

This Land Is Your Land: Legal Solutions to America’s Landlocked Public Property

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Introduction

Chances are, you weren't born into wealth and luxury. But, like every other American, you hold a stake in an immense treasure: 828 million acres of public land.¹ You carry a deed to some of America's most beautiful natural wonders—Yellowstone, the Great Smokey Mountains, the Grand Canyon, and more—regardless of your personal wealth or social status. It is a modern miracle that the American public enjoys these vast acres—equivalent to the entire landmass of India²—for hiking, sightseeing, and other outdoor recreation. This concept is deeply American: making land, recreation, wildlife, scenery, and solitude available to all.³

Unfortunately, large swaths of this public land are inaccessible. Although the outdoor recreation community has long been aware of public land parcels that have no legal access,⁴ until recently, neither outdoor recreationists nor the federal government knew exactly how much public land is inaccessible to the public.⁵ But in 2018, private businesses and nonprofit organizations worked together to discover 16.43 million acres of “landlocked” public lands spread across twenty-two states.⁶

These landlocked public lands lie untouched by public roadways and lack access easements—leaving them inaccessible and off-limits to the public. As a result, these public lands are circumscribed behind private property, along with their accompanying hiking, camping, fishing, biking, skiing, and hunting opportunities. And adjacent private property owners enjoy exclusive benefit of these lands that belong to us all.

1. *Public Lands*, HEADWATERS ECONS., <https://headwaterseconomics.org/public-lands/protected-lands/public-land-ownership-in-the-us/> [https://perma.cc/W3EK-Y3YZ].

2. India has a total landmass of 3,287,263 km², which is equal to approximately 812.3 million acres. *Countries of the World by Area*, NATIONS ONLINE PROJECT, https://www.nationsonline.org/oneworld/countries_by_area.htm [https://perma.cc/WV9X-M6PA].

3. MARK KENYON, *THAT WILD COUNTRY: AN EPIC JOURNEY THROUGH THE PAST, PRESENT, AND FUTURE OF AMERICA'S PUBLIC LANDS* 5 (2019).

4. See Merry J. Chavez, Note, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373, 1373–74 (1987) (summarizing how the “question of access has haunted public lands for the last century” and become a “key battleground” for recreationalists and other stakeholders).

5. *The Corner-Locked Report*, ONX [hereinafter *Corner-Locked Report*], <https://www.onxmaps.com/onx-access-initiatives/corner-crossing-report> [https://perma.cc/YBE3-8LNG].

6. See *Inaccessible Public Lands*, THEODORE ROOSEVELT CONSERVATION P'SHIP [hereinafter *Inaccessible Public Lands*], <https://www.trcp.org/unlocking-public-lands/> [https://perma.cc/56KZ-3YW3] (summarizing the results of the *Corner-Locked Report*, *supra* note 5, that was a partnership between onX and the Theodore Roosevelt Conservation Partnership).

Landlocked properties can be categorized in two ways. First, by *how* they are landlocked: either “corner-locked” or “isolated.” This distinction is fully elaborated upon in Part II, *infra*, and almost equally divides the landlocked properties as 8.30 million acres are corner-locked and 8.13 million acres are isolated.⁷ The second way to categorize the properties is by their ownership: either state or federal. Of the total 16.43 million landlocked acres, 6.35 million acres belong to individual states,⁸ while the almost 10 million remaining are managed by federal agencies such as the Bureau of Land Management (BLM) or the United States Forest Service (USFS).⁹

This Note examines the legal and political challenges surrounding America’s landlocked public lands and offers unique solutions to unlock these properties. Part I explains the history behind how and why these lands became inaccessible to the public. Part II introduces the distinctions between corner-locked and isolated landlocked parcels. Part III provides a call to action by examining the cost to society that these landlocked public lands impose via their economic and social opportunity costs. Part IV discusses how the common law doctrine of easements by strict necessity and the public trust doctrine fail to solve the landlocked public lands issue. Parts V and VI examine legislative attempts to unlock these lands, through property acquisitions and other non-acquisition-based programs.

Finally, Part VI evaluates the special issue of corner-crossing on corner-locked properties and argues that the Unlawful Inclosures Act of 1885 (UIA) is an effective tool for combatting trespass claims related to corner-crossing. Indeed, litigants have used this 135-year-old statute to gain access to public land across privately held parcels. The UIA is still good law, and its application in corner-crossing cases would unlock 8.3 million acres of corner-locked property and provide the public with all the economic and social benefits that accompany those vast acres.

I. Our Checkered Past: How the Landlocked Problem Began

Today’s public lands access challenges are rooted in the history of the lands themselves. Congress promulgated 18th and 19th-century policies that governed how newly acquired federal land was to be surveyed and granted

7. *Corner-Locked Report*, *supra* note 5; *Inaccessible Public Lands*, *supra* note 6. The isolated land figure was calculated by subtracting the *Corner Locked Report*’s finding of 8.3 million corner-locked acres from the *Inaccessible Public Lands*’s finding that 16.43 million acres *total* of public land are landlocked in some form. *Supra* note 5; *supra* note 6.

8. THEODORE ROOSEVELT CONSERVATION P’SHIP & ONX, *INACCESSIBLE STATE LANDS IN THE WEST: THE EXTENT OF THE LANDLOCKED PROBLEM AND THE TOOLS TO FIX IT 2* (2019), https://www.trcp.org/wp-content/uploads/2019/11/2019-onX-TRCP-Report_for_web.pdf [<https://perma.cc/LA7B-W363>].

9. *Inaccessible Public Lands*, *supra* note 6.

to railroad companies and homesteaders as incentives for westward expansion. This Part details that history and characterizes the scope of the landlocked public lands problem. The first subpart provides historical context surrounding landlocked federal lands. The second subpart describes the similarities—and significant differences—that accompany state-owned landlocked lands.

A. *A Historical Account of Federal Landlocked Lands*

Nearly 10 million acres of federal public land is landlocked and off-limits to the general public.¹⁰ The history behind these landlocked federal public lands is long and tortuous. It includes legislation, judicial opinions, and 185 years of real estate transactions implicating the federal government, state governments, large corporations, and small farmers. To fully understand this history, one must start with the Public Land Survey System.

1. *Public Land Survey System.*—After the American Revolutionary War, the United States acquired title to the Ohio Country—which included all the land west of the Appalachian Mountains, north of the Ohio River, and east of the Mississippi River.¹¹ This property windfall required the federal government to confront a new problem, and one important issue was how to measure, divide, distribute, and induce settlement of this newly-acquired territory. In short, the federal government needed to inventory its new land and quickly turn that land into cash. The new Union was deeply in debt from the war¹²—and did not yet have the power to directly tax the citizenry¹³—so it was in desperate need to sell off the Ohio Country to raise funds for the increasingly insolvent government.¹⁴

10. THEODORE ROOSEVELT CONSERVATION P’SHIP & ONX, OFF LIMITS BUT WITHIN REACH: UNLOCKING THE WEST’S INACCESSIBLE PUBLIC LANDS 5 (2018), <https://www.trcp.org/wp-content/uploads/2019/02/TRCP-onX-Landlocked-Report-8-26-2018.pdf> [<https://perma.cc/JQ28-AVJW>].

11. *See Treaty of Paris (1783)*, OHIO HISTORY CENTRAL, https://ohiohistorycentral.org/w/Treaty_of_Paris_ [<https://perma.cc/B322-Z62Y>] (explaining how the Treaty of Paris secured all land east of the Mississippi River for the United States and thus allowed U.S. settlers to move into the Ohio Country); *see also Ohio Country*, OHIO HISTORY CENTRAL, https://ohiohistorycentral.org/w/Ohio_Country [<https://perma.cc/A9CU-2348>] (defining the Ohio Country as the “territory roughly west of the Appalachian Mountains and north of the Ohio River prior to the American Revolution”).

12. C. ALBERT WHITE, BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 11 (1983), <https://www.blm.gov/sites/blm.gov/files/histrect.pdf> [<https://perma.cc/C2BP-U6GQ>].

13. *Id.*

14. *See id.* (“The Northwest Territory loomed as the only asset the new country had which might be turned into hard money. If the vast public domain could be sold to settlers, it could return millions of dollars to the treasury and solve the pressing immediate need for money.”).

The Confederation Congress appointed a committee to design a system for surveying and distributing the Ohio Country.¹⁵ The committee reviewed a few existing survey methods, notably the British “metes and bounds” system from the original colonies.¹⁶ This system defined property lines using topography and natural landmarks.¹⁷ A simple description under this system might read: “From the point on Goodfood Creek’s north bank one mile above the junction of Slab and Coldwater Creeks, north for 1300 yards, northwest to the large standing rock, west to the large oak tree, south to Goodfood Creek, then down the center of the creek to the starting point.”

But this system had issues. First, the obvious: nature evolves. Trees die, storms shift boulders, and floods cause streams to change course. Second, the system’s irregular shapes led to complex descriptions that created legal disputes based on deeds subject to multiple interpretations.¹⁸ This uncertainty was not useful for the large land tracts in the Ohio Country that investors were buying sight-unseen.¹⁹ Investors hate uncertainty. And the government needed more than rudimentary landmark descriptions to induce investment into this new territory.

To address these shortcomings, the committee introduced the Public Land Survey System (PLSS) through the Land Ordinance of 1785.²⁰ The ordinance required the United States’ Geographer to divide the territory into townships, six miles square, “divide[d] . . . by lines running due north and south, and others crossing these at right angles.”²¹ Each township was then divided into one-square-mile sections of 640 acres.²² In simpler terms, this ordinance shifted from the uncertain “metes and bounds” system to a standardized system using straight lines and set measurements. It divided the land into square “townships” of thirty-six square miles, further divided into “subdivisions” of 640 acres or one mile, and quarter-sections of 160 acres.²³

15. *Id.*

16. *Id.*; see also Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 *YALE L.J.* 872, 889 (2019) (“[T]he American colonies’ use of metes and bounds in property descriptions derived from English practice.”).

17. See WHITE, *supra* note 12, at 9 (noting how survey descriptions under the metes and bounds system were tied to things like “trees, rocks, creek junctions, or stone mounds”).

18. See *id.* (“This whole system led to many overlapping claims, boundary disputes, and clouded titles which the courts were swamped with.”).

19. See *id.* at 14 (“The lands were to be sold at auction hundreds of miles away, so it was necessary to know just what was being sold or bought.”).

20. *About the Public Land Survey System*, MIN. & LAND RECS. SYS. (June 16, 2023), <https://mlrs.blm.gov/s/article/PLSS-Information> [https://perma.cc/7E7U-H9YT].

21. UNITED STATES, *An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory* (May 20, 1785).

22. *Id.*

23. *Id.* A quarter-quarter section, therefore, was 40 acres—the basis for the “back 40” and “40 acres and a mule” phrases that often appear in American popular culture.

The federal government reserved several sections for its own purposes²⁴ and auctioned the rest.²⁵ Fortunately, the PLSS's clarity and defined title system encouraged demand for western lands by giving speculators security in their purchases and minimizing the risk of legal disputes. This fulfilled the government's desire to convert this untapped resource into revenue. Although Congress intended the PLLS to reduce property disputes, its legacy has created modern-day conflicts between public and private lands that would have been unimaginable in 1785.

2. *Pacific Railway Acts*.—Throughout the first half of the 19th century, the United States acquired the American West.²⁶ For many years, much of this land remained undeveloped. For example, in 1860, Nebraska's average population density equaled about one person per every five square miles.²⁷ While the 1848 California gold rush tempted many eastern residents to move west,²⁸ they faced a choice between three unpleasant travel options: a four-month trek across the continent, a thirty-five-day voyage through the Isthmus of Panama, or a four-month sail around Cape Horn.²⁹ Many travelers longed for a better alternative.

Although the gold rush reignited interest, discussions about a transcontinental railroad had existed since 1844.³⁰ The government wanted the West settled,³¹ and safe and efficient transportation was a critical issue for settlers. But “northern and southern interests were deadlocked over the route [the railroad] should take.”³² A southern route would promote growth in the Southwest and could lead to more slave states.³³ But a northern route would align with the East's industrial priorities and discourage the spread of

24. For example, section 16—near the township center—was set aside for a public school. *Id.* Other sections were reserved for land bounties to American Revolution veterans for their service in the war. *Id.*

25. *Id.*; see also WHITE, *supra* note 12, at 14 (describing the auction process in plainer language).

26. *Leo Sheep Co. v. United States*, 440 U.S. 668, 670 (1979). The Louisiana Purchase in 1803 and the Gadsden Purchase in 1853 were the primary acquisitions of land during this timeframe. *Id.*

27. *Id.*

28. See Samantha Gibson, *California Gold Rush*, DIGIT. PUB. LIBR. OF AM., <https://dp.la/primary-source-sets/california-gold-rush> [<https://perma.cc/4V6R-RDPC>] (explaining how roughly 300,000 people, including Americans from all walks of life, headed to California between 1848 and 1855).

29. *Leo Sheep Co.*, 440 U.S. at 670.

30. *Id.* at 670–71.

31. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 2 (David M. Kennedy ed., 2007) (“In 1845, the ambition to occupy still more land would be characterized . . . as the fulfillment of America's ‘manifest destiny’—a term that soon became as important as ‘empire’ to describe American nationhood.”).

32. Roger D. Billings, *The Homestead Act, Pacific Railroad Act and Morrill Act*, 39 N. KY. L. REV. 699, 705 (2012).

33. *Id.*

slavery.³⁴ The Civil War removed southern congressmen, paving the way for the northern route approval, and spurred Congress to act. Driven by the need to bridge the logistical gap with California³⁵ and to move troops and materials westward,³⁶ Congress passed the Pacific Railway Act of 1862.³⁷ The Act and its five amendments—collectively known as the “Pacific Railway Acts”³⁸—would provide financial support for the transcontinental railroad.³⁹ The railroad companies needed this support because the venture was too risky and expensive for private investors to move without tangible government inducement.⁴⁰ Because private capital was insufficient, the government financed the railroad with the only currency it had—public lands.

The Pacific Railway Acts granted the railroad companies a 200-foot right-of-way next to the track plus ten sections of land on both sides of the track.⁴¹ Odd-numbered sections were granted to the railroad; even-numbered sections were reserved by the government. The result was a “checkerboard” pattern of public-private land ownership, which still fractures the American West and provides challenges to those who wish to access their public lands.

34. *Id.*

35. *Leo Sheep Co.*, 440 U.S. at 671.

36. *See id.* at 674–75 (describing the western Civil War Battles of Picacho Pass and Glorieta Pass, which both impressed upon Congress the necessity to efficiently move men and supplies westward). It is unsurprising that the driving forces behind so many technological advancements—gold and war—also supplied the momentum for the first American transcontinental railroad.

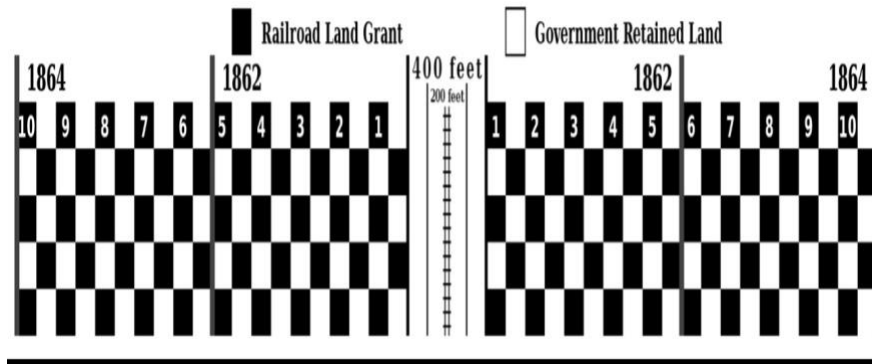
37. Pacific Railway Act of 1862, ch. 120, 12 Stat. 489.

38. This term was used in a similar context in another student comment on landlocked property. *See* John W. Sheridan, Comment, *The Legal Landscape of America's Landlocked Property*, 37 UCLA J. ENV'T L. & POL'Y 229, 232 (2019). While Sheridan did not provide specific citations, there are five known acts from the 1860s that amended or supplemented the original Pacific Railroad Act. Act of July 2, 1864, ch. 216, 13 Stat. 356 (amending); Act of Mar. 3, 1865, ch. 88, 13 Stat. 504 (same); Act of July 3, 1866, ch. 159, 14 Stat. 79 (same); Act of Mar. 3, 1863, ch. 112, 12 Stat. 807 (setting a standard gauge for the Pacific Railroad); Act of Mar. 3, 1869, ch. 127, 15 Stat. 324 (allowing construction of the railway between Denver and Cheyenne).

39. *See* Pacific Railway Act of 1862, ch. 120, § 5, 12 Stat. 489, 492–93 (authorizing the issuance of government bonds that would constitute a “first mortgage on the whole line of the railroad”).

40. *See* HORACE GREELEY, AN OVERLAND JOURNEY 383–84 (1860) (“The amount is too vast; the enterprise too formidable; the returns too remote and uncertain.”). Indeed, only \$2 million was raised via the sale of Union Pacific stock—a mere 1–2% of the estimated \$100–200 million needed to build the railroad. Billings, *supra* note 32, at 705.

41. The 1862 Act only granted the railway companies alternating sections within ten miles of the track, but the grants were doubled to include all odd-numbered sections within twenty miles of the track in the 1864 amendment. *Compare* Pacific Railway Act of 1862, ch. 120, § 3, 12 Stat. 489, 492 (limiting the railroad grants to an area “within the limits of ten miles on each side of said road”), *with* Act of July 2, 1864, ch. 216, §4, 13 Stat. 356, 358 (amending the Pacific Railway Act of 1862 to “strick[e] out the word ‘ten,’ where the same occurs in said section, and by inserting in lieu thereof the word ‘twenty’”).

Figure 1⁴²

The rationale behind this checkerboard scheme was simple. Congress hoped the railroad would increase the adjacent public land values, which Congress could then sell at double the price to offset the cost of the subsidy and foster private enterprise.⁴³ The vision was for parallel development on both private and public land leading to a network of access roads.⁴⁴ But this pattern of access roads has not come to complete fruition, and there are still millions of public land acres locked by private land within the checkerboard.

3. *The Effect of the Homestead Act of 1862.*—The Homestead Act of 1862⁴⁵ mirrored the Pacific Railway Acts, both in promoting western migration and in landlocking public land. The Homestead Act allowed settlers to claim 160 acres of land from the public sections on the

42. *Public Land Survey System*, WIKIWAND, https://www.wikiwand.com/en/Public_Land_Survey_System [<https://perma.cc/2F9B-PUAH>].

43. See PAUL W. GATES, *PUB. LAND L. REV. COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 346 (1968). (“[T]he price of the reserved sections was doubled so that . . . by giving half the land away and thereby making possible construction of the road, canal, or railroad, the government would recover from the reserved sections as much as it would have received from the whole.”).

44. *Leo Sheep Co. v. United States*, 440 U.S. 668, 686 (1979) (“Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.”); see also CONG. GLOBE, 31st Cong., 1st Sess. 846 (1850) (outlining the dynamics of the checkerboard grants system where the “Government owns a large proportion of the property. They sell it. . . . Roads are made, villages and towns are built up, and all the improvements that can be of value to a country go on and increase the value of the lands”) (statement of Sen. Cass).

45. Homestead Act of 1862, ch. 75, 12 Stat. 392.

checkerboard.⁴⁶ In exchange, homesteaders paid a fee and needed to live on the land for five years, cultivate it, and complete modest improvements.⁴⁷

The legal process was simple. First, the settler applied for a homestead and paid a fee.⁴⁸ After a land agent checked for previous ownership claims, the five-year residency began.⁴⁹ When the five-year period was complete, the homesteader “proved up” the claim by providing evidence that he had developed the land.⁵⁰ After the homesteader proved his claim and paid an additional fee, the Government Land Office issued him a deed of title known as a “patent.”⁵¹

Congress passed variations of the Homestead Act throughout the 1870s,⁵² and any U.S. citizen could receive 160 acres of land.⁵³ The Acts spurred western migration, increased economic development, and helped make the transcontinental railroad a success. As formerly public sections of the checkerboard were subdivided and converted to private land by settlers, 270 million acres were transferred from the public domain to private homesteaders through the Homestead Act.⁵⁴ But there were unintended consequences. As settlers prioritized the best lands, vast tracts of public land were isolated within private boundaries. Much of that public land is still inaccessible today.

II. The “Corner-Locked” vs. “Isolated” Land Distinction

When seeking legal solutions to unlock landlocked public land, it is important to understand both the *ownership* (state or federal) and *how* the properties are landlocked. In fact, nearly half of America’s landlocked public lands are corner-locked, while the rest are isolated. The legal strategies available to unlock these lands can turn on this distinction.

Isolated parcels are like public-land islands in a sea of private land. These parcels are completely surrounded by private property. In contrast, corner-locked parcels stem from the checkerboard pattern that the PLSS and Pacific Railway Acts created.⁵⁵ Where four sections meet, they form a point defined by the intersection of two boundary lines—one running north-south,

46. *Id.* § 1, 12 Stat. at 392.

47. *Id.*; *About the Homestead Act*, NAT’L PARK SERV., <https://www.nps.gov/home/learn/historyculture/aboutthomesteadactlaw.htm> [<https://perma.cc/9FU5-KL7P>].

48. FRED A. SHANNON, *THE FARMER’S LAST FRONTIER* 53 (Henry David et al. eds., 1945).

49. Billings, *supra* note 32, at 714.

50. *Id.* at 714–15. Two friends or neighbors of the homesteader signed an affidavit and swore that the homesteader’s assertions about improving and occupying the land were true. *Id.* at 715.

51. *Id.*

52. The Desert Land Act (1877), Timber Culture Act (1878), and the Timber and Stone Act (1878) were all later variations of the Homestead Act. *Id.* at 714 & nn. 108–10.

53. *Id.* at 714.

54. *Id.* at 722.

55. *See supra* notes 41–42 and accompanying text.

one east-west. One court described this intersection as “like a point in mathematics . . . without length or width.”⁵⁶ This should, in theory, allow a person to step from one section to another without trespassing—a concept known as corner-crossing.⁵⁷ Instead, at every point where four squares meet, there is a property corner ripe for controversy because many private landowners consider corner-crossing a trespass.

If corner-crossing were legal, over half of the 16.43 million acres of landlocked land would be unlocked. In fact, 27,120 landlocking corners create 8.3 million acres—the equivalent to almost four Yellowstone National Parks—of corner-locked land.⁵⁸ Of these corner-locked acres, 74% are on federal lands, and the rest belong to at least eleven states.⁵⁹ Roughly half of the corner-locked acres are just one corner-cross away from access, but the other half require crossing multiple corners.⁶⁰ These properties share a corner with 11,000 private landowners,⁶¹ of which at least 19% are resource-extraction companies—not ranchers or farmers.⁶²

The inaccessibility of corner-locked parcels stems from the legal ambiguities about corner-crossing. Part IV of this Note addresses legal remedies that apply to both isolated and corner-locked public lands, and Parts V and VI focus on solutions specific to corner-crossing.

III. A Call to Action: Why Unlocking Public Lands Is of National Importance

This Part describes the price society pays when our public lands are inaccessible. The first subpart details the economic opportunity cost to our national and local economies, and the second subpart describes the social opportunity costs to our lives and communities. The third subpart explains why it is critical that *this* public land is available, recognizing that Americans already enjoy access to millions of public land acres.

A. *Economic Opportunity Cost*

Inaccessible public lands represent lost outdoor recreation opportunities, and the economic impact is tremendous. In 2021, outdoor recreation contributed \$861.5 billion to the economy and supported

56. *Mackay v. Uinta Dev. Co.*, 219 F. 116, 118 (8th Cir. 1914).

57. *Corner-Locked Report*, *supra* note 5.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

4.5 million American jobs.⁶³ That same year, BLM lands saw 80.45 million visits, with visitors enjoying 922.8 million hours on federal public land.⁶⁴ And 2017 data show that the outdoor recreation industry generated \$65.3 billion in federal tax revenue⁶⁵ and \$59.2 billion in state and local tax revenue,⁶⁶ with \$45 billion in economic output and 396,000 jobs stemming directly from public lands.⁶⁷

And the outdoor recreation economy is growing at record levels. The COVID-19 pandemic accelerated this growth as over 10 million additional people have started participating in outdoor recreation since March 2020.⁶⁸ The pandemic not only sparked Americans' desire to be outdoors, but it also provided flexible work options that enabled participation in outdoor recreation.⁶⁹ Even more, 2021 data suggest that "outdoor recreation is 'sticky'; once someone begins to participate, they are likely to continue."⁷⁰ Now, about 54% of Americans—164 million people—participate in outdoor recreation⁷¹—more than the combined attendance at all NFL, NBA, MLB, and NHL games.⁷²

The booming outdoor economy offers diverse, high-paying jobs. These jobs are mainly sustainable resource or tourism based, non-exportable, and predominantly based in rural communities.⁷³ It is unsurprising that most Western residents across the political spectrum perceive public lands as boosting their state and local economies⁷⁴ because data confirms that rural

63. *Outdoor Recreation Satellite Account, U.S. and States, 2021*, BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM. (Nov. 9, 2022, 10:00 AM), <https://www.bea.gov/sites/default/files/2022-11/orsa1122.pdf> [<https://perma.cc/MR68-Y4SL>].

64. BUREAU OF LAND MGMT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2021, at 170 tbl.4-1 (2022), https://www.blm.gov/sites/default/files/docs/2022-07/Public_Land_Statistics_2021_508.pdf [<https://perma.cc/VTC5-LCUV>].

65. OUTDOOR INDUS. ASS'N, THE OUTDOOR RECREATION ECONOMY 2 (2017) [hereinafter OUTDOOR RECREATION ECONOMY], https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf [<https://perma.cc/48EC-CWV5>].

66. *Id.*

67. *Id.* at 14.

68. KELLY DAVIS, OUTDOOR INDUS. ASS'N, STATE OF THE OUTDOOR MARKET 1 (2022), <https://outdoorindustry.org/wp-content/uploads/2015/03/State-of-the-Outdoor-Market-August-2022.pdf> [<https://perma.cc/KF6M-TMT2>].

69. *Id.* at 2.

70. *Id.* at 4.

71. *Id.* at 1.

72. OUTDOOR RECREATION ECONOMY, *supra* note 65, at 16.

73. *About LWCF*, LAND & WATER CONSERVATION FUND COAL., <https://lwcfoalition.org/about-lwcf> [<https://perma.cc/V65Z-2BZC>].

74. *See* Lori Weigel & Dave Metz, Colo. Coll. State of the Rockies Project Poll Presentation: The 2022 Survey of the Attitudes of Voters in Eight Western States 34 (February 17, 2022) (presentation available at <https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2022.html>) [<https://perma.cc/8GD5-AQRU>] (finding that seventy-four percent of surveyed residents across seven western states think that national public lands help state economies).

communities with more public lands tend to have improved economies.⁷⁵ Indeed, rural counties with the highest share of public lands have lower rates of unemployment and greater personal income growth than counties with less public land.⁷⁶ And counties with public land experience more income and wealth per resident.⁷⁷ Public lands especially promote small businesses, including thousands of outfitters and guiding companies. Given the undeniable benefits of public lands and the recreation opportunities they offer, the landlocked lands foreclose potential economic growth and development in communities that need it most.

B. *Social Opportunity Costs*

In addition to economic growth, landlocked public lands hinder the social advantages linked to nature access. John Muir, an environmental philosopher, emphasized nature's role in nourishing the soul: "Everybody needs beauty as well as bread, places to play in and pray in, where Nature may heal and cheer and give strength to body and soul alike."⁷⁸ This idea unites environmentalists, conservationists, and outdoors enthusiasts across the political spectrum. Indeed, nonprofit organizations like the left-leaning Sierra Club⁷⁹ and the right-leaning ConservAmerica⁸⁰ agree wholeheartedly on one thing: access to the natural world is in the nation's best interest.

Scientific studies validate these claims. In fact, evidence now connects improved wellness and lower mortality rates with access to the natural world.⁸¹ And research also shows that exposure to nature can mitigate ADHD symptoms; promote social bonding; reduce violence; stimulate learning and creativity; and serve as a buffer to stress, depression, and anxiety.⁸² Some

75. See OUTDOOR RECREATION ECONOMY, *supra* note 65, at 15 ("Western rural counties with the highest shares of federal lands had faster population, employment, personal income, and per-capita income growth than their peers with the lowest share of federal lands.")

76. Sheridan, *supra* note 38, at 235 (citing Megan Lawson, *Federal Lands in the West: Liability or Asset?*, HEADWATERS ECON. (Feb. 21, 2017), <https://headwaterseconomics.org/public-lands/federal-lands-performance> [<https://perma.cc/RVE2-8FMZ>]).

77. Megan Lawson, *National Monuments Can Boost Local Economies*, HEADWATERS ECON. (May 25, 2021), <https://headwaterseconomics.org/public-lands/national-monuments-studies/> [<https://perma.cc/4DNV-82AS>].

78. JOHN MUIR, THE YOSEMITE 256 (1912).

79. See *Sierra Club Strategic Plan Overarching Visionary Goals*, SIERRA CLUB, <https://www.sierraclub.org/sites/default/files/Strategic-Plan-Overarching-Visionary-Goals.pdf> [<https://perma.cc/WXR7-M3A3>] (describing an organizational goal to ensure that "all who live in the United States have access to natural areas").

80. *Conservation Is Conservative*, CONSERVAMERICA, <https://www.conservamerica.org> [<https://perma.cc/9ATC-QQ5D>] ("[P]roviding access to recreational opportunities . . . on public lands for the use and enjoyment of present and future generations is a top priority.")

81. Richard Louv, *Outdoors for All: A Nascent Global Movement Proclaims That Access to Nature Is a Human Right*, SIERRA (May 7, 2019), <https://www.sierraclub.org/sierra/2019-3-may-june/feature/outdoors-for-all-nature-is-a-human-right> [<https://perma.cc/S73G-C4JD>].

82. *Id.*

further research even suggests that just twenty minutes in nature can reduce stress hormone levels.⁸³ These benefits have led some health professionals to integrate nature into their treatments.⁸⁴ Taking this all into consideration, some environmental groups argue that access to nature is a human right⁸⁵—recognizing that although the “psychological, physical, and cognitive benefits of nature may be universal, . . . access to natural areas is not.”⁸⁶

Even politicians have long recognized the value of ensuring the public’s access to the natural world. In 1965, Congress created the Land and Water Conservation Fund⁸⁷ (LWCF) to enhance public access to outdoor areas and thereby strengthen the “health and vitality” of the American citizenry.⁸⁸ Echoing Congress in a 1971 special message to it to promote an environmental program, President Nixon said “[Public lands represent] in a sense, the breathing space of the nation.”⁸⁹ And in 2019, Congress demonstrated strong bipartisan support for public lands when it permanently reauthorized the LWCF.⁹⁰ Public lands are like public schools or public libraries—places to learn, explore, play, and develop—and unhindered, low-cost access to public lands facilitates these enriching experiences. Public lands level the playing field and offer these immense benefits from the natural world to anyone willing to put on a pair of hiking shoes, regardless of their class or socioeconomic status. So it is unsurprising that almost all Western residents use their public lands. In 2022, 88% of Western residents recreated on public lands at least once in the prior year, with an astonishing 68% visiting three or more times.⁹¹

83. MaryCarol R. Hunter, Brenda W. Gillespie & Sophie Yu-Pu Chen, *Urban Nature Experiences Reduce Stress in the Context of Daily Life Based on Salivary Biomarkers*, 10 FRONTIERS IN PSYCH., Apr. 2019, at 1, 6.

84. Louv, *supra* note 81.

85. *See id.* (detailing the development of a “nascent global movement” that is proclaiming access to nature should be recognized as a human right).

86. *Id.* The push for expanding access to nature is grounded in biologist Edward O. Wilson’s biophilia hypothesis, which “suggests that human beings are genetically programmed to have an affiliation with” the natural world. *Id.* If this hypothesis is right, access to nature is “more than a nice pursuit, [or] a pastime . . . It is a necessity.” *Id.*

87. *See* subpart V(B), *infra*, for a full discussion of the history and benefit of the Land and Water Conservation Fund.

88. CAROL HARDY VINCENT, CONG. RSCH. SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES 1 (2019).

89. Richard Nixon, Special Message to the Congress Proposing the 1971 Environmental Program (Feb. 8, 1971), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-proposing-the-1971-environmental-program> [<https://perma.cc/GMM6-CQB7>].

90. VINCENT, *supra* note 88, at 1 (2019). The bill passed the House of Representatives by a vote of 363–62 and the Senate by a vote of 92–8. *S.47 – John D. Dingell, Jr. Conservation, Management, and Recreation Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/47/actions?s=4&r=1> [<https://perma.cc/5BND-XPWF>].

91. COLO. COLL., STATE OF THE ROCKIES PROJECT, PUBLIC LANDS IN THE WEST 4 (2022), https://www.coloradocollege.edu/other/stateoftherockies/_documents/2022/2022%20State%20of

Although access to public lands provides these social benefits, landlocked public property creates social harms. Obviously, restricted access reduces opportunities for people to experience the benefits these lands provide. But another harm is more insidious. *De facto* private ownership of these public lands by their adjacent landowners creates a system where the rich get richer to the exclusion of—and paid for by—the lands’ rightful owners.

No business-savvy landowner wants outright ownership of public lands.⁹² “That would entail responsibility, stewardship, and worse, the payment of property taxes.”⁹³ Instead, landowners with neighboring public lands can privately exploit a public resource with the public bearing the costs.⁹⁴ Even worse, some landowners near popular public recreational areas sell “trespass permits” that allow recreationists to access the public land via the private, landlocking property—but only after paying a fee.⁹⁵ These landowners, by controlling adjacent public lands, profit at the public’s expense. In a time of escalating economic inequality,⁹⁶ private dominion over landlocked public lands exacerbates the injustice. Public lands should be a haven for everyone—regardless of income or social status—not a means for landowners to acquire free property to add to their private fiefdom.

C. *The Importance of These Landlocked Public Lands*

The fact that Americans already enjoy access to millions of acres of public land does not diminish the importance of unlocking the public property that is still inaccessible. This subpart lays out two reasons why access to *these* public lands is critical. First, as outdoor recreation on public lands continues to boom, overcrowding becomes a concern. So unlocking over 16 million acres can ease the burden on the already-accessible public places. And second, much of the landlocked public land is raw, untouched wilderness. These properties offer opportunities for adventure and isolation that are undermined by the manicured trails and man-made infrastructure that accompany many public lands.

%20the%20Rockies%20Topic%20Report%20on%20Public%20Lands%20d2%20002.pdf
[<https://perma.cc/F62W-E6T4>].

92. CHRISTOPHER KETCHAM, THIS LAND: HOW COWBOYS, CAPITALISM, AND CORRUPTION ARE RUINING THE AMERICAN WEST 127 (2019).

93. *Id.*

94. *Id.*

95. See Chavez, *supra* note 4, at 1391 & n.120 (describing how one hunting operation sells “trespassing permits” for hundreds of dollars that allow the holders to access BLM land across private land).

96. See Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/short-reads/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/> [<https://perma.cc/UJD9-GUH9>] (finding that the wealth gap between America’s richest and poorest families more than doubled between 1989 and 2016).

Americans are flooding to public lands in record numbers.⁹⁷ By all accounts, this increased participation in public land recreation is a good thing.⁹⁸ But like the chic new restaurant in town, the growing popularity of our public lands leads to many people waiting in line for a spot to become available. In fact, a quick camping trip to Yosemite National Park—once available to the spontaneous weekend warrior—now requires advanced planning and pre-arranged passes.⁹⁹ And some public land campgrounds have become so popular that people are using internet bots to snag reservations as soon as they become available.¹⁰⁰

Public land overcrowding is not limited to charismatic national parks like Yosemite. Indeed, many public lands are exceeding their “recreational carrying capacity”—the point where there are too many people around to enjoy the experience of being in nature.¹⁰¹ It is hard to benefit from the enrichment that nature provides when plans to enjoy a peaceful morning hike turn into a battle for parking at the trailhead. Implicit in the allure of recreating on public lands is the desire to experience nature without the constant presence of crowds. So with more people recreating on public lands more often, Americans would benefit from access to more land to visit. To continue the restaurant analogy, everyone would benefit if the owners would open a new spot across town. When it comes to public land, almost 17 million new spots already exist—the owners just need to unlock the door.

Unlocking landlocked public land would not only ease the overcrowding problem, but it would also provide access to unique recreational opportunities. In the West, the landlocked public land consists of myriad ecological landscapes—including grasslands, deserts, forests, and mountains.¹⁰² These landscapes are home to thousands of geographical features that would attract would-be outdoor recreators.¹⁰³ These inaccessible features include 691 distinct mountain peaks or buttes, 414 bodies of water, 269 natural springs, and other ridgelines, cliffs, and arches.¹⁰⁴ Along with

97. *See supra* subpart III(A).

98. *See supra* subpart III(B).

99. Tania Lown-Hecht, *Overcrowding Outdoors Bumming You Out?*, OUTDOOR ALL. (July 28, 2021), <https://www.outdooralliance.org/blog/2021/7/21/crowding-on-public-lands> [<https://perma.cc/B34M-QTZP>].

100. Kurt Repanshek, *Rush to the Outdoors Has Challenged Recreation.Gov*, NAT'L PARKS TRAVELER (Mar. 3, 2021), <https://www.nationalparkstraveler.org/2021/03/rush-outdoors-has-challenged-recreationgov> [<https://perma.cc/ZY3Y-9FHQ>].

101. *Recreation Carrying Capacity*, U.S. ARMY CORPS OF ENG'RS, <https://corpslakes.ercd.dren.mil/employees/carrycapacity/carrying.cfm> [<https://perma.cc/5YMF-RXSB>].

102. *How 15 Million Inaccessible Acres of Public Lands in the West Impact Outdoor Recreation*, ONX (Aug. 17, 2021), <https://www.onxmaps.com/blog/15-million-inaccessible-acres-public-land-impact-outdoor-recreation> [<https://perma.cc/DF59-8E9Z>].

103. *See id.* (“These inaccessible lands hold potential for peak-bagging, skiing, scrambling, climbing, camping, overlanding, and rock crawling.”).

104. *Id.*

their inherent natural beauty, these landlocked properties provide another selling point—unrefined wilderness. Places like Yellowstone National Park are undoubtedly beautiful. But they contain a network of paved roads, manicured hiking trails, and charming campsites that are a constant reminder that civilization is nearby. Although these accommodations are often helpful, many outdoor recreators long for a more primitive experience.¹⁰⁵

Unlocking our landlocked public lands can help provide that experience. These properties are necessarily unadulterated. Because the public cannot access this land, there is no need for the man-made infrastructure that many parks contain. The result is often untouched wilderness. Instead of the “Disney World of National Parks,”¹⁰⁶ these properties offer an experience more akin to how the landscape looked long before mankind made our “improvements.” And these types of experiences provide the solitude, silence, and wildness that refreshes the soul.¹⁰⁷

IV. The Common Law Fails to Remedy the Landlocked Problem

This Part discusses common law doctrines that litigants and scholars have offered—mostly unsuccessfully—as remedies to the landlocked public land problem. The first subpart examines easements by strict necessity, and the second subpart examines the public trust doctrine.

A. *Easements by Necessity Fail to Address the Landlocked Public Land Problem*

On the surface, the most straightforward solution to solving the landlocked public lands problem is through easements by necessity. Easements are property rights that give the owner of one property (the dominant estate) a non-possessory right over another’s property (the servient estate).¹⁰⁸ For landlocked public lands, an effective easement would burden the servient estate (private property) with a right of way for the public to access the dominant estate (the landlocked public parcel). Easements can be created expressly or by implication, and courts recognize two types of

105. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 149 (1949) (“I am glad I shall never be young without wild country to be young in.”).

106. Theodore Wells, *Yellowstone Is the Disney World of National Parks*, *MEDIUM* (March 22, 2022), <https://medium.com/the-orange-journal/yellowstone-is-the-disney-world-of-national-parks-ef884b20b58b> [<https://perma.cc/2T5G-4FWV>].

107. See HENRY DAVID THOREAU, *WALKING* 51 (The Riverside Press 1914) (1862) (“Life consists with wildness. The most alive is the wildest. Not yet subdued to man, its presence refreshes him.”).

108. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (AM. L. INST. 2000).

easements arising from implication: those from prior use and those by necessity.¹⁰⁹

Courts generally agree that an easement by necessity is created when: “(1) the title to two parcels of land was [once] held by a single owner; (2) the unity of title was severed by a conveyance of one of the parcels; and (3) at the time of severance, the easement was necessary for the owner of the severed parcel to use his property.”¹¹⁰ In other words, when a landowner conveys a portion of his lands and retains the rest, the common law presumes that the grantor has “reserved an easement to pass over the granted property if such passage is necessary to reach the retained property.”¹¹¹ Courts strictly construe the absolute necessity requirement, and the necessity element is often the focus of easement by necessity litigation. Specifically, most courts will not imply an easement by necessity if another access route to the land exists—however inconvenient or expensive.¹¹²

Easements by necessity stem from the public policy that property should not be made unusable due to inaccessibility.¹¹³ This public policy aims to “prevent any man-made efforts to hold land in perpetual idleness” that would result if the land were cut off from all access to a public road (or other means of access) by being surrounded by private lands.¹¹⁴

At first pass, this doctrine seems like an ideal solution to the landlocked public land issue. Unfortunately, the Supreme Court has already foreclosed easements by necessity as an effective legal remedy here. In *Leo Sheep Co. v. United States*,¹¹⁵ the Court addressed whether the government possessed an implied easement to build a road across private land to access landlocked public land.¹¹⁶ Leo Sheep Company brought an action to quiet title against the government after the government built a dirt road across the company’s

109. *E.g.*, *Hamrick v. Ward*, 446 S.W.3d 377, 381 (Tex. 2014); *Cobb v. Daugherty*, 693 S.E.2d 800, 806–07 (W.Va. 2010).

110. *Fitzgerald Living Tr. v. United States*, 460 F.3d 1259, 1266 (9th Cir. 2006); *see also* *Berry v. Moon*, 387 S.W.3d 306, 310 (Ark. Ct. App. 2011) (outlining the same elements).

111. *Leo Sheep Co. v. United States*, 440 U.S. 668, 679 (1979).

112. For example, courts have held that the necessity requirement was not met when the dominant estate was accessible via a navigable waterway. *See, e.g.*, *Welch v. State*, 908 A.2d 1207, 1210 (Me. 2006) (“Land abutting navigable water is generally not entitled to an easement by necessity over neighboring land because it is not considered to be landlocked.”); *Est. of Thomson v. Wade*, 499 N.Y.S.2d 541, 542 (N.Y. App. Div. 1986), *aff’d*, 509 N.E.2d 309 (N.Y. 1987) (“An easement by necessity cannot arise when access is available through a publicly used waterway.”). The same has been true for tortuous terrain. *See, e.g.*, *Richards v. Land Star Grp., Inc.*, 593 N.W.2d 103, 112 (Wis. Ct. App. 1999) (finding that an easement by necessity was not warranted although the access to the plaintiff’s property required traversing a 300-foot embankment).

113. *Murphy v. Burch*, 205 P.3d 289, 293 (Cal. 2009); *Hereford v. Gingo-Morgan Park*, 551 So.2d 918, 921 (Ala. 1989) (quoting *Helms v. Tullis*, 398 So.2d 253, 255 (Ala. 1981)).

114. *Murphy*, 205 P.3d at 293 (quoting *Roemer v. Pappas*, 249 Cal. Rptr. 743, 745 (Cal. Ct. App. 1988)).

115. 440 U.S. 668 (1979).

116. *Id.* at 678.

land to provide access to landlocked public land.¹¹⁷ The private land at issue was a legacy of a Pacific Railroad Act grant, and Leo Sheep Company was a successor to the Union Pacific Railroad in its ownership.¹¹⁸ The government was prompted to build the road after public complaints that the Leo Sheep Company was denying access to the public land or requiring the payment of access fees.¹¹⁹

The government based its defense on the “settled rules of property law” that invoke an easement by necessity when a grantor landlocks themselves via a real estate transaction.¹²⁰ The Tenth Circuit, in support of the government, concluded that when Congress granted land to the railroad, it implicitly reserved an easement to pass over private property to reach other public parcels.¹²¹

The Supreme Court rejected the easement by necessity argument and reversed the Tenth Circuit’s decision for two reasons. First, the Court held that even when public land was landlocked, it is unclear the strict necessity easement would include the right to construct a road to a recreational area.¹²² Second, and more importantly, the Court held that easements by necessity could not be implied because the government, as a sovereign, could exercise its eminent domain power.¹²³ The Court noted that the doctrine was only applicable whenever “such passage is necessary to reach the retained property.”¹²⁴ But in *Leo Sheep*, the easement was not a “necessity” because there was another way to access the land—condemnation through eminent domain.¹²⁵

Unwilling to strain the doctrine to situations when a sovereign could get access to its land via condemnation, the Court then turned to what it saw as the “pertinent inquiry”: whether Congress *intended* to reserve an easement to the federal government when it granted the land to the Union Pacific Railroad in 1862.¹²⁶ The Court noted how the Pacific Railway Acts specifically

117. *Id.*

118. *Id.* at 677–78.

119. *Id.* at 678.; *see also* Chavez, *supra* note 4, at 1391 & n.120 (describing how private landowners generate income by charging for “trespassing permits” whereby the general public pays the landowner for permission to cross over their lands to reach publicly owned BLM lands).

120. *Leo Sheep Co.*, 440 U.S. at 679.

121. *Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977).

122. *Leo Sheep Co.*, 440 U.S. at 679. The Court elaborated in a footnote, explaining that “[i]t is very unlikely that Congress in 1862 contemplated this type of intrusion, and it could not reasonably be maintained that failure to provide access to the public at large would render the [public] land useless.” *Id.* at 679 n.15.

123. *Id.* at 679–80.

124. *Id.* at 679.

125. *Id.* at 679–80.

126. *Id.* at 680–81.

enumerated reservations in the grant,¹²⁷ but a reserved right of access was omitted.¹²⁸ Given this omission, the Court was unconvinced that Congress intended to reserve access rights across the private land¹²⁹ and therefore refused to recognize the implied easement that the government asserted.¹³⁰

The practical implications of the government's easement-by-necessity argument colored the Court's holding in *Leo Sheep*. The Court emphasized how the Tenth Circuit's holding affected property rights in 150 million acres in the West.¹³¹ And judicially implying easements across those acres would have a "substantial impact" on property rights that vested over a century before the case.¹³² The Court highlighted the "special need for certainty and predictability" when dealing with land titles and refused to support the construction of "public thoroughfares without compensation" when the government could provide access without relying on an "ill-defined power."¹³³

All told, *Leo Sheep* makes it harder for the public to access its landlocked property. Without the ability to gain access through easements by necessity, the government is left with limited options. Voluntary land and easement purchases, negotiated access rights, and condemnation actions will be discussed as potential solutions in Part V.

B. *Public Trust Doctrine*

Some commentators have argued that the common law public trust doctrine (PTD) could be a useful tool in providing access to landlocked public land.¹³⁴ But for the reasons detailed in this subpart, the PTD is also unlikely to be effective in unlocking most public land.

The PTD originated in Rome and later found favor in England as an approach to protect public access to tidal waters.¹³⁵ In England, a riparian property owner held title to submerged land under a river or lake not affected

127. *Id.* at 681. Mineral rights were excepted from the grants and reserved to the federal government. Pacific Railway Act of 1862, ch. 120, § 3, 12 Stat. 489, 492.

128. *Leo Sheep Co.*, 440 U.S. at 681.

129. *See id.* ("It is possible that Congress gave the problem of access little thought; but it is at least as likely that the thought which was given focused on negotiation, reciprocity considerations, and the power of eminent domain as obvious devices for ameliorating disputes.")

130. *Id.* at 682.

131. *Id.* at 678.

132. *Id.* at 682.

133. *Id.* at 687–88.

134. *See generally* Shelby D. Green, *No Entry to the Public Lands: Towards a Theory of a Public Trust Servitude for a Way Over Abutting Private Land*, 14 WYO. L. REV. 19 (2014) (discussing public trust doctrine as a means to gain access to landlocked public land).

135. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1969) (describing how the modern public trust doctrine finds its roots in English and Roman law concerning the nature of rivers, seas, and seashores).

by the tide.¹³⁶ In contrast, the King held tidal land in trust to guarantee that the citizenry enjoyed unimpeded commerce, navigation, and fishing rights.¹³⁷ So the private shore owner could not deny the public access to tidal waters.¹³⁸

Both state and federal American common law have acknowledged and expanded the PTD. The Supreme Court first recognized the PTD in 1842 via *Martin v. Lessee of Waddel*.¹³⁹ Then, in 1892, the Court extended the doctrine to cover *all* navigable waters—regardless of whether the waters were subject to the tide—to facilitate commerce on the United States’ thousands of miles of non-tidal navigable waterways.¹⁴⁰ Over a century later, the Court again extended the PTD to cover tidal waters that were not navigable.¹⁴¹ While the Court has extended the PTD at a federal level, the state courts have taken the doctrine even further.

Indeed, states have interpreted the PTD to encompass a wide range of public interests.¹⁴² The New Jersey Supreme Court expanded the PTD the furthest in *Matthews v. Bay Head Improvement Ass’n*.¹⁴³ In *Matthews*, a neighborhood resident wanted access to a local public beach and sued, claiming that the PTD gave him a right-of-way across private property to access the shore.¹⁴⁴ The court agreed and recognized that “[t]o say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.”¹⁴⁵ In short, a public right to swim in the ocean is stymied if the public cannot access the shore. This interpretation of

136. Green, *supra* note 134, at 62.

137. *Id.*

138. *Id.*

139. See 41 U.S. (16 Pet.) 367, 412–13 (1842) (explaining that, at common law, the Crown held title to “the shores, and rivers, and bays, and arms of the sea, and the land under them . . . as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery”).

140. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436–37 (1892) (“The [public trust] doctrine [was] founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.”).

141. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988) (explaining that prior cases discussing a state’s public trust interest “should have made clear that the State’s claims were not limited to lands under navigable waterways”).

142. See *Mont. Coal. for Stream Access v. Curran*, 682 P.2d 163, 170–71 (Mont. 1984) (allowing public recreational use of a streambed without regard to private ownership under the PTD); *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1121 & n.14 (Alaska 1988) (applying the PTD to public fishing rights); *Gould v. Greylock Rsr. Comm’n*, 215 N.E.2d 114, 121–22 (Mass. 1966) (discussing parklands); *Hixon v. Pub. Serv. Comm’n*, 146 N.W.2d 577, 582 (Wis. 1966) (quoting *State v. Pub. Serv. Comm’n*, 81 N.W.2d 71, 74 (Wis. 1957)) (describing previous state decisions allowing public uses for hunting, fishing, swimming, and sailing).

143. 471 A.2d 355 (N.J. 1984).

144. *Id.* at 358.

145. *Id.* at 364.

the doctrine to require “reasonable access”¹⁴⁶ across private land significantly enlarged the doctrine’s scope. State courts could use similar reasoning to provide access to other state-owned landlocked properties. But the PTD’s application is likely limited to state-owned public lands.¹⁴⁷ Even then, few states are likely to accept the broad “reasonable access” interpretation adopted by the New Jersey Supreme Court.

At the federal level, it is likely that the PTD applies only to federal lands that are submerged beneath tidal or navigable waterways.¹⁴⁸ But even if the doctrine applies to non-submerged federal land, both state and federal courts—out of concerns for the reliance interests of private landowners—should hesitate to hold that the doctrine demands public access to those lands. As the Court in *Leo Sheep* noted, such a holding would implicate legal rights attached to millions of private acres that vested over a century ago.¹⁴⁹ Applying the evolved PTD to those properties would upset the notions of predictability and certainty that property law exists to embolden.

V. Legislative Solutions to Unlock Public Lands

Without common law solutions to the landlocked public land problem, Americans must turn to their legislatures for answers. This Part addresses legislative remedies to unlock public lands.

A. Congress Helps Unlock Public Lands Through Property Acquisitions

The Court in *Leo Sheep* told the government that if it wanted access to its landlocked property, it must buy that access. But before a government agency can buy a property interest, it needs two things: authority and money. This Part discusses legislation that satisfies both needs. The Federal Land Policy Management Act (FLPMA) gives the BLM acquisition authority. And the Land and Water Conservation Fund (LWCF) provides the revenue needed to make the purchases.

1. Federal Land Policy and Management Act.—Before 1976, the BLM’s land-acquisition powers were restricted, as its authority was typically granted by special legislative permission and required Congress to determine specific

146. *Id.*

147. See Alaska Const. Legal Def. Conservation Fund, Inc. v. Kempthorne, 198 Fed. App’x 601, 603 (9th Cir. 2006) (“Public Trust Doctrine is currently applicable only to states. Because [plaintiffs] provide no support for extending this doctrine to the federal government, the district court properly dismissed this claim.”).

148. See Bennett J. Ostdiek, *Public Rights and Sovereign Power: Rethinking the Federal Public Trust Doctrine*, 51 TEX. ENV’T L.J. 215, 242 (2021) (“*Fletcher* thus makes it clear that the public trust doctrine . . . only applies to lands beneath navigable waters.”); see also Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 444–46 (1892) (suggesting in dicta that title to land under navigable waterways is different from the title that the U.S. holds in above-the-water properties).

149. *Leo Sheep Co. v. United States*, 440 U.S. 668, 678, 682 (1979).

land parcels to buy.¹⁵⁰ But in 1976, Congress enacted the FLPMA,¹⁵¹ which granted the BLM general acquisition authority via both eminent domain and negotiated purchases or exchanges.¹⁵² This section will discuss both of those paths.

Although the FLPMA empowers the BLM to use eminent domain for better land access,¹⁵³ the statute limits that authority to instances where it is “necessary to secure access to public lands.”¹⁵⁴ This “necessary” requirement suggests stricter conditions on the BLM’s eminent domain authority than the Constitution requires.¹⁵⁵ Still, ensuring access to landlocked properties would likely satisfy the statute’s necessity requirement.¹⁵⁶ Even so, eminent domain should be a last resort to gain access to landlocked property. Condemnation actions are both politically contentious and fiercely litigated. If state and federal governments began a crusade to condemn easements across landlocking private land, the political fallout would result in a pyrrhic victory for outdoor recreationists. The future of thriving public lands hinges on congressional support through adequate funding that requires politicians—and their constituents—to have a positive view toward public land access. Public land enthusiasts should avoid political moves that could lead to contempt and insufficient funding for access, maintenance, and protection of public lands. To maximize the political palatability of public land access initiatives, government agencies should exhaust alternatives to condemnation actions—like negotiated land purchases and transfers—when unlocking public lands.

In fact, the FLPMA also permits the BLM to execute land exchanges and purchases.¹⁵⁷ And voluntary land purchases, like those made in

150. See, e.g., Land and Conservation Fund Act of 1965, Pub. L. No. 88-578, § 1(b), 78 Stat. 897, 897 (1964) (providing that one of the purposes of the Act was to establish a fund for acquiring public land); *id.* § 6(b) (requiring any appropriations from the fund for use in acquisition of land to be authorized by law).

151. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 16 USC § 1338a; 43 U.S.C. §§ 1701–2, 1711–87).

152. *Id.* § 205(a), 90 Stat. at 2755 (authorizing the Secretary of the Interior to “acquire [public lands] . . . by purchase, exchange, donation, or eminent domain, lands or interests therein”).

153. *Id.*

154. *Id.*

155. Compare *United States v. 82.46 Acres of Land, More or Less Situate in Carbon Cnty.*, 691 F.2d 474, 477 (10th Cir. 1982) (holding that while courts cannot normally review condemnation actions assuming a governmental entity has authority, the FLPMA’s “qualified delegation” of eminent domain power for only necessary lands means that such determinations by the Secretary of the Interior can be subject to judicial review), with *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (holding outside of the FLPMA context that the Constitution’s “public use” requirement for eminent domain was satisfied by a condemnation action that took private property for economic enrichment without considering “necessity”).

156. At the time of this writing, I have been unable to find any cases that consider condemnation actions under the FLPMA that involve supplying access to completely landlocked property.

157. See *supra* note 152.

collaboration with nonprofit organizations or state agencies, dodge the controversy tied to eminent domain. For example, the nonprofit Trust of Public Lands bought and then resold property to the BLM in 2017 that provided access to 32,000 previously inaccessible acres in Arizona's Coronado National Forest.¹⁵⁸ In another case, the BLM partnered with Montana Fish, Wildlife, and Parks Department to provide access to landlocked BLM property.¹⁵⁹ The BLM also engages in land acquisitions without outside help. In 2021 alone, the BLM funded projects that improved public access in Wyoming,¹⁶⁰ Colorado,¹⁶¹ California,¹⁶² and New Mexico.¹⁶³

Land swaps, where the BLM trades a parcel of public land for a parcel of private land, help all parties involved. Private landowners usually get lands adjacent to their existing properties, while the government sees cost savings associated with having to pay only for the value differences. And the public benefits by gaining access to previously inaccessible public land.¹⁶⁴

2. Land and Water Conservation Fund.—Although the FLPMA empowers the BLM to acquire land to enhance public access, those acquisitions require sufficient funding. The primary funding source for these purchases is the Land and Water Conservation Fund (LWCF). Established in 1965,¹⁶⁵ the LWCF was designed to use revenues from the depletion of one natural resource (offshore oil and gas)¹⁶⁶ to conserve public lands and

158. Sheridan, *supra* note 38, at 250.

159. *Id.*

160. See Press Release, Bureau of Land Mgmt., BLM Kicks Off Great Outdoors Month with Two Acquisitions Through the Land and Water Conservation Fund (June 3, 2022), <https://www.blm.gov/press-release/blm-kicks-great-outdoors-month-two-acquisitions-through-land-and-water-conservation-0> [<https://perma.cc/2EC3-2GNC>] (“The BLM Wyoming acquisition is the largest land purchase that the BLM has undertaken in Wyoming, creating a 118-square-mile contiguous block of public land and improving public access to the North Platte River.”).

161. See *id.* (“This acquisition in Colorado allows the BLM to permanently protect and enhance the cultural, recreational, and wildlife resources in Escalante Canyon for the benefit and enjoyment of present and future generations.”).

162. See *Corner-Locked Report*, *supra* note 5 (noting that BLM allocated funds to improve public access to California's Mojave Trails National Monument in 2021).

163. See Algernon D'Ammassa, *Nonprofit Purchases Land Providing Access to Organ Mountain-Desert Peaks Monument*, LAS CRUCES SUN NEWS (Apr. 8, 2021, 2:43 PM), <https://www.lcsun-news.com/story/news/local/2021/04/08/wilderness-land-trust-secures-access-organ-mountain-desert-peaks-achenbach-canyon-trail/7142445002/> [<https://perma.cc/XA8N-7FP9>] (detailing how a nonprofit purchased land to open up a public access point with immediate plans to sell it to the BLM).

164. See, e.g., Sheridan, *supra* note 38, at 251 (describing the details and benefits of the “Skull Valley Land Exchange” between the BLM and a private livestock company).

165. Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (1964).

166. The fund accumulates the vast majority of its revenues from oil and gas leases on the Outer Continental Shelf. VINCENT, *supra* note 88, at 1.

waters.¹⁶⁷ And since its inception, the fund has helped gain public access to 5 million acres of public land.¹⁶⁸ The LWCF has been used for three general purposes: effecting federal acquisition of recreational land; supporting state acquisition of recreational land; and funding other federal natural resource-related programs.¹⁶⁹

The LWCF is not a typical trust fund as is understood in the private sector. For example, although the LWCF Act credits the fund with \$900 million annually, Congress historically needed to specifically appropriate these funds for use.¹⁷⁰ The fund was rarely fully appropriated, and by 2019 less than half of the \$40.9 billion that had accrued in the LWCF had been used—leaving \$22 billion untouched.¹⁷¹ Even more, the LWCF’s authority to accrue money faced challenges and expired twice before 2019.¹⁷² This rightfully troubled environmentalists and outdoor recreationists, prompting more than 200 conservation groups to urge Congress to reauthorize the LWCF.¹⁷³

But in 2019, Congress made significant changes to the LWCF. First, a 2019 amendment permanently reauthorized the fund and ensured continuous revenue collection.¹⁷⁴ Second, the amendment specified that no less than 40% of the fund must go to state projects and no less than 40% must be used for “federal purposes,” with Congress still deciding the distribution of the remaining 20%.¹⁷⁵ Finally, the amendment required Congress to spend \$15 million or 3% (whichever is greater) of the appropriated monies on projects that increase access to public land.¹⁷⁶ Although these changes enhanced the LWCF, Congress still left a hole in the legislation. The

167. See *Land and Water Conservation Fund*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/lwcf> [<https://perma.cc/D5AF-B47K>] (“The fund helps strengthen communities, preserve history and protect the national endowment of lands and waters.”).

168. Randall Williams, *204 Hunting, Fishing, and Conservation Groups Urge Lawmakers to Revive LWCF*, THEODORE ROOSEVELT CONSERVATION P’SHIP (Nov. 8, 2018), <https://www.trcp.org/2018/11/08/204-hunting-fishing-conservation-groups-urging-lawmakers-revive-lwcf/> [<https://perma.cc/UWB2-458Z>].

169. VINCENT, *supra* note 88, at 3, 8–9.

170. *Id.* at 1.

171. *Id.* at 2.

172. In 2015, Congress allowed the LWCF to expire, leaving it powerless to accrue its funds. *Id.* at 1 n.3. Congress later extended the LWCF to 2018, but it then expired again in September of that year. *Id.*

173. Williams, *supra* note 168.

174. See John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 3001, 133 Stat. 754–55 (2019) (amending 54 U.S.C. § 200302(c)(1) to strike out the portion limiting the LWCF’s funding through a certain year and thus making it perpetual); see also VINCENT, *supra* note 88, at 18 (explaining the amendment).

175. See § 3001, 133 Stat. at 755 (inserting the two forty-percent requirements in a subsection detailing the “total amount made available to the Fund through [congressional] appropriations,” thus implying that Congress can still appropriate the last twenty percent as it sees fit).

176. *Id.*

amendment permanently authorized the fund to *accrue* its monies, but Congress retained discretion on *appropriating* the funds.¹⁷⁷ And money that did not get appropriated did not get spent.

This hole was addressed in 2020 with the Great American Outdoors Act (GAOA), which permanently funds the LWCF at \$900 million annually “without further appropriation or fiscal year limitation.”¹⁷⁸ So Congress can no longer hold LWCF monies hostage, and at least \$27 million is dedicated each year to increasing access to landlocked lands.¹⁷⁹

B. *Legislative Solutions that Unlock Lands Without Acquisitions*

Not all public land access initiatives require land or easement acquisitions. This subpart discusses three tools that federal and state governments are using to increase access to landlocked public land: the Modernizing Access to Our Public Land Act, dedicated personnel assigned to facilitate increased public land access, and short-term access programs.

1. Modernizing Access to Our Public Land Act.—The Modernizing Access to Our Public Land (MAPLand) Act¹⁸⁰ addresses the lack of modern data for recreational opportunities on public lands. Previously, most agencies identified public land recreational opportunities on paper maps or roadside signage that demarcated campgrounds, hiking trails, and areas open to public hunting.¹⁸¹ Although some of these details can be accessed in a format compatible with GPS, in most cases it cannot.¹⁸² But, the MAPLand Act mandates certain federal agencies¹⁸³ to digitize and publish geographic information system (GIS)¹⁸⁴ mapping data on their websites.¹⁸⁵ This data

177. Before its 2020 amendment, the pertinent statutory section only instructed that LWCF funds “shall be available for expenditure for the purposes of this chapter only when appropriated for those purposes.” 54 U.S.C. § 200303 (2014) (amended 2020).

178. Great American Outdoors Act, Pub. L. No. 116-152, § 3, 134 Stat. 682, 686 (2020) (codified at 54 U.S.C. § 200303).

179. Twenty-seven million dollars would represent the three percent minimum on public lands that the 2019 amendment dictates. *See supra* note 176 and accompanying text.

180. Modernizing Access to Our Public Land Act, Pub. L. No. 117-114, 136 Stat. 1175 (2022) (codified at 16 U.S.C. §§ 6851–57).

181. Randall Williams, *MAPLand Act: The Basics*, THEODORE ROOSEVELT CONSERVATION P’SHIP (Mar. 20, 2020), <https://www.trcp.org/2020/03/20/mapland-the-basics/> [<https://perma.cc/PL4T-9HRU>].

182. *Id.*

183. “Federal land management agency” is defined in the MAPLand Act to include: the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the U.S. Fish and Wildlife Service, the Forest Service, and the Corps of Engineers. § 2, 136 Stat. at 1175.

184. GIS is a mapping format compatible with modern GPS devices and cell phones. THE ARCGIS BOOK 102, 135 (Christian Harder & Clint Brown eds., 2d ed. 2017).

185. § 4, 136 Stat. at 1176.

includes details about easements, reservations, and rights-of-way that may be used to provide access to the federal land.¹⁸⁶

By digitizing this information, the MAPLand Act illuminates public rights-of-way that were obscure or only available on local paper files. For instance, the USFS alone has roughly 37,000 recorded easements, but only 5,000 are digitized.¹⁸⁷ Making this information readily available aides both the public and agency land managers because it allows the land managers to identify and act upon landlocked areas.

The MAPLand Act empowers public land enthusiasts, conservation groups, and federal agencies by providing comprehensive digital access information. This information unveils previously unknown access points and helps agencies prioritize landlocked areas.

2. *Walk-In Access Programs.*—State-level walk-in access programs incentivize private landowners to provide public access through financial benefits. State fish and wildlife agencies administer these programs, which typically involve short-term contracts with private landowners to make private lands available to the public.¹⁸⁸ Although traditionally used only for private land access, some states are leveraging these programs to access landlocked public lands by collaborating with adjacent private landowners. “In Montana, 618,330 acres of landlocked state and federal land were ‘unlocked’ during the 2020 hunting season thanks to the properties enrolled as Block Management Areas.”¹⁸⁹ Similarly in Idaho, 525,115 acres of public land were unlocked in 2019 thanks to landowners participating in the Access Yes program.¹⁹⁰ And the Unlocking Public Lands program in Montana provides an annual tax credit to landowners who provide access across their

186. *Id.*

187. Press Release, Rep. Russ Fulcher, Rep. Fulcher Introduces Bill to Modernize and Standardize Public Lands Access Information (Mar. 10, 2020), <https://fulcher.house.gov/2020/3/rep-fulcher-introduces-bill-to-modernize-and-standardize-public-lands-access-information> [<https://perma.cc/7Q6H-GMT8>].

188. Eight of the thirteen Western states have walk-in access programs, including: the Block Management program in Montana, *What Is Block Management?*, MONT. FISH, WILDLIFE & PARKS, <https://fwp.mt.gov/hunt/access/blockmanagement/about> [<https://perma.cc/3FLK-KJZP>]; Access Yes in Idaho, *Access Yes!*, IDAHO FISH & GAME, <https://idfg.idaho.gov/yes> [<https://perma.cc/Y4G8-YNR7>]; Access Yes in Wyoming, *AccessYes Programs*, WYO. GAME & FISH DEP’T, <https://wgfd.wyo.gov/Public-Access/Access-Yes> [<https://perma.cc/UM87-CR49>], and Open Gates in New Mexico. *Open Gate Program*, N.M. DEP’T OF GAME & FISH, <https://www.wildlife.state.nm.us/hunting/maps/open-gate-program/> [<https://perma.cc/FT4A-8MKH>].

189. *Corner-Locked Report*, *supra* note 5.

190. *Access Yes!*, *supra* note 188.

property to “locked” public land for hiking, birdwatching, fishing, hunting, and trapping.¹⁹¹

3. *Dedicated Staff and Programs.*—States are also effectively addressing public land access challenges by appointing specialized staff and creating specific programs aimed at unlocking landlocked public land. For example, Montana created a “Public Access Specialist” role whose primary mandate is to increase access to both state and federal public lands.¹⁹² This dedicated staff member helps Montana prioritize public land access projects by working with landowners and agency land managers.¹⁹³ The Public Access Specialist also has the Montana Public Lands Access Network (MTPLAN) program at their disposal. Using this program, Montana helps buy “public access easements across private lands and open landlocked or difficult-to-access public lands for recreation.”¹⁹⁴

Following Montana’s approach, other states and the federal government should consider similar roles and programs. Here, an ounce of prevention is worth a pound of cure. Dedicated personnel would facilitate an effective and efficient use of the LWCF instead of scattered, agency-wide approaches that are unlikely to achieve the best return on investment.

VI. The Special Issue of Corner-Locked Lands

This Part will explore the unsettled law related to corner-crossing. It will first explore the scope and magnitude of the corner-crossing debate. Next, it will turn to prior state legislative and judicial action on the issue. Finally, it will examine current corner-crossing litigation in Wyoming federal court and how a 19th-century federal statute could clarify this legal gray area.

A. *Legal Implications of Corner-Crossing*

The primary opposition to corner-crossing rests in the legal reality that land ownership includes more than just the surface of the land. This is a bedrock principle of American property law: a landowner’s use and enjoyment of their property would be impinged if their ownership rights were limited to the surface. For example, the law governing mineral interests is based on the long-standing doctrine that landowners enjoy subsurface

191. *Unlocking Public Lands*, MONT. FISH, WILDLIFE & PARKS, <https://fwp.mt.gov/aboutfwp/access/unlocking-public-lands> [https://perma.cc/REA2-HTV7].

192. *Four Ways States Are Solving the Landlocked Public Lands Problem*, THEODORE ROOSEVELT CONSERVATION P’SHIP (Aug. 29, 2019), <https://www.trcp.org/2019/08/29/four-ways-states-solving-landlocked-public-lands-problem/> [https://perma.cc/75Y2-K6EW].

193. *Id.*

194. *Id.*

rights.¹⁹⁵ To this end, the landowner owns and controls the airspace above the property (up to a certain limit).¹⁹⁶

The landmark case *United States v. Causby*¹⁹⁷ underscored this principle by addressing low-flying planes over private property. The Supreme Court held that the airplanes at issue committed an unlawful taking by occupying the airspace immediately above the property:

[I]f the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. . . . [Thus, a] landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . [I]nvasions of [that airspace] are in the same category as invasions of the surface.¹⁹⁸

Few would contest this holding. Indeed, without ownership of the immediate airspace, landowners could not build structures like homes, barns, and fences on their property.¹⁹⁹ And courts have used the *Causby* rule to combat what most would consider inappropriate incursions of private airspace—like ensuring drones cannot hover uninvited over a private home or car accident scene.²⁰⁰

But how does this relate to corner-crossing? Can private property owners really contend that when a hiker steps—for less than a second—through the airspace above an infinitesimally small corner, the hiker is guilty of an “invasion” of the adjacent landowner’s property and a burden on the enjoyment of their land? Apparently so.

Landowners argue that because the corners are “like a point in mathematics . . . without length or width,” corner-crossing necessarily invades the airspace of the private property.²⁰¹ Indeed, the United Property

195. The common-law *ad coelum* doctrine states that “whoever own[s] the land controlled everything, from the heavens above to hell below.” Laura K. Donohue, *Who Owns the Skies? Ad Coelum, Property Rights, and State Sovereignty*, in *EYES TO THE SKY: PRIVACY AND COMMERCE IN THE AGE OF THE DRONE* 131, 131 (Matthew Feeney ed., 2021) (footnote omitted). *But see* *Alevizos v. Metro. Airports Comm’n of Minneapolis & St. Paul*, 216 N.W.2d 651, 657 (Minn. 1974) (“It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world.”) (quoting *United States v. Causby*, 328 U.S. 256, 260–61 (1946)).

196. *See* Donohue, *supra* note 195, at 131–32 (discussing the incorporation of the doctrine into American law and its subsequent limit to 500 feet in the 20th century).

197. 328 U.S. 256 (1946).

198. *Id.* at 264–65; *see also* *Herrin v. Sutherland*, 241 P. 328, 332 (Mont. 1925) (“[I]t seems to be the consensus of the holdings of the courts in this country that the air space, at least near the ground, is almost as inviolable as the soil itself.”).

199. *Causby*, 328 U.S. at 264.

200. *See, e.g.,* *Rivera v. Foley*, No. 3:14-cv-00196, 2015 WL 1296258, at *10 (D. Conn. Mar. 23, 2015) (citing to *Causby* in holding that plaintiff flying a drone into a police-restricted area was effectively trespassing onto an active crime scene).

201. *Mackay v. Uinta Dev. Co.*, 219 F. 116, 117–18 (8th Cir. 1914).

Owners of Montana website claims, “To cross a corner, a member of the public must cross all four corners, including the private ones. That is a trespass—a physical occupation of private property.”²⁰² Therefore, they say, “[t]here is no ‘minimal’ amount of trespass that wouldn’t be considered taking of property.”²⁰³ In short, these landowners assert, the government cannot allow the public to corner-cross over private property corners. That, they claim, would be an unconstitutional “taking” of private property.²⁰⁴

B. Failed Attempts to Resolve Corner-Crossing Debate

The legality of corner-crossing remains uncertain as states struggle to pass clarifying legislation and local law enforcement maintain discretion on whether to prosecute corner-crossers. Inconsistent court cases and failed legislation have cemented corner-crossing in a legal gray area.

For example, Wyoming is ripe with legal controversy on the subject. In 2003, a Wyoming hunter was cited for trespassing for corner-crossing after locating the corner with help from a GPS device.²⁰⁵ After a bench trial, the hunter was found not guilty of the charge “Trespass to Hunt” in violation of a state game and fish law²⁰⁶ because he had not entered the property (or its airspace) to hunt, fish, or trap “upon the private property,” but sought only to hunt on public land.²⁰⁷

The next year, the Wyoming Attorney General’s Office issued a memorandum that declared that the hunter’s trial had “no binding effect on any court.”²⁰⁸ The memorandum stated that although the hunter did not violate the Trespass-to-Hunt statute, other corner-crossers might violate the *criminal* trespass statute.²⁰⁹ According to the attorney general, a corner-crosser could be charged under the Wyoming criminal trespass statute

202. *Corner Trespass*, UNITED PROP. OWNERS OF MONT., <https://upom.org/corner-trespass-2/> [<https://perma.cc/83MC-3AUG>].

203. *Id.*

204. *Id.*; see also U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

205. *Man Found Innocent of ‘Corner Jumping,’* BILLINGS GAZETTE (April 12, 2004), https://billingsgazette.com/news/state-and-regional/wyoming/man-found-innocent-of-corner-jumping/article_63cab769-4d7b-599d-a293-ff221e356a5e.html [<https://perma.cc/8K9R-HJ6K>].

206. WYO. STAT. ANN. § 23-3-305(b) (“No person shall enter upon the private property of any person to hunt, fish, collect antlers or horns, or trap without the permission of the owner or person in charge of the property.”).

207. Memorandum from Patrick J. Crank, Wyo. Att’y Gen., to Terry Cleveland, Dir. of Wyo. Game & Fish Dep’t [hereinafter Wyoming Attorney General Memorandum] (June 8, 2004) (quoting WYO. STAT. ANN. § 23-3-305(b)), <https://www.wyoleg.gov/InterimCommittee/2019/01-2019060313-04Trespass-CornerCrossing.pdf> [<https://perma.cc/535T-2XLA>]; see also Abstract of Court Record, *State v. Kearney*, CT-2003-0007175 (Cir. Ct. Albany Cnty.) (finding the defendant not guilty).

208. Wyoming Attorney General Memorandum, *supra* note 207.

209. *Id.*

because the legislature had made it clear that landowners own the airspace above the ground, and “the [criminal statute’s] definition of ‘enter’ is expansive enough to include penetrating an invisible plane.”²¹⁰

State legislatures have tried—and failed—to clarify the legality of corner crossing. In 2011, the Wyoming House of Representatives considered a bill that would have legalized corner-crossing if private lands or improvements were not touched, but that bill did not make it beyond committee.²¹¹ A similar bill in Montana also died in a House committee in 2013.²¹² Yet another bill was introduced to the Nevada Assembly in 2017, but “[n]o further action [was] taken.”²¹³ Also in 2017, another Montana corner-crossing bill was introduced.²¹⁴ But this time—just four years after attempting to legalize corner-crossing—the bill intended to make corner-crossing a misdemeanor punishable by up to six months in jail.²¹⁵ That bill also died in a House committee.²¹⁶

In Montana, more trespass cases reinforce the legal ambiguity of corner-crossing. Indeed, Montana authorities charged Cody Cherry, a Montana citizen, with trespassing on two separate occasions after he corner-crossed twice on the same ranch.²¹⁷ The first set of charges were dismissed largely because of imported reasoning from a county attorney’s opinion in another case that claimed that “[i]t was not trespassing to go from one section of public land to the next over that infinite corner.”²¹⁸ In his second case, Cherry was found guilty of trespass after walking on eighty feet of private property

210. *Id.*; see also WYO. STAT. ANN. § 6-3-303(a) (“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, or after being notified to depart or to not trespass.”).

211. H.B. 171, 2011 Leg., Gen. Sess. (Wyo. 2011); *HB0171 Corner Crossings at Intersecting Public and Private Lands in Legislation - 2011*, STATE OF WYO. 67TH LEGISLATURE, <https://www.wyoleg.gov/Legislation/2011/HB0171> [<https://perma.cc/2MVK-96S8>] (showing that the bill’s last action was in committee).

212. H.B. 235, 63d Leg., Reg. Sess. (Mont. 2013); *Montana Legislature: Detailed Bill Information*, MONT. LEGIS. BRANCH, [http://laws.leg.mt.gov/legprd/law0210w\\$bsiv.actionquery?p_bill_no1=0235&p_bltp_bill_typ_cd=hb&z_action=find&p_sess=20131](http://laws.leg.mt.gov/legprd/law0210w$bsiv.actionquery?p_bill_no1=0235&p_bltp_bill_typ_cd=hb&z_action=find&p_sess=20131) [<https://perma.cc/ZFV6-77TW>].

213. A.B. 386, 79th Leg., Reg. Sess. (Nev. 2017); *AB386 Overview*, NEV. ELEC. LEGIS. INFO. SYS., <https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10315/Overview> [<https://perma.cc/7SJA-NX3R>].

214. H.B. 662, 65th Leg., Reg. Sess. (Mont. 2017).

215. *Id.*

216. *Montana Legislature: Detailed Bill Information*, MONT. LEGIS. BRANCH, [http://laws.leg.mt.gov/legprd/LAW0210W\\$BSIV.ActionQuery?P_BILL_NO1=662&P_BLTP_BILL_TYP_CD=HB&Z_ACTION=Find&P_SESS=20171](http://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=662&P_BLTP_BILL_TYP_CD=HB&Z_ACTION=Find&P_SESS=20171) [<https://perma.cc/HQ7J-YSEB>].

217. *Corner-Locked Report*, *supra* note 5.

218. Don Thomas, *Our Checkered Past*, OUTSIDE BOZEMAN (Fall 2021), <https://outsidebozeman.com/culture/the-new-west/our-checkered-past> [<https://perma.cc/8B65-TPNJ>].

between public parcels.²¹⁹ This stretched the definition of “corner” a bit too far.

In sum, courts in different states found hunters not guilty of trespass after stepping over property corners, an attorney general memo declared that corner-crossers *may* violate the state’s criminal trespass statute, and three states introduced—and failed to pass—legislation intended to clarify the legal status of corner-crossing. No wonder there is so much uncertainty on this issue.

C. *Current Litigation Related to Corner-Crossing*

Against this backdrop of inconsistent and nebulous legal history rests ongoing litigation involving corner-crossing hunters. The case has gained national attention as a topic of hope and controversy in the outdoor community.

In 2021, four out-of-state hunters from Missouri corner-crossed in Wyoming on their way to elk hunt on nearby BLM land.²²⁰ The hunters did not touch private land.²²¹ Instead, they used an A-frame ladder to cross the private fence without touching either the fence or the private property.²²² But in climbing up one side of the ladder and down the other, they crossed through the airspace of the other two parcels meeting at the point. Unfortunately for them, the private parcels were part of the 23,277-acre Elk Mountain Ranch—owned by North Carolina businessman Fred Eshelman.²²³

Before their hunt, the hunters spoke with local law enforcement about their plan to corner cross near the Elk Mountain Ranch.²²⁴ Both a local police

219. *Park County Court Cases Testing Boundaries of Public Access, Private Property Rights*, YELLOWSTONE PUB. RADIO (Feb. 28, 2020, 5:48 PM), <https://www.ypradio.org/environment-science/2020-02-28/park-county-court-cases-testing-boundaries-of-public-access-private-property-rights> [<https://perma.cc/5GLJ-FYSS>]; see also *State v. Cherry*, 457 P.3d 237, 238–39 (Mont. 2020) (providing a detailed factual background of the second case against Cherry).

220. *WY BHA Carbon County Corner Crossing Issue Statement*, BACKCOUNTRY HUNTERS & ANGLERS (Jan. 26, 2022), https://www.backcountryhunters.org/wycorner_crossing [<https://perma.cc/P2JC-R79V>].

221. *Id.*

222. *Id.*

223. Angus M. Thuermer Jr., *Corner-Cross Landowner Gave Millions to Conservatives, Conservation*, WYOFILE (Mar. 12, 2022), <https://wyofile.com/corner-crossing-landowner-gave-millions-to-conservatives-conservation/> [<https://perma.cc/N65T-6PDL>]. Eshelman made his fortune in the pharmaceutical industry. Forbes estimated his net worth to be \$380 million in 2014. Katia Savchuk, *Pharma Multi-Millionaire Gives \$100 Million to University of North Carolina*, FORBES (Dec. 3, 2014, 6:47 PM), <https://www.forbes.com/sites/katiasavchuk/2014/12/03/pharmaceutical-multi-millionaire-gives-100-million-to-university-of-north-carolina/?sh=2b5beb356ed7> [<https://perma.cc/57HA-FC4S>].

224. See Will Walkey, *Corner Crossing Lawsuit Is the Latest Fight Over Mountain West Land Access*, WYO. PUB. RADIO (Sept. 23, 2022, 4:30 PM), <https://www.wyomingpublicmedia.org/open-spaces/2022-09-23/corner-crossing-lawsuit-is-the-latest-fight-over-mountain-west-land->

deputy and a Wyoming Fish and Game warden told the hunters that they would not be charged with trespassing.²²⁵ Indeed, despite the ranch manager's lobbying for a citation,²²⁶ both a Wyoming Game and Fish Department warden and a local sheriff's deputy refused to cite the hunters after conducting an on-site investigation of the incident.²²⁷ Several days later, however, the apparent influence of Eshelman's money kicked in, and the Carbon County Attorney instructed that the men be cited for criminal trespass.²²⁸

The resulting litigation has all the markers of a case that can draw outside attention to the corner-crossing issue. Consider the classic David-and-Goliath fact pattern. An out-of-state multi-millionaire and ranch owner uses his outsized money and influence to keep working-class outdoor recreationists from accessing their public land—claiming the public land for his use only. All of this when the hunters neither touched nor harmed the private land. Facts like these show the inequities that criminalizing corner-crossing can promulgate and should cause the average person to consider the corner-crossing issue more closely.²²⁹

At the close of the criminal trial, a jury returned not-guilty verdicts for all four hunters.²³⁰ In some sense, the not-guilty verdict is an example of jury nullification. Indeed, the law governing property rights over the immediate airspace is clear: a landowner has the right to exclude others from the airspace directly over their property. The 2004 Wyoming Attorney General memo was unequivocal about that.²³¹ And the hunters crossed at least a portion of the Elk Mountain Ranch airspace. So this small victory for four out-of-state hunters could be a sign of changing headwinds in the public sphere concerning corner-crossing. Fortunately for those interested in the law about corner-crossing, this case did not stop after the criminal trial.

With the criminal trial still pending, Eshelman filed a trespass civil action in Montana state court, seeking damages and a declaratory judgment

access [<https://perma.cc/9UJ4-C5L6>] (“[The hunters] notified the local sheriff’s office prior to their days-long trip.”).

225. Thuermer Jr., *supra* note 223.

226. *Id.* To pressure the officers to cite the hunters, the Elk Mountain Ranch manager brazenly asked the officers: “Do [your law enforcement supervisors] realize how much money my boss has . . . and property?” *Id.*

227. Angus M. Thuermer Jr., *Jury Finds Four Corner-Crossing Hunters Not Guilty of Trespass*, WYOFILE (April 29, 2022) [hereinafter *Corner-Crossing Hunters Not Guilty*], <https://wyofile.com/jury-finds-four-corner-crossing-hunters-not-guilty-of-trespass/> [<https://perma.cc/G2RM-KJYZ>].

228. *See id.* (reporting the defense attorney’s view that Eshleman used “his money, clout and influence,” to get charges filed against the hunters).

229. *See supra* subpart III(B) for full discussion on the social harms associated with landlocked lands such as these.

230. Thuermer Jr., *Corner-Crossing Hunters Not Guilty*, *supra* note 227.

231. *See supra* notes 208–11 and accompanying text.

that corner-crossing is trespass as a matter of law.²³² The defendants removed the case to federal court.²³³ After the federal district court denied the plaintiff's motion to remand to state court, Eshelman's attorney signed a disclosure statement alleging damages of up to \$7.75 million stemming from the hunters' corner-crossing.²³⁴ This case sets up a battle between two competing legal doctrines. In one corner, the right for landowners to control their airspace.²³⁵ And in the other corner, a 135-year-old federal statute that proscribes enclosing federal public land—the Unlawful Inclosures Act.²³⁶

D. Could the Unlawful Inclosures Act Resolve the Corner-Crossing Issue?

The Unlawful Inclosures Act should abrogate state-law trespass claims involving public land corner-crossing. “Generally speaking, state law defines property interests.”²³⁷ But through the Property Clause,²³⁸ Congress possesses plenary power over federally owned public lands.²³⁹ Indeed, the Supreme Court, in assessing Congress's plenary power, has observed that “[t]he power over the public land thus entrusted to Congress is without limitations.”²⁴⁰ In fact, Congress's powers under the Property Clause are broad enough to extend beyond the public land borders “to regulate conduct on private land that affects public land.”²⁴¹

232. Complaint for Declaratory Judgment & Civil Trespass at 6, 9, Iron Bar Holdings, LLC v. Cape, No. 22-34 (Wyo. Dist. Ct. 2d. Jud. Dist. Feb. 15, 2022).

233. Defendants' Petition for Removal, Iron Bar Holdings, LLC v. Cape, No. 2:22-cv-00067 (D. Wyo. Mar. 22, 2022).

234. Order Denying Remand to State Court at 1, Iron Bar Holdings, LLC v. Cape, No. 2:22-cv-00067 (D. Wyo. May 19, 2022); Angus M. Thuermer Jr., *Ranch Owner: Corner-Crossing Damages Could Exceed \$7M*, WYOFILE (Sept. 2, 2022), <https://wyofile.com/ranch-owner-corner-crossing-damages-could-exceed-7m/> [<https://perma.cc/N9ZQ-YBJ6>].

235. *See* United States v. Causby, 328 U.S. 256, 264 (1946) (“Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.”).

236. Unlawful Inclosures of Public Lands Act, ch. 149, 23 Stat. 321 (1885) (codified as amended at 43 U.S.C. § 1061–66).

237. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 707 (2010); *see also* Vandever v. Lloyd, 644 F.3d 957, 963 (9th Cir. 2011) (“[W]e look to state law to determine what property rights exist . . .”).

238. U.S. CONST. art IV, § 3, cl. 2. (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

239. *See, e.g.,* United States v. Bd. of Cnty. Comm'rs of Otero, 843 F.3d 1208, 1209, 1215 (10th Cir. 2016) (holding that a state law aimed at authorizing a local commissioner to mitigate fire danger in the Lincoln National Forest without first obtaining permission from the U.S. Forest Service “must yield to federal law regarding conduct on federal land”).

240. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. City & Cnty. of San Francisco*, 310 U.S. 16, 29 (1940)).

241. *Id.* at 538.

Although state and local governments typically share legal authority with Congress over federal land, state and local powers “must yield under the Supremacy Clause when they conflict with federal law.”²⁴² Indeed, “federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution’s Supremacy Clause.”²⁴³ So where Congress has enacted federal legislation concerning the protection, use, or acquisition of public lands, conflicting state laws—as well as private claims relying on state laws—must yield to federal law.²⁴⁴

The federal law implicated by this corner-crossing issue is the Unlawful Inclosures of Public Lands Act of 1885 (UIA).²⁴⁵ Congress enacted the UIA in response to the “range wars” between 19th-century cattlemen.²⁴⁶ Throughout those range wars, cattlemen would build fences around public lands to exercise monopoly control over—without possessing a legal claim to—swaths of public land.²⁴⁷ To curb these exclusionary practices, Congress enacted the UIA to proscribe “all ‘enclosures’ of public lands, by whatever means.”²⁴⁸ The UIA reads, in relevant part:

All inclosures of any public lands . . . heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation . . . are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosures is hereby forbidden and prohibited[.]

. . . .

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct . . . any person from peaceably entering upon . . . any tract of public land subject to . . . entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands[.]²⁴⁹

The Supreme Court first construed the UIA in *Camfield v. United States*,²⁵⁰ a case in which the government charged defendant landowners with

242. *Bd. of Cnty. Comm’rs of Otero*, 843 F.3d at 1212.

243. *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002).

244. *Cf. Kleppe*, 426 U.S. at 543 (“A different rule would place the public domain of the United States completely at the mercy of [the State].” (quoting *Camfield v. United States*, 167 U.S. 518, 526 (1897))).

245. Unlawful Inclosures of Public Lands Act, ch. 149, 23 Stat. 321 (1885) (codified as amended at 43 U.S.C. §§ 1061–66).

246. *Leo Sheep Co. v. United States*, 440 U.S. 668, 683 (1979).

247. *See id.* at 684 n.20 (“For example . . . a letter to the House of Representatives . . . related two instances in Colorado where cattle companies fenced in more than one million acres each.”).

248. *Camfield v. United States*, 167 U.S. 518, 525 (1897).

249. §§ 1, 3, 23 Stat. at 321–22 (codified at 43 U.S.C. §§ 1061, 1063).

250. 167 U.S. 518 (1897).

violating the UIA.²⁵¹ There, the defendants placed fences on their private property, “manifestly intended to enclose the Government’s lands, though, in fact, erected a few inches inside the defendants’ [private] line.”²⁵² The defendants thus enclosed 20,000 acres of public land to carry out irrigation projects on their parcels.²⁵³ They admitted to the fencing scheme, but argued that the UIA was unconstitutional if it applied to fences located on private land.²⁵⁴

The Court disagreed.²⁵⁵ It concluded that Congress’s powers to protect and control the use of its own lands must include prohibiting landowners who owned or controlled the alternate sections in the checkerboard to enclose the entire tract.²⁵⁶ The Court analyzed the fence from the perspective of nuisance law, noting that though a landowner may generally do as they please with their property, “[h]is right to erect what he pleases upon his own land will not justify him in maintaining a nuisance.”²⁵⁷ To this end, the Court went on to announce what has become the UIA test:

So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, . . . but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large.²⁵⁸

Early cases following *Camfield* elaborated the scope of the UIA. In the first notable case, the Eighth Circuit held in *Mackay v. Uinta Development Co.*²⁵⁹ that the UIA did not require a fence or a physical structure to support a cause of action.²⁶⁰ Instead, a mere threat of a trespass claim was enough to

251. *Id.* at 521–22.

252. *Id.* at 525.

253. *Id.* at 522, 528.

254. *Id.* at 522.

255. *Id.* at 528.

256. *Id.* at 524–25.

257. *Id.* at 522.

258. *Id.* at 528.

259. 219 F. 116 (8th Cir. 1914). In 1929, the Eighth Circuit was divided into two circuits. Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346. The Eighth Circuit retained Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas. *Id.* § 1. The new Tenth Circuit took Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma. *Id.* Thus, Eighth Circuit decisions prior to the 1929 split are, at a minimum, particularly persuasive to the Tenth Circuit, if not binding authority. Compare *Boynton v. Moffat Tunnel Improvement Dist.*, 57 F.2d 772, 781 (10th Cir. 1932) (“[D]ecisions cited from the Supreme Court of the United States, from the Eighth Circuit Court of Appeals, and from this court, are binding upon us.”), with *Est. of McMorris v. Comm’r of Internal Revenue*, 243 F.3d 1254, 1258 (10th Cir. 2001) (“[W]e have never held that the decisions of our predecessor circuit are controlling in this court.”).

260. *Mackay*, 219 F. at 120.

violate the statute.²⁶¹ *Mackay* required the court to analyze a trespass claim brought by a landowning company against a sheep farmer.²⁶² The company owned all the odd-numbered sections in a tract of land that included at least 300 square miles (192,000 acres).²⁶³ Almost all the even-numbered sections in the tract were public land.²⁶⁴

Mackay was a sheep farmer whose spring and summer ranges were north of that tract.²⁶⁵ His wintering lands, however, were to the south of the tract on an unbroken parcel of public land.²⁶⁶ The onset of winter required Mackay to shepherd his sheep across the tract that included the plaintiff's odd-numbered sections to the public-land wintering range where he was permitted to graze his sheep.²⁶⁷ The company warned Mackay not to cross its lands.²⁶⁸ In essence, the company asserted the obvious—Mackay could not drive his sheep across the tract without either himself or his sheep trespassing on many private, odd-numbered sections. When Mackay refused to heed the company's warning and started across the tract with his sheep, the company had him arrested and filed a civil suit for trespass.²⁶⁹

If this fact pattern sounds familiar, it is because it is similar to the pending civil case against the hunters at Elk Mountain: defendants have an implied license from the government to use public land for a lawful purpose, and a wealthy private landowner is—under the color of state trespass law—attempting to gain exclusive use and control over public land by preventing corner-crossing.

Mackay claimed the right to herd his sheep over the publicly owned sections without subjecting himself to a charge of trespass and used the UIA as a defense to his crossing.²⁷⁰ The company conceded Mackay's right to the public domain—in theory²⁷¹—but threatened to prosecute him with trespass if he entered the odd-numbered sections. “If the position of the company were sustained,” the court noted, “[n]ot even a solitary horseman could pick his

261. *Id.* at 118, 120.

262. *Id.* at 117.

263. *Id.* The size of the company-owned tract was contested at the trial court. While both parties agreed that the tract was at least 20 miles north to south and 15 miles east to west (300 square miles), one witness at the trial testified that the east-to-west distance was about 58 miles. *Id.* So, the tract could have included as many as 1,160 square miles (742,000 acres).

264. *Id.*

265. *Id.* at 117–18.

266. *Id.* at 118.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *See id.* at 119 (“But the right admitted [by the company] is a theoretical one, without utility, because practically it is denied except on terms [the company] prescribes.”).

way across without trespassing.”²⁷² Today’s corner-crossing litigation directly implicates the court’s hypothetical solitary horseman.

The court acknowledged that this case created a conflict between competing rights: the landowner’s private property rights conflicted with the public welfare.²⁷³ But it also recognized that *Camfield* dealt with this same conflict and determined that legislation like the UIA can be constitutional, even if it weakens “absolute rights of private property.”²⁷⁴ In line with *Camfield*, the Eighth Circuit thus recognized that the UIA “prohibit[s] every method that works [as] a practical denial of access to and passage over the public lands.”²⁷⁵ In other words, fences or other physical structures are not required to unlawfully enclose public land. Indeed, the mere threat of a civil trespass action can violate the UIA. The court held that the UIA entitled Mackay to cross over the checkerboard tract without violating trespass laws: “all persons . . . have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.”²⁷⁶

The same year, the Eighth Circuit further developed the UIA doctrine. In *Stoddard v. United States*,²⁷⁷ the court affirmed the trial court’s order for the defendant to remove a fence on private land that obstructed the free passage of livestock to public land.²⁷⁸ The defendant argued that section 3 of the UIA limited the UIA’s reach to people and did not guarantee access to animals.²⁷⁹ The *Stoddard* court refused to adopt the limited “persons only” reading of the UIA and concluded that the UIA “was intended to prevent the obstruction of free passage or transit for any and all lawful purposes over public lands.”²⁸⁰ The free passage of hikers, hunters, campers, and outdoors enthusiasts (and the animals that join them) is a lawful purpose for which the public may seek access to public lands.

More recently, in *United States ex rel. Bergen v. Lawrence*,²⁸¹ the Tenth Circuit analyzed the UIA and relevant case law and affirmed the UIA’s broad power to protect access to public lands. The issue in *Bergen* was whether a defendant-landowner could construct a fence on his property without following government requirements. The defendant erected an “antelope-proof” fence on his property—defying BLM standards—that denied antelope

272. *Id.* at 118.

273. *See id.* at 119 (“It is difficult to say that a man may not inclose his own land, regardless of the effect upon others.”).

274. *Id.*

275. *Id.* (emphasis added).

276. *Id.* at 118.

277. 214 F. 566 (8th Cir. 1914).

278. *Id.* at 569.

279. *Id.* at 568; *see also supra* note 249 and accompanying text.

280. *Stoddard*, 214 F. at 568–69 (emphasis added).

281. 848 F.2d 1502 (10th Cir. 1988).

access to critical wintering habitat on public land.²⁸² The trial court found that the fence violated the UIA and ordered the defendant to either remove the fence or modify it to conform to BLM standards.²⁸³ The Tenth Circuit affirmed.²⁸⁴ In doing so, the court in *Bergen* provided guidance for UIA claims that applies to today's corner-crossing litigation in two important ways.

First, *Bergen* acknowledged the UIA and the early cases that helped create the UIA doctrine are still good law.²⁸⁵ Aside from the obvious reasons why this is important, the *Bergen* court imported the Eighth Circuit doctrine into the Tenth Circuit. This helps clarify whether the pre-1929 Eighth Circuit UIA decisions are binding on today's Tenth Circuit.²⁸⁶ Notably, four of the six states that comprise the Tenth Circuit hold almost half of the total corner-locked acreage in the country.²⁸⁷

Second, the court in *Bergen* held that the district court's order requiring that the fence be removed or modified was not a "taking" that required compensation.²⁸⁸ Indeed, the court observed that "[a]ll that [defendant] has lost is the right to exclude others, including wildlife, from the public domain—a right he never had."²⁸⁹ This nullifies the corner-crossing opponents' argument that "[t]here is no 'minimal' amount of trespass that wouldn't be considered taking of property."²⁹⁰

In summary, the UIA and subsequent cases that developed its meaning have left today's courts with the following doctrine: (1) The federal government has plenary power to regulate private property to protect access to its own lands.²⁹¹ (2) Fences or other physical barriers are unnecessary to violate the UIA. Indeed, mere threats of trespass prosecution suffice.²⁹²

282. *Id.* at 1504. During the winter of 1983, antelope "collected against the fence and starved in an unsuccessful attempt to reach the [critical habitat]." *Id.*; see also *United States ex rel. Bergen v. Lawrence*, 620 F. Supp. 1414, 1416 (D. Wyo. 1985) (explaining how BLM standards require private fences to be constructed in a way that allow antelope to go over or under them).

283. *United States ex rel. Bergen v. Lawrence*, 620 F. Supp. 1414, 1420 (D. Wyo. 1985).

284. *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1512 (10th Cir. 1988).

285. See *id.* at 1506 ("[T]he UIA remains federal law and was amended in 1984 when Congress modified a procedural provision."); *id.* at 1506–09 (citing *Camfield v. United States*, 167 U.S. 518, 525, 528 (1897), *Stoddard*, 214 F. at 568–69, and *Mackay v. Uinta Dev. Co.*, 210 F. 116, 119 (8th Cir. 1914) favorably in its analysis of the UIA application to the case).

286. See *supra* note 259 (describing the implications of the 1929 Eighth Circuit split on today's Tenth Circuit courts).

287. New Mexico, Colorado, Wyoming, and Utah combine for 3.3 million corner-locked acres. *Corner-Locked Report*, *supra* note 5.

288. *Bergen*, 848 F.2d at 1507.

289. *Id.* at 1508; see also *Green*, *supra* note 134, at 56 ("[T]he right to exclude the public never inhered in the title to [private] land that stands as a gateway to public resources.")

290. *Corner Trespass*, *supra* note 202.

291. *Camfield v. United States*, 167 U.S. 518, 528 (1897).

292. *Mackay v. Uinta Dev. Co.*, 219 F. 116, 118, 120 (8th Cir. 1914).

(3) The UIA is not limited to “persons” and was enacted to prevent landowners from denying free passage for “all lawful purposes over public lands.”²⁹³ And (4), requiring a private landowner to remove a barrier denying access to public land is not a “taking” that requires compensation.²⁹⁴

The UIA does not implicate the same reliance interest concerns as the common law solutions because at the time of the grants, landowners understood that the public could cross corners. It has been private action—not the law—that has evolved. This is shown by Justice Thurgood Marshall’s questioning during the *Leo Sheep* oral argument:

[I]s it not true, if you look at the checkerboard that it would always be possible to stay on government land except where you have to cross at corners? . . . So is it not possible that Congress—you mentioned the widespread understanding that people could go anyplace they wanted to in those days without worrying about having somebody build a fence in front of them. Is it not likely that Congress did not dream that there would be any problem about cutting across a corner every mile or so?²⁹⁵

The UIA has been on the books since 1885—just a few years after the transcontinental railroad was completed.²⁹⁶ And early cases like *Mackay* made it clear that the UIA abrogated state-law trespass claims for corner-crossing.²⁹⁷ So if there are any reliance interests at stake here, it is the interest of the public to lawfully cross at the public corners, not of the landowner to “exclude others . . . from the public domain—a right he never had.”²⁹⁸

Conclusion

The Outdoor Recreation Resources Review Commission, in a 1962 report to the President and Congress stated: “It seems unnecessary to defend the right of the public to enter upon its own property unless such entry constitutes a hazard to the visitors or to the resource”²⁹⁹ Yet here we are, sixty years later, defending that right, as more than 16 million acres of public land lie out of the public’s reach. Not that progress has not already been made. In fact, as recently as 1986, some estimated that between 80 and 120

293. *Stoddard v. United States*, 214 F. 566, 568–69 (8th Cir. 1914).

294. *Bergen*, 848 F.2d at 1507.

295. Transcript of Oral Argument at 12, *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (No. 77-1686).

296. The railroad was completed on May 10, 1869. Ellen Terrell, *Completion of the Transcontinental Railroad*, LIBR. OF CONG. (Dec. 2020), <https://guides.loc.gov/this-month-in-business-history/may/completion-transcontinental-railroad> [<https://perma.cc/XYB2-XPV9>].

297. See *supra* notes 273–77 and accompanying text.

298. *Bergen*, 848 F.2d at 1508.

299. THE FREDERIC BURK FOUND. FOR EDUC., SAN FRANCISCO STATE COLL., FEDERAL AGENCIES AND OUTDOOR RECREATION: A REPORT TO THE OUTDOOR RECREATION RESOURCES REVIEW COMM’N 2 (1962).

million acres of public land were inaccessible.³⁰⁰ But this progress is no reason to lose urgency in unlocking the rest of America's landlocked property.

The common law has been unable to offer meaningful solutions to this problem. The Court in *Leo Sheep* refused to allow the BLM to acquire private property through an implied easement arising from necessity.³⁰¹ And the Public Trust Doctrine is just as unlikely to provide access across private land to landlocked public parcels.³⁰² But Congress and state legislatures have recently stepped up to facilitate land and easement acquisitions that have slowly chipped away, parcel-by-parcel, at unlocking our public lands.³⁰³

This Note takes the next step and offers a unique solution—specific to the special issue of corner-crossing. The UIA has long been overlooked as a federal remedy to state-law trespass claims related to corner-crossing. Indeed, if the UIA and its progeny are properly understood and applied, 8.3 million acres of corner-locked property could be made publicly accessible in one fell swoop. This would be an enormous win for outdoor recreationists and the American public. This land is your land. It is time that the law treats it as such.

300. Chavez, *supra* note 4, at 1380.

301. *See supra* subpart IV(A).

302. *See supra* subpart IV(B).

303. *See supra* Part V.