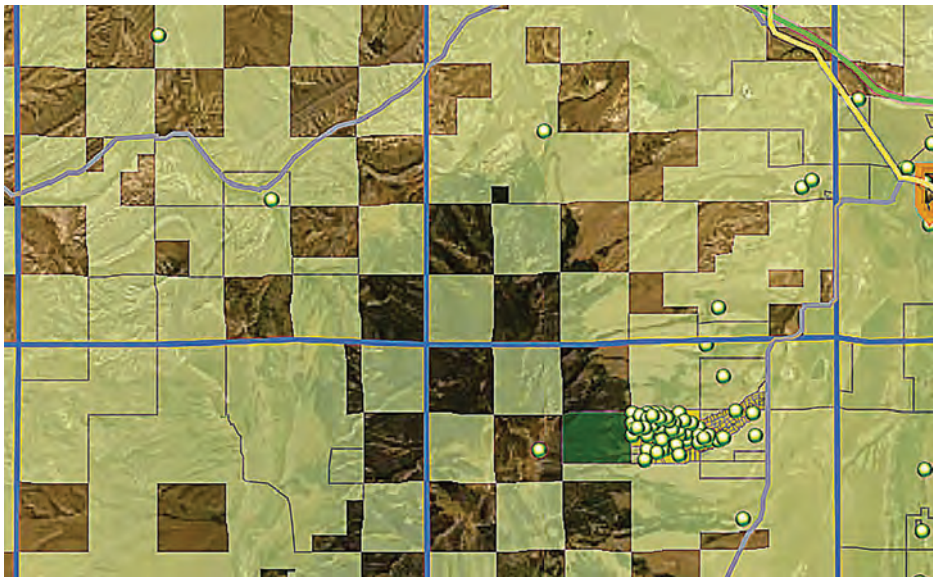

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The Chaos of Checkerboard

Unintentional trespassing, unlawful inclosures and the curious case of private air space.
By Chance Gowan

In October 2021, four hunters from Missouri, hoping to hunt on public land that was intermixed with private lands, climbed over a fence with a specially made ladder and, upon setting foot on the adjacent public land, set in motion a series of events that will permanently re-shape land ownership and public access across much of the western United States.

The hunters were attempting to hunt elk on public lands in Wyoming. Those lands were intermixed with private lands in what is called a "checkerboard ownership." The private lands are owned by Fred Eshelman; a wealthy pharmaceutical magnate. Eshelman had purchased the 22,000-acre Elk Mountain Ranch under the holding company "Iron Bar Holdings." The public lands were Bureau of Land Management (BLM) and the State of Wyoming lands.

The hunters were standing on BLM land, planning to use their handheld GPS devices to guide them to the next corner, where they would simply step over Iron Bar's piece of the corner and onto an adjacent section of BLM ground. Except all of those lands (BLM, State of Wyoming, and Iron Bar Holdings) were enclosed by fences and under the exclusive management of Eshelman's Iron Bar Holdings company. The legality of the ownership and public accessibility of those lands is what is at stake.

When the hunters' incursion was noticed, Eshelman, incensed with the alleged trespass, compelled his ranch manager to call the sheriff's office and file a complaint. As the story goes, a local game warden and two sheriff's deputies arrived. After a heated discussion, with the ranch manager demanding the hunters' arrest, the game warden told the hunters and the Elk Mountain ranch manager that the hunters had done nothing wrong. A few more words were exchanged and the law enforcement officers left.

It's hard work keeping a ranch viable, and having people wandering around guessing where it might be legal to be, isn't tenable.

The next day, another sheriff's deputy was summoned. After speaking to the hunters and the ranch manager, he too refused to charge the hunters with any wrongdoing. Then an influential person made a few phone calls, and the next day another deputy sheriff arrived; and, under direct orders from the District Attorney's office, the hunters were immediately charged with criminal trespass. We'll likely never know for sure what transpired to suddenly cause law enforcement to change their position. However, the bottom line was, the situation had incredulously gone from an unchargeable infraction to a criminal offense.

Apparently dissatisfied with the lack of gravity of the enforcement actions, Eshelman, via Iron Bar Holdings, brought a civil action against the hunters alleging, among other things, that at least seven million dollars in damages had occurred as a result of the purported trespass.

It appears the hunters did not and have not knowingly set foot on Elk Mountain Ranch property. They simply stepped from one corner of publicly owned land onto another corner of publicly owned land; and, in the process, their feet likely crossed into "air-space" above Elk Mountain Ranch property, where Iron Bar Holdings apparently claims to own the air (or rights to it)—which is where the alleged trespass occurred.

How putting your feet into someone else's "air-space" constitutes a trespass and resulted in millions of dollars in damages is something that, apparently, only Eshelman and a few attorneys understand.

This story is only a part of a much bigger problem. Today, across 11 western states, 8.3 million acres of public lands are "corner-locked" within the perimeter of a private landholding, where the corners of each section have never been accurately surveyed.

As more people have moved into the rural West, some large landholdings have gradually been divided into smaller private holdings, and legal issues with checkerboard ownership have become much more complicated.

Federal law stipulates that any enclosure of public lands, by whatever means, is unlawful—even claiming an exclusive right to use "any part" of the public domain—like a common ownership corner, is unlawful...so too is obstruction of free passage or transit over or through the public lands. (See 43 U.S.C. §§ 1061, 1063)

At issue is this: does a landowner, therefore, have a right to enclose and prevent reasonable access to public land in the checkerboard of public/private ownership? On the surface, the federal law seems clear. However, as we peel back the layers things become much more complicated, with both sides making valid arguments..

In 1885, Congress passed the Unlawful Inclosures Act (UIA), as a means to settle range wars between cattlemen and farmers over access and use of lands in the West. In 1988, the Tenth Circuit Court of Appeals stated as follows: The UIA proscribes "enclosures are unlawful when they deny access to public lands for 'lawful purposes'; Congressional guidance in FLPMA is relevant to assist the court in determining what uses of the public lands are lawful, and therefore protected under the UIA." (U.S. ex rel. Bergen v. Lawrence, 848 F.2d 1502 (10th Cir. 1988)

The Tenth Circuit upheld the lower court's ruling, stating: "Surely, the free passage of hunters and their quarry is a lawful purpose for which the public may seek access to public lands." (United States ex rel. Bergen v. Lawrence, 620 F. Supp. 1414 (D. Wyo. 1985)

The way it stands now—in many instances—the public land that is encased into a concurrent holding of private land (in a checkerboard pattern) has unofficially and without Congress' intent, resulted in gifting

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the public lands to the private landowners. Without intending any wrongdoing, landowners with ranch lands in the mixed-checkerboard ownership have managed and utilized these lands, as their own, for generations. Perimeter fences enclose public lands within the bounds of private ranchlands, and they have been managed and cared for as one for a very long time.

Checkerboard ownership is the result of the Union Pacific Act passed in 1862. Under that act, the Union Pacific Railroad Company was awarded odd-numbered lots of public land along the "railbed-right-of-way." These "lots" are referred to as "Sections" and a "Section of Land" is 640 acres—one square mile. This was done in order to encourage the Union Pacific to build and develop railways across the vast open spaces of this growing country.

By granting to the railroad the odd-numbered sections while the government retained ownership of the even-numbered sections, a checkerboard effect resulted. Odd-numbered sections were surrounded on all four sides by even-numbered sections, which remained part of the public domain. But the same situation existed for the even-numbered sections, which were surrounded by the odd-numbered railroad land.

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ABOVE: Chance Gowan demonstrates how a ladder can enable hunters to cross corners on checkerboard land. LEFT: Elk Mountain elevation marker. Originally called "Medicine Butte," Elk Mountain and surrounding areas served as sacred Indian hunting grounds. OPPOSITE PAGE: The checkerboard pattern of land ownership around Elk Mountain in Carbon County, as depicted by a GIS program. The unshaded 640-acre sections are BLM lands.

After the railways were developed, the railroad companies transferred (sold) ownership of the odd-numbered sections to ranchers. Due to the checkerboard nature of the distribution of these lands, when the sales were made, the adjoining sections of government land were incorporated into the ranchlands as part of the whole. There really was no way of avoiding it. As free range faded into history and private ranches sprang up, the boundaries had to be "identified and monumented" (physically identified and recorded). Fences were built to contain and manage the distribution of cattle, and the rest, as they say, is history.

This has resulted in a situation where a ranch may have, say, 5,000 acres within the bounds of their ranch and, if those lands fall within the checkerboard ownership domain—approximately half (2,500 acres) of

those lands would be deeded land owned by the ranch, and 2,500 acres within the perimeter bounds of the ranch remain as public domain. That is exactly the situation on Elk Mountain Ranch.

It's all very complicated. Acts of Congress, like the imminently important Taylor Grazing Act reinforce this federal law. The way things are, where many large parcels of private lands throughout the West are intermixed with public lands and fenced in, or otherwise restrict or prohibit public access is called "an unlawful inclosure" of public lands, which is very clearly defined by the UIA; when the public is barred from use of public lands in this way, it seems to be a clear-cut case of unlawful inclosure. Except, it isn't that simple!

Elk Mountain, Carbon County, Wyo., via wyomingcarboncounty.com.

There is a hugely important other side to this issue. Ranchers have to be able to control their livestock. They need to be able to fence their lands—and not just the boundaries. They need to have a means to divide the lands into pastures, so they can effectively contain and manage livestock grazing and distribution and access to water. There is no feasible way for them to fence every section of private land within the contiguous checkerboard of their ranch.

When these four guys from Missouri realized that, by law, they should be able to essentially step from one corner of public land onto another corner of public land, it opened up a myriad of possibilities for them to hunt and access public lands that, for the most part, had not been openly available for public hunting for decades.

The hunters built a special ladder, which allowed them to straddle the fence around the perimeter of Elk Mountain Ranch, climb over the fence (without physically touching it) and step directly onto public land, where they had every right to be. Except, once they were inside the fence it was virtually impossible for them to find precisely where the corner in the checkerboard ended and private land began. Without complicated and expensive surveys by licensed civil engineers, it's virtually impossible to find the exact point at which four corners of four sections come together.

The hunters wrongly believed their handheld GPS devices would tell them exactly where they were and when to step over the corner onto the next section of public land. But they evidently couldn't take into account the problem of trespassing into "private air space."

There are two sides to this story. Private property rights are important aspects of any land ownership. In the rural West, private property rights are a major component of the livelihood of ranches that have been owned and managed for generations. It's hard work keeping a ranch viable, and having people wandering around guessing where it might be legal to be isn't tenable—especially where livestock management and farming operations are ongoing.

The matter was first brought before a state court in Wyoming. That court ruled that the hunters were within their rights to "corner cross" onto the Elk Mountain Ranch. Subsequently a Wyoming federal court made essentially the same ruling. Iron Bar Holdings then elevated the case to the Tenth Circuit Court of Appeals, and both parties filed a formal brief in January of 2024.

Since then, additional legal complications have emerged, and everything is tangled in barbed wire again. It's my understanding that the Tenth Circuit Court won't hear the case until those complications have been resolved. Exactly when that case might be heard and decided isn't clear, but most learned scholars following the case believe it will ultimately wind up in the U.S. Supreme Court.

A final decision is likely many years away. As it is right now, hunters, fishermen, photographers and recreationists seem to have the right to "corner-cross" in checkerboarded lands onto a private land holding—at least in Wyoming. ■

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