THE FULLER & SEMERAD LAW FIRM
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June 16, 2023

FOR IMMEDIATE RELEASE

This letter contains the opinion of its author only

To whom it may concern:

I feel compelled to address some uncertainty and misgivings about the May 26, 2023, decision by the United States District Court for the District of Wyoming in a case called *Iron Bar Holdings, LLC v. Cape et al.*, Case No. 22-cv-67-SWS. That decision is appended to this letter and will be called Appendix 1.

Over the last few weeks, I have listened to news reports and podcasts and read social media posts and other declarations concerning the Court's decision in *Iron Bar* that, in my opinion, unnecessarily dilute the meaning and effects of this decision. To be sure, I believe that these commentators want to be careful and are largely well-intentioned. After all, discretion is the better part of valor. But in their efforts to be careful, these folks have engendered more confusion than the Court's decision demands.

Through this decision, the Court held that legitimate corner crossing—"travel by foot through the checkerboard from public land to public land at corners, while never touching private land and not damaging private property, without the permission of the owner(s) of the adjoining private land(s)"—does not constitute civil trespass. *See* Appendix 1 at 2. Instead, the Court concluded that long-standing federal caselaw "allows such corner crossing by foot without trespass liability." *Id.*

Two general reactions have coalesced around the decision generally and these holdings specifically. First, commentators have said this conclusion is specific to the defendants—the Missouri 4—and their actions in this case only. Second, some have said these holdings do not authorize a person to corner cross peacefully and harmlessly in the Elk Mountain area or any other area in the Checkerboard without fear of legal repercussions.

I respectfully disagree with both these reactions.

On Point 1, the Court announced a broader holding than that the defendants in *Iron Bar* were not liable for trespass for corner crossing. It also held that the public "is entitled to" a reasonable way of passage to access public land, this reasonable way of passage is corner crossing that does not harm or make contact with private lands, and that private landowners "must suffer" the temporary incursions into airspace near their private lands when the public corner crosses lawfully.

People should remember what the plaintiff requested in their lawsuit: a declaratory judgment as well as a permanent injunction. In its operative complaint, the First Amended Complaint (filed Nov. 1, 2022) attached as Appendix 2, the plaintiff wrote as follows:

242 South Grant Street, Casper, Wyoming 82601 Tel: (307) 265-3455 Fax: (307) 265-2859

25. This Court has jurisdiction over this action under the provisions of the Wyoming Uniform Declaratory Judgments Act, Wyo. Stat. Ann. § 1-37-101 et seq., in that Plaintiff is a person interested in determining its rights pertaining to real property upon which Defendants have trespassed, and desires to obtain a declaration of its rights with respect to Defendants' conduct at issue herein.

26. Plaintiff was and is, and at all times relevant to this Complaint, the owner of the real property described in Exhibit 1 hereto, including but not limited to the airspace above the surface of such real property.

27. A justiciable dispute, case, and controversy exists between Plaintiff and Defendants concerning the rights to and possession, use, and control of the Property, including the airspace. By Exhibit 1 hereto, Plaintiff has provided sufficient evidence of its ownership, control, and possessory interest in the Property, and Defendants' actions in carrying out a "corner crossing" is a trespass upon the Property.

28. Entry of a declaratory judgment by this Court will serve to remove uncertainty and terminate the controversy between the parties, and will resolve those issues relevant to title, possession, and rights concerning the Property at issue.

29. Adjudication by the Court of the dispute, case, and controversy will resolve any legal questions as to the ownership, possession, and control of the airspace above Plaintiff's Property and will confirm that Defendants had no right to cross the Property and to carry out a "corner crossing."

30. The Court should enter a declaratory judgment as to the parties' respective rights and obligations in the subject matter of this litigation.

31. Defendants have no right to own, possess, control, use, interfere with, or cross (even temporarily) Plaintiff's Property. The Court should declare as such.

32. Defendants have no express or implied right of access or easement upon or across Plaintiff's Property to get to adjoining public lands. The United States Supreme Court rejected such an argument when made by the United States government, regarding lands in the checkerboard in Wyoming; if the United States has no such right, then certainly no private citizen has such a right.

33. Defendants have no right, title, or interest of any type of nature in the Property owned by Plaintiff, whether as owners, equitable owners, easement owners, guests of the BLM, invitees of the BLM, tenants, users, corner-crossers, possessors, members of the public, or otherwise. The Court should declare as such.

34. The Court should declare that none of the Defendants have a right or privilege to cross or otherwise demand entry upon or across Plaintiff's Property.

> 35. The Court should require Defendants to account for and describe in detail any act or omission that any one of them has taken at any time with respect to Plaintiff and/or its real property.
>
> 36. The Court should declare that any act or omission taken by any of the Defendants with respect to ownership, authority to enter, cross, use, and/or control of the Property was done without legal authority and was void ab initio.
>
> 37. The Court should declare that Defendants trespassed upon Plaintiff's Property and caused damage to Plaintiff thereby, both in 2020 and 2021.

See First Amended Complaint at 5-7, Appendix 2.

In its summary judgment decision, the Court concluded that, "Defendants are entitled to judgment as a matter of law as to all claims of trespassing involving Defendants' corner crossings in 2020 and 2021." Appendix 1 at 32. In its "Final Judgment," the Court entered final judgment "in favor of Defendants and against Plaintiff on all claims of airspace trespass and declaratory judgment." *See* Appendix 3 at 1 (filed June 1, 2023).

Under Wyoming law (the law selected by plaintiff), a request for declaratory judgment asks a court to "declare rights, status and other legal relations." *See* Wyo. Stat. Ann. § 1-37-102. The Tenth Circuit, which hears and decides appeals coming from federal district courts in Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho, has said, "A declaratory judgment that would not have practical consequences without later additional litigation is not proper." *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1380 (10th Cir. 2011) (following *Public Serv. Comm'n of Utah v. Wycoff*, 344 U.S. 237, 244–46 (1952)).

The Court in *Iron Bar* did not issue a facially improper decision on plaintiff's request for declaratory judgment—that is, a decision that "would not have practical consequences without later additional litigation . . . ." *See id.* Instead, it announced the rights and legal relations concerning corner crossing thusly:

> Synthesizing the law surveyed above, the Court finds that where a person corner crosses on foot within the checkerboard from public to public land without touching the surface of private land and without damaging private property, there is no liability for trespass. In this way, the private landowner is entitled to protect privately-owned land from intrusion to the surface and privately-owned property from damage while the public is entitled to its reasonable way of passage to access public land. The private landowner must suffer the temporary incursion into a minimal portion of its airspace while the corner crosser must take pains to avoid touching private land or otherwise disturbing private property.

Appendix 1 at 26.

Several important takeaways here:

1. The Court did not say there is no liability for trespass in this case only. It said, under the conditions described, there is no liability for trespass. Full stop. This means in future cases too.
    a. To bolster this point, note that the Court did not refer to the defendants here, but used general terms such as "a person," "the public," and "the corner crosser." The Court did not limit its holding to these defendants under the facts of this case only.

    b. To this end, the Court has specifically selected this decision for publication. It will be published at __ F. Supp. 3d __ in the future.

2. The Court announced that, while private landowners have certain rights, the public is entitled to a reasonable way of passage to access public land. This is not a throwaway statement. It is not meaningless. Federal courts do not issue advisory opinions—in fact, under Article III of the United States Constitution, federal courts have no power to render suggestions or guidance to third parties on hypothetical issues. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *see also Columbian Fin. Corp.*, 650 F.3d at 1376 ("It is not the role of federal courts to resolve abstract issues of law. Rather, they are to review disputes arising out of specific facts when the resolution of the dispute will have practical consequences to the conduct of the parties.").

3. The Court used the word "must" to explain the burdens that must be borne by private landowners in general and corner crossers in general. The Court did not say private landowners "may have to endure" corner crossers; it said, they must suffer the temporary pains inflicted on a minimal portion of private airspace when corner crossers access public land at section corners. (It also said corner crossers must do things correctly and respectfully).

These takeaways show: (1) the Court issued a decision designed to govern conduct going forward, not just in this case; (2) the public has a right to access public land in the Checkerboard and it can do so by corner crossing in the right way; and (3) landowners must suffer the temporary and minimal intrusions caused by corner crossers.

If a landowner wants to sue another corner crosser in Wyoming's Checkerboard for civil trespass, the *Iron Bar* decision would demand dismissal and, perhaps, sanctions under Rule 11 for the attorney or attorneys who brought the action. (Attorneys cannot file frivolous lawsuits).

Point 2—the Court's decision does authorize corner crossing in the Checkerboard. The Court says it plainly, as noted above, "the public is entitled to its reasonable way of passage to access public land." The reasonable way? Corner crossing without touching the surface of private land and without damaging private property.

Other points.

There are many ways to commit a trespass in Wyoming. Trespass to hunt, criminal trespass, and civil trespass are three different legal creatures. The *Iron Bar* decision concerned allegations of civil trespass. How does it apply (if at all) to the other kinds of trespass?

The trespass to hunt question is easy. The Wyoming Legislature, as the Court noted in the *Iron Bar* decision, amended Wyoming's trespass to hunt statute to require physical contact with or driving on the surface of private property. *See* Appendix 1 at 25 (citing Wyo. Stat. Ann. § 23-3-305(b), effective July 1, 2023). So considering that a lawful corner cross presupposes that the person does not contact the surface of private property, *see* Appendix 1 at 2, 26, 30–31, a lawful corner cross does not conflict with Wyoming's trespass to hunt statute. (Also, recall the 2004 A.G. Opinion from the Wyoming Attorney General's Office, which said corner crossing does not violate Wyoming's trespass to hunt statute).

The trickier question is criminal trespass. Wyoming's criminal trespass statute says:

> (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. For purposes of this section, notice is given by:
>
> (i) Personal communication to the person by the owner or occupant, or his agent, or by a peace officer; or
>
> (ii) Posting of signs reasonably likely to come to the attention of intruders.

Wyo. Stat. Ann. § 6-3-303(a).

Still, the answer can be drawn from the *Iron Bar* decision.

Remember, the Court said, the public is entitled to reasonable access to public lands and lawful corner crossing (no contact with private ground and no damage to private property) is not a trespass. *See* Appendix 1 at 2, 26. How then could a prosecutor prove beyond a reasonable doubt that a person had knowledge he was not authorized to corner cross when the *Iron Bar* Court said he has a right to do so? How could a prosecutor argue or prove in good faith that a private landowner gave lawful and effective notice that corner crossing is prohibited when the *Iron Bar* Court said the plaintiff's various efforts to prevent corner crossing violated federal law? *See* Appendix 1 at 27-28 (holding that plaintiff's locked chain blocking corner crossing violated the Unlawful Inclosures Act of 1885).

What's more, Wyoming's criminal trespass statute "was never designed to resolve civil property disputes." *United States v. Miller*, 659 F.2d 1029, 1033 (10th Cir. 1981). If the legality of accessing public lands by corner crossing is at all questionable (which in my opinion, post-*Iron Bar*, it is not), prosecutors should not bring criminal trespass cases against corner crossers in a misguided effort to get a different answer than the Court's decision in *Iron Bar*. As the Tenth Circuit wrote in a case appealed from the United States District Court for the District of Wyoming

concerning the application of Wyoming's criminal trespass statute to a disputed question of property rights:

> The Wyoming courts have not spoken on the issue of whether it is an abuse of the criminal process to use a criminal trespass statute to try disputed rights to real property. However, other states which have considered the question have held that it is. In *Steele v. State*, 191 Ind. 350, 132 N.E. 739 (Ind. 1921), the Indiana court held that a criminal court was not the proper forum to settle a dispute between a landlord and a subtenant. The opinion stated:
>
> > It is the well-settled law in this state, and of many other states, that it is an abuse of the penal statute relating to criminal trespass to try disputed rights in real property. (Citations omitted) It is the opinion of the court therefore that the verdict (finding the defendant guilty of criminal trespass) is contrary to law. 132 N.E. at 740.
>
> In *State v. Larason*, 75 Ohio L. Abs. 211, 143 N.E.2d 502 (Ct. Common Pleas Ohio 1956), the same rule was stated with regard to a criminal trespass charge against the defendant for parking his car on the plaintiff's land, where the defendant believed that he had an easement to park there. The court stated that a criminal trial is not suitable for determining property rights, because criminal trespass statutes have generally been construed strictly and do not afford a substitute for other adequate civil remedies. The court added that it is an abuse of a penal statute relating to criminal trespass to use it to try disputed rights in real property. *Id.* at 503-504.
>
> An Illinois case which reaches the same result is *People v. Miller*, 344 Ill.App. 574, 101 N.E.2d 874 (Ill. App. 1951). There the defendant was charged and was adjudged guilty of criminal trespass, where he was also on the land in question under the claim of right. The court found that the evidence did not prove the defendant guilty beyond all reasonable doubt and it stated that if the conviction were allowed to stand on the facts disclosed by the record it would settle a dispute over title and right of possession of land. A penal statute, it continued, can't be used to try disputed rights of title. The court said that it was well settled law that it is an abuse of the penal statute relating to criminal trespass to so use it.
>
> In *People v. Johnson*, 16 Mich.App. 745, 168 N.W.2d 913 (1969), the court noted the distinction between when a prosecution under the criminal trespass statute is and is not an appropriate vehicle for resolution of the controversy at issue. The court stated that the requirement of an intent to remain upon the lands of another without lawful authority causes the criminal trespass statute to be inapplicable in determining the questions of title or right to possession where the act which was the subject of the prosecution was a good faith one under a claim of right.
>
> There can be no question but that the defendant in this case, Mr. Miller, was crossing the land under a claim of right to use it, and the long-standing practice

> makes the prosecution of this case less applicable than in the cases cited above. It was obvious to the trial judge, as well, that the criminal action was not appropriate. When the trial court sentenced the defendant he said "I don't regard you as a criminal in this regard, I want you to know that. I think you are a fine, good citizen." Having found Miller's claim to an easement or a license unsupported in the law, the court convicted Miller of a crime, even though the court recognized that the case did not involve criminal activity. But in such a situation, a criminal conviction is contrary to the law.
>
> In *Jennings v. Shuman*, 567 F.2d 1213, 1220 (3rd Cir. 1977), the court stated that "(a)buse of process is by definition a denial of procedural due process." Under the circumstances of this case, the above quote is particularly relevant.

Miller, 659 F.2d at 1032–33.

To be sure, an unwise prosecutor could ask the local sheriff or police to cite legitimate, peaceful corner crossers for criminal trespass under Wyo. Stat. Ann. § 6-3-303(a) (though not trespass to hunt). It is my opinion that doing so would be folly. The outcome, as shown over and over when such cases are brought, would very likely be a dismissal or an acquittal. My opinion that such a prosecution would not lead to a conviction had good support before the *Iron Bar* decision. Following that decision, I have only grown more resolute in my opinion as a defendant charged with criminal trespass would have the *Iron Bar* decision as incredibly potent legal support for outright dismissal or for jury instructions that are fatal to the prosecution.

* * * * * *

The *Iron Bar* decision has done more than the commentators believe. It is my opinion that it authorizes and endorses public access to public lands in Wyoming's Checkerboard by corner crossing with great care. It is also my opinion that it declaws all efforts to prohibit or prosecute corner crossing under any species of trespass in Wyoming.

That is, of course, until the appeal. The notice of appeal deadline is, by my count, July 1, 2023. So, stay tuned.

Respectfully,

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APPENDIX # 1

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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

IRON BAR HOLDINGS, LLC, a North Carolina limited liability company registered to do business in Wyoming,

Plaintiff,

v.

BRADLEY H. CAPE, ZACHARY M. SMITH, PHILLIP G. YEOMANS, and JOHN W. SLOWENSKY,

Defendants.

Case No. 22-CV-67-SWS

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the following cross motions for summary judgment:

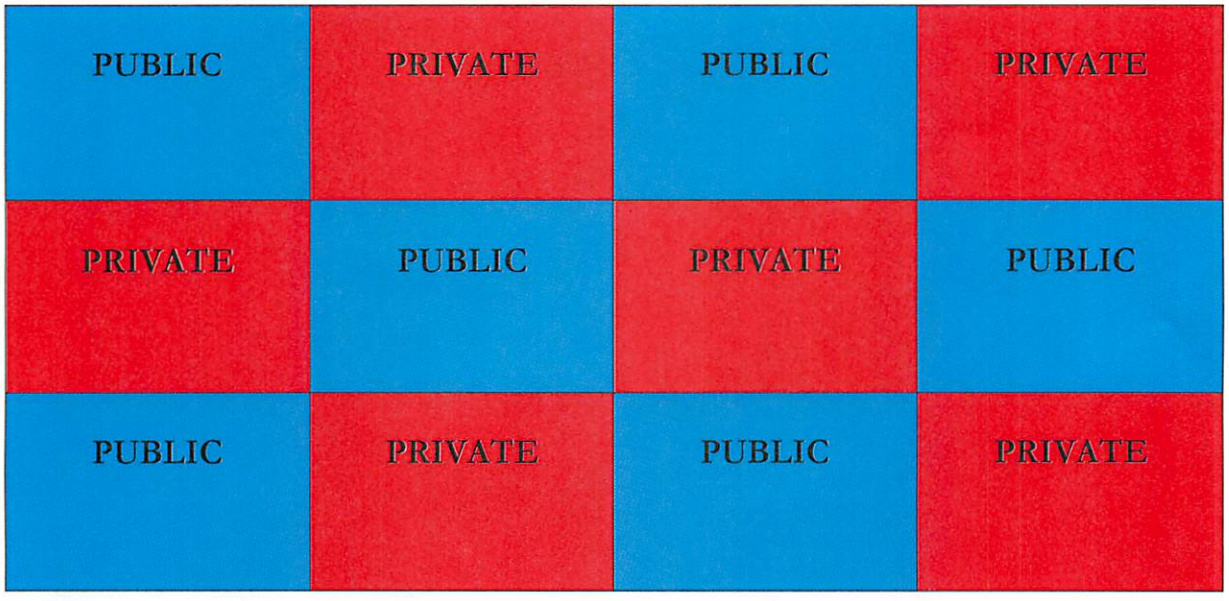
(1) Plaintiff's Motion for Partial Summary Judgment and supporting memorandum (ECF 63, 64), to which Defendants responded (ECF 68); and

(2) Defendants' Motion for Summary Judgment and supporting memorandum (ECF 65, 66), to which Plaintiff responded (ECF 67), and Defendants provided a limited reply (ECF 75) with the Court's leave.

The Court heard oral argument on the motions on May 10, 2023. (ECF 76.) Having considered the parties' submissions, the arguments of counsel, the record, the amici briefs (ECF 42, 45), and being otherwise fully advised, the Court finds, concludes, and orders as set forth here.

INTRODUCTION

Plaintiff privately owns a significant amount of real property on Elk Mountain in Carbon County, Wyoming. (Am. Compl. ¶¶ 1, 11; ECF 37-1.) Much of Plaintiff's private property borders and surrounds federal public lands managed by the U.S. Department of Interior Bureau of Land Management (BLM), state public lands managed by the State of Wyoming, and township lands managed by the Town of Hanna. (ECF 64-9; *see also* ECF 66-2.) Many of the private and public lands meet at their corners, forming a checkerboard pattern, as roughly demonstrated here:



The points of contact at each corner meet at an infinitely small point and, "like a point in mathematics, are without length or width." *Mackay v. Uinta Development Co.*, 219 F. 116, 118 (8th Cir. 1914.) In brief, the tortured path resulting in this generally 40-mile wide checkerboard pattern of land ownership (20 miles on each side of the railroad track) has been summarized thusly:

History and politics have complicated the pattern of land ownership in the

> West. To promote western expansion in the nineteenth century, the federal government encouraged the construction of rail lines through the West by granting every other 640-acre parcel along rail corridors to a railroad company. The hope was that the lands remaining with the government would increase in value as the companies built rail lines, which the government would later sell at high prices. The plan was successful further east, but the government struggled to sell the lands in the arid West. The result of this failed venture is the checkerboard pattern of public and private land that now plagues much of the West.

Hannah Solomon, *Wyoming's Data Trespass Laws Trample First Amendment Rights*, 18 Vt. J. Envtl. L. 346, 353–54 (2016) (footnotes omitted); *see also Leo Sheep Co. v. United States*, 440 U.S. 668, 670-77 (1979) (discussing the circumstances and events resulting in the creation of the checkerboard pattern of land ownership that persists today in parts of the West).

"It is at once apparent that this checkerboard ownership pattern necessarily impedes the ability of government employees and the general public to travel to and from federal land, as frequently the only access routes travers private property." *United States v. 82.46 Acres of Land, More or Less, Situate in Carbon Cnty, Wyo.*, 691 F.2d 474, 475 (10th Cir. 1982). This lawsuit involves the decades-long dispute of whether an individual is subject to civil liability for trespassing if they travel by foot through the checkerboard from public land to public land at the corners, while never touching private land and not damaging private property, without the permission of the owner(s) of the adjoining private land(s). The Court finds the century-old case of *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), which also originated in the District of Wyoming, provides the answer and allows such corner crossing by foot without trespass liability.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (internal quotation marks omitted). Testimony or other evidence "grounded on speculation does not suffice to create a genuine issue of material fact to withstand summary judgment." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

The Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment. *Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Trust*, 744 F.3d 623, 628 (10th Cir. 2014). "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979)

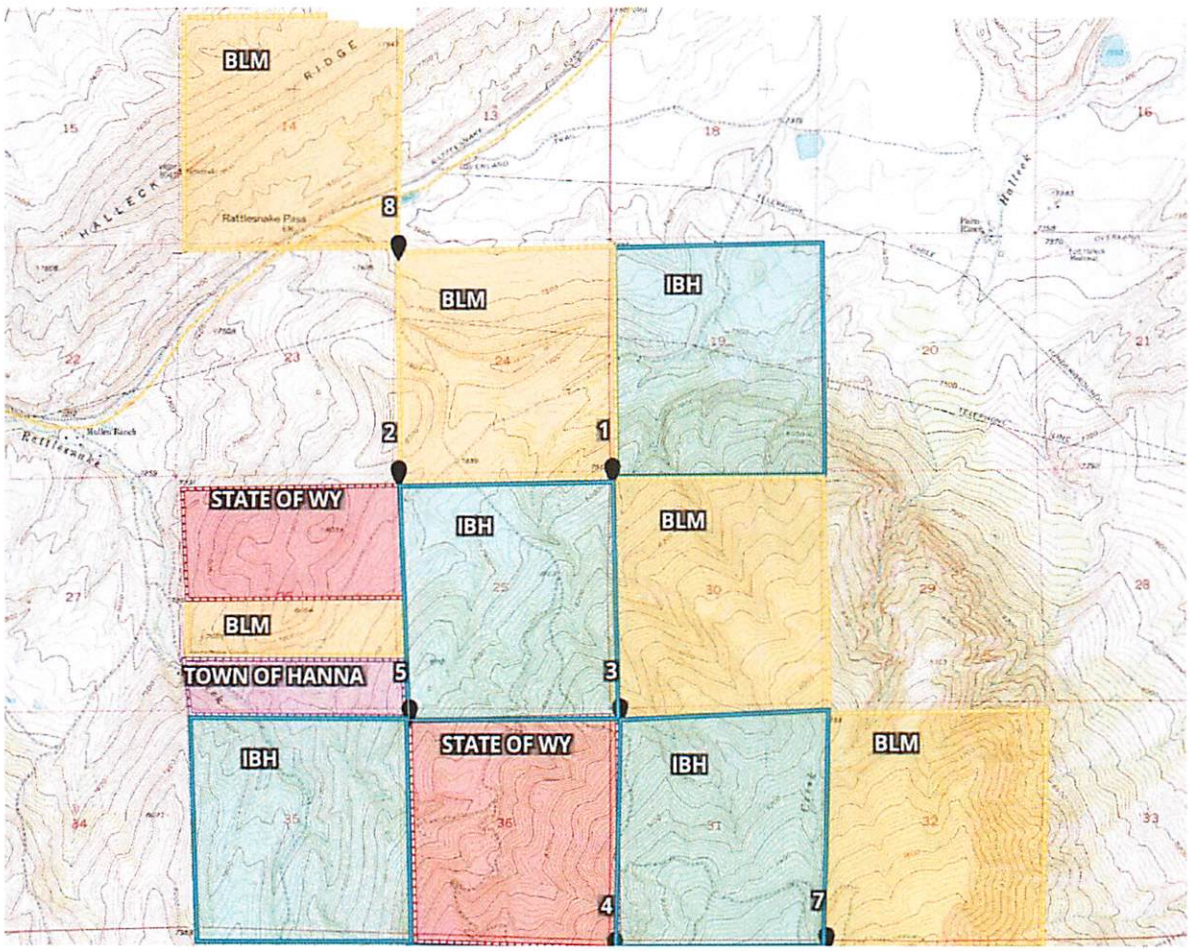
Generally, the moving party has "both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2003)). If the moving party carries this initial burden, the nonmoving party may not rest on its pleadings but must bring forward specific facts showing a genuine dispute for trial. *Id.* (citing *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)).

FACTS

1. 2020 Hunt and Corner Crossings

In the fall of 2020, Defendants Cape, Smith, and Yeomans traveled from their homes

in Missouri to Carbon County to hunt big game on Elk Mountain. (Am. Compl. ¶¶ 2-4, 18; Answer to Am. Compl. ¶¶ 3-5; 19.) They each had a valid hunting license and/or tag to hunt in the area. (ECF 66 p. 10.) They drove on a public road, Rattlesnake Pass Road, to Section 14, which is public land managed by the BLM, where they parked and set up their camp. (Cape Depo. 42:13-15.) Over the next several days, they hunted on several sections of public land in a south-southeastern direction from their camp, specifically on Sections 24, 30, 36, and 26 (*id.* 31:4-12), which are shown on the following map.



This map is an excerpt from Plaintiff's Exhibit 8 (ECF 64-9), but the Court notes Plaintiff also owns Sections 13 and 23, though not denoted on the map. (ECF 64 p. 3; ECF 68 p. 2; ECF

66 p. 4.) Each numbered Section is one square mile (640 acres) of land. (ECF 66-15 p. 7.)

Upon approaching the northwest corner of public Section 24 from public Section 14 (denoted at Pin Drop 8 on the map above), the three hunters were met with two steel posts, each with a "No Trespassing" sign, that were connected together with a chain, a padlock, and some wire. One post was installed in Section 13 (private) and the other in Section 23 (private), and the chain and wire ran through the air over the corner of Sections 13, 24, 23, and 14, as shown here from Defendants' Exhibit E (ECF 66-5).

The survey marker ("brass cap") shown in the photo between the two signs protruding about a foot out of the ground designates the "corner" where Sections 13, 24, 23, and 14 meet. (ECF

66 pp. 3-4.) Other than these chained-together signs, there were no posts, fencing, or buildings within one-quarter of a mile of the corner. (Grende Depo. 43:4-8.)

With their backpacks and hunting gear, Defendants Cape, Smith, and Yeomans could not fit between the signs and under the chain to move from Section 14 to Section 24. (ECF 66 p. 6; *see* Grende Depo. 42:19-23 (agreeing the chain and lock "present a physical obstacle to anyone who is walking from Section 14 to Section 24 across the corner").) So, one by one, each grabbed one of the steel posts and swung around it, planting their feet only on Sections 14 (BLM) and Section 24 (BLM) but passing through the airspace above Section 23 (Plaintiff) and/or Section 13 (Plaintiff). (ECF 64 p. 4; ECF 68 pp. 3-4.) In holding onto the steel posts and swinging around them to cross from Section 14 to Section 24, there is no evidence the Defendants caused any damage to Plaintiff's property. (Grende Depo. 27:3-25.)

They then proceeded with their hunt on the public land. At the other corners they crossed (denoted as Pin Drops 1, 2, and 5 on the above map), there were no further physical barriers such as steel posts and chain, so the hunters simply stepped or jumped over the survey marker/brass cap from public land to public land, again passing momentarily through airspace above Plaintiff's privately-owned land. (*See, e.g.*, ECF 64 p. 8; ECF 68 p. 2; Cape Depo. 58:11-24 (describing stepping over the survey marker from Section 36 (BLM) to Section 26 (BLM)); Yeomans Depo. 39:10-18.) The hunters spent about a week hunting in the area and crossed the corners multiple times using the methods described. (ECF 64 p. 4; ECF 68 p. 2.)

Plaintiff observed Defendants Cape, Smith, and Yeomans during their 2020 hunt and did not approve of Defendants' presence. Plaintiff never consented to Defendants entering its property or airspace in any manner. (ECF 64 p. 8; *see* ECF 68 pp. 3-5.) Prior to 2020,

Plaintiff instituted an ongoing practice of having its employees confront or interact with a "suspected trespasser" found on or near Plaintiff's property, even if the person was found while on public land. (Eshelman Depo. 32:12-34:8, 66:17-25.) The suspected trespasser is instructed to leave, but if they resist, Plaintiff will contact local law enforcement, including the Wyoming Game & Fish Department, to seek a criminal trespass citation or other prosecution. (ECF 66 p. 9.) And if in Plaintiff's view law enforcement takes insufficient action on the matter, Plaintiff will continue to contact law enforcement to push the matter and will also contact the local prosecutor's office to request criminal prosecution. (*Id.* p. 9.) Finally, as here, Plaintiff may also institute a civil action against the suspected trespasser. (*Id.* p. 10.) Probably obvious at this point, Plaintiff considers corner crossing to be an invasion of the airspace above its land that constitutes unlawful trespassing. (Eshelman Depo. 60:20-25, 63:13-23, 78:9-14, 83:25-84:8.)

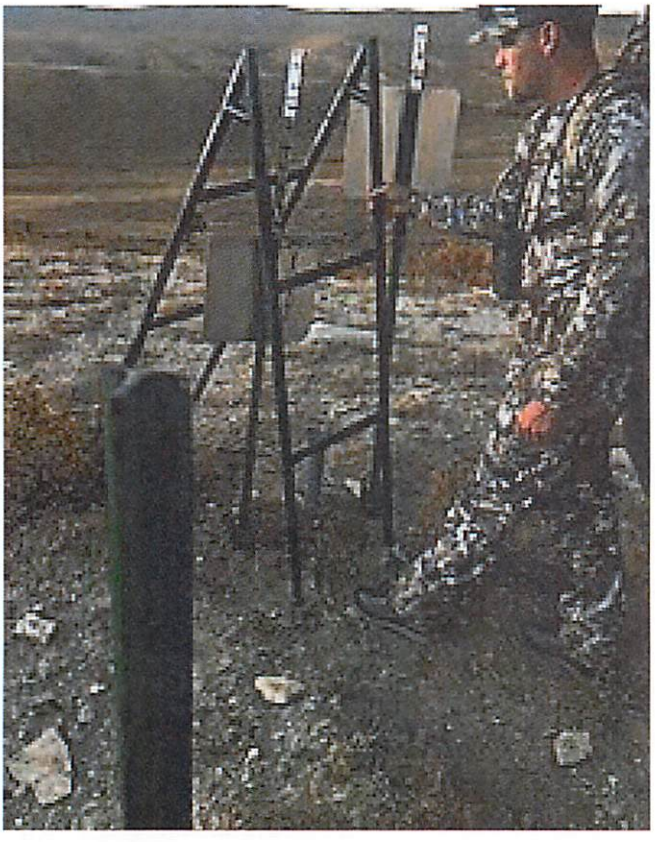
In 2020, Plaintiff's property manager, Steven Grende, confronted the Defendants when he found them on public land because he determined they could only reach such public land by trespassing, whether by corner crossing through Plaintiff's airspace or otherwise. (ECF 66 p. 10; Grende Depo. 68:9-20; Smith Depo. 25:17-26:17.) When he requested they leave the area, the hunters refused. (Yeomans Depo. 81:18-82:6.) Mr. Grende then contacted law enforcement to complain about the alleged trespassing. (Smith Depo. 56:4-11.) The hunters explained to the responding sheriff's deputy that they had corner crossed from public land to public land without touching private land, and law enforcement did not issue any warning or citation to the hunters in 2020. (Cape Depo. 105:3-23; Smith Depo. 56:1-57:23; Yeomans Depo. 80:14-81:14.) The three hunters successfully completed their hunting trip as

planned that year and then returned home.

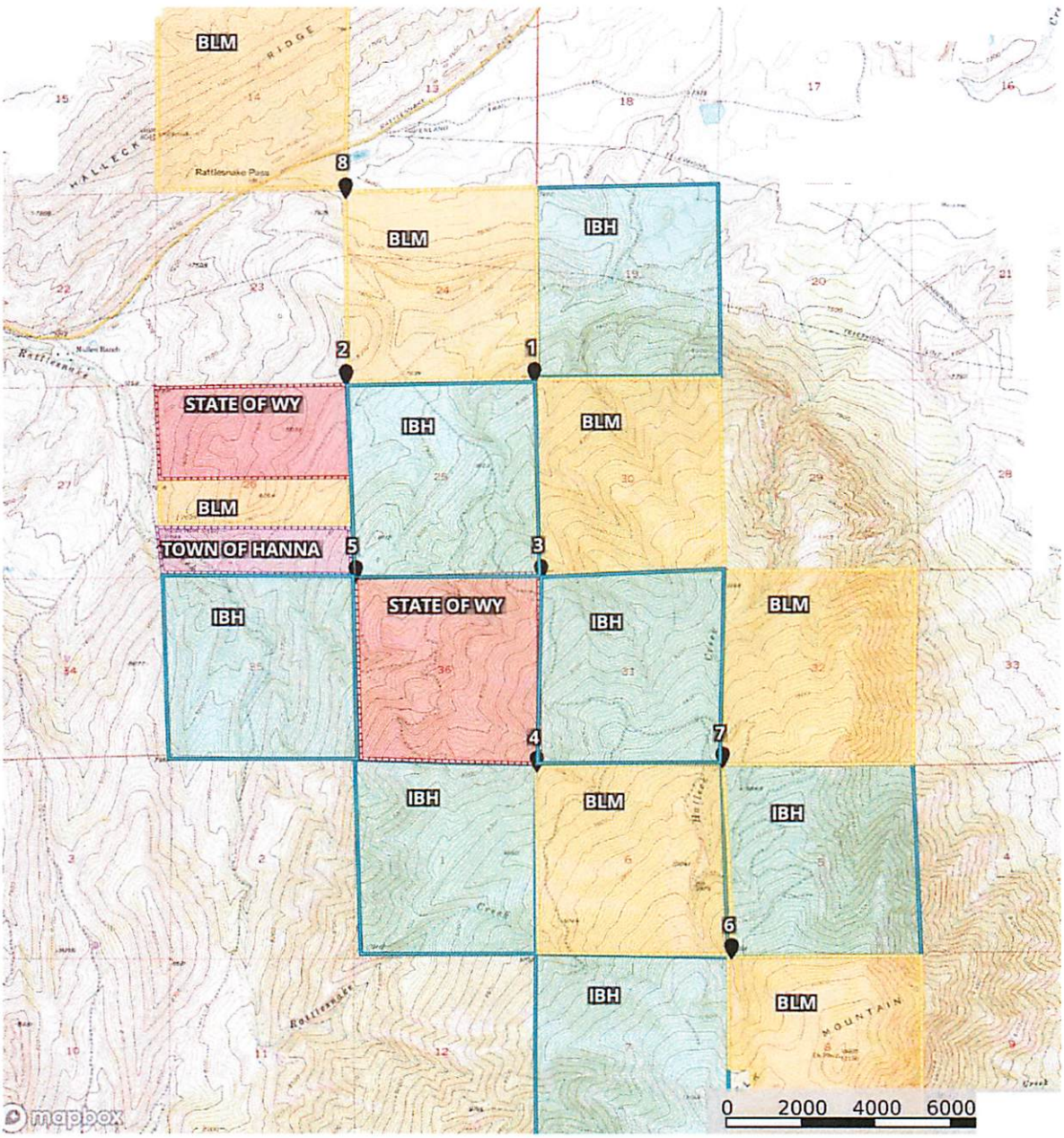
There is no evidence the three hunters physically touched the surface of Plaintiff's land when corner crossing or caused any damage to Plaintiff's private property in 2020. (Grende Depo. 22:12-24:20.)

2. 2021 Hunt and Corner Crossings

The three hunters plus Defendant Slowensky returned to the same area in the fall of 2021 to hunt. This time, in an effort to not touch Plaintiff's steel posts when crossing from public Section 14 to public Section 24, they brought a steel A-frame ladder that Defendant Cape had constructed. (ECF 64-10; Cape Depo. 77:2-22; Smith Depo. 34:1-5; Yeomans Depo. 43:20-44:12.) As shown here in a cropped portion of Plaintiff's Ex. 9 (ECF 64-10), the ladder straddled over the lower "No Trespassing" sign, with two feet resting on Section 14 and the other two feet on Section 24. (ECF 66-15 p. 8.)



The now-four hunters crossed the same corners as the previous year plus a few more to access additional sections of public lands. Specifically, Defendants hunted on Sections 14, 24, 26, 30, 36, 32, 6, and 8, while crossing the corners denoted by Pin Drops 1-8 on the following map. (*See* ECF 64 pp. 6-7; ECF 68 p. 2.)



This map was adapted from Plaintiff's Exhibit 8 (ECF 64-9) to show the additional Sections

of land that were hunted in 2021, and the Court again notes Plaintiff also owns Sections 13 and 23 though such is not denoted on the map. The hunters only used their ladder to cross from Section 14 to Section 24 because the other corners were unobstructed and they could simply step or jump over the survey marker/brass cap from public land to public land. (ECF 64 p. 8; ECF 68 p. 2.)

Defendants' 2021 hunting expedition did not go as smoothly as the prior year's. Plaintiff proved much more aggressive about expelling the hunters from the area and seeking their criminal prosecution for alleged trespassing in 2021. Mr. Grende and another Plaintiff employee confronted the hunters in person multiple times in attempts to get them to leave the public lands bordering Plaintiff's private lands. (Yeomans Depo. 82:7-83:1, 83:18-84:1.) Plaintiff's employees also interfered with Defendants' hunt by constantly watching them from nearby and by driving motorized vehicles on public parcels near Defendants while they hunted in an effort to scare away the game. (ECF 66 p. 12.) When the hunters refused to stop corner crossing and hunting on the public lands, Mr. Grende contacted the Wyoming Game and Fish Department, which said it would not take action against the hunters. (Grende Depo. 68:21-69:5.) Undeterred, he then contacted the local sheriff's office, which initially also refused to take action against the hunters. (*Id.* at 69:6-15.) He then contacted the local prosecuting attorney's office, which said it was willing to prosecute the corner crossings as criminal trespassing. (*Id.* at 69:21-70:5.) The prosecuting attorney's office directed the sheriff's office to write citations for criminal trespass to each Defendant, which were issued. (ECF 66 p. 14; ECF 66-21 p. 8.) In connection, the Wyoming Game and Fish Department also instructed Defendants to leave the area and not enter the subject public lands again. (ECF 66 p. 14.)

Consequently, the hunters' 2021 hunting trip was cut short. Following a jury trial several months later, each Defendant was acquitted by the jury of the state criminal trespass charge. (ECF 66-24.)

There is no evidence the hunters made physical contact with Plaintiff's private land or caused any damage to Plaintiff's private property in 2021. (Grende Depo. 21:2-23:2, 28:1-13.)

3. "Waypoint 6" from Defendant Smith

During Defendants' 2020 hunting trip, Defendant Smith used a GPS mapping tool on his cellphone called "onX Hunt," which helps hunters find property lines and determine land ownership. (*See* Decl. Zachary Smith at ¶¶ 3-8, ECF 72-1 p. 3; Spitzer Depo. 10:19-12:18.) Plaintiff subpoenaed the raw metadata created by Defendant Smith's use of the onX Hunt application and found that Defendant Smith had designated a waypoint, "Waypoint 6," that was located on Plaintiff's private land and not near a corner. (ECF 67-3, 67-4.) Plaintiff contends Waypoint 6 establishes Defendant Smith, and maybe other Defendants, trespassed upon the surface of Plaintiff's private land in 2020. (ECF 67 p. 24.)

The onX Hunt metadata for Waypoint 6 shows it was created on September 30, 2020 (while Defendant Smith was hunting in Wyoming) and was deleted from the application on October 19, 2020. (ECF 67-3 p. 2.) Defendant Smith believes his onX Hunt raw data is accurate but says he does not recall creating Waypoint 6 and, in any event, it does not solely prove his physical presence at the location of the waypoint. (Decl. Zachary Smith at ¶¶ 7-12.) An onX Hunt user can "drop" (create) a waypoint to designate their current location, but they can also drop a waypoint that is nowhere near their current location, including from a different state. (Spitzer Depo. 25:2-12.)

ANALYSIS

The Court will focus its initial discussion on the issue of corner crossing and whether it, as it was performed by Defendants in this case, constitutes an actionable trespass.

1. Subject to Certain Restrictions, a Private Landowner Owns the Airspace Within a Reasonable Height of the Land and Enjoys a Right to Exclude Others from that Airspace

No person can reasonably doubt the fundamental importance of private property rights to the development and continuing validity of the United States. "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'" *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (quoting Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)). Indeed, the Fifth Amendment protects an individual's property against encroachment by the federal government and the Fourteenth Amendment protects that same property against encroachment by a state.

While the U.S. Constitution protects a person's property interests, *Jordan-Arapahoe, LLP v. Board of Cnty. Comm'rs of County of Araphoe, Colo.*, 633 F.3d 1022, 1025 (10th Cir. 2011), the actual property interests themselves "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

> We thus must turn to state law in understanding the scope of property rights in land ownership. This is not always a simple task. The modern understanding of the bundle of sticks of land ownership is overlain with myriad competing land use, zoning, and environmental regulations. A landowner faces numerous

> restrictions on the full use and alienability of land depending on the interplay of local, state, and federal law.

Jordan-Arapahoe, 633 F.3d at 1026; *see Garnett v. Brock*, 2 P.3d 558, 563 (Wyo. 2000) ("In order to be afforded constitutional status, property rights must have been initially recognized and protected by state law."), *overruled on other grounds by Brown v. City of Casper*, 248 P.3d 1136 (Wyo. 2011).

The property rights at issue in this case are two-pronged and intertwined: (1) Plaintiff's ownership of the airspace above its land, and (2) Plaintiff's right to exclude others from that airspace. Looking at the first prong, the Wyoming Statutes have stated since 1931:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the right of [aircraft] flight[1] ....

Wyo. Stat. § 10-4-302; *see Cheyenne Airport Board v. Rogers*, 707 P.2d 717, 722 (Wyo. 1985). The U.S. Supreme Court similarly stated:

> [I]t 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. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.

United States v. Causby, 328 U.S. 256, 264 (1946) (internal citation and footnote omitted); *see Griggs v. Allegheny County, Pa.*, 369 U.S. 84, 89 (1962) ("the use of land presupposes the use of

[1] The right of aircraft flight is immaterial to this case, which involves incursions into airspace only a few feet off the ground, but the Supreme Court case of *United States v. Causby*, 328 U.S. 256 (1946), effectively "divided the airspace into two strata. The landowner owned the airspace within the 'immediate reaches' of the surface of his land, but the upper air was navigable airspace, in the public domain." *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1045–46 (10th Cir. 1974).

some of the airspace above it").

Turning now to the latter prong, of course an owner of real property has a right to exclude others from their property. The Wyoming Supreme Court has explained, "Ownership of property implies the right of possession and control and includes the right to exclude others; that is, a true owner of land exercises full dominion and control over it and possesses the right to expel trespassers." *Sammons v. Am. Auto. Ass'n*, 912 P.2d 1103, 1105 (Wyo. 1996). The U.S. Supreme Court similarly said, "It is true that one of the essential sticks in the bundle of property rights is the right to exclude others." *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 82 (1980).

Applying these ownership principles here, the law makes clear that Plaintiff is the lawful owner of "as much of the space above the ground" of its property as it could reasonably occupy or use in connection with the land. Additionally, Plaintiff has the right to exclude others from that airspace.

Taken together, this would appear dispositive of the matter. This is not the end of the analysis, though. As the Court noted, "A landowner faces numerous restrictions on the full use and alienability of land depending on the interplay of local, state, and federal law." *Jordan-Arapahoe*, 633 F.3d at 1026. The U.S. Supreme Court has recognized landowners take their land subject to certain express legal restrictions, such as zoning ordinances, as well as "'background principles of nuisance and property law' [that] independently restrict the owner's intended use of the property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32 (1992)). "And valid preexisting federal-law limitations on what otherwise would be state-law property rights are among the

limitations that may inhere in title so as to limit compensable property rights." *McCutchen v. United States*, 14 F.4th 1355, 1365 (Fed. Cir. 2021), *cert. denied*, 143 S. Ct. 422 (2022); *see also Interstate Consol. St. Ry. Co. v. Commonwealth of Massachusetts*, 207 U.S. 79, 87 (1907) ("the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation").

2. Relevant Restrictions on the Ownership of Airspace and Right to Exclude Within the Checkerboard Pattern of Land Ownership

Thus, the next step of the examination is determining whether there are any relevant restrictions on the Plaintiff's ownership of the subject airspace or its right to exclude others from that airspace. The Court's examination reveals history, federal caselaw, federal statutory law, and recent Wyoming legislation demonstrate corner crossing in the manner done by Defendants in this case is just such a restriction on Plaintiff's property rights because Defendants, "in common with other persons [have] the right to the benefit of the public domain," *Mumford v. Rock Springs Grazing Ass'n*, 261 F. 842, 849 (8th Cir. 1919), which necessarily requires some limitation on the adjoining private landowner's right of exclusion within the checkerboard pattern of land ownership.

First, and most pertinent to the issues here, is the case of *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), which has many parallels to the instant lawsuit. In *Mackay*, the "Uinta Development Company sued Mackay for damages for trespass by trailing his sheep across and depasturing its lands in Wyoming." *Id.* at 117. Mackay was moving his sheep south across the Wyoming checkerboard to graze on federal lands for the winter. *Id.* at 117-18. Uinta Development Company warned Mackay not to cross its privately-owned lands on the

way. *Id.* at 118. Mackay nevertheless started his sheep south, crossing portions of the company's private land as well as parcels of public land as he went, while his sheep grazed upon the land the entire way. *Id.* Mackay "drove his sheep, over the protest and prohibition of the [company], upon and along a strip of land three-fourths of a mile wide upon and across the entire length or width of some of the [company's] sections of land, and caused his sheep to consume nine-tenths of the grass thereon." *Id.* at 120-21 (Sanborn, J., dissenting). At the company's insistence, Mackay was arrested along the way, and the company also sued him for civil trespass. *Id.* After a bench trial, the district court rendered judgment for the company, holding Mackay liable for civil trespass damages. *Id.* at 117.

On appeal, the Eighth Circuit reversed the District of Wyoming's decision. *Id.* at 120. The Eighth Circuit held: "The question here, which we think should be answered in the affirmative, is whether Mackay was entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass." *Id.* at 120. In determining that Mackay should have a reasonable way of passage over the company's private lands to access the public lands, the appellate court said:

> The company admitted [Mackay's] right as to the public domain, but warned him not to go over any of its lands on penalty of prosecution for trespass.... If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government [concerning public lands] continues, all persons as its licensees have an equal right of use to the public domain, which cannot be denied by interlocking lands held in private ownership.
>
> ...

> This case illustrates the conflict between the rights of private property and the public welfare under exceptional conditions.... This large body of land, with the odd-numbered sections of the company and the even-numbered sections of the public domain located alternately like the squares of a checker-board, remains open as nature left it. Its appearance is that of a common, and the company is so using the contained public portions. In such use it makes no distinction between them and its own holdings. It has not attempted physically to separate the latter for exclusive private use. It admits that Mackay had the right in common with the public to pass over the public lands. But the right admitted is a theoretical one, without utility, because practically it is denied except on terms it prescribes. Contrary to the prevailing rule of construction, it seeks to cast upon the government and its licensees all the disadvantages of the interlocking arrangement of the odd and even numbered sections because the grant in aid of the railroad took that peculiar form. It could have lawfully fenced its own without obstructing access to the public lands. That would have lessened the value of the entire tract as a great grazing pasture, but it cannot secure for itself that value, which includes as an element the exclusive use of the public lands, by warnings and actions in trespass.

Id. at 118-20.[2]

The many parallels between the circumstances in *Mackay* and those here are obvious. And significant to *Mackay's* decision that a member of the public was "entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass" were the "exceptional conditions" created by the unique checkerboard of land ownership that is at the center of this controversy. However, questions remain concerning whether *Mackay* is still valid law all these years later, and the Court turns to those questions now.

Mackay has never been expressly overruled, but whether it is binding on this Court appears unsettled. *Mackay* was decided by the Eighth Circuit Court of Appeals. In 1929, Congress divided the Eighth Circuit into two circuits. The Eighth Circuit retained Minnesota,

[2] Judge Sanborn dissented in *Mackay*, but not concerning whether Mackay had the right to cross the company's private land to gain access to the public lands. Instead, Judge Sanborn opined, "The owner of land is not deprived of his right to recover the damages he sustains by the taking by another of his grass, growing grain, or timber from his land, or the mineral out of it, even if the taker has the right to cross his land[.]" *Mackay*, 219 F. at 121.

Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas. The new Tenth Circuit took Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma. Thus, at the time of *Mackay*, Wyoming was part of the Eighth Circuit. In the years since its formation, the Tenth Circuit has issued conflicting guidance on the binding nature of prior Eighth Circuit decisions. *Compare Boynton v. Moffat Tunnel Improvement Dist.*, 57 F.2d 772, 781 (10th Cir. 1932) ("decisions 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 Estate of McMorris v. Comm'r*, 243 F.3d 1254, 1258 (10th Cir. 2001) ("we have never held that the decisions of our predecessor circuit are controlling in this court").

Because *Mackay* originated from the District of Wyoming and was decided by the appellate court then sitting over this Court, this Court can find no reasonable basis to believe it is not bound by *Mackay's* decision. Nonetheless, even if *Mackay* is somehow only persuasive authority, the Court finds it particularly persuasive due to the many factual parallels between *Mackay* and the instant case.

Additionally, Plaintiff in this case has argued *Mackay* was implicitly overruled by *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). The material differences between *Leo Sheep* and *Mackay* suggest such a claim to be exaggerated. In *Leo Sheep*, two companies (Leo Sheep Co. and Palm Livestock Co.) owned the odd-numbered sections in an area of the checkerboard lands in Wyoming that sat east and south of the Seminoe Reservoir. *Id.* at 677-78. "Because of the checkerboard configuration, it is physically impossible to enter the Seminoe Reservoir sector from this direction without some minimum physical intrusion upon private land." *Id.* at 678. The federal government intervened after receiving several complaints that the private

landowners were denying the public access to the reservoir over the private lands or were demanding access fees. *Id.* Upon the theory that Congress reserved to the federal government an implied easement over the privately-owned checkerboard lands when they were originally conveyed, the federal government built a dirt road extending from a local county road to the reservoir that crossed both public and private lands and invited the public to access the reservoir using the new road. *Id.* The companies moved to quiet title in the private lands against the federal government. *Id.* The District of Wyoming granted the petition and quieted title in the companies, but the Tenth Circuit reversed on direct appeal, concluding Congress implicitly reserved an easement to pass over the private odd-numbered sections of the checkerboard in order to reach the even-numbered public sections. *Id.* On permissive review, the U.S. Supreme Court reversed the Tenth Circuit. *Id.* at 688. The Supreme Court found insufficient evidence existed to suggest Congress impliedly reserved an easement by necessity in favor of the government across the private lands. *Id.* at 681-82.

The Court does not agree that *Leo Sheep* implicitly overruled *Mackay* for two reasons. First, several years after *Leo Sheep* was decided, the Tenth Circuit relied on *Mackay* in part in *U.S. ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1509 (10th Cir. 1988), and never noted or suggested *Mackay* was overruled or invalid in any manner.

Second, and more significantly, *Leo Sheep* and *Mackay* are too factually and legally different for the Court to conclude *Mackay* cannot coexist in a world with *Leo Sheep*. The primary intruder in *Leo Sheep* was the federal government, whereas in *Mackay* (as in the instant case) it was a private individual. This is a fundamental difference because the federal government holds the power of eminent domain (condemnation), but private individuals do

not. Then Justice Rehnquist noted in *Leo Sheep*, "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power **to construct public thoroughfares without compensation.**" *Id.* at 687-88 (emphasis added). As this quote demonstrates, significant to the Supreme Court's consideration of the matter in *Leo Sheep* was the federal government's power of eminent domain (condemnation) under the Fifth Amendment, which allows the government to take private property without the owner's consent and convert it to public use (such as a public thoroughfare) in exchange for just and fair compensation.[3] The *Leo Sheep* opinion added: "Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption **those rights had to be purchased.**" *Id.* at 687 (emphasis added). Essentially, the Supreme Court determined the federal government's argument for an implied easement was an attempt to condemn a portion of private property to build a public thoroughfare without having to pay for it. That simply isn't the case or the issue in *Mackay* (or in the instant case).

The eminent domain distinction is substantial because *Leo Sheep* distinguished itself from a prior case that did not involve the federal government based in part on the availability of eminent domain. In *Buford v. Houtz*, 133 U.S. 320 (1890), a group of cattle ranchers owned some odd-numbered lots in the checkerboard pattern within the then-territory of Utah. *Id.* at

[3] *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2251-52, 2254-57 (2021), for a recent discussion of eminent domain.

321-22. They sought an injunction against a group of sheep ranchers to prevent the sheep ranchers from moving their sheep across the odd-numbered parcels to reach even-numbered public lands for grazing. *Id.* at 322-24. The trial court dismissed the case, determining the cattle ranchers had failed to state a viable claim for equity to support its injunction request, and the supreme court of Utah affirmed the dismissal. *Id.* at 321. The U.S. Supreme Court agreed and also affirmed the dismissal, stating:

> The appellants [cattle ranchers] being stock-raisers, like the defendants [sheep ranchers], whose stock are raised and fattened on the unoccupied lands of the United States mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use.... If we look at the condition of the ownership of these lands on which the plaintiffs rely for relief, we are still more impressed with the injustice of this attempt.... Of this 921,000 acres of land, the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one-third of this entire body of land, which ownership attaches to different sections and quarter sections scattered through the whole body of it, they propose by excluding the defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes, if any such right exists, is equal. The equity of this proceeding is something which we are not able to perceive.

Id. at 325-26. The Supreme Court distinguished the *Leo Sheep* decision from *Buford* by stating, "The Court [in *Buford*] also was influenced by the sheep ranchers' lack of any alternative." *Leo Sheep*, 440 U.S. at 687 n.24. The federal government's power of condemnation, to take private land for public use in exchange for fair payment, is the important alternative that was available in *Leo Sheep* but not available in *Buford* or in *Mackay* (or in this case). In sum, the Court does not find *Leo Sheep* implicitly overruled *Mackay*.

The Court further finds *Leo Sheep* of limited applicability when examining the instant case. First, as already noted, *Leo Sheep* concerned the construction of a public thoroughfare (a

dirt road) across portions of private property, whereas the undisputed evidence in this case shows no damage or alteration to Plaintiff's private property. In this case, the primary intrusion of Plaintiff's property takes the form of an incursion into a small portion of the airspace above the land that lasted a matter of seconds, not a permanent construction that altered Plaintiff's land. Second, like in *Mackay*, the power of eminent domain (condemnation) is not an alternative available to Defendants in this case. Thus, *Leo Sheep* is so materially different from the case at bar as to offer practically no persuasive value on the matter. The Court concludes *Mackay* remains valid and finds it is the authority most directly on point to the questions in this case.

In sum, *Mackay* is still valid authority that is at least very persuasive, if not outright binding, on the instant matter. The many similarities cause the Court to conclude the core principle of *Mackay*, that private individuals possess "a reasonable way of passage over the unenclosed tract of land without being guilty of trespass" within the checkerboard applies to the circumstances of this lawsuit. Admittedly, though, the "way of passage" taken in *Mackay* was significantly more intrusive than the "way of passage" taken in this case, and the scope of the path taken in *Mackay* is not at issue in this case. Instead, the scope of the path taken by Defendants in 2020 and 2021 is at issue in this case, which is where the Court now turns.

3. Determining the Scope of the Relevant Restriction on the Ownership of Airspace and Right to Exclude Within the Checkerboard Pattern of Land Ownership

The Court's conclusion that the main principle of *Mackay* applies here to give Defendants "a reasonable way of passage over the unenclosed tract of land without being guilty of trespass" is both buttressed and limited in scope by two additional considerations.

First, the Court finds the Tenth Circuit case of *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043 (10th Cir. 1974), offers persuasive guidance on the matter. That case concerned aircraft travel rather than pedestrian travel, but the discussion there runs parallel to the issues concerning Defendants' corner crossings in this case. Specifically, the Tenth Circuit there stated an incursion into only airspace requires some accompanying damage to or interference with the actual use of the landowner's property to constitute an actionable trespass. *Id.* at 1045.

> Appellant contends the allegation and proof of actual damages is unnecessary because violation of a landowner's possessory right constitutes a trespass for which at least nominal damages are presumed. This is ordinarily true when trespass to realty is concerned. But traversing the airspace above a plaintiff's land is not, of itself, a trespass. It is lawful unless done under circumstances which cause injury.

Id. Applying a similar principle to the present case, Defendants' temporary incursions into the airspace at the corners of Plaintiff's land does not constitute trespassing unless actual damages result therefrom, and there is no evidence that Defendants' airspace intrusions caused actual damage to or interfered with Plaintiff's use of its property. Neither does this Court believe Plaintiff can premise damages upon the loss of the right to exclude individuals from public lands, absent the use of an aircraft or human cannon shot, which Plaintiff never held.

Second, recalling that the scope of property rights is largely defined by state law, the Court considers the recently amended version of Wyoming Statute § 23-3-305(b), Senate File No. SF0056, which was passed overwhelmingly by the Wyoming Legislature earlier this year, signed into law by the Governor, and set to take effect July 1, 2023. The new version of that statute, with the recent amendments in bold, provides:

> (b) No person shall enter upon, **travel through or return across** the private

> property of any person to **take wildlife,** hunt, fish, collect antlers or horns, or trap without the permission of the owner or person in charge of the property. Violation of this subsection constitutes a low misdemeanor punishable as provided in W.S. 23-6-202(a)(v) [up to $1,000 fine and six months of imprisonment]. **For purposes of this subsection "travel through or return across" requires physically touching or driving on the surface of the private property.**

Wyo. Stat. § 23-3-305(b) (bold added) (to become effective July 1, 2023). The plain language of the recent amendments to this statute applies to corner crossings as they occurred in this case, where Defendants did not touch the surface of Plaintiff's land. Moreover, the statutory changes plainly demonstrate the Wyoming Legislature's intent to ensure such corner crossing does not constitute a criminal act.

4. <u>Corner Crossing on Foot in the Checkerboard Pattern of Land Ownership Without Physically Contacting Private Land and Without Causing Damage to Private Property Does Not Constitute an Unlawful Trespass</u>

In sum, Plaintiff indeed possesses a property interest in the airspace above its land (up to a certain height that is not at issue in this case) and generally holds the right to exclude others from its property, but that right is not boundless. Defendants

> in common with other persons [have] the right to the benefit of the public domain, and the courts will not enforce any rule of property in the [Plaintiff] that will deny to the [Defendants] and those similarly situated a reasonable way of passage over the uninclosed tracts of land of the [Plaintiff].

Mumford, 261 F. at 849; *see Mackay*, 219 F. at 118 ("As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership."). Plaintiff asserts, "Federal courts have recognized that Congress purposely created the checkerboard, and [Plaintiff] is not to blame for the problems arising from the pattern." (ECF 67 p. 25.) Plaintiff is correct that it is not to blame for the problems caused by the checkerboard pattern

of land ownership, but "[i]n such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party." *Mackay*, 219 F. at 118. Plaintiff may not "cast upon the government and its licensees all the disadvantages of the interlocking arrangement of the odd and even numbered sections because the grant in aid of the railroad took that peculiar form." *Id.* at 119-20.

It is only reasonable for the owner of the private sections and the public, as the owner of the alternating sections, to share in the solution. Synthesizing the law surveyed above, the Court finds that where a person corner crosses on foot within the checkerboard from public land to public land without touching the surface of private land and without damaging private property, there is no liability for trespass. In this way, the private landowner is entitled to protect privately-owned land from intrusion to the surface and privately-owned property from damage while the public is entitled its reasonable way of passage to access public land. The private landowner must suffer the temporary incursion into a minimal portion of its airspace while the corner crosser must take pains to avoid touching private land or otherwise disturbing private property. Similar restrictions imposed upon a landowner within the "exceptional conditions" created by the checkerboard, *Mackay*, 219 F. at 120, date back well over a century and are some of those "background principles of nuisance and property law [that] independently restrict the owner's intended use of the property," *Lingle*, 544 U.S. at 538 (internal quotations omitted).

5. <u>Defendants' Corner Crossings in this Case are Not Unlawful Trespasses</u>

In applying this principle to the undisputed facts of this case, the Court considers first the corner crossings where Defendants did not make physical contact with Plaintiff's land or

private property, including those where Defendants needed to only step over a survey marker/brass cap and where they used the A-frame ladder in 2021 to climb over Plaintiff's signs, lock, and chain without touching them. This covers every corner crossing in 2021 as well as all 2020 corner crossings except for the crossings between Section 14 and Section 24. The undisputed evidence here is that Defendants performed these corner crossings without physically touching Plaintiff's private land and without otherwise damaging Plaintiff's private property. (Grende Depo. 11:14-12:12, 16:16-17:11, 21:2-22:11.) Consequently, a cause of action for civil trespass does not lie against Defendants as it concerns these corner crossings, and they are entitled to summary judgment in their favor as to these corner crossings.

The Court now considers the 2020 corner crossings between Sections 14 and 24, where Defendants Cape, Smith, and Yeomans admitted to holding onto Plaintiff's steel post to swing around the locked chain that connected the two steel posts. The Court again finds guidance in *Mackay*. The Unlawful Inclosures Act of 1885 (UIA), 43 U.S.C. §§ 1061-1066, was a consideration in *Mackay* but was not singularly controlling. *See Mackay*, 219 F. at 120. The Court similarly finds the UIA applicable but not singularly controlling regarding Defendants' 2020 corner crossings between Sections 14 and 24. The UIA states in relevant part:

> 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[.]

43 U.S.C. § 1063.

It is undisputed that the locked chain that was installed between the steel posts by Plaintiff hung through the airspace over the adjoining public land of Sections 14 and 24.

(Grende Depo. 39:5-14.) And the locked chain further presented a physical obstacle and obstruction to anyone attempting to step across the corner from Section 14 to Section 24. (Grende Depo. 42:19-23.) Thus, Plaintiff's lock and chain constituted an improper attempt to "prevent or obstruct … any person from peaceably entering upon … any tract of public land" in violation of the UIA.[4] The Eighth Circuit in *Mackay* said about the UIA, "We think, however, that a private litigant cannot recover from another for an invasion of an alleged right founded upon his own violation of the statute." *Mackay*, 219 F. at 120. Plaintiff's violation of the UIA forced Defendants to grab the steel posts, which were anchored on private property, to maneuver around the physical obstacle. Consistent with *Mackay*, Plaintiff may not recover for a trespass, if any, occurring due to Plaintiff's violation of the UIA.

Moreover, and apart from the UIA, the undisputed evidence again shows Defendants did not touch the surface of Plaintiff's land or damage its private property in connection with these corner crossings. (Grende Depo. 22:12-24:20, 27:3-28:13) Consequently, a cause of action for civil trespass does not lie against Defendants as it concerns these 2020 corner crossings, and they are entitled to summary judgment in their favor as to these 2020 corner crossings.

As it relates to the various corner crossings performed by Defendants in moving from public land to public land by foot in 2020 and 2021 within the checkerboard pattern of land ownership, they cannot be subject to liability for civil trespass. Defendants are therefore entitled to summary judgment in their favor concerning Plaintiff's cause of action for civil

[4] In addition to precluding the use of physical barriers, § 1063 of the UIA also makes it unlawful to threaten or intimidate any person from peaceably entering upon any tract of land subject to entry under the public land laws of the United States, or preventing or obstructing free passage or transit over or through the public lands.

trespass related to all of Defendants' corner crossings.

6. A Genuine Dispute of Material Fact Exists Concerning Whether "Waypoint 6" Constitutes Unlawful Trespassing

Recall that Waypoint 6 does not appear to involve an act of corner crossing but rather an alleged trespass upon the surface of Plaintiff's private land, Section 19, in an area away from a corner. (*See* ECF 67-4.) Waypoint 6 was created on September 30, 2020, on the onX Hunt application being used by Defendant Smith, and it was deleted (from the app but not from onX Hunt's metadata) about three weeks later. (*See* ECF 67-3 p. 2.) And a waypoint can be created without the user ever being at the designated location.

Many or most of the waypoints created by Defendant Smith indicated his current location or an area where he had been or intended to go. (*See* ECF 67-5.) On the other hand, all Defendants were adamant in their depositions that they never stepped foot on Plaintiff's private land. Defendant Smith also expressly asserted under penalty of perjury that his onX Hunt metadata is accurate, that he must have created Waypoint 6 without realizing it, but he never made physical contact with or traveled to Waypoint 6. (ECF 72-1.) Thus, evidence exists to support Plaintiff's claim of trespass as to Waypoint 6, specifically the conceded accuracy of the onX Hunt data and the other waypoints that depicted many of Defendants Smith, Cape, and Yeomans physical locations. Contrary evidence in the form of Defendants' depositions and declarations exists to counter Plaintiff's claim as to Waypoint 6. Therefore, the Court finds a genuine dispute of material fact exists regarding whether a Defendant trespassed upon Plaintiff's Section 19 in connection with Waypoint 6, and the question should be submitted to a jury for determination. Summary judgment is not appropriate on this issue.

On this claim, though, the undisputed evidence is that Plaintiff does not know of any

damage and has not repaired any damage caused by Defendants to its property in 2020. (Grende Depo. 24:11-20, 27:8-12.) Accordingly, only nominal damages in the maximum amount of $100.00 are at issue for Defendants' alleged trespass in 2020 concerning Waypoint 6.[5] *See Goforth v. Fifield*, 352 P.3d 242, 250 (Wyo. 2015) (noting that when no actual damages are shown, Wyoming allows the recovery of nominal damages for an actionable trespass, and the Wyoming Supreme Court interprets nominal damages to max out at $100.00 based on Wyo. Stat. § 1-14-125).

CONCLUSION

The conflict inherent in the checkerboard pattern of landownership, which pits a landowner's right to exclude others from private property against the public's right to access public lands, has been around for well over a century and has visited this Court multiple times over the years. In determining the present lawsuit, the Court primarily relies on the opinion from *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), which originated in this Court and was issued by the appellate court for this Court. *Mackay* explained that for "exceptional conditions," including the conflict borne of the checkerboard, "the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party." *Id.* at 118. And the Court's survey of the law revealed that where a person corner crosses on foot in the checkerboard from public land to public land without touching the surface of private land and without otherwise damaging private property, there is no liability for trespass. *See id.* at 120 ("The question here, which we think should be answered in the affirmative, is

[5] Defendant Slowensky was not present for the 2020 hunting trip and therefore cannot be liable for any such trespass.

whether Mackay was entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass."). This determination, though, is necessarily unique to and limited in application to the "peculiar" "interlocking arrangement of odd and even numbered sections," *id.* at 119-20, making up the checkerboard pattern of land ownership created by Congress in the mid-1800s.

When this law is applied to the undisputed evidence in this case, no reasonable jury could find Defendants liable for civil trespass for their corner crossing activities. However, the facts and circumstances surrounding Waypoint 6 are in genuine dispute, and this claim of trespass must be submitted to a jury for a decision, albeit limited to nominal damages.

The Court addresses one final matter. While this lawsuit has been pending, and with greater frequency in recent weeks, the Court has received various attempts, whether by email or phone call, from members of the public to offer their opinions as to how this Court should resolve this controversy. These submissions have come from people who are not parties to this case and who, unlike the amici parties, have not been given permission by the Court to tender a submission that can be viewed and responded to by all parties. The Court's staff has screened these improper submissions, and the Court has not reviewed or considered these submissions as part of examining the issues in this case, nor will the Court review or consider them or any other improper ex parte submissions in the future. Attempts by a person or entity not a party to a lawsuit to influence or persuade a court of law's decision are improper. "Whereas the fundamental function of a legislature in a democratic society assumes accessibility to [public] opinion, the judiciary does not decide cases by reference to popular opinion." *Hodge v. Talkin*, 799 F.3d 1145, 1159 (D.C. Cir. 2015) (quotations omitted)

(alteration in original). The founders of the United States sought to insulate the Judicial branch of government from public opinion so judges could apply and be influenced only by the law, not by popular opinion or public polling. This Court's sworn obligation is to uphold and apply the law. The Court has done its utmost to decipher the applicable law and apply it to the facts of this and every case. To the extent this Court's determination of the law is believed to be erroneous, the remedy is for a party to take an appeal.

ORDER

In conformity with the findings of fact and conclusions of law determined herein,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF 65) is **GRANTED IN PART AND DENIED IN PART**. Defendants are entitled to judgment as a matter of law as to all claims of trespassing involving Defendants' corner crossings in 2020 and 2021. Defendants' request for summary judgment is denied as to the claim of trespassing involving Waypoint 6 (which does not involve corner crossing) due to the existence of a genuine dispute of material fact, but any recovery by Plaintiff on such claim shall be limited to nominal damages.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment (ECF 63) is **DENIED**. Plaintiff is not entitled to judgment as a matter of law concerning Defendants' corner crossings in 2020 and 2021, and a genuine dispute of material fact exists to preclude summary judgment concerning the alleged Waypoint 6 trespassing (which does not involve corner crossing).

ORDERED: May 26th, 2023.

Scott W. Skavdahl
United States District Judge

APPENDIX # 2

APPENDIX # 2

UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

IRON BAR HOLDINGS, LLC, a North Carolina limited liability company registered to do business in Wyoming, Plaintiff, vs. BRADLY H. CAPE, an individual, ZACHARY M. SMITH, an individual, PHILLIP G. YEOMANS, an individual, and JOHN W. SLOWENSKY, an individual, Defendants.	)	Case No. 22-CV-00067-SWS

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT & CIVIL TRESPASS

COMES NOW Plaintiff, Iron Bar Holdings, LLC, by and through its undersigned attorneys, Pence and MacMillan LLC, and for its complaint against Defendants Bradly H. Cape, Zachary M. Smith, Phillip G. Yeomans, and John W. Slowensky hereby states and alleges as follows:

INTRODUCTORY STATEMENT

This case is a declaratory judgment and civil trespass action in which Plaintiff seeks a declaration from the Court that Defendants committed a civil trespass on real property owned by Plaintiff. Defendants carried out a so-called "corner crossing" by which they intentionally and

knowingly traveled from real property managed by the United States Department of Interior Bureau of Land Management ("BLM"), across Plaintiff's real property and then onto BLM-managed land in an area of Carbon County, Wyoming commonly known as the "checkerboard." In the checkerboard area, two sections of privately-owned real property lie diagonally adjacent to two sections of federal public land managed by the BLM. Defendants used a custom-built device to cross from one section of BLM-managed land, across Plaintiff's two sections of private land, and then onto an adjacent BLM-managed section of land. Upon information and belief, Defendants contend that they have a right to carry out the "corner crossing," which Plaintiff denies.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Iron Bar Holdings, LLC, is a North Carolina limited liability company registered to do business in Wyoming. Said Plaintiff owns certain real property located in Carbon County, Wyoming. Plaintiff Iron Bar Holdings, LLC sometimes does business as Elk Mountain Ranch.

2. Upon information and belief, Defendant Bradly H. Cape, date of birth 1991, is of-age, is an individual natural person, and is a resident of the state of Missouri.

3. Upon information and belief, Defendant Zachary M. Smith, date of birth 1998, is of-age, is an individual natural person, and is a resident of the state of Missouri.

4. Upon information and belief, Defendant Phillip G. Yeomans, date of birth 1971, is of-age, is an individual natural person and is a resident of the state of Missouri.

5. Upon information and belief, Defendant John W. Slowensky, date of birth 1974, is of-age, is an individual natural person, and is a resident of the state of Missouri.

6. A dispute, case, and controversy exist between Plaintiff and Defendants.

7. This Court has jurisdiction over this action pursuant to Article 5, Section 10 of the Wyoming Constitution and Wyo. Stat. Ann. § 1–37–102.

8. The real property and property rights that are the subject of this action are located in Carbon County, Wyoming.

9. Venue is appropriate in Carbon County, Wyoming by virtue of Wyo. Stat. Ann. §§ 1-5-101, 1-5-104, and 1-5-107.

GENERAL ALLEGATIONS

10. Plaintiff restates each and every allegation contained in Paragraphs 1 through 9 above as if fully set forth herein.

11. Plaintiff owns certain real property located in Carbon County, Wyoming (hereinafter the "Property"), as set forth in Exhibit 1, attached hereto and incorporated herein by this reference.

12. At all times relevant hereto, Plaintiff owned, controlled, and possessed the Property where Defendants committed a criminal trespass and a civil trespass.

13. Plaintiff's Property in question is fenced and/or posted.

14. Several No Trespassing signs are located on Plaintiff's Property, clearly visible to others, to attempt to keep unauthorized persons from entering the Property.

15. Defendants have no right, title, or interest of any type or nature in Plaintiff's Property, whether as owners, equitable owners, easement owners, guests of the BLM, invitees of the BLM, tenants, users, corner-crossers, possessors, members of the public, or otherwise. Defendants have no right or privilege, whether express or implied, to use and/or access the BLM-managed lands by crossing Plaintiff's Property.

16. On or about September 26-30, 2021, Defendants entered upon and across Plaintiff's Property by way of a "corner crossing" in order to hunt big game animals. Upon information and belief, Defendants may have entered upon and across Plaintiff's Property on other dates, to be determined during the course of discovery in this matter. "Corner crossing" occurs when two pieces of public land diagonally share a corner with two pieces of private land, and a person crosses from one piece of public land, diagonally across the two parcels of private property, and onto an adjacent piece of public land. In order to carry out a "corner crossing," the person must physically travel across the privately-owned real property.

17. Specifically, Defendants built a ladder-like device and used said device to cross two sections of Plaintiff's Property in order to hunt on an adjacent BLM-managed section of real property.

18. Similar to the actions described in ¶ 16 above, upon information and belief Plaintiff alleges that one or more of the Defendants entered upon and across Plaintiff's Property in the fall 2020 big game hunting period in September and/or October in order to hunt big game animals.

19. Plaintiff has a right to exclusive control, use, and enjoyment of its Property, which includes the airspace at the corner, above the Property. For purposes of this Complaint and under controlling law, the Property includes the airspace above the surface of the land, the surface of the land, and the subsurface below.

20. Plaintiff owns and controls the airspace above its real property, and is entitled to exclude others from the use of that airspace by a "corner crossing."

21. Defendants knowingly, intentionally, and purposely interfered with Plaintiff's right to use, control, and enjoy its Property by "corner crossing" through the Property and trespassing across the Property, even if Defendants did not step onto the surface of the Property.

22. Defendants' intentional entry upon the Property was committed without Plaintiff's permission or acquiescence and was a trespass upon the Property.

23. As a result of Defendants' trespass upon Plaintiff's Property, Plaintiff has suffered damages in an amount to be proven at trial, in an amount exceeding the minimal jurisdictional limit of this Court, plus costs, expenses, and fees.

FIRST CLAIM FOR RELIEF--DECLARATORY JUDGMENT

24. Plaintiff restates each and every allegation contained in Paragraphs 1 through 23 above as if fully set forth herein.

25. This Court has jurisdiction over this action under the provisions of the Wyoming Uniform Declaratory Judgments Act, Wyo. Stat. Ann. § 1-37-101 et seq., in that Plaintiff is a person interested in determining its rights pertaining to real property upon which Defendants have trespassed, and desires to obtain a declaration of its rights with respect to Defendants' conduct at issue herein.

26. Plaintiff was and is, and at all times relevant to this Complaint, the owner of the real property described in Exhibit 1 hereto, including but not limited to the airspace above the surface of such real property.

27. A justiciable dispute, case, and controversy exists between Plaintiff and Defendants concerning the rights to and possession, use, and control of the Property, including the airspace. By Exhibit 1 hereto, Plaintiff has provided sufficient evidence of its ownership, control, and

possessory interest in the Property, and Defendants' actions in carrying out a "corner crossing" is a trespass upon the Property.

28. Entry of a declaratory judgment by this Court will serve to remove uncertainty and terminate the controversy between the parties, and will resolve those issues relevant to title, possession, and rights concerning the Property at issue.

29. Adjudication by the Court of the dispute, case, and controversy will resolve any legal questions as to the ownership, possession, and control of the airspace above Plaintiff's Property and will confirm that Defendants had no right to cross the Property and to carry out a "corner crossing."

30. The Court should enter a declaratory judgment as to the parties' respective rights and obligations in the subject matter of this litigation.

31 Defendants have no right to own, possess, control, use, interfere with, or cross (even temporarily) Plaintiff's Property. The Court should declare as such.

32. Defendants have no express or implied right of access or easement upon or across Plaintiff's Property to get to adjoining public lands. The United States Supreme Court rejected such an argument when made by the United States government, regarding lands in the checkerboard in Wyoming; if the United States has no such right, then certainly no private citizen has such a right.

33. Defendants have no right, title, or interest of any type of nature in the Property owned by Plaintiff, whether as owners, equitable owners, easement owners, guests of the BLM, invitees of the BLM, tenants, users, corner-crossers, possessors, members of the public, or otherwise. The Court should declare as such.

34. The Court should declare that none of the Defendants have a right or privilege to cross or otherwise demand entry upon or across Plaintiff's Property.

35. The Court should require Defendants to account for and describe in detail any act or omission that any one of them has taken at any time with respect to Plaintiff and/or its real property.

36. The Court should declare that any act or omission taken by any of the Defendants with respect to ownership, authority to enter, cross, use, and/or control of the Property was done without legal authority and was void *ab initio*.

37. The Court should declare that Defendants trespassed upon Plaintiff's Property and caused damage to Plaintiff thereby, both in 2020 and 2021.

38. The Court should enter an order requiring Defendants to pay damages to Plaintiff in an amount to be proven at trial, plus costs, expenses, and fees as may be allowed by law.

SECOND CLAIM FOR RELIEF--CIVIL TRESPASS, INJUNCTION

39. Plaintiff restates each and every allegation contained in Paragraphs 1 through 38 above as if fully set forth herein.

40. Plaintiff was and is, and at all times relevant to this Complaint, the owner of the Property described in Exhibit 1 hereto.

41. Plaintiff was and is, and at all times relevant to this Complaint, the exclusive owner, occupier, possessor, and controller of the Property, with a right to exclude others therefrom.

42. At all times relevant herein, Plaintiff was in lawful and exclusive possession and control of the Property.

43. At all times relevant hereto, none of the Defendants possessed any right, privilege, title, or interest of any type of nature in the Property owned by Plaintiff, whether as owners, easement owners, equitable owners, guests of the BLM, invitees of the BLM, tenants, possessors, users, corner-crossers, possessors, members of the public, or otherwise.

44. On or about September 26-30, 2021, and also in September – October 2020, while Plaintiff was in lawful possession, custody, and control of the Property, Defendants made an unauthorized, willful, and intentional entry upon the Property by way of a "corner crossing," knowing they were crossing Plaintiff's Property.

45. The ability of Defendants to be upon and use public lands does not carry or include any right or privilege whatsoever, whether express or implied, to cross private property to get to adjoining public lands.

46. Defendants' unauthorized entry upon and across the Property was made without Plaintiff's permission, consent, or acquiescence.

47. Defendants' unauthorized entry upon and across the Property was willful, purposeful, knowing, and intentionally done, as the Property was fenced or posted, and "No Trespassing" signs were posted in a plain and visible manner in the area in question.

48. In violating Plaintiff's property rights, Defendants acted maliciously and oppressively toward Plaintiff in that at all times prior to, during, and after Defendants committed such "corner crossing" trespass, the Defendants had knowledge of the location of the public and private property boundary lines.

49. Defendants' unauthorized entry and trespass clouds the title to Plaintiff's Property and Plaintiff has suffered damages for interference with the exclusive use, possession, and control of such Property, in an amount to be proven at trial.

50. As a direct and proximate result of Defendants' actions, Plaintiff suffered and will continue to suffer damage for the loss of the use, custody, possession, and control of the Property as long as Defendants continue or threaten to continue unauthorized entry and trespass upon and across Plaintiff's Property.

51. Unless Defendants are compelled to cease from trespassing on Plaintiff's Property and violating Plaintiff's property rights, Plaintiff will suffer irreparable injury.

52. The Defendants are actively carrying out a campaign to solicit funds to defend their improper and unlawful actions, and upon information and belief may intend to encourage other persons to carry out unlawful "corner crossings" upon Plaintiff's Property.

53. The Court should enter an order requiring Defendants to pay damages to Plaintiff in an amount to be proven at trial.

54. The Court should enter an order restraining Defendants from carrying out any "corner crossings" across Plaintiff's Property.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor as follows:

A. The Court should declare that Defendants have no ownership interest, privilege, or right to control, use, possess, or cross the real property owned by Plaintiff.

B. The Court should enter a declaratory judgment as described in the First Claim for Relief set forth above, in favor of Plaintiff.

C. The Court should enter an order requiring Defendants to account for any act or omission taken with respect to the Property.

D. The Court should enter an order requiring Defendants to pay damages to Plaintiff, in an amount to be proven at trial, for trespassing upon and interfering with Plaintiff's use, control, possession, and enjoyment of the Property.

E. To the fullest extent, the Court should require Defendants to pay the attorneys' fees, costs, and expenses incurred by Plaintiff in this litigation, as may be allowed by law.

F. The Court should provide other just and appropriate relief to Plaintiff, the premises considered.

DATED this 1st day of November, 2022.

/s M. Gregory Weisz
M. Gregory Weisz, Wyo. Bar No. 6-2934
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Plaintiff's Attorneys

APPENDIX # 3

APPENDIX # 3

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

IRON BAR HOLDINGS, LLC, a North Carolina limited liability company registered to do business in Wyoming,

Plaintiff,

v.

BRADLEY H. CAPE, ZACHARY M. SMITH, PHILLIP G. YEOMANS, and JOHN W. SLOWENSKY,

Defendants.

Case No. 22-CV-67-SWS

FINAL JUDGMENT

This matter comes before the Court on its Order on Cross Motions for Summary Judgment (ECF 83), which is fully incorporated herein by this reference, and Plaintiff's Withdrawal of Remaining Claim (ECF 86), which withdrew Plaintiff's claim of physical surface trespass. Together, these documents dispose of all causes of action.

FINAL JUDGMENT is hereby entered in favor of Defendants and against Plaintiff on all claims of airspace trespass and declaratory judgment. Plaintiff's claim of physical surface trespass is voluntarily withdrawn. Neither party is entitled to an award of attorney fees in this action, and any award of costs will be governed by Fed. R. Civ. P. 54(d)(1) and Local Civil Rule 54.2.

DATED: ~~May~~ June 1st, 2023.

F.R.C.P. 58(b)(2) approval as to form:

Scott. W. Skavdahl
United States District Judge

Entered: Margaret Botkins
Clerk of Court

By: Kim Blonigen
Kim Blonigen
Deputy Clerk of Court