"Streambeds, Game Trails, & Corner Crossings: Public Access & Private Property"

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I. Corner Crossings

A. Defining the "Corner Crossing" Issue

1. "Corner crossing" is "travel by foot through the checkerboard from public land to public land at the corners, while never physically touching private land and not damaging private property, without the permission of the owner(s) of the adjoining private land(s)."[1]

2. The legal question about "corner crossing" can be asked several ways, but the primary competing versions of the question are:

   a. Does "corner crossing" in the Checkerboard involve trespassing on adjacent private land?;

   b. Can a landowner in the Checkerboard prohibit a person from "corner crossing"?

3. The "corner crossing" problem affects everyone—from landowners, their business operations, employees, and agents to local, state, and federal governments and law enforcement to public land users of every stripe. And it affects an enormous amount of land—more than 8 million acres scattered across the U.S., by some estimates.

4. The territory/property – the "Checkerboard:"

[1] *Iron Bar Holdings, LLC v. Cape*, 674 F. Supp. 3d 1059, 1062 (D. Wyo. 2023); *appeal pending*, No. 23-8043 (10th Cir., June 20, 2023).

a. From the1820s through the 1870s, Congress "gave away" 150 million acres of public land through "checkerboard" land grants with the idea that the States or private companies would sell the lands to raise the capital needed to build roads, canals and other infrastructure projects.[2]

b. These lands were platted into six-mile by six-mile squares called "townships" that were themselves subdivided into 36 square mile parcels called "sections."[3] Each section contained approximately 640 acres and surveyors numbered each section sequentially from 1 to 36 starting with a given township's northeastern-most section and snaking west and east until reaching Section 36, the southeastern-most section.[4]

c. The following image illustrates the general section numbering for each township:[5]

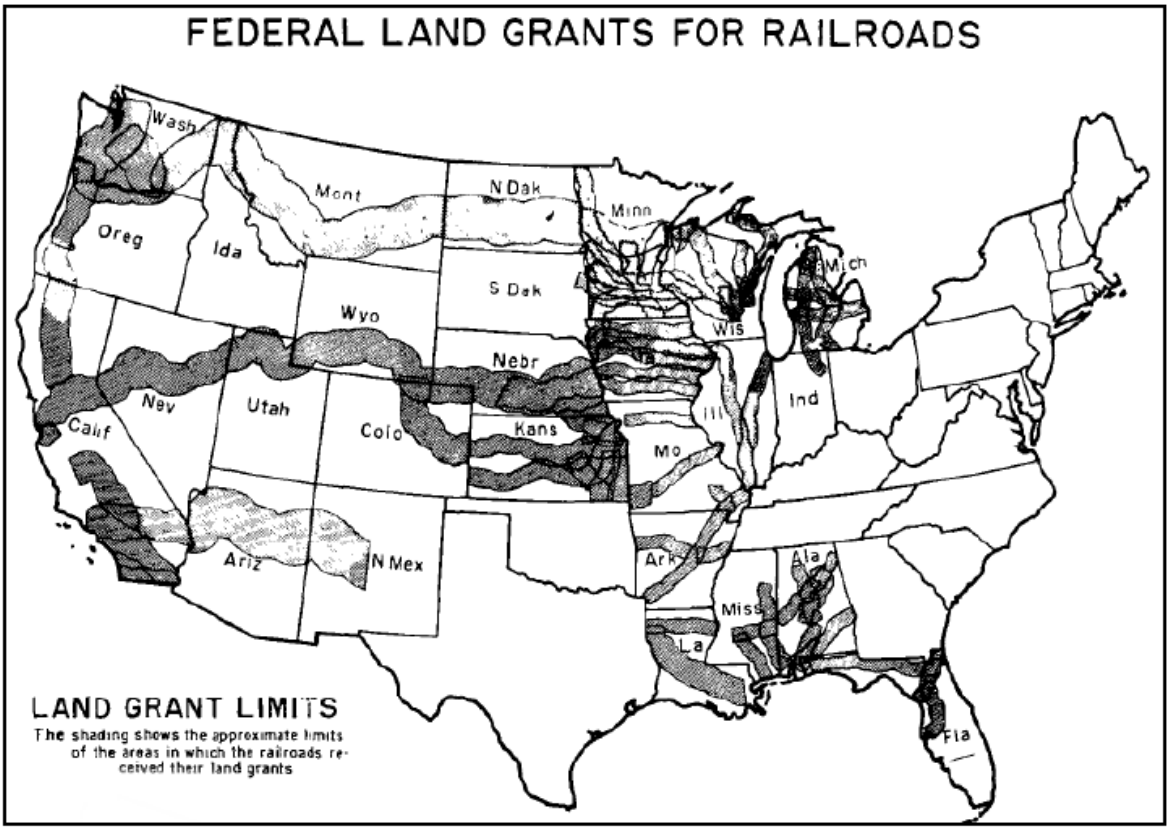
[2]*See* Paul Gates, *History of Public Land Law Development* 357–58 (1968) (examples include Act of March 2, 1827, 4. Stat. 237 (1827) (giving land to Indiana for the construction of the Wabash and Erie Canal; similar land grants were made in Ohio and Alabama); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1424 n.1 (10th Cir. 1986).
[3]Bureau of Land Management, *Manual of Surveying Instructions for the Survey of the Public Lands of the United States* 12 (2009).
[4]*Id.*
[5]This diagram comes from the opening brief of the Plaintiff/Appellant Iron Bar Holdings, LLC, filed in the Tenth Circuit under Case No. 23-8043 ("Iron Bar's Opening Brief") at page 16.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

d. Through its "checkerboard" land grant scheme, Congress generally deeded the odd-numbered "sections" while it retained the even-numbered sections.[6] One of the beneficiaries of these land grants were railroad companies constructing what would

[6]*See* Gates, *supra* note 2, at 357–58; *Mountain States Legal Found.*, 799 F.2d at 1424 n.1; Pacific Railroad Act, 12 Stat. 489, 492, § 3 (July 1, 1862).

become the transcontinental railroad.[7] By the early 1870s, Congress had granted around 150 million acres with 130 million acres to the railroad companies alone.[8]



e. Congress justified this enormous land give-away with the belief that the railroad would sell its sections to raise money to build the railroad meaning that the value of the federally retained even-numbered sections would increase substantially as the surrounding odd-numbered sections developed following the completion of the railroad. The Congressional intent was for the federal government to then sell their retained

[7]Pacific Railroad Act, 12 Stat. 489, 490, § 1; Act of July 2, 1864, 13 Stat. 356, 358.
[8]Gates, *supra* note 2, at 384–85.

checkerboard lands for a higher price.[9] This plan of granting railroads the odd numbered sections and then selling the federally retained even numbered sections worked well

PUBLIC	PRIVATE	PUBLIC	PRIVATE
PRIVATE	PUBLIC	PRIVATE	PUBLIC
PUBLIC	PRIVATE	PUBLIC	PRIVATE

throughout Illinois, Indiana, Minnesota, Iowa and Missouri because all of the lands eventually left federal ownership or control. By the end of 1853, over 2,600 miles of railroads were projected and over 8 million acres had been granted for railroads.[10]

f. "By granting to the railroad the odd-numbered sections, and retaining the even-numbered sections, a checkerboard effect resulted."[11]

[9] *Id.* at 346; Cong. Globe, 31st Cong., 1st Sess., 845 (1850).
[10] *Id.* at 360.
[11] *Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977), *rev'd* 440 U.S. 668 (1979).

g. While this plan worked well in eastern states where people were more willing to move, it did not prove as successful out west. The government was unable to sell all of its lands, so it began disposing of them through the various Homestead acts.[12] The lands that were not disposed of were retained by the government with many now managed by the BLM.[13]

h. This ownership pattern remains to the present day across several western states, including New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Nevada, Arizona, California, Oregon, and Washington.[14]

i. These lands are rich with wildlife, including big game, which make them coveted for hunting, fishing, birding, and other recreational purposes.[15] These lands also contain vast natural resources, including native grasses, which have served the cattle ranching and wool growing operations for centuries.[16]

j. For many years, all people—the private parties owning odd-numbered sections in the "checkerboard" and any other person interested in using the public land for a lawful purpose—could travel to and use the public land sandwiched

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[12] *See* Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 STANFORD L. REV. 1373, 1377-78 (1987).
[13] *See id.* at 1778.
[14] *See* "The Corner-Locked Report," onX Maps, *available at* https://www.onxmaps.com/onx-access-initiatives/corner-crossing-report; *See also* Brief of *Amicus Curiae* Wyoming Stock Growers Association and Wyoming Wool Growers Association in Support of Plaintiff-Appellant and the Reversal of the Appealed Decision, filed in the Tenth Circuit in Case No. 23-8043 ("WSGA & WWGA Amicus Brief"), at pages 1-2 (Statement of Identity and Interest of Amici).
[15] "The Corner-Locked Report," *supra* note 11.
[16] *See Buford v. Houtz*, 133 U.S. 320, 322 (1890) ("The allegation is, that these lands are very valuable for pasturage and the grazing of stock and are of little or no value for any other purpose . . . .").

between private sections even if these travels took them across the surface of the private land.[17] Landowners bristled against this practice, which produced conflict and strife between ranchers and shepherds, homesteaders, and other travelers.[18] With the passage of the Taylor Grazing Act of 1934,[19] the conflict between the private landowners and ranchers or shepherds ended because with that Act livestock grazing on the "public checkerboard lands" was completely excluded unless the grazing permittee acquired a preference right to graze on those federal lands. This conflict extended to landowners engaging in a variety of practices to exert monopolistic control over neighboring public sections in the Checkerboard.[20]

k. Congress responded with legislation that forbids *both* enclosures of public land *and* other efforts to obstruct entry to public land.[21] Those Acts however did not prohibit the

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[17]*See Buford*, 133 U.S. at 326 ("We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."); *Homer v. United States*, 185 F. 741, 747 (8th Cir. 1911) ("Purchasers of odd number sections of land from the railroad company take the same with knowledge that the United States may retain the ownership of the even numbered sections indefinitely . . . We think, that . . . an opening should be made in the general inclosure as will allow free ingress and egress to the public lands in question."); Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 666, 674–75 (2011). However, there were other court cases that determined that *Buford v. Houtz* (see fn 16 infra.) was based on the custom in Utah and other states called into question whether such grazing or crossing of private land to get to federal land was proper. *See e.g., Northern Pac. Ry. Co. v. Cunningham*, 89 F.594 (D. Wash. 1898).

[18]Candy Moulton, *Conflict on the Range*, True West (Aug. 28, 2011).

[19] Pub. L. 73-482 48 Stat. 1269, 43 U.S.C. §§ 315 *et seq*.

[20]S. Rep. No. 48-979, at 1 (1885); H.R. Exec. Doc. No. 49-166 (Feb. 15, 1887), at 2; Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155, 181–82 (2016).

[21]Unlawful Inclosures of Public Lands Act, 43 U.S.C. §§ 1061 *et seq*.

legitimate protection of the private lands in the checkerboard. The scope, sweep, and application of that legislation—the Unlawful Inclosures Act—as well as this history, tradition, and custom has been hotly debated in recent years as the question of public access through "corner crossing" has been litigated in Wyoming courts.

l. However, at no time has Congress expressly authorized trespass across private lands or reserved a right of access across private lands to reach the federal lands even though Congress clearly reserved access in other cases.[22]

m. Still, "[i]t is at once apparent that 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 [sic] private property."[23] The only possible route from one section of public land to another *without* intruding on private land is to cross at the section corners shared by the two sections of public land—to corner cross.

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[22] This contrast between the reservations in the checkerboard land grants versus the Stock-Raising Homestead Act must mean something. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...."). The absence of a specific access reservation in the "checkboard" grants in contrast to the specific access reservation in the 1916 Stock-Raising Homestead Act must be given recognition. A court cannot amend the law to fit what the court thinks Congress may have intended had Congress known what we do today. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996) (stating "Nor are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known. If that effort is to be made, it should be made by Congress, and not by the federal courts.").

[23] *United States v. 82.46 Acres of Land, More or Less, Situated in Carbon Cnty., Wyo.*, 691 F.2d 474, 475 (10th Cir. 1982); *see also Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) ("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.").

n. The question, then, is whether corner crossing is an unlawful trespass, an uncompensated taking of private land, or a lawful way of accessing public land in the Checkerboard.

B. The competing property interests — private landowners; public land users

1. Private Landowners

a. "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . . ."[24]

b. Current owners of the odd-numbered sections in the Checkerboard—successors-in-fee to the railroads—have deep-seated, well-justified, and long-recognized interests in keeping uninvited and unwanted people off their property.[25]

c. Without the ability to control the flow of trespassers on their property, landowners lose something fundamental about

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[24]*Leo Sheep*, 440 U.S. at 687.

[25]"The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). "In less exuberant terms, we have stated that the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point*, 141 S. Ct. at 2072 (quoting *Kaiser Aetna v. United States*, 444 U. S. 164, 176, 179–80 (1979)); *see also* Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "sine qua non" of property).

property ownership, of course.[26] But, practically, these landowners also have to worry about damage to any business operations on their land, including ranching, cattle-raising, and wool-growing, among others, as well as physical damage to their property and interference with quiet enjoyment and use of their property.[27]

d. As the "corner crossing" question has been fought over in court, landowners have argued that a person commits a trespass by corner crossing because the person necessarily intrudes into some portion of airspace situated directly above the surface of the adjacent landowner's property.[28]

e. This argument is:

1. A landowner has the right to exclude people from his property.[29]

2. "Property" includes the "superadjacent [sic] airspace" above the surface of the land.[30]

3. Thus, a landowner has the right to exclude people from the suprajacent airspace above the surface of his land.[31]

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[26]*See supra* note 19.
[27]*See* WSGA & WWGA Amicus Brief at 3-6; *see also* United Property Owners of Montana's *Amicus Curiae* Brief in Support of Plaintiff-Appellant Iron Bar Holdings, LLC filed in the Tenth Circuit in Case No. 23-8043 ("UPOM Amicus Brief") at 20-24.
[28]*See, e.g.,* "Corner Trespass," United Property Owners of Montana, *available at* https://upom.org/corner-trespass-2/.
[29]*Cedar Point*, 141 S. Ct. at 2072.
[30]*United States v. Causby*, 328 U.S. 256, 265 (1946).
[31]*Id.*; *see also* Restatement (Second) of Torts § 159 (1965) (trespass may be committed "on, beneath, or above the surface of the earth").

4. Corner crossing requires, if nothing else, *some* entry into the superjacent airspace above the surface of neighboring private land.

5. Therefore, a landowner has the right to prohibit corner crossing because (1) corner crossing involves entry into suprajacent airspace above the surface of land and (2) a landowner has the right to exclude people from that suprajacent airspace. Put another way, unauthorized corner crossing—corner crossing done with the consent of the neighboring private landowner—is a trespass.

6. There is also a concern over where this trespass ends. If someone can trespass over a corner of airspace to shoot wildlife, can they take a four-wheeler across the corner to retrieve any game that was killed? If someone can trespass by putting a ladder over a corner, can they take down a fence to be able to cross the corner? Does physical crossing include flying a drone across the corner and how does a landowner protect his private property when a drone is flying across the corner? Just like Congress did not consider the unintended future consequences of failing to reserve access across the checkerboard sections because Congress believed that the Western states would be settled like the Eastern states, what are the unintended consequences of allowing trespass that, for now, only includes the airspace immediately above the private property.

f. Beyond this syllogism, landowners point to the Supreme Court's decision in *Leo Sheep*[32] to bolster their position that others should not be able to corner cross—*i.e.*, use some minimal portion of private land to access public land—with impunity.

[32]440 U.S. 668 (1979).

1. *Leo Sheep* involved a lawsuit brought by a wool growing company and a stock raising company that owned odd-numbered sections of the Checkerboard in Carbon County, Wyoming, against the United States. The companies sued the United States because the government had "cleared a dirt road extending from a local county road to the [Seminoe] [R]eservoir across both public domain lands [even-numbered sections] and fee lands of the Leo Sheep Co." and the companies argued this governmental action was contrary to the companies' fee title in the odd-numbered lands in question.[33] The United States erected this road because it had received "complaints that private owners were denying access over their lands to the reservoir area or requiring the payment of access fees."[34] After negotiations with the landowners failed, the government simply cleared the road without the consent of the landowners.

2. The federal district court granted the companies' motion for summary judgment, but that order was reversed by the Tenth Circuit on appeal because the Tenth Circuit reasoned that "when Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government."[35]

3. The Supreme Court granted certiorari because the Tenth Circuit's holding "affects property rights in 150 million acres of land in the Western United States."[36]

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[33] *Id.* at 677–78.
[34] *Id.* at 678.
[35] *Id.*
[36] *Id.*

And, it reversed the Tenth Circuit's judgment for two main reasons.

a. First, the Supreme Court held that the Tenth Circuit's recognition of an implied easement was wrong twice-over.[37]

b. While recognizing that "[w]here a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property," the Supreme Court concluded that such an "easement by necessity" would not normally include "the right to construct a road for public access to a recreational area."[38]

c. Additionally, the Court held that the United States, unlike another landowner, cannot rely on the "easement-by-necessity" doctrine. "More importantly, the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to affect the same result."[39] In short, if the United States wanted to enjoy easement-like access over private land, it would have to use its power of eminent domain to take the land and then pay just compensation for the taking.

[37] *Id.* at 678–83.
[38] *Id.* at 679.
[39] *Id.* at 679–80.

d. Instead, the United States could only avail itself of some access easement if the Pacific Railroad Act of 1862—the act creating the Checkerboard—actually granted the government an easement over the odd-numbered sections.[40] Finding no such reservation of right in the act itself, the Supreme Court concluded "we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here."[41]

4. Second, the Supreme Court concluded that the Unlawful Inclosures of Public Lands Act of 1885 had no application to the legality of the government's claim.[42]

a. "The Government argues that the prohibitions of this Act should somehow be read to include the Leo Sheep Co.'s refusal to acquiesce in a public road over its property, and that such a conclusion is supported by this Court's opinion in *Camfield v. United States*, 167 U.S. 518 (1897). We find, however, that Camfield does not afford the support that the Government seeks. That case involved a fence that was constructed on odd-numbered lots so as to enclose 20,000 acres of public land, thereby appropriating it to the exclusive use of Camfield and his associates. This Court analyzed the fence from the perspective of nuisance law and

[40] *Id.* at 680–82.
[41] *Id.* at 682.
[42] *Id.* at 683 ("Nor do we find the Unlawful Inclosures of Public Lands Act of 1885 of any significance in this controversy.").

concluded that the Unlawful Inclosures Act was an appropriate exercise of the police power."[43]

b. "There is nothing, however, in the *Camfield* opinion to suggest that the Government has the authority asserted here. In fact, the Court affirmed the grantee's right to fence completely his own land."[44]

c. "In that light we cannot see how the Leo Sheep Co.'s unwillingness to entertain a public road without compensation can be a violation of that Act."[45]

d. Finally, landowners and supporting groups argue that legalizing corner crossing is bad public policy.

5. Corner crossing will lead to increased trespassing and damage to private property because of bad faith actors and because corner monuments are not always findable or traversable.[46]

6. Legalized corner crossing will place increased burdens on owners of odd-numbered sections to fence and patrol their property to keep out unwanted trespassers.[47] Increased fencing and other efforts will disrupt "previously intact wildlife corridors and habitats, leading to biodiversity loss and ecosystem degradation."[48]

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[43]*Id.* at 684–85.
[44]*Id.* at 685.
[45]*Id.*
[46]Iron Bar's Opening Brief at 54-55.
[47]*Id.* at 55.
[48]*Id.*at 57.

7. Given the popularity of hunting in the Checkerboard, the risks of errant (or intentional) gunfire will increase with more foot traffic in the area.[49]

8. Corner crossing will hurt efforts to establish public access in more appropriately situated locations for access.[50]

9. Corner crossing will not increase access to public land because landowners will fence off the private land.[51]

10. Corner crossing opens up federal property to use by the public without the government's input or planning concerning consequences or the effects of increased use.[52]

11. Corner crossing deprives landowners of any entitlement or claim to compensation for providing public access to public land.[53]

12. Uncontrolled public activity in the Checkerboard while cattle or sheep are in the vicinity "can cause great stress to livestock, resulting in decreased weight gains, poor breeding rates, and damage to both private and public land from the excessive movement of stressed livestock."[54]

13. "Interactions with the public may cause livestock to congregate on private and state lands which will cause

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[49] *Id.* at 56.
[50] UPOM Amicus Brief at 20.
[51] Iron Bar's Opening Brief at 57.
[52] UPOM Amicus Brief at 21.
[53] *Id.* at 22.
[54] WSGA & WWGA Amicus Brief at 3.

degradation of these parcels and remove the balance found in cooperative management of public and private lands."[55]

b. *Public Land Users*

1. "And if I apply that rule, is the public land encompassed within the private[ly] owned sections no longer public?"[56]

2. From the creation of the Checkerboard in 1862 to present, the even-numbered sections of land in the Checkerboard—which are publicly owned and managed by local, state, or federal governments[57]—have been held open to the public for any lawfully recognized use.[58]

3. To protect public ingress and egress to and from the even-numbered sections (public land) and to thwart private monopolization of these lands, courts have declared unlawful various efforts by private landowners to police, control, or limit public use of these public lands.[59]

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[55]*Id.* at 3-4.
[56]Hearing Transcript from Summary Judgment Hearing in *Iron Bar Holdings, LLC v. Cape et al.*, Case No. 2:22-cv-67-SWS, at 12:20-22 (May 10, 2023).
[57]*Mountain States Legal Found.*, 799 F.2d at 1424 n.1.
[58]*Buford*, 133 U.S. at 326 (holding that public lands "shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use").
[59]*See Camfield v. United States*, 167 U.S. 518, 519–20 (fencing on odd-numbered sections only encircling public land); *McKelvey v. United States*, 260 U.S. 353, 355–59 (1922) (armed militias patrolling and policing even-numbered sections); *Mackay v. Uinta Development Co.*, 219 F. 116, 119–20 (8th Cir. 1914) (trespass lawsuit); *Buford*, 133 U.S. at 321–25 (trespass lawsuit).

4. Beyond helicopter or some other mode of transportation,[60] the only way of egress and ingress to most sections of public land in the Checkerboard is at shared section corners—*i.e.*, by corner crossing.[61] If corner crossing is subject to the absolute control of adjacent private landowners, then about 4.15 million acres of public land becomes privately controlled.[62]

5. Public land users make several arguments that corner crossing is lawful or, put another way, that landowners cannot lawfully stop or control corner crossing.

6. Traversing low-level airspace is not an actionable trespass unless doing so interferes with use of the land or causes damage to the land.[63]

7. Long-standing American custom and tradition supports public access to unenclosed, unimproved public land for lawful purposes.[64] To this end, a landowner's right to exclude others from *its property* does not extend so far as to allow landowners to exclude others from

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[60]*Iron Bar*, 674 F. Supp. 3d at 1076 (referring to helicopter or "human cannon shot").
[61]Appellees'/Defendants' Answering Brief filed in the Tenth Circuit in Case No. 23-8043 (the "Hunters' Brief") at 2-3.
[62]The Corner-Locked Report, *supra* note 11.
[63]*Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1045 (10th Cir. 1974) ("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."); *see also Palisades Citizens Ass'n v. Civil Aeronautics Bd.*, 420 F.2d 188, 192 (D.C. Cir. 1969); *Allegheny Airlines, Inc. v. Cedarhurst*, 132 F. Supp. 871, 878–79 (E.D.N.Y. 1955), *aff'd* 238 F.2d 812 (2d Cir. 1956); *Browning v. MCI, Inc. (In re WorldCom, Inc.)*, 546 F.3d 211, 217 (2d Cir. 2008).
[64]*Buford*, 133 U.S. at 326.

neighboring public land or to achieve monopolistic control over that public land by implication.[65]

8. The Unlawful Inclosures of Public Lands Act of 1885 (the "UIA") prohibits "all 'enclosures' of public lands, by whatever means . . . ."[66] The UIA expressly outlaws any person using "force, threats, [or] intimidation" (along with fences and "any other unlawful means") to prevent or obstruct peaceful entry to public lands.[67] So, using a state-law trespass claim to achieve an *effective* enclosure of public land or in a way that completely prevents and obstructs peaceful entry to public lands violates the UIA.

9. *Mackay* illustrates this argument.

a. John Mackay sought to drive a band of sheep across Wyoming's Checkerboard to reach his winter range.[68]

b. The Uinta Development Company, a cattle ranching outfit that owned several odd-numbered

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[65]*See id.* at 332 ("Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under pretense of owing a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege."). *See also United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1508 (10th Cir. 1988) ("All that Lawrence has lost is the right to exclude others, including wildlife, from the public domain -- a right he never had."); *Camfield*, 167 U.S. at 526 ("It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.").
[66]*Camfield*, 167 U.S. at 525. *Accord Bergen*, 848 F.2d at 1505, 1508–09.
[67]43 U.S.C. § 1063; *see also Mackay*, 219 F. at 119–20; *Bergen*, 848 F.2d at 1511 ("[I]t is not the fence itself, but its effect which constitutes the UIA violation.").
[68]*Mackay*, 219 F. at 117–18.

sections of land in the area, warned Mackay not to cross its land.[69]

c. Because no other path existed to get Mackay and his flock to their winter range, Mackay started across the Checkerboard, including the odd-numbered sections, despite the Uinta Company's warnings.[70] He was arrested in route for trespassing.[71] The Uinta Company also sued him for damages in the United States District Court for the District of Wyoming.[72]

d. At trial, Mackay argued that, if the cattle company refused to designate a reasonable path to the public domain for him and his flock, then "he was entitled to select a reasonable way."[73] The trial court rejected this argument and found that Mackay was indeed liable for trespassing on the Uinta Company's land.[74]

e. On appeal, the then-Eighth Circuit[75] reversed the trial court's legal conclusion about Mackay's "reasonable way" argument.[76]

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[69] *Id.* at 118.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] "In 1929, Congress divided the Eighth Circuit into two circuits. The Eighth Circuit retained Minnesota, 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." *Iron Bar*, 674 F. Supp. 3d at 1073.
[76] *Mackay*, 219 F. at 118–20.

f. Surveying *Buford*, *Camfield*, the UIA, and cases applying them, the Eighth Circuit concluded that the UIA "has been construed to prohibit every method that works a practical denial of access to and passage over the public lands" and so, in the Checkerboard, a landowner cannot use *either* fences *or* "warnings and actions in trespass" to obstruct access to public lands and "secure for itself that value, which includes as an element the exclusive use of the public lands[.]"[77]

g. Thus, the Eighth Circuit held that Mackay was "entitled to a reasonable way of passage over the unenclosed tract of land without being guilty of trespass."[78]

10. In the most recent high-profile lawsuit weighing private property rights against public access to public land in the Checkerboard, the United States District Court for the District of Wyoming followed *Mackay* to conclude 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."[79] That decision is being reviewed on appeal by the Tenth Circuit, which held oral arguments in the case on May 14, 2024, in Denver, Colorado.

[77] *Id.* at 119–20.
[78] *Id.* at 120.
[79] *Iron Bar*, 674 F. Supp. 3d at 1077.

II. Access of Wyoming streams across private property for fishing/boating/recreation

A. Wyoming

Just as corner crossing across private lands is an issue, so is whether a recreationist or angler can take a boat down a waterway on private property. Most western state Constitutions state that water is held in trust for the citizens of the state[80] but generally at statehood the banks and bed of a stream were granted to the property owners under most homestead acts (There is some variation because there were dozens of homestead acts). So, if under the Wyoming constitution, the state holds the water in trust for the citizens and that water is declared to be the property of the state,[81] but the landowner owns the stream bed and banks, the question is whether a fisherman or boater just use the state's water for fishing or boating while crossing over the private property of the landowner.

1. Navigability and use of streams for boating by the public is a state law issue. In Wyoming, the issue was decided in *Day v. Armstrong.*[82]

a. Navigable water – defined by the original Rivers and Harbor Act of 1882.[83] The Act said that while the states own or manage most of the water in the state, the federal government has control over navigable water and the federal government owns the riverbed of navigable waters which are waters that pass between states used to transport commerce.

b. Wyoming, in fact, has few legally defined navigable waters under the Rivers and Harbors Act. Wyoming is the headwaters of 4 major river basins, based on how the continental divide runs. They are Missouri-Mississippi, Green-Colorado, Snake-Columbia, and Great Salt Lake. The few "navigable waters" Wyoming includes the Snake River from

[80] *See e.g.,* Wyo. Const. Art. 1 § 31.
[81] *See e.g.,* Wyo. Const. Art. 8 § 1.
[82] *Day. v. Armstrong*, 362 P.2d 137 (Wyo. 1961).
[83] Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151.

Jackson Lake to the Utah border and Flaming Gorge near Green River to the Colorado line.

c. *Day v. Armstrong* held that boaters could float down both navigable and "non-navigable waters" so long as such water is actually usable by a small craft.[84] Being "actually usable" does not mean that if there is one rapid or obstruction, the stream cannot be used for boating, but generally the recreationist cannot touch the sides or bottom of the stream as that is private property.[85] The landowner also owns all islands in the stream so resting on an island is a trespass in Wyoming.

2. Once the Clean Water Act of 1972 was passed as an amendment to the Rivers and Harbor Act, Congress and the courts expanded the definition of a navigable water, but the Wyoming access case was decided before the Clean Water Act amendments and there has not been another challenge in Wyoming.

B. Montana

1. In 1984, the Montana Supreme Court held that the streambed of any river or stream that has the capability to be used for recreation can be accessed by the public regardless of whether the river is navigable or who owns the streambed property.[86]

2. On January 16, 2014, the Montana Supreme Court, in a lawsuit filed by the Public Land/Water Access Association over access via county bridges on the Ruby River in Madison County, Montana expanded this right, reaffirmed the Montana Stream Access Law and the a right to access rivers in Montana from public easements.[87] Thus, while the landowner may put up fences to stop livestock from accessing the area between a roadway or bridge to the

[84] *Day*, 362 P.2d at 147.
[85] *Day*, 362 P.2d at 147.
[86] *Montana Coalition for Stream Access, Inc. v. Curran,* 210 Mont. 38, 53, 682 P.2d 163, 171 (1984).
[87] Bitterroot Protective Ass'n v. Bitterroot Conservation Dist. (BRPA II), 198 P.3d 219 (Mont. 2008).

water, the landowner has to also erect styles or put up gates to allow public access to the stream or river.[88]

C. Colorado

1. Stream access in Colorado followed Wyoming's rules until a 2023 decision brought some aspects into question. In 1979, the Colorado Supreme Court held that the public had a right to traverse on "navigable waters" in Colorado for boating and fishing.[89] However, in 2023, an angler named Roger Hill sued a landowner named Mark Warsewa and Linda Joseph for blocking his access to the navigable stream bed. Hill sought to quiet title against the landowners by arguing that since the Arkansas River was navigable at statehood, the stream bed was public land held by the state therefore he could walk up and down the River to fish. The State of Colorado joined the suit (since Hill argued that the streambed was public land). After years of procedural arguments and bouncing around between the state and federal court, the case ended at the Colorado Supreme Court which held that Hill did not have standing to sue to argue that the streambed was public land.[90]

2. Based on this ruling, recreationists and anglers have claimed that access to waterways is now in question based on the need to be able to pull boats across rapids or rocks or portage around barriers.[91]

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[88] *Lane, Robert N. (2015). "The Remarkable Odyssey of Stream Access in Montana". Public Land and Resources Law Review Vol. 36, Article 5. Retrieved 2018-04-10.*

[89] *People v. Emmert,* 198 Colo. 137 (Colo. 1979).

[90] State of Colorado v. Hill, 530 P.3d 623 (Colo. 2023).

[91] "The problem, of course, with this transfer of title to the bed is that there's no paper to sort of designate which streams are navigable or not navigable," said Mark Squillace, Hill's lawyer and a professor of natural resources law at the University of Colorado Law School. "It requires this type of litigation to make the determination that a particular stream or stream segment is in fact navigable for title. And so that's what we sought to do in this case." Emma VandenEinde, *Colorado Supreme Court upholds a narrow stream access laws – "a total outlier" in the Mountain West,* Wyoming Public Media, June 12, 2023.