

Corning Crossings and Montana's Trespass Laws

Presented by
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MONTANA ENVIRONMENTAL QUALITY COUNCIL

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Checkerboard lands

Land ownership in Montana and other western states often resembles a checkerboard or patchwork quilt, where private and public lands border each other.

Federal public lands are managed by various agencies, including the Bureau of Land Management (DOI), U.S. Forest Service (USDA), and U.S. Fish & Wildlife Service (DOI).

The Montana Board of Land Commissioners manages, on behalf of school beneficiaries, over 5,000,000 acres of state trust lands.

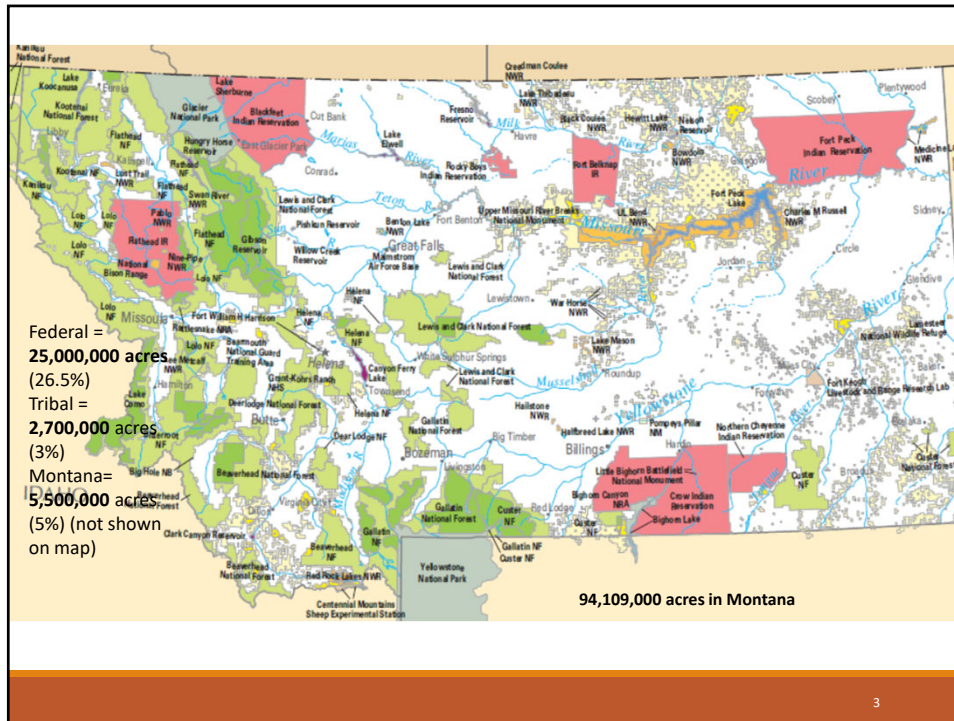
- State trust land public access map:

<https://experience.arcgis.com/experience/7b4a375a144542ed9f0cd4b4f6f4cf2b>



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Landlocked public lands

8.3 MILLION ACRES...

72% LOCKED IN CHECKERBOARD PATTERN

70% BUREAU OF LAND MANAGEMENT

26% STATE LANDS

4% OTHER FEDERAL LANDS

49% ARE ONLY 1 CORNER AWAY FROM AN ACCESS POINT

According to Onx, there are 8.3 million acres of state and federal landlocked public lands across the West.

- 1.52 million landlocked acres in Montana (approx. 5% of 30.5 million acres of federal and state lands in Montana)
- Of those 1.52 million acres, approximately **871,000 acres are corner locked** (less than 3% of federal and state lands in Montana).

Source: The Corner-Locked Report, onX (March 2025)
<https://www.onxmaps.com/onx-access-initiatives/corner-crossing-report>

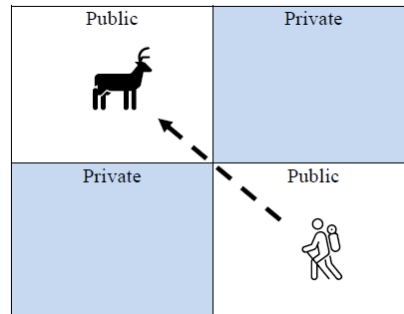
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Corner crossing

Corner-crossing: moving from one parcel of public land to another at the point where the two parcels meet at the corner.

Is corner crossing:

- a **trespass** against the private owner or
- a lawful way to **access public land**?



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State Law vs. Federal Law

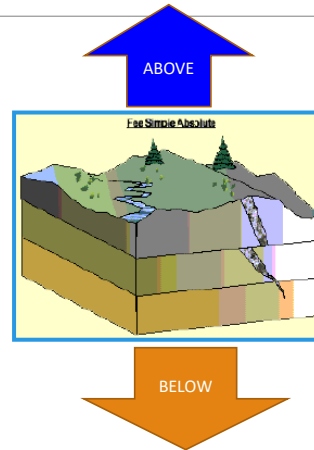
- As a general principle, **property law is a matter of state law**. *United States v. Rodgers*, 461 U.S. 677 (1983).
 - Although many aspects of property laws are consistent between states, there are also many differences.
- The federal government has the **power to regulate federal lands**.
 - U. S. Constitution Art. IV, § 3: The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States[.]
- Issue: Does federal law or state law govern when corner-crossing on federal land bordered by private land?

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Ownership of real property extends above and below the surface

- From ancient Roman law: **“To whomsoever the soil belongs, he owns also the sky and to the depths.”**
- Mont. Code Ann. 70-16-101: The owner of land in fee **has the right to the surface** and to everything permanently situated **beneath or above it**.
- Known as the “heaven to hell” doctrine.



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Limitations on a landowner's air space rights

With the development of airplanes, the courts **have modified the “heaven to hell” doctrine** to limit the amount of airspace subject to private ownership.

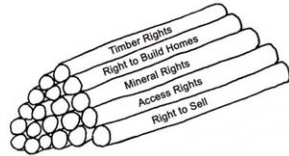
Landowners own that portion of the air above their property:

- which is **actually being used** or can **potentially be used** for purposes such as trees, buildings, or other improvements,
- plus a **buffer zone** that prohibits intrusions that would impair the owner's full enjoyment of the property.

In 2025, the Montana Legislature enacted MCA § 45-6-210, making it a **criminal trespass** to fly an unmanned aerial vehicle **200 feet or lower** over private property without the landowner's consent.

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“Bundle of Sticks”



In the United States, the courts define (and protect) “property” as a series of rights, often referred to as a “bundle of sticks.” These rights include:

- Right to **possess** the property.
- Right to **use** the property as the owner desires.
- Right to **exclude** others from the property.
- Right to **sell** or transfer the property.

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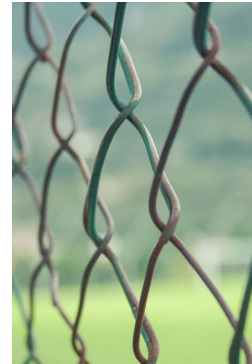
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Right to Exclude

The **right to exclude** others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

The law of **trespass** protects the landowner’s right to exclude others.

- “[H]owever minimal the economic cost it entails,” the right to exclude others from entering and using [private] property has been repeatedly called “**the most fundamental of all property interests.**” *Kafka v. Montana Dept. of Fish, Wildlife & Parks*, 2008 MT 460, ¶71



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Types of Trespass

Civil trespass: (various statutes and common law) enforced by property owner through a civil action

Criminal trespass (45-6-203, MCA): enforced by state through a criminal action

Criminal trespass by unmanned aerial vehicle (45-6-210): enforced by state through a criminal action

Hunting without landowner permission (87-6-415): enforced by state through a criminal action



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Elements of civil trespass

Davis v. Westphal,
2017 MT 276, ¶16

Civil trespass requires proof that:

- a person intentionally entered or remained (or caused a third party or thing to enter or remain)
- upon the property of another
- without permission or legal right
- regardless of the trespasser's knowledge, lack of knowledge, or good faith mistake as to actual property ownership or the trespasser's right to be there.

It does not matter whether:

- the unauthorized entrance is momentary or lengthy;
- the landowner suffers any damages to her property;
- the person entering didn't realize he was on someone else's property; or
- the intrusion was reasonable.

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Trespass?

Frank, while hunting, walks onto property that he believes is national forest land, but in fact it belongs to a private individual.

Mary, believing she's building a fence on her property, in fact builds it one foot onto her neighbor's property.

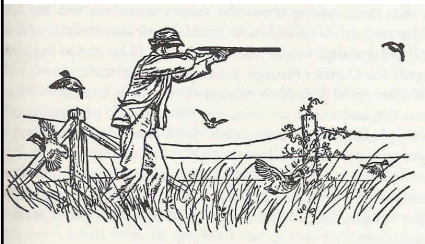
Mark hits a golf ball onto his neighbor's property, breaking a window.

Jane flies a drone 20 feet over her neighbor's backyard.

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Herrin v. Sutherland 74 Mont. 587 (1925)



Did the hunter trespass when **he fired a shot** over the landowner's property?

- Yes; the landowner successfully brought a civil trespass action.

"Land ... in its legal signification *has an indefinite extent, upwards as well as downwards*; whoever owns the land possesses all the space upwards to an indefinite extent; such is the maxim of the law." 74 Mont. at 596.

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Criminal Trespass: MCA 45-6-203

A person commits the offense of criminal trespass to property if the person **enters or remains unlawfully** in or upon:

- an occupied structure; or
- the premises of another.

Penalty:

- fine not to exceed \$500 or
- 6 months prison
- or both.
- If the person is hunting, fishing, trapping, or collecting or attempting to collect antlers, antler sheds, or animal horn while trespassing, the trespasser's hunting, fishing, or trapping licenses **may be revoked** up to 24 months.

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Definition of
“enter or
remain
unlawfully”

MCA 45-6-201

A person enters or remains unlawfully when the person is not licensed, invited, or otherwise privileged to do so.

“Privileged to do so” exists if:

- explicit permission of the landowner (which may be revoked at any time)
- or by the failure of the landowner to post notice denying entry onto private land.
- Notice is posted by signage or fluorescent orange paint – see details at 45-6-201, MCA

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Hunting without Permission: 87-6-415, MCA

“A person **may not hunt or attempt to hunt** furbearers, game animals, migratory game birds, nongame wildlife, predatory animals, upland game birds, or wolves on private property **without first obtaining permission** of the landowner, the lessee, or their agents.”

- There is **no requirement** to post notice under 87-6-415!

Hunting starts when you leave your vehicle with the intent to hunt until you come back. *State v. Cherry*, 2020 MT 25, ¶ 13.

First offense: fined not less than \$135 or more than \$500.

Second or subsequent offense within 5 years: fined not less than \$500 or more than \$1,000, and forfeits any hunting, fishing, or trapping license for not less than 12 months or more than 3 years.

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Unmanned Aerial Vehicle Trespass: 45-6-210

“[A] person commits the offense of criminal trespass by unmanned aerial vehicle if the person knowingly causes an unmanned aerial vehicle to fly **200 feet or lower** over the property or residence of another person without the authorization of the property owner or resident.”

- \$500 fine

Exceptions:

- Government operations, including firefighting, law enforcement, and emergency response;
- peace officer search warrants, accident investigations (MCA 46-5-109);
- use within the boundaries of an easement by the easement holder;
- Inspection by utilities of property or equipment;
- FAA licensed drone operations.

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Iron Bar Holdings, LLC v. Cape, 131 F.4th 1153

Iron Bar owned private land adjacent to BLM land in a checkerboard pattern.

To prevent corner-crossing, Iron Bar erected signposts over the corner marker at various section corners where its land adjoined public land.

- There were no other posts or fencing near these corners.

While hunting in Wyoming in 2020, hunters from Missouri grabbed a steel post and swung around it, planting their feet only on the public land, but passing through the airspace above Iron Bar's property.



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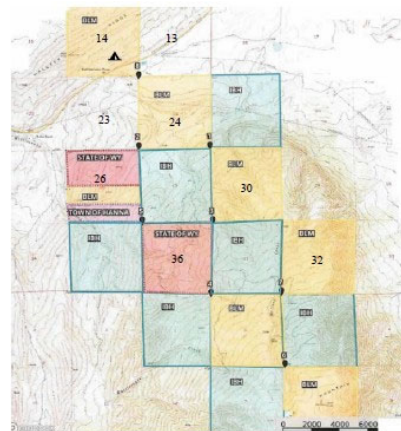
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Civil Trespass Case

In 2021, the hunters returned, this time using a portable ladder to cross the posts and chain on the corners.

The county sheriff issued a criminal trespass citation; the hunters were acquitted at a jury trial.

Iron Bar, the landowner, filed a lawsuit in federal court for civil trespassing against the hunters.



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State trespass law

The federal district court ruled there was no trespass: "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."

10th Circuit ruling: district court **got it wrong** -- "stepping through Iron Bar's airspace" **is a civil trespass**.

But the 10th Circuit then proceeded to analyze whether **federal law** allows corner-crossing where state law would otherwise prohibit it.

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Unlawful Inclosures Act of 1885

The Unlawful Inclosures Act of 1885 prohibits erecting a fence or other structure in a manner that **incloses** public lands. 43 USC 1601.

For example, when a rancher owning all of the odd-numbered sections in a township built a fence around the entire township (including even-numbered public land sections), he violated the Act. *Camfield v. United States*, 167 U.S. 518 (1897).

- The Court noted that if the rancher had instead fenced in each of his odd-numbered sections, **he had the right to do so even if it had the same effect** of preventing access to the public lands. 167 U.S. at 527-528

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Unlawful Inclosures Act, cont'd

The Act also prevents a person from erecting a fence or structure that **prevents or obstructs** “any person from peaceably entering upon” public land subject to entry or “prevent[s] or obstruct[s] free passage or transit over or through the public lands.” 43 U.S.C. 1603.

The **Ninth Circuit** (in which Montana sits), has ruled that property owners are lawfully entitled to inclose their private lands with fences under the 1885 Act, even though such fencing prevents or obstructs access to public land. *Potts v. United States*, 114 F. 52, 54-55 (1902).

- The Ninth Circuit **overturned** as overly broad a district court’s instruction that “a fence built by a person upon his own land was unlawful if in effect it inclosed and shut out the public from any part of the public domain.”

In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), the U.S. Supreme Court ruled that the Act did not allow the construction of a road across odd-numbered lots owned by private persons in order to provide public access to even-numbered public land lots.

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10th Circuit Decision

The Unlawful Inclosures Act creates an implied access right to public land;

- but not an implied easement to build a road across the corner.

The posts and chains constructed by Iron Bar over the corner markings constituted an “inclosure” that obstructed passage through public lands;

The “inclosure” was a public nuisance;

The Unlawful Inclosures Act “contemplates a limited physical intrusion necessary to abate” the nuisance.

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Controlling Principles

“The controlling principle is that checkerboard landowners cannot maintain a barrier **that has the effect of fully enclosing public lands and preventing complete access for a lawful purpose.**” 131 F.4th at 1174.

“[A] barrier to access, even a civil trespass action, **becomes an abatable federal nuisance** in the checkerboard when its effect is to inclose public lands by completely preventing access for a lawful purpose.” 131 F.4th at 1174.

“The district court was correct to hold that the Hunters could corner-cross **as long as they did not physically touch** Iron Bar's land.” 131 F.4th at 1179.

“We appreciate this may be an unsatisfying result for property owners within the checkerboard. It **leaves open questions** for landowners and the public alike, including **who might be liable** during a corner-crossing incident, and what duty of care each party owes the other.” 131 F.4th at 1179.

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U.S. Supreme Court

Iron Bar appealed the 10th Circuit's decision by filing a petition for writ of certiorari with the U.S. Supreme Court, arguing that:

- The ruling is inconsistent with a prior Supreme Court case, *Leo Sheep Co. v. United States*, 570 F.2d 881 (10th Cir. 1977), which held that the federal government did not reserve any easements to pass through privately-owned sections to reach public sections in a checkerboard landscape.
- Congress did not preempt state-law trespass actions when it enacted the Unlawful Inclosures Act.
- By functionally granting the public a limited easement through Iron Bar's property, the Tenth Circuit's decision constituted an unconstitutional taking.



In October 2025, the Supreme Court denied Iron Bar's petition.

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Take-aways



The ruling only applies within the 10th Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, Utah, and those portions of Yellowstone Park in Montana).



The ruling only applies to federal lands, not state public lands.



The ruling does not allow corner-crossings if there is a road, trail, or other access to the federal parcel.



Hunters must locate a physical survey marker before stepping over a corner. Digital maps or tools are not sufficiently accurate.



Hunters, their gear, and any game carcasses must not touch private property while corner-crossing.

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State of Montana Position

In November 2025, Montana Fish, Wildlife & Parks (FWP) Director Christy Clark confirmed that “corner crossing remains unlawful in Montana, and Montanans should continue to obtain permission from the adjoining landowners before crossing corners from one piece of public land to another.”

Game wardens are authorized to issue citations for trespass, to be referred to county attorneys to exercise their prosecutorial discretion.

<https://fwp.mt.gov/homepage/news/2025/nov/1103-fwp-reaffirms-position-on-corner-crossing-in-montana>

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Public Lands Access Programs

The **Unlocking Public Lands Program**, 87-1-294, MCA, compensates property owners for granting access -- including corning crossings -- to otherwise inaccessible parcels of state or federal land for the purpose of fishing, hunting, trapping, hiking, bird-watching and other forms of outdoor recreation.

- Participating landowners may receive an annual tax credit of \$750 for each parcel of public land made accessible, with a maximum annual tax credit of \$3,000 for making four (4) parcels of public land accessible.

FWP has approximately 70 agreements in place under the **Public Access Land Agreements Program**, 87-1-295, MCA, opening up 530,000 acres of inaccessible or under-accessible public land.

- Participating landowners are eligible for an annual payment of up to \$15,000 per year and may also be eligible for up to \$1,000 per year for improvements needed to facilitate access.

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Other Programs with Potential Public Lands Access Benefits

FWP uses the **Block Management** framework to pay landowners for walk-in corridors that allow hunters to cross private land to hunt on adjoining public land.

Elk Hunting Access Agreements with landowners provide elk hunting opportunities and, in some cases, access to adjacent public lands.

Conservation easements acquired by FWP often include permanent public hunting access, and in many cases provide access to adjacent public lands.

For more information on Montana's public access programs, visit <https://fwp.mt.gov/hunt/landownerprograms>

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Gianforte Administration Public Access Efforts

- 5,677 acres Big Snowy Mountains Wildlife Management Area in Golden Valley County, providing public access to over 100,000 acres of public land.
- 53,000 acre Great Outdoors Conservation Easement in northwestern Montana.
- Habitat Conservation Lease Program: goal of 500,000 acres over next several years using 30-40 year leases that include public hunting and recreational access.
- River Access Program: identifying and closing gaps in river access, including funding of \$4,000,000 for Lower Yellowstone River access corridors and acquisition of North Wildcat Coulee Wildlife Management Area. See map at <https://mtfwp.maps.arcgis.com/apps/inspect/basic/index.html?appid=16b70578c4c34cf08dd1b6bcd8981667>

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Questions?

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