WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 3, 2022

TO Joint Judiciary Committee

FROM David Hopkinson, Staff Attorney

SUBJECT Topic Summary: Trespass

This summary provides a brief overview of existing Wyoming trespass law and a brief overview of current lawsuits related to trespass and corner crossing.

Approved Interim Topic

Priority No. 1: Trespass.

The Committee will receive reports and recommendations from stakeholders regarding Wyoming's law on trespass.

Trespass Law in Wyoming: An Overview

Trespass on private property is currently enforceable through both criminal and civil actions. This overview is not intended to be an exhaustive catalogue of all Wyoming law pertaining to trespass; but rather, to provide the core trespass law and examples of statutory attempts to address specific circumstances that may arise. The statutory language of each trespass statute is included in the Appendix.

Criminal Trespass Statutes

Wyoming Statutes provide three crimes relating to unauthorized entry onto private property: (1) criminal trespass[1], (2) trespass to hunt[2], and (3) trespass to collect resource

[1] W.S. 6-3-303.
[2] W.S. 23-3-305.

data[3]. The distinction among these crimes is found in the motive for entering the land and the requirement that the potential trespasser know entry is not authorized.

General Criminal Trespass

To be guilty of criminal trespass, a person must enter or remain on the private property of another either: (1) knowing he is not authorized to do so; or (2) after being notified to depart or not to trespass.[4] Under this statute, notice may be given by (1) personal communication to the person by the owner or occupant, by law enforcement, or by an agent of the owner or occupant; or (2) posting signs that are "reasonably likely to come to the attention of intruders."[5] Criminal trespass is a misdemeanor punishable by six months' imprisonment, a fine of not more than $750, or both.[6]

Game and Fish Trespass

Unlike the general criminal trespass statute, a person hunting, fishing, trapping, or collecting antlers does not need to know, or to have been first notified, that the person is trespassing to be guilty of trespassing under the game-and-fish statute.[7] It is enough to convict if a person enters private property without permission with the purpose to hunt, fish, trap or hunt for horns.[8] Trespass under this section is a misdemeanor punishable by up to six months in jail, a fine of not more than $1,000, or both.

Hunting on private property (either privately owned or leased lands) at night is similar in not requiring a culpable mental state, but in addition, requires the hunter to have *written* permission from the landowner or lessee in order to avoid violating the prohibition against night hunting on private property.[9]

Criminal Data Trespass

In 2015, the Legislature enacted a law to prohibit a person from trespassing to collect resource data, which includes land-use data and data related to agriculture, minerals, and natural-resources. As amended the following year, this statute forbids entry without

[3] W.S. 6-3-414.
[4] W.S. 6-3-303.
[5] W.S. 6-3-303(a)(ii).
[6] W.S. 23-3-305(b) and 23-6-202(a)(v).
[7] W.S. 23-3-305(b).
[8] *Id.*
[9] W.S. 23-3-305(e).

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permission onto private land for the purpose of collecting resource data.[10] Like the Game and Fish Trespass offense, this crime does not require a culpable mental state (knowledge of trespass) for conviction, so long as the person enters another's private land for the purpose of collecting resource data without an ownership interest in the land, legal authorization to enter, or permission from the owner to enter. The criminal data trespass statute also provides an enhanced penalty – up to one year imprisonment, and a fine of not more than $1,000, or both. Upon subsequent conviction this law provides for a mandatory ten-day imprisonment and up to one year imprisonment, a fine of not more than $5,000, or both.

The Tenth Circuit Court of Appeals (of which Wyoming is a part) has found one subsection of this statute to be facially unconstitutional. The Court recognized data collection as protected under the First Amendment's "speech creation" doctrine. Subsection (c) created heightened penalties for crossing private land in order to access adjacent land for the purpose of collecting resource data.[11] Although subsection (c) is no longer enforceable, the rest of the criminal data trespass statute remains in place.

Trespass on closed ski areas

Wyoming Statutes also provides for a fine-only penalty for (1) skiing on land posted as closed; (2) entering public or private land adjoining a ski area when posted as closed; or (3) entering a portion of leased government land knowing the lessee has deemed the area unsafe or has posted warning signs prohibiting entry which are reasonably likely to come to the attention of the public.[12]

Trespass on Land owned by the State Loan and Investment Board (SLIB)

If a person knowingly and willfully trespasses on SLIB owned or mortgaged land and cuts timber, grass, or hay, or grazes or cultivates the land without authority, the person is guilty of a misdemeanor and subject to a of fine not less than $25 nor more than $500, imprisonment for not less than 30 days nor more than six months, or both.[13]

Civil Trespass

Common Law Civil Trespass

[10] W.S. 6-3-414.

[11] *Western Watersheds Project v. Michael*, 353 F.Supp.3d 1176 (D. Wyo. 2018); See *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017).

[12] W.S. 6-9-201.

[13] W.S. 11-34-130.

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Wyoming recognizes a civil cause of action in common law for trespass onto private property.[14] Trespass is an intentional tort. A landowner or other person entitled to exclusive possession of land may sue a person who enters land without authorization. Distilled, the elements of civil trespass are: (1) the plaintiff was in possession of the property; and (2) the defendant intentionally entered upon the property.[15]

The Wyoming Supreme Court has explained that "trespasses are invasions of the interest in the exclusive possession of the land and its physical condition."[16] Although intent is an element of entry, it is important to recognize that under the civil cause of action, proof of the person's actual knowledge that the land is private property is not required. The Wyoming Civil Pattern Jury Instructions explain that "[a]n entry is intentional if the Defendant intended to be in that location. An entry can be intentional even if the defendant mistakenly thought [he] had a right to be on the property."[17]

When filing a civil suit, a plaintiff seeks a monetary award against or injunctive relief from the defendant based on the harm inflicted by the wrongdoing (damages). The Wyoming Supreme Court explained the damages awards arising from civil trespass as follows: "[w]hen real property has been damaged or destroyed by a wrongful act such as trespass, the desired objective is to ascertain as accurately as possible the amount of money that will fairly and adequately compensate the owner for the loss."[18] The Court further explained:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for:
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> > (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred;
> > (b) the loss of use of the land; and
> > (c) discomfort and annoyance to him as an occupant.[19]

[14] *Bellis v. Kersey*, 2010 WY 138, ¶ 19, 241 P.3d 818, 824
[15] Wyoming Civil Pattern Jury Instruction 21.09
[16] *Bellis v. Kersey*, 2010 WY 138 ¶ 19, 214 P.2d 818.
[17] Wyoming Civil Pattern Jury Instruction 21.09.
[18] *Goforth v. Fifield*, 2015 WY 82, ¶ 37, 352 P.3d 242, 249 (Wyo. 2015).
[19] *Id*. ¶ 38.

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If no actual damages are proven, a jury shall award nominal damages (less than $100) to the plaintiff.[20] Also, punitive damages may be available where the plaintiff's conduct was committed with reckless disregard for, or a willful indifference to, the plaintiff's rights.[21]

Statutory Civil Actions

In addition to the remedy available for common law trespass, the Legislature has provided statutory causes of action and a framework to address specific types of entry onto private land. Examples include: a civil action for data trespass,[22] oil and gas entry onto a surface estate,[23] and liability for breach into a lawful enclosure by an animal.[24]

W. S. 40-27-101 (Civil Data Trespass), which contains similar language to the criminal data-trespass statute, specifies that a person who trespasses to collect resource data is liable for "all consequential and economic damages" as well as "litigation costs" including "expert witness fees, other witness fees, costs associated with depositions and discovery, reasonable attorney fees and the reasonably necessary costs of identifying the trespasser, of obtaining effective service of process on the trespasser and of successfully effecting the collection of any judgment against the trespasser."[25] As with the criminal data trespass, subsection (c) which created heightened penalties for crossing private land in order to access adjacent land for the purpose of collecting resource data, has been held to be facially unconstitutional by the Tenth Circuit.[26]

Article 4 of Title 30, Chapter 5 details the rights of oil and gas operations to enter land and a surface owner's right to recovery for damage caused to the surface estate by that entry. W.S. 30-5-401 through 30-5-410 allows oil and gas operators with mineral rights to enter another's land for reasonable and necessary operations. The article requires minimum notice to the surface owner, good faith negotiations and the opportunity for mediation or arbitration, a surety bond, and penalties for late payments of damage. Article 4 provides procedures for grievances and appeals but does not preclude any other remedy available under the law.[27]

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[20] Wyoming Civil Pattern Jury Instruction 21.11; *Goforth* at ¶ 44, 352 P.3d at 250 (holding nominal damages not to exceed $100.00).
[21] *Sears v. Summit, Inc.*, 616 P.2d 765, 770 (Wyo. 1980).
[22] W.S. 40-27-101.
[23] W.S. 30-5-401 et seq.
[24] W.S. 11-28-108.
[25] W.S. 40-27-101(d).
[26] *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017).
[27] W.S. 30-5-401 et seq.

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The owner of livestock or buffalo that breach a lawful enclosure of another is liable for all damages sustained by the owner of the enclosure. W. S. 11-28-108 details that a suit may be maintained in court or by arbitration. This section provides damages but also provides that if the plaintiff's enclosure was not a lawful fence, judgment shall be against the plaintiff for costs of the suit and damages sustained by the defendant.

Corner Crossing

One area of concern related to current trespass law is "corner crossing." This occurs when ownership of land is divided in a checkerboard fashion such that parcels of land meet creating an intersection of four sections of land, and an individual steps across the corner from one section of land to another.

In June 2004, the Wyoming Attorney General's office issued an opinion that "corner crossing" from one parcel of public land to another parcel of public land while passing through the corners of private land was not trespass under the game and fish trespass statute[28], but may constitute trespass under the criminal statute.[29]

There is a pending civil lawsuit in federal court brought by a land owner against several hunters who "corner crossed" between two parcels of public land passing through the land owners private land.[30] While Wyoming statute provides that ownership of the space above the lands and waters of the state is vested in the several owners of the surface beneath, subject to the right of flight,[31] the hunters argue in part that the Wyoming law is preempted by the federal Unlawful Inclosures Act,[32] which prohibits obstructing free passage over or through public lands.[33] They additionally argue that the land at the corner is "vested" equally between the private land owner and the federal government and as such the private land owner cannot assert exclusive rights and control over that airspace.

No trial date has been set, and the court has yet to make any ruling on the merits of the hunters claims. The issue of preemption or coownership of the airspace of a corner does not appear to have been directly addressed in any previous cases.

This summary is meant to provide a broad and basic overview of Wyoming trespass law. If you have any questions, please let me know.

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[28] W.S. 23-3-305(b).
[29] W.S. 6-3-303.
[30] 2:22-cv-00067-SWS *Iron Bar Holdings LLC v. Cape et al.*
[31] W.S. 10-4-302
[32] 43 U.S.C. 1061 et seq.
[33] 43 U.S.C. 1063.

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