

O P I N I O N

Corner crossing sparks new 'range war'

Corner crossing. Think about this landscape: 8.3 million acres in 11 Western states, including more than 1 million in Wyoming. Those two simple words have that scale and magnitude of legal impact. They are in dispute in litigation now pending in the 10th Circuit Court of Appeals in Denver. In my opinion this is the most important case over land use and private property rights versus public access in a century.

Those two words are at the heart of a modern-day range war, right out of pages of the Old West. The fight pits a North Carolina businessman who acquired a large Wyoming ranch (private land owner) against the public (nonresident elk hunters from Missouri). After the rancher got the prosecutor in Rawlins to sue the hunters for criminal trespass, in 2023 the jury acquitted the hunters — not guilty, go home. The civil trespass issue then went before the federal District Court in Cheyenne. The District Court judge agreed with the hunters, citing an 1895 case interpreting a federal grazing statute that contains this dramatic language: “a few would be cattle kings ... [cannot] ... leverage ownership of railroad sections in the Checkerboard to obtain exclusive control over the entire landscape.”

Checkerboard, railroad sections, corner crossing — there are about 140 years of history involved to put those words in context. First, imagine that you are standing on a really big checkerboard. The yellow squares are public land (managed by the U.S. Bureau of Land Management), and the white squares are private land (former railroad lands). You step from one yellow square to another, diagonally. In stepping across diagonally, you do not touch a white square. The legal issue: By accessing, stepping across the corners at the intersection of the yellow BLM squares, did you trespass on the white squares, private land? Now imagine each square is 640 acres, a section of land, 1 square mile. Also, imagine the checkerboard is 40 miles wide and hundreds of miles long, extending for about 20 miles on each side of a railroad track crossing the center of the checkerboard. A picture is said to be worth 1,000 words. See the checkerboard map for the area along Interstate 80 near Elk Mountain, the litigation landscape.

That is what happened in the West. From about 1850 to 1870, to accelerate the pace of construction, railroad companies received more than 175 million acres of public land that eventually were sold into private ownership (the white squares in the checkerboard example). That's an area more than 1/10th of the whole United States and larger in area than Texas. In the 1860s the Union Pacific Railroad laid track across southern Wyoming, roughly parallel to what became Interstate 80, and was granted more than a million acres. The railroad sections eventually sold to ranchers and other private land owners. The federal government (BLM) retained every other section. Thus, the checkerboard private/public land pattern.

Now 140-plus years later, in the rancher's appeal from Cheyenne to Denver in the appellate court brief, the lawyers for the rancher frame the trespass legal issue using Old West and Open Range War imagery with historical resonance: “Defendants and their amici [‘friends of the court’] do not offer a [winning] legal argument, so much as a story — the sequel to the range wars. ... Defendants [hunters] cast themselves as heirs to the small-time herders and homesteaders of yore, law abiders who merely want to use public land for law-abiding purposes. ... Standing in their way are private landowners, the modern-day descendants of the cattle kings who once ruled the Plains through fence and force. Defendants invite this court to play the role of town sheriff. ... corralling [the ranchers] ... and restoring order to the West.”

Stay tuned, this is a really big deal. Whoever loses at the Denver appeals court likely will appeal to the U.S. Supreme Court. The billionaire rancher's property rights legal theory is supported by several amici briefs, including from the Wyoming Stock Growers Association. Also, the nonresident hunters' right-of-access legal theory is supported by several amici briefs, including from the Sierra Club.

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GUEST SHOT

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