106] The purpose of the UIA was to ensure free and equal access to the public lands by prohibiting the construction of any fence that prevented the lawful use by others of the public domain.[107] The UIA prohibited the obstruction of access "by force, threats, intimidation . . . fencing or enclosing, or any other unlawful means."[108]

Early interpretations of the UIA gave public land users rights of access over private landowners.[109] For example, in *Camfield v. United States*, the Supreme Court held that the UIA prohibits the construction of fences on private lands if they limit access to public lands.[110] In *Camfield*, the defendant landowner erected fences along the boundaries of his own property in a fashion that enclosed the public checkerboarded sections, thereby appropriating the public sections for his exclusive use.[111] The government argued that even though the fences were built on the

100. *Id.* at 489-90; *see also* Coby Dolan, Comment, *Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147, 152 (1999).

101. Stimpert, *supra* note 96, at 490.

102. 133 U.S. 320, 326 (1890) (stating that it is a long-standing custom that public lands of the U.S. "shall be free to the people who seek to use them, where they are left . . . unenclosed." This case is still good law today).

103. Stimpert, *supra* note 96, at 490.

104. Dolan, *supra* note 100, at 155.

105. *Id.*

106. *Id.*

107. 43 U.S.C. § 1061 (1994); *see also* GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, 2 PUB. NAT. RESOURCES L. § 15:9 (2d ed.) (2023).

108. 43 U.S.C.A. § 1063 (1994).

109. COGGINS & GLICKSMAN, *supra* note 107.

110. 167 U.S. 518, 524-25 (1897).

111. *Id.* at 527.

defendant's own private lands, the landowner violated the UIA because the property owners had no "claim, color of title or asserted right" to the public land they enclosed.[112] The Court held that even though the fences were built on private property, private landowners had no right to "exclude" or "frighten off" intending settlers, and therefore the government had the right to order the removal of the fences.[113] *Camfield* stands for the principle that Congress has the right to protect the public lands from nuisances erected upon adjoining property.[114]

Although *Camfield* was an access victory in the sense that the result was the removal of fences that rendered public land inaccessible, the Court's decision did not provide a remedy for the western checkerboard problem generally. The primary problem was that the case was decided on nuisance principles, limiting the application of the holding because 1) it suggested that where there are no physical barriers to constitute a nuisance, the UIA does not apply; and 2) it placed the burden on the excluded plaintiff to demonstrate that the enclosure was erected for no other purpose but to harm the intending settler. A landowner could therefore potentially defeat a UIA challenge if he or she simply showed that the enclosures were erected for other purposes, such as preserving the landowner's right to exclusive enjoyment. The *Camfield* Court also made no reference to the intent behind the UIA, which could have broadened the application of the holding. Despite these gaps, for nearly 100 years following *Camfield*, access questions under the UIA were seldom litigated because the principle of free access was firmly established, many federal tracts were formally reserved, and Western traditions usually tolerated passage over private lands so long as the trespasser did not harm the private lands.[115] By 1979, however, the issue was brought back into the forefront by *Leo Sheep Co. v. United States*.[116]

Plaintiff Leo Sheep Co. was the Union Pacific Railroad's successor in title to specific odd-numbered land parcels in Carbon County, Wyoming.[117] Adjacent to these parcels was the Seminoe Reservoir, a

112. *Id.* at 522.

113. *Camfield*, 167 U.S. at 524-25 (the Court also rejected the defendant's claim that the UIA was unconstitutional to the extent it governed use of private property).

114. *Id.* at 526 ("The government has the same right to insist upon its proprietorship of the even-numbered sections that an individual has to claim the odd sections; and if such proprietor would have the right to complain of the government fencing in his lands in the manner indicated . . . the government has the same right to complain of a similar action upon his part.").

115. COGGINS & GLICKSMAN, *supra* note 107.

116. 440 U.S. 668 (1979).

117. *Id.* at 677-78.

federal reservoir used by the public for hunting and fishing.[118] The Seminoe Reservoir was inaccessible except for dirt roads off the public road that traversed private lands, making it impossible to enter the reservoir area without intruding upon private land.[119] In the years preceding the litigation, the BLM began receiving complaints that private owners were either denying access over their lands to the reservoir area or charging fees for crossing their lands.[120] The BLM responded to the complaints by relocating part of the dirt road so that it crossed instead at the southeast and southwest corners of the Leo Sheep property.[121] Except for that minimal intrusion, the road was located on public land.[122]

Leo Sheep brought an action of quiet title against the government.[123] The Tenth Circuit ruled in favor of the government, holding that in passing the Union Pacific Act of 1862, Congress impliedly intended to reserve an easement of access to the lands retained in federal ownership.[124] On appeal, the Supreme Court reversed, holding that no such intention is apparent in the UPA, and that the BLM's construction of the road touching the corner of the private land could not be justified by easement by necessity.[125]

The Court explained that when a private landowner "conveys to another individual a portion of his lands . . . and retains the rest . . . the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property."[126] The Court then clarified that easements by necessity arise when the "usefulness of land is at stake"—a judgment that is left to the court as to what is reasonably essential to the land's use.[127] The Court was not convinced that unless the government provided access to the Seminoe Reservoir land via the installation of a public road, the land was useless.[128] However, they did not analyze the reasonableness because the judges believed an easement

118. *Id.* at 678.

119. COGGINS & GLICKMAN, *supra* note 107; *see also Leo Sheep Co*., 440 U.S. at 678.

120. *Leo Sheep Co*., 440 U.S. at 678.

121. *Id.*

122. *See* Ann M. Rochelle, *Public Lands—Problems in Acquiring Access to Public Lands Across Intervening Private Land—Leo Sheep Co. v. United States*, 15 LAND & WATER L. REV. 119, 123 (1980), scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1473&context=land_water (diagram of the described area).

123. *Id.* at 123-24.

124. *Id.* at 124.

125. *Leo Sheep Co*. 440 U.S. 668, 680-82.

126. *Id.* at 679.

127. *Id.* at 679 n.15.

128. *Id.* at 679-80.

by necessity was defeated for a more significant reason: even though Seminoe Reservoir was landlocked, the easement was not actually a matter of necessity in this case because the government had the power of eminent domain.[129] An easement by necessity is not warranted when the government has the ability to create an easement upon just compensation to the owner of the servient estate.[130] In other words, building a road was not "necessary" when the BLM could have created the same right-of-way by instead condemning the land and compensating Leo Sheep Co. for the intrusion.

The Court also rejected the government's argument that Leo Sheep's refusal to acquiesce to a public road on its property was an action that fell within the UIA's prohibition against unlawful enclosures.[131] In its reasoning, the Court cited the distinction it made in *Camfield* between impermissible enclosing of large public pastures while harboring an "evil" intent to block access to public lands under the guise of merely enclosing the landowner's own lands, and permissible fencing of discrete sections of private land individually with the legitimate intent to protect their private property.[132] Leo Sheep's actions, the Court determined, fell within the permissible category.

Leo Sheep left open the question of whether the doctrine of an easement by necessity may be available to parties other than the United States. And if such a recreational right to access does apply, would it exempt corner crossers such as those in *Iron Bar* from trespass liability? To begin to answer these questions, we first must consider what constitutes trespass.

IV. TO THE HEAVENS

The right to exclude others is one of the most treasured rights in property ownership.[133] The principle is a fundamental property right, not merely an empty formality that can be balanced away.[134] Although every state has different criminal and civil trespass statutes, as a general matter one is liable for trespass if he or she *intentionally* enters the land of another, irrespective of whether the entrance causes harm.[135] Intent in this

129. *Id.*
130. *Id.* at 680.
131. *Id.* at 679, 684-85.
132. *Id.* at 684-85.
133. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).
134. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2077 (2021).
135. RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965); *see also* Born v. Exxon Corp., 388 So. 2d 933, 934 (Ala. 1980).

context means intent to be on the land and does not take into account the trespasser's motivation.[136] In other words, trespass onto real property does not require proof that a person knew they were trespassing. It requires only that the trespasser intended to enter the land.[137]

Ancient doctrines of common law recognized the right to land ownership "extended to the periphery of the universe."[138] This approach is reflected in the Latin maxim that the rights of the surface owner extend upward to the heavens (*ad coelum*) and downward to the center of the earth (*ad inferos*).[139] Although this doctrine has since been dispelled in modern law, remnants of the principle remain.[140] Most relevant here, private property rights recognize that unauthorized intrusion into the airspace above the landowners' property constitutes trespass.[141] Such an intrusion is trespass even if the thing never touches the land itself and even if the intrusion does not interfere with the landowners' enjoyment of the land.[142] Additionally, invasion of another's property or airspace need not be more than *de minimis* in order to constitute a trespass.[143]

In *United States v. Causby*, the Supreme Court set forth the upper limit to where ownership of airspace stops.[144] In that case, a chicken farmer was forced to abandon his business because of the constant plane

136. 75 AM. JUR. 2D *Trespass* § 23 (2023); *see also* Hensley v. San Diego Gas & Elec. Co., 213 Cal. Rptr. 3d 803, 819 (Cal. App. Dep't Super. Ct. 2017) ("The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation.").

137. 75 AM. JUR. 2D *Trespass* § 23 (2023); *see also* Golonka v. Plaza at Latham, L.L.C., 270 A.D.2d 667, 669 (N.Y. App. Div. 2000) ("a person entering upon the land of another without permission, whether innocently or by mistake, is a trespasser"); *but see* Bowman v. State, 376 S.E.2d 187, 188 (1989) (holding that to prove that defendants violated criminal trespass statute, State was required to prove that defendants had actual knowledge that they were on private premises).

138. United States v. Causby, 328 U.S. 256, 260 (1946).

139. John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 980-81 (2008).

140. *See* United States v. Causby, 328 U.S. 256, 261 (1946).

141. RESTATEMENT (SECOND) OF TORTS § 158 cmt. on cl. (a), illus. 6 (AM. L. INST. 1965) ("A, on a public lake, intentionally discharges his shotgun over a point of land in B's possession, near the surface. The shot falls into the water on the other side. A is a trespasser.").

142. RESTATEMENT (SECOND) OF TORTS § 158 cmt. i (AM. L. INST. 1965).

143. Standard Realty Assocs., Inc. v. Chelsea Gardens Corp., 105 A.D.3d 510, 510 (N.Y. App. Div. 2013) (rejecting defendants' contention that dismissal of a trespass claim is warranted because the encroachment into four inches of plaintiffs' airspace was de minimis); *see also* People v. Durst, No. 2013NY063655, 2013 WL 6608386, at *4 (N.Y. Crim. Ct. Dec. 16, 2013) (holding the same for criminal trespass).

144. 328 U.S. 256, 264 (1946) ("[A]irspace is a public highway.").

traffic at the military airport next door during World War II.[145] Causby claimed the government had illegally "taken" his property without compensation in violation of the Fifth Amendment.[146] The Court rejected the idea that a landowner's property rights extended infinitely upward, but held that full enjoyment of the land required that the landowner have exclusive control of the immediate reaches of his or her property.[147] In so deciding, the Court conceded that the federal government regulates the "public highway" 500 feet and above the land surface.[148] In the space below the 500-foot mark, the *Causby* court established at least two relevant guiding principles: first, the Court condemned activity that has "a direct and immediate interference with the enjoyment and use of the land."[149] Second, the Court established that "the airspace, apart from the immediate reaches above the land, is part of the public domain."[150] The Court was clear, however, that it "need not determine . . . what [the] precise limits are," leaving open the question of what is included in the "immediate reaches" and what is in the public domain below the 500-foot mark.[151]

This open question has been taken up by some state legislatures and lower courts. Although their interpretations do not necessarily provide a controlling answer, they suggest that the kind of intrusion committed by corner crossers (i.e., passing briefly through the private airspace a few feet above landowners' property) could certainly be considered the "immediate reaches above the land." For example, Wyoming statute 10-4-302 states that ownership of the space above private land is vested in the owners below, limited only by the right of flight.[152] The next clause, however, permits flight over private property unless it is "[a]t such a low altitude as to interfere with the existing use to which the land or water . . . is put by the owner" or presents an imminent danger to persons or property lawfully on the land.[153] This qualification suggests that the public domain may fall lower than what the *Causby* Court identified, but affirmatively establishes that airspace above landowners' property is under their ownership, limited only by this right of flight.

145. *Id.* at 258-59.
146. *Id.* at 258.
147. *Id.* at 264.
148. *Id.* at 263-64.
149. *Id.* at 266.
150. *Id.*
151. *Id.*
152. WYO STAT. ANN. § 10-4-302 (1977).
153. WYO. STAT. ANN. § 10-4-303 (1977).

Other courts have similarly rejected opportunities to extend the public domain into the lower regions of airspace. For example, in an unpublished yet persuasive opinion by the Wisconsin Court of Appeals, the court rejected a "stepping over" exception to trespass set forth by the defendant.[154] The defendant in this case, Koenig, owned a parcel of property that connected diagonally to a county-owned public parcel at the corner.[155] The other two adjacent parcels were owned by the Aldriches, who erected an eight-foot tall L-shaped fence at the corner.[156] It was undisputed that Koenig could access the public land by going around the Aldriches' property.[157] However, he opted to access the public land in an apparently more convenient way, by stepping directly from his property onto the county-owned property.[158] It was evident that in order to corner-cross from his property to the county's property, part of Koenig's body entered the airspace above the Aldriches' property.[159]

Koenig argued that the circuit court erred by concluding that stepping over, but not on, the Aldriches' property constituted a trespass.[160] Koenig conceded that he could not cross the corner at issue without trespassing into the Aldriches' property, but argued that this brief intrusion into the air above their property ("stepping over") should be an exception to Wisconsin's civil trespass statute.[161] The appeals court held that Koenig's argument for a "stepping over" exception to trespass was not persuasive and that Koenig's intrusion into the airspace above the Aldriches' property constituted trespass.[162] There were two bases for the holding: first, Wisconsin's Restatement of Torts provided an illustration of trespass that Koenig's actions fit squarely into.[163] Second, the court declined to adopt the outcome of a Wisconsin Supreme Court case put forth by Koenig to support his exception theory.[164] In that case, *Leipske v. Guenther*, the court held that a horse who leaned its head into private property indeed trespassed, but the owner was nonetheless excepted from liability because in these circumstances the owner was not liable for

154. Koenig v. Aldrich, 2020 WI App 60, ¶ 10, 394 Wis. 2d 187, 949 N.W.2d 882.
155. *Id.* at ¶ 2.
156. *Id.* at ¶¶ 2-3.
157. *Id.* at ¶ 2.
158. *Id.*
159. *Id.*
160. *Id.* at ¶ 5.
161. *Id.* at ¶ 6; *see also* WIS. STAT. § 114.03 (2023).
162. *Koenig*, 394 Wis.2d, ¶ 10.
163. *Id.* at ¶ 7 ("A extends his [or her] arm over the boundary fence between A's land and B's land. A is a trespasser.").
164. *Id.* at ¶¶ 9-10.

"every conceivable damage which his trespassing animals may commit."[165] The *Koenig* court concluded that the facts of the case were too distinct from the present case to justify applying the same exception.[166]

Trespass jurisprudence demonstrates that intrusion into the airspace a couple feet above a landowner's property, where state law limits the property right only by the right of flight, is trespass per se. The question, therefore, is whether it is nevertheless possible to find that corner crossing is not trespass. There are a few possible pathways to reach such a rule.

V. WHO REIGNS?

A. "Stepping Over" Exception to Trespass

The first possible legal argument is that corner crossing is trespass, but a "stepping over" theory creates an exception. Although the *Koenig v. Aldrich* court rejected a "stepping over" exception, there is a critical factual difference between *Koenig* and *Iron Bar* that potentially leaves open the possibility for such an exception for individuals who corner cross: in *Koenig*, the public land that the trespasser was trying to reach was not landlocked. Koenig had other means for reaching the public parcel; corner crossing was merely the more "convenient" option.[167] The court did not discuss this point explicitly, but at the very least it raises a distinguishing fact that could be used to argue why a "stepping over" exception may be applicable in a landlocked lands context when it did not in *Koenig*.

One justification for a "stepping over" exception to trespass is that some jurisdictions acknowledge a *de minimis* exception to trespass liability. The *de minimis* provision in the Model Penal Code "authorizes courts to . . . ignore merely technical violations of law."[168] The *de minimis* theory stands for the proposition that even where a trespass is found to have occurred, the courts do not hold the trespasser liable where 1) the defendant's conduct was within a customary license or tolerance; or 2) the defendant's conduct neither caused nor threatened the harm sought to be prevented by the law defining the offense, or did so only to a trivial degree; or 3) the court believes that the legislature would have made an exception if the case was before it.[169]

165. Leipske v. Guenther, 7 Wis.2d 86, 90 (Wis. 1959).
166. *Koenig*, 394 Wis.2d, ¶¶ 9-10.
167. *Id.* at ¶ 2.
168. MODEL PENAL CODE § 2.12 ed. note (AM. L. INST. 2022).
169. *Id.*

For example, New York's highest court held that a charge of trespass into airspace could be defeated by a finding that the encroachment was de minimis.[170] The case, *Wing Ming Properties (U.S.A.) Ltd. v. Mott Operating Corp.*, thus leaves open the possibility that a minimal intrusion into a plaintiff's airspace in a corner-crossing context may be dismissed as *de minimis*. The outcome in *Leipske*, where the Court held that the owner of a horse was not liable for trespass when the horse extended his head into plaintiff's property, also supports the *de minimis* theory.[171] One of the bases for the holding was that the trespass occurred "above and not on the land;" the implication being that trespass into airspace is a harm of a lesser degree, and such intrusions may be more amenable to a *de minimis* exception to trespass.[172] Together, these cases also demonstrate that a criminal law "*de minimis*" principle can apply in a civil law context.

One of the problems with a "stepping over" exception to trespass is that such a holding, if binding, would effectively invalidate all state laws that leave open the possibility for trespass liability in corner crossing. Courts may be more hesitant to create a blanket exception previously only applied in limited contexts. Nevertheless, a "stepping over" exception to trespass is an appealing legal possibility because 1) it is simple; and 2) it achieves the desired goal of excepting corner crossing from trespass liability without creating an entirely new exception category. Rather, it merely applies an existing legal principle to a new context.

B. Recreational Right of Access Created by Easement by Necessity

The second possible legal argument is that corner crossing is not trespass, because an easement by necessity applies to individuals seeking to access otherwise inaccessible landlocked lands. Although the holding in *Leo Sheep* precluded the government from claiming an easement by necessity for otherwise inaccessible lands, there are a few reasons why this holding does not kill the potential to find a recreational right of access.

First, the *Leo Sheep* holding is limited. The Court did not comment on whether *individuals* may corner cross, or whether they could do so in cars, on horseback, on foot, and so on. *Leo Sheep* merely decided that landowners have title to the corners of their private property, and the government cannot construct a road that touches those corners unless it

170. Wing Ming Props. (U.S.A.) Ltd. v. Mott Operating Corp., 594 N.E.2d 921, 922 (N.Y. 1992).

171. *Leipske*, 7 Wis.2d at 91.

172. *Id.* at 92.

condemns and pays for it. *Leo Sheep* itself does not foreclose the possibility that an easement by necessity exists for parties other than the United States, who lack the power of eminent domain, and such a holding could theoretically be reached without overruling *Leo Sheep*.

Second, the Court held that easements by necessity could only be implied where the usefulness of the land was threatened but it did not analyze the question of whether landlocked lands are rendered useless by lack of legal access. The Court was confident that the government's eminent domain power precluded a necessity argument and therefore left open to interpretation the extent the usefulness of landlocked lands is threatened by lack of access relative to a hunter-plaintiff. Because recreationalists do not have eminent domain power, and thus do not have the same alternative means of access that the U.S. government has, it is possible that in this context the usefulness threat looms larger. Further still, even if the eminent domain power has some influence over the necessity analysis for recreationalists using public land, a showing of necessity does not require defendants to show that no other options were available in lieu of trespass.[173] These gaps leave room for the conclusion that *Leo Sheep* is a decision limited to its facts and would not necessarily be controlling in a case such as *Iron Bar*.

Finally, the doctrine of absurd result could be applied to reach an easement by necessity right to access even though it did not arise in *Leo Sheep*. Under this theory, "interpretations of a statute which would produce absurd results are to be avoided [by the courts] if alternative interpretations consistent with the legislative purpose are available."[174] It is undisputed that the primary purpose of the UPA was to dispose of lands in order to subsidize the railroad industry and encourage westward expansion. It is also clear that the federal government did not intend to retain the public parcels in the long term. In fact, Congress planned to sell the even-numbered blocks after the tracks were laid and were merely retaining them on the presumption that they would be worth more once the railroad was in operation. The only reason they remained in the public domain was because they were unable to sell them. Indeed, Congress even began giving them away for free under the Homestead Act when attempts to sell failed.

If the UPA statute is interpreted to mean the brief passage over a corner point is considered a trespass, and there is no easement that removes the risk of illegal trespass, then the result is effectively

173. *See* Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908).

174. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

prohibiting access to millions of acres of public land and instead converting this land into a free asset for a private landowner. This is an absurd result. In *Leo Sheep Co.*, Justice Rehnquist himself remarked on the significance of the holding to affect property rights in 150 million acres of land in the Western United States.[175] Although absurdity did not come up at the time *Leo Sheep* was decided, there is certainly a case to be made that reading the statute in a way that prohibits access into this much public land was not what Congress intended when it drafted the UPA.

C. Recreational Right of Access by Implied License Under the UIA

The third possible legal argument is that property owners who block access by placing "No Trespass" signs or otherwise prohibit recreationalists from accessing landlocked public lands are in violation of the UIA. Such a finding requires that the court interpret the UIA to mean that enclosures can be "constructive" or imposed by a lone sign rather than a fence. The court making such a finding would also have to do away with the nuisance justification, and instead rely on statutory interpretation supported by legislative intent. This kind of reading is possible because 1) the purpose of the UIA was to ensure free and equal access to the public lands, a purpose that arguably cannot be effectuated by "No Trespassing" signs and other threats that operate to keep the public out of public lands; 2) the UIA prohibits the obstruction of access by "any . . . unlawful means," not just fences;[176] and 3) *Leo Sheep* conceded that non-physical barriers could amount to enclosures. In *Leo Sheep*, the Court determined that the UIA did not apply when landowners refused to "acquiesce" to the government road, but on the basis that the enclosure was not the kind of enclosure *Camfield* imagined as impermissible under nuisance principles.[177]

One drawback to this solution is that it applies only to landlocked federal lands. Another potential problem is that if landowners are enjoined to remove property markers, it could have the undesired outcome of increased instances of trespass because it may be harder for recreationalists to tell where private property begins. This could lead to increased liability that would have otherwise been avoided by fencing. Additionally, even if the *Iron Bar* court were to hold that the UIA prohibits Mr. Eshelman from placing "No Trespass" signs or otherwise threatening to stop recreationalists from accessing public land, it does not

175. Leo Sheep Co. v. United States, 440 U.S. 668, 678 (1979).
176. 43 U.S.C. § 1063.
177. *Leo Sheep*, 440 U.S. at 684-85.

necessarily follow that corner crossing absent these barriers is not trespass. To make this argument more powerful against trespass, courts would need to find support in *Buford*, the doctrine of absurd result, or one of the arguments made in subparts A and B.

It is also worth noting that the standing requirements of the UIA require that the government bring the claim.[178] The role of the citizen under the UIA is limited to submission of an affidavit.[179] If a person believes a private landowner has unlawfully enclosed a public land parcel, a citizen may submit an affidavit describing the unlawful enclosure and petition the government to enforce the UIA.[180] The government is then compelled to initiate a lawsuit if it finds that there is evidence that an unlawful enclosure is present.[181] In *Iron Bar*, the UIA is being used as a defense, but a plaintiff seeking to enjoin a landowner from fencing off corner access points would have to demonstrate that the landowner's unfenced land amounts to an enclosure, and the government must affirm this preliminary finding and join the suit. This avenue for increased access rights is therefore less direct than those imagined in subparts A and B.

VI. CONCLUSION

Although none of the four hunters in *Iron Bar* physically stepped onto any private lands, they were charged with trespass for passing briefly through the air space of Elk Mountain Ranch.[182] If the trespass charges are successful, the court will essentially be reinforcing the idea that Congress, in enacting legislation intended to promote the settlement of the West, instead locked up millions of acres of public lands.[183] The checkerboard pattern of ownership that the UPA created, along with its consequences, persists today. The inevitable result is that someone's rights—whether it be the public's right to access public lands or private landowners' property rights—will be infringed upon.

This Comment makes the argument that the private landowner should bear those consequences. The public is already paying for public lands as taxpayers and permit holders. They should not bear the additional risk of liability, while landowners profit from exclusive access to land—

178. 43 U.S.C. § 1062.

179. *Id.*

180. *Id.*

181. *Id.*

182. Jerrold A. Long, *Railroad Land Grants and Public Access*, 37-SUM NAT. RESOURCES & ENV'T 57 (2022).

183. *Id.*

a privilege they do not pay for and that does not belong to only them.[184] It is the better outcome from an economic standpoint, a public access policy standpoint, and offers a solution to the current legal problem. Additionally, local agencies do not want to enforce trespass statutes against corner crossers.[185] In the scenario where someone inevitably possesses the power to regulate access, those decisions should sit with the government, not individual landowners.

A legal rule that creates a trespass exception for corner crossing is not without its problems. Where lawful corner crossing ends and trespass begins is a boundary not readily apparent by a legal rule granting access. There are also environmental concerns. As visitors to public lands increase, there is a real risk that increased human activity is harmful to the preservation of public lands and antithetical to conservation goals. Academics and even some of the strongest advocates for public land access caution against bright line legal rules and prefer collaborative solutions to avoid vilifying other stakeholders.[186] Finally, some may believe that decisions about access should rest with the landowners, not the government.

But despite these flaws, a bright line legal rule remains the best option. While a UIA argument, without more, may not guarantee broad access, a rule that creates a "stepping over" exception to trespass or an easement by necessity are viable and powerful alternatives. Both options would have to overcome legal hurdles to be effectuated, but they are nonetheless the best options to unlock landlocked lands. Such a rule would create more predictability in the law for landowners and recreationalists, immediately unlock millions of inaccessible public lands, and relieve the administrative and financial burden on the BLM, allowing the saved funds to support other recreation and conservation programs. Generating a legal rule to support this agenda has never been more urgent, and we can no longer settle for unreliable, volunteer-based programs to

184. *See* Chavez, *supra* note 18, at 1391 n.120 (explaining how there is incredible incentive for private landowners profiting from public lands to maintain the status quo. "Landowners collect large fees . . . for granting access to public lands across their own lands." For example, one hunting operation sells 10-day elk hunts for $2,600 per person).

185. Sam Lungren, *New Criminal Charges Dropped, But Corner Crossing Case Could Still Set Precedent*, MEATEATER (May 11, 2022), https://www.themeateater.com/conservation/public-lands-and-waters/inside-the-wyoming-corner-crossing-case-everyone-is-watching ("[T]he idea of non-resident hunters running roughshod over generational family ranches won't sit well with many longtime residents of Wyoming.").

186. Sabrina King, *Corner Crossing: An Obvious Issue that Requires a Nuanced and Collaborative Approach*, Backcountry Hunters & Anglers (Jan. 27, 2023), https://www.backcountryhunters.org/corner_crossing_an_obvious_issue_that_requires_a_nuanced_approach.

solve the corner crossing problem. *Iron Bar* presents an opportunity to advance a bright line rule that corner crossing is not a trespass. Preserving access is a national interest and an economic imperative. The time has come to unlock public lands and restore the outdoor heritage that Teddy Roosevelt imagined.