Representing the Surface Owner on Severed Estate Lands in Arizona

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I. Introduction

A. General Considerations

The Old West experienced many struggles: sheepmen versus cattlemen, family or clan feuds, cattle barons versus small ranchers, and political disputes. Most of these ancient conflicts have ended but at least one continues today.

Nowadays entire Arizona communities can struggle with the sudden appearance of a mineral estate developer seeking to disrupt the surface estate and its improvements for mineral exploration or development purposes.[1] Severed estate problems can confront both the individual and larger surface owner. At one time Pima County faced 3,812 mining claims on federal minerals within open space reserves created pursuant to Pima County's Sonoran Desert Conservation Plan.[2]

The situation develops because the surface estate of a tract of land can be severed from the mineral estate by grant or reservation in a deed or by patent. A land patent is an exclusive land grant made by a sovereign entity with respect to a particular tract of land.[3] This article focuses on basic use conflicts arising between private surface and mineral owners as a result of deed and patent, and the surface owner's alternatives in dealing with the situation.

The severance of a mineral estate from a surface estate creates separate rights of ownership and use in and to the resulting surface and mineral estates. Potential conflicts in the use and development of different estates in the same land arise whenever one estate is severed from another. [4]

Severed estates can cause real problems and should not be ignored. The mineral estate has traditionally been held to be dominant over the surface estate, with a broad array of rights implied by law to the owner of the mineral estate.[5]

Many of the severances, whether by deed or patent, occur on formerly rural lands now subject to development due to Arizona's increasing population. The unwary and surprised surface owner can be difficult to represent when residential development encroaches onto these areas. A cautious surface owner should be as proactive as possible, seeking accommodation with the mineral estate owner in the case of severance by deed and utilizing the existing regulatory mechanisms in the case of severance by patent. Simply ignoring the issue and waiting until potential mineral development appears increases the likelihood of the ever-present shotgun in the hands of the surface occupant readily becoming the center of attention.[6]

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[1] Susan Carroll, "Community Struggles to Keep Rights to Land" *Arizona Republic*, 13 February 2006, A1.
[2] HR 2944, The Southern Arizona Public Lands Protection Act, Testimony Submitted by: Chuck Huckelberry, Pima County Administrator; Date of Testimony; January 21, 2010.
[3] Land patent. n.d. In *Wikipedia*. Retrieved 28 April 2014, http://en.wikipedia.org/wiki/Land_patent.
[4] 6 Am. L. of Mining § 200.01 (2nd ed. 1984).
[5] 6 Am. L. of Mining § 200.02 (2nd ed. 1984).
[6] Lacey, John C., Conflicting Surface Interests: Shotgun Diplomacy Revisited, 22 Rocky Mt. Min. L. Inst. 731 (1976).

The existence of separate estates necessarily creates difficult questions regarding their concurrent use and development. A purchaser must closely examine his chain of title and insurance documentation since a severed estate is fully transferable. Real property mortgages are not deemed as encumbered by reason of a mineral reservation.[7] The same is true of investments in real estate.[8] Mineral estates may be reserved by either party in an exchange for state lands.[9]

The confrontation between surface and mineral estate owners pre-dates the Arizona Territory. Arizona contains nine land grants from the Spanish Crown or Mexican Republic.[10] In 1891 the United States Congress enacted a new procedure for investigation and confirmation of Spanish and Mexican grants within the territories of Arizona, New Mexico, and Utah.[11] Other western states were also included.

The 1891 Act contained language limiting the transfer of minerals but requiring the surface owner's consent to mining operations. In 1901 the Supreme Court of the United States ruled that a mining location after the effective date of the 1891 act on a land grant would be a valid location.[12] However, in 1925 the Supreme Court of Arizona ruled that a land patent passed to the grantee all minerals other than gold, silver, and quicksilver, and also all gold, silver, and quicksilver mines or deposits not known as valuable at the time of the patent.[13]

The mineral estate has traditionally been held to be dominant over the surface estate, with a broad array of rights implied by law to the owner of the mineral estate.[14] The scale of the problem is significant as approximately 1,653,491 or 13.3% of Arizona's 12,400,000 acres of private land [15] remain subject to severance by patent.[16] The number of acres subject to severance by deed is unknown.

B. Severances

Severance by deed occurs when a private conveyance of real property segregates the surface and mineral estates. The segregating language can appear as a limited conveyance of all or a part of either estate. It can also appear as a reservation of the mineral estate. The reservation language can take many forms, referencing all minerals or specific minerals.

Severance by patent, for purposes of this article, occurs when the United States of America issues a patent disposing of public lands but reserving minerals to the United States.[17] The reservation language can usually be found toward the end of the patent. Even if a patent

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[7] A.R.S. § 20-553.B.
[8] A.R.S. § 20-1564.B.1.
[9] A.R.S. § 37-605.C.
[10] Cabeen, T. W., Land Tenure in Northeastern Arizona, New Mexico Geological Society, Ninth Field Conference.
[11] Act of Mar. 3, 1891, ch. 539, 26 Stat. 854.
[12] Lockhart v. Johnson, 181 U.S. 516, 526 (1901); Baca Float No. 3, 36 L.D. 455, 471 (1908).
[13] Gallagher v. Boquillas Land & Cattle Company, 28 Ariz. 560, 238 P. 395 (1925).
[14] 6 Am. L. of Mining § 200.02 (2nd ed. 1984).
[15] Arizona State Land Department Annual Report 2011 – 2012; Arizona State Land Department; http://www.azland.gov/report/report2012_full.pdf.
[16] U.S. Department of the Interior Legacy Rehost 2000 (LR2000).
[17] 1 Am. L. of Mining § 9.01.1 (2nd ed. 1984).

does not include reservation language a patent can convey no more and no less than was authorized by the statute pursuant to which it was issued.[18] Specific statutory mechanisms for disposal are discussed below.

Construction of a severance deed depends on the intent of the parties at the time of its execution[19], as reflected by the language of the conveying instrument.[20]. Construction of a patent issued pursuant to statute depends on the intent of the legislature enacting the statute. Cases relating to one of these two methods of severing mineral and surface estates are not authority for the other method of severing estates.[21]

II. Severance by Deed

A deed severance can be found by examination of the deeds in the chain of title and by review of the exceptions in a title company's commitment. Many unwary purchasers have ignored the unfamiliar reservation language to their eventual dismay.

The Arizona Supreme Court addressed the nature of such severed estates and their interaction in Spurlock v. Santa Fe Pacific R. Co., 694 P.2d 299, 143 Ariz. 469 (Ariz. App., 1984). Spurlock addresses the issue of whether a deed reservation of "all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands" includes the disputed substances of helium, nitrogen, potash, petrified wood, and industrial clay.[22] The case unambiguously defines "minerals" as inorganic, commercially valuable substances which are distinct from the soil itself, whether known or unknown to the parties at the time of severance.[23]

Severance by deed creates two distinct, co-existing, and individually valuable estates. The mineral estate owner retains ownership of all commercially valuable substances separate from the soil, while the surface estate owner assumes ownership of a surface that has value in its use and enjoyment.[24]

Spurlock recognizes that in order for both the surface and mineral estates to co-exist and retain their individual value, some accommodation between the respective owners is necessary. With respect to minerals specified in the conveyance or minerals commercially known to exist at the time of the conveyance, reasonable destruction of the surface estate is permissible. However, no such specific intent can be found with respect to substances which were unknown or had no commercial value at the time of the conveyance. The holder of the mineral estate owns such substances, but his development of these resources must not substantially interfere with the surface owner's estate. The Arizona Supreme Court has opined that only in this way can the

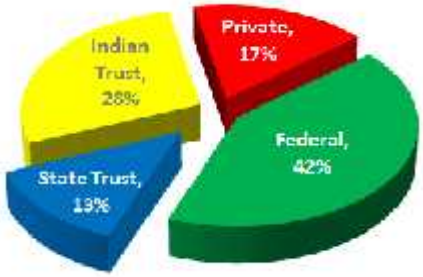
[18] 1 Am. L. of Mining § 9.02.4 (2nd ed. 1984).
[19] Twitty, Howard A., Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations, 6 Rocky Mt. Min. L. Inst. (1961).
[20] 6 Am. L. of Mining § 200.02 (2nd ed. 1984).
[21] See note 18 above.
[22] Spurlock v. Santa Fe Pacific R. Co., 694 P.2d 299, 143 Ariz. 469, 474 (Ariz. App., 1984).
[23] Ibid, 143 Ariz. 469, 481.
[24] Ibid, 143 Ariz. 469, 478.

general intention of the parties to create and enjoy two co-existing, individually valuable estates be given effect.[25]

III. Severance by Patent

Arizona is a public land State, one of the thirty States created out of the public domain.[26] The United States obtained the lands that would become Arizona through the 1848 Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic (Treaty of Guadalupe Hidalgo)[27], which ended the Mexican War, and the subsequent Gadsden Purchase Treaty[28] of 1853. The State was admitted into the Union on February 14, 1912.[29]

Consequences of Arizona's status as a public land state include most of the land still being owned by the United States or Native American entities. The State of Arizona contains an estimated 72,931,000 acres, or approximately 113,417 square miles, making it the sixth largest state in the United States. Only 17% of that total acreage, or approximately 12,400,000 acres, is privately owned.[30]



A further consequence of the State's creation from the public domain is a significant portion of the 12,400,000 acres of Arizona's private lands do not include full surface and mineral rights. This situation arose, in part, because a considerable portion of Arizona's private lands originated in federal statutes which created only surface ownership, reserving the mineral estate to the United States.

A significant portion of Arizona's 12,400,000 acres of private lands do not include full surface and mineral rights. This situation arose, in part, because a considerable portion of Arizona's private lands originated in patents issued pursuant to federal statutes which created surface ownership only, reserving the mineral estate to the United States.

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[25] Ibid.
[26] *Manual of Surveying Instructions*, The Department of the Interior, § 1-23 (1973).
[27] Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, February 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922.
[28] Gadsden Purchase Treaty, 10 Stat. 1031 (December 30, 1853).
[29] 36 Stat. 557; 37 Stat. 1728.
[30] See note 15 above.

Most of these severed estate lands originated in patents issued under the Stock-Raising Homestead Act of 1916[31] (SRHA) or the Taylor Grazing Act of 1934[32] (TGA). These statutes generally reserved all three classifications of federal minerals: locatable, salable, and leasable minerals.[33] Both statutes contemplated agricultural and stockraising surface uses and are therefore commonly found in formerly rural areas. Both the SRHA and TGA were expressly repealed by § 702 of the Federal Land Policy and Management Act of 1976 (FLPMA).[34]

Federal records indicate 2,976 patents encompassing 1,418,269 acres were issued under the SRHA and 473 patents encompassing 417,501 acres were issued under the TGA in Arizona prior to FLPMA.[35] A commonly accepted rule of thumb is that each SRHA and TGA patent encompassed 160 acres, one-quarter of a public land survey section. Many of these original parcels of land have been subdivided into smaller allotments with divided surface ownership.

A county-by-county summary of SRHA and TGA patents is attached hereto as Appendix A.

By methods described below, the severed surface and mineral estates on 182,209 acres of the total SRHA and TGA patented acreage have been consolidated.[36] The resulting remaining 1,653,491 acres of SRHA and TGA severed estate lands therefore amount to approximately 13.3% of Arizona's private lands.

The patent surface owner also faces risk if an attempt is made to use the mineral estate for his own purposes. Processing mineral materials trespass is a high priority for the BLM. A surface owner may extract, sever, or remove only minimal amounts of mineral materials from split estate land for personal use for purposes of improving the surface, even if the materials are not removed off of the tract.[37] Any separation or alteration of the various constituents of the material, through methods such as screening or crushing, constitutes a mineral use of the materials and requires a contract or permit. Furthermore, any use of the materials in a construction project, such as for road base, building foundations, or ornamentation, also constitutes a mineral use of the materials – even if the material was not altered in any way – and also requires purchase or permit from the BLM.[38]

A. Reservations and Types of Federal Minerals

An Arizona surface owner will most commonly encounter issues with third parties seeking to claim the locatable minerals, as compared to salable or leasable minerals. On both a

[31] 39 Stat. 862, 43 U.S.C. § 299, et seq.
[32] Pub.L.No. 73-482, ch. 865, 48 Stat. 1269, 1272 (1934) amended by Pub. L. No. 74-827, amended by Act of June 16, 1936, ch. 842, 49 Stat. 1976, 1976-78 (repealed 1976).
[33] 1 Am. L. of Mining § 9.03.3 (2nd ed. 1984).
[34] Public Law 94-579, as amended (October 21, 1976), 43 U.S.C. § 1701, et seq.
[35] U.S. Department of the Interior Legacy Rehost 2000 (LR2000).
[36] Ibid.
[37] 43 CFR 3601.71(b)(1).
[38] DOI Instruction Memorandum No. 2014- 085, Unauthorized Use of Mineral Materials on Split Estate Lands, dated April 23, 2014.

national and statewide basis locatable minerals in lands patented under the SRHA and TGA comprise the majority of federal reserved minerals that are subject to location.[39]

Locatable minerals include any valuable mineral deposit that is not saleable or leasable and is locatable under the Mining Law of 1872,[40] as amended. The term generally refers to metalliferous minerals such as gold and silver but also includes uncommon varieties of sand, stone and other building materials.

Salable minerals include common varieties of sand, stone, gravel, clay and other mineral materials. The Mineral Materials Act of 1947,[41] as amended, governs exploitation of salable minerals on BLM and other federal lands.

Leaseable minerals include coal, phosphate, oil, gas, sodium and others. The Mineral Lands Leasing Act of 1920 [42] provides for disposal of leasable minerals thorough competitive and non-competitive leasing systems.

B. Stockraising Homestead Act

1. Statute

The SRHA authorized qualified persons to enter lands designated by the Secretary of the Interior as "stock-raising lands," and to acquire a patent for 640 acres or less, but reserved to the United States "all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." Until 1993, the prospector was able to enter such lands to prospect and, upon discovery of a deposit of locatable minerals perfect the location, subject only to liability to the agricultural entryman for resultant damages to crops or permanent improvements.[43]

On April 16, 1993, Congress enacted an amendment to the SRHA leaving its original text intact, but adding eight provisions which impose higher burdens, vis-a-vis surface owners, on persons desiring to conduct mineral exploration and location activities on SRHA lands. The effect is to increase the rights of the surface owners of those lands. These amendments became' effective October 16, 1993, and, in summary, they require the following[44]:

> No person (other than the surface owner) may enter lands subject to the SRHA to explore or locate a mining claim without filing notice of intention with the Secretary of the Interior, and without providing notice to the surface owner at least 30 days prior to entry;
>
> During the 90-day period following filing of such notice, no other person (including the surface owner) may file such a notice, explore, or locate a mining claim on the lands, or

[39] 1 Am. L. of Mining § 9.04.2 (2nd ed. 1984).
[40] 30 U.S.C. § 22, et seq.
[41] 30 U.S.C. § 601, et seq.
[42] 30 U.S.C. § 181, et seq.
[43] 1 Am. L. of Mining § 9.05. 2 (2nd ed. 1984).
[44] Wellborn, John F., New Rights of Surface Owners: Changes in the Dominant/servient Relationship Between the Mineral and Surface Estates, 40 Rocky Mt. Min.L. Inst. Chapter 22, page 4 (1994).

file application for or acquire any interest in such lands. If the person who files the notice also files a plan of operation, the 90;.day period is extended until the plan of operation is acted upon by the Secretary;

Surface owner consent is required to engage in mineral activities other than simple exploration which does not involve the use of mechanized earthmoving equipment, explosives, road construction, drill pads, or the use of toxic or hazardous materials;

If the mineral owner is unable to secure permission from the surface owner, the Secretary may grant permission;

With or without surface owner consent, a bond is required (i) to insure the completion of reclamation, (ii) to insure payment to the surface owner, upon abandonment, for any permanent damages to crops and tangible improvements of the surface owner that resulted from mineral activities, and (iii) to insure payment to the surface owner of compensation for any permanent loss of income of the surface owner. In addition, the bond [22-11]amount may reflect permanent reduction in utilization of the land;

The amendment limits the total combined acreage which may be covered at any one time under notices filed by anyone person (and affiliate of that person) to 6,400 acres in one state. Further, notices totaling no more than 1,280 acres may be filed against anyone surface owner;

Before mineral activities may be conducted, a Surface Use Plan of Operations (SUPO) must be filed and approved, and the surface owner shall have had at least 45 days to comment on the plan. The plan must cover minimizing damages to crops, improvements, grazing or other surface uses, and the payment of fees for loss of income to the surface owner. The Secretary has 60 days (extendable, of course) to approve the plan;

The fee shall be paid to the surface owner, usually in advance of the mineral activity and shall not exceed the fair market value for the surface of the land.

2. Regulations

The Secretary of the Interior promulgated regulations adopting the 1993 SRHA changes.[45] These regulations restate much of the amendment and add certain clarifications, including the following[46]:

During the 90-day period following the filing of the notice, no one may file an application under 209 of FLPMA to acquire an interest in the lands covered by the notice;

The standard for the required Plan of Operations is that set forth in 43 C.F.R. § 3809, and it is clarified that filing the plan results in an extension of the 90-day period until the BLM approves or denies the plan;

[45] 43 C.F.R. § 3814, et seq.; 43 C.F.R. § 3838.10-91.
[46] See note 44 above.

The separate notice to the surface owner of the filing of the notice of intent to locate must be given by registered or certified mail at least 30 days prior to actual entry.

C. Taylor Grazing Act

1. Statute

Section 8 of the TGA authorized the Secretary of the Interior to accept, on behalf of the United States, title to any privately owned lands, in exchange for a patent for public lands of equivalent value. Either party to an exchange based on equal value might make a mineral reservation but reservations of minerals were not required in exchanges between private persons and the United States. The same statute provided for exchanges between the United States and states based on equal acreage. In such exchanges, when the lands selected by the state were mineral in character, the patent was required to "contain a reservation of all minerals to the United States."[47]

Minerals reserved to the United States in patents granted pursuant to the TGA exchanges remained open to mineral location and leasing, at least until repeal of section 8 of the TGA by FLPMA in 1976. Whether the repeal withdrew such minerals from appropriation initially seemed unclear. However subsequent decisions of the Interior Board of Land Appeals held that the minerals are available for appropriation under the mining or mineral leasing laws.[48]

2. Regulations

Reserved minerals in lands patented with a mineral reservation under the TGA are subject to appropriation under the mining law.[49] Surface operations on locatable minerals are regulated by 43 C.F.R. § 3809, et seq.[50], including the unnecessary and undue degradation standards found therein.

IV. Evaluating and Confronting a Mineral Reservation

Severed estates created by deed are treated differently from those created by patent. In both cases the surface owner's first step is an independent geological evaluation of the property.

A. Geological Evaluation of a Severed Mineral Estate

A surface owner confronting a severed mineral estate should independently evaluate the mineral potential of the land. The services of a qualified geologist or mining engineer, preferably one registered with the Arizona Board of Technical Registration, will assist in defining the issues challenging such owner.

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[47] 1 Am. L. of Mining § 9.05(2)(i) (2nd ed. 1984).
[48] Ibid.
[49] 43 C.F.R. § 3811.2-9.
[50] 43 C.F.R. § 3809.5.

Any assessment of severed mineral estate should include a close inspection of the surface to observe general geology of the area and to search for signs of current or past mineral exploration activities. Indications of mineral-related efforts could include presence of claim posts, trenches, drill sites, and of course, mine shafts and adits. One must be aware, however, that reclamation efforts or natural physical processes could obscure past surface disturbances. Also, some exploration efforts such as geochemical sampling and geophysical surveys do not leave significant footprints. Therefore, additional work is required to gain further knowledge of site mineral potential. These studies would typically include: 1) A search of BLM records for past mining claim locations and exploration or mining plans; 2) Inspection of historical mine file data held by such entities as the Arizona Geological Survey and the United States Geological Survey, and; 3) Study of the geological literature to search for clues regarding subject site mineral potential.

Should an initial site inspection or other indicators suggest high mineral potential, additional work is required. Commonly, this would include collection of samples to be analyzed for whatever valuable minerals (copper, gold, sand and gravel, limestone, etc.) could be present within the severed mineral estate. Salable minerals such as sand and gravel and decorative rock are particularly important near metropolitan areas due to transportation costs being so critical in profitable sale of low price to high volume rock products. Because BLM collects cash royalties on sale of common variety minerals, it is highly unlikely that significant occurrences of such minerals would be conveyed to surface owners. Conveyance of other mineral interests for locatable and leasable minerals would depend on degree of mineral potential and land use considerations. In some cases, surface sampling would not be applicable because potential mineralization is covered by barren material on the surface. Examples of this situation would be a layer of coal 100 feet below the surface, deep oil deposits, or even projection of metal-bearing quartz veins into severed mineral estate that is covered by rocks younger than the veins. Definite evaluation of these types of geological conditions is usually beyond the ability or desire of most surface owners. Depending on its intensity and level of certainty, covered mineral potential may preclude conveyance of mineral interests to the surface estate owner.[51]

The mineral estate may have value and be an exploitable asset. Or it may have no value. In either case or something in between, understanding the nature of the mineral estate will help define the surface owner's alternatives. The services of a qualified geologist or mining engineer will assist in that understanding.

B. Severance by Deed

Spurlock defines the relationship between a private surface owner and a private mineral estate owner. As expeditiously as possible the surface owner should conduct the above described mineral evaluation and evaluate it in the Spurlock context. Failing to be proactive will eventually remove many of the surface owner's options.

[51] Dr. David E. Wahl, Jr., Ph.D., Registered Geologist.

Then seek to reach an accommodation with the minerals owner. Both the surface and mineral estates are fully negotiable. The time to do this is before mining operations are contemplated. This accommodation can be anything from an agreement regarding mining operations to an outright purchase of the mineral rights. A mutual agreement including all the necessary compromises is preferable to taking one's chances in a court-imposed interpretation of Spurlock.

C. Severance by Patent

Dealing with a SRHA or TGA reserved mineral estate is two -step process, more administrative in nature than with confronting a private reservation. In this case the United States owns the minerals, whatever their nature. Those valuable minerals, if any, are potentially exploitable by third parties. It is therefore imperative that the surface owner conduct the above-described mineral evaluation.

A SRHA or TGA surface owner will probably encounter the Bureau of Land Management (BLM), United States Department of the Interior (DOI), when confronting the severed mineral estate. BLM manages 12.2 million acres of surface acreage and 17.5 million acres of subsurface acreage in the State of Arizona.[52] It is responsible for implementation of the federal mining laws on those lands.

BLM policy regarding reserved mineral estate development and its conflict with the surface owner is set forth in a policy statement[53]

> The BLM will work cooperatively with surface owners and mineral operators in recognizing their rights on split-estate lands. In the absence of a Surface Owner Agreement and in managing development of the Federal mineral estate on a nonfederal surface, the BLM will take into consideration surface owner mitigation requests from pre-development to final reclamation.

This policy statement does not give the surface owner anything resembling preemptive rights. It does reinforce the need for the surface owner to be proactive in his evaluation of the mineral estate.

1. Application for Conveyance of Minerals

After evaluating the mineral estate, the surface owner should apply to the United States Department of the Interior (DOI) for a conveyance of the mineral estate. Completion of the conveyance application could result in a patent from the United States vesting the mineral estate, or parts thereof, in the surface owner. During this process the surface owner may have to confront a third party already holding the locatable minerals through mining claims. The mining

[52] "Fast Facts," Arizona Bureau of Land Management, 25 July 2014, http://www.blm.gov/az/st/en/info/about/fast_facts.html>.
[53] Caswell, James, BLM Director, Bureau of Land Management - Energy and Mineral Policy, part 4, 26 August 2008.

claims can be eliminated through arriving at an accommodation or a private contest with the claims owner.

A county-by-county summary of Section 209 patents is attached hereto as Appendix A.

The application for conveyance is conducted pursuant to Section 209 of the Federal Land Policy and Management Act of 1976 (FLPMA).[54]. If the DOI makes one of two findings, the United States may convey the mineral estate to the SRHA or TGA surface owner. Those two findings are: (1) that there are no known mineral values in the land; or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land, and that such development is a more beneficial use of the land than mineral development.[55]

How can I obtain the mineral rights under my property?

> The BLM regulations establish procedures under section 209 of the Federal Land Policy and Management Act of 1976, for conveyance of mineral interests owned by the United States where the surface is or will be in non-Federal ownership. The objective is to allow consolidation of surface and subsurface or mineral ownership where there are no "known mineral values" or in those instances where the reservation interferes with or precludes appropriate non-mineral development and such development is a more beneficial use of the land than the mineral development.[56]

Another BLM policy expresses the intent of avoiding the conveyance of some, but not all, of the mineral interests. If the public land has no known mineral values, the BLM may convey the mineral estate. Where the land does have known mineral values, the BLM may convey only if a finding is made that the reservation is interfering with or precluding appropriate non-mineral development of the land and that such development is a more beneficial use of the land than mineral development.[57]

No specific form of application for conveyance of minerals is required. However, each application must include[58]: (1) the surface owner's identifying information, (2) proof of ownership, (3) a certified copy of the SRHA or TGA patent, and (4) a statement describing the nature of the federally reserved or owned minerals, the existing and proposed uses of the land, why nonmineral development of the land would be more beneficial than mineral development , why the reservation of the mineral interests in the United States is interfering with that development, and how the proposed use will comply with state and local zoning and planning requirements.

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[54] Public Law 94-579, as amended (October 21, 1976), 43 U.S.C. § 1701, et seq.
[55] 43 U.S.C § 1719.
[56] Land and Mineral Ownership, Bureau of Land Management, http://www.blm.gov/es/st/en/prog/lands/00.print.html, (26 July 2014).
[57] DOI Instruction Memorandum No. 2013-170, dated August 2, 2013.
[58] 43 C.F.R. § 2720, et seq.

> Application Procedures - Applications must be filed in the appropriate BLM District Office. No specific form is required but each application shall include the name, legal mailing address and telephone number of the existing or prospective record owner of the land; proof of ownership; a certified copy of any patent or other instrument of conveyance with supporting survey evidence. The application must also include a statement concerning the nature of federally-reserved or owned mineral values in the land; existing and proposed uses of the land; why the reservation of the mineral interests in the U.S. is interfering with or precluding appropriate non-mineral development; how and why such development would be a more beneficial use of the land; a showing that the proposed use complies with state and local zoning requirement; and a non-refundable filing fee of $50.00 and administrative fee of $2,500.00. Please note that these fees in no way insure favorable action on an application.[59]

A critical part of the process is the closure order. BLM will issue an order closing the surface owner's land to further mineral entry. That means a third party cannot attempt to utilize the mineral resources for a period of two years. The closure order is renewable.

2. Private Contests

If mining claims are already present when the surface owner initiates his conveyance application and efforts at accommodation with the claimant fail, the surface owner can seek to eliminate the mining claims through a private contest. A private contest is an administrative proceeding brought within the administrative tribunal of the Department of the Interior Office of Hearings and Appeals to invalidate mining claims.[60]

Generally, the object of a contest of mining claims is to invalidate the claim or site by showing that it is invalid for failure to comply with the requirements of the mining laws. The surface owner's purpose in bringing a contest is to eliminate the conflict which the mining claims represent so that its right to possession or use of the land is unfettered by the mining claims.[61]

The SRHA or TGA surface owner has standing to bring a private contest against a mining claimant.[62] The Code of Federal Regulations specifically allows surface owners to initiate private contests in that part dealing with contests and protest proceedings regarding public land hearings[63]:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the Act of May 14, 1880, as amended (43 U.S.C. 185), or the Act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim

[59] See note 56 above.
[60] 2 Am. L. of Mining § 50.01 (2nd ed. 1984).
[61] Ibid.
[62] Morales v. Baudendistel, 105 IBLA 211 (1988); Thomas v. Morton, 408 F.Supp. 1361 (D. Ariz., 1976).
[63] 43 C.F.R. § 4.450-1.

> invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

The principal issue in private contests is whether the claimant has made a discovery of valuable minerals. The validity of any mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim.[64]

The principal test of whether or not a discovery of valuable minerals has occurred in known as the prudent man test. There has been no discovery of a valuable mineral deposit within a mining claim unless there has been physically exposed within the limits of the claim mineralization of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine.[65] The prudent man rule has been refined to also encompass a "marketability" test. This rule requires the mineral locator to show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be minded, removed and disposed of at a profit.[66]

In a private contest the burden of proof is on the contestant "to establish the invalidity of the contested claim by a preponderance of the evidence."[67] But there is no requirement for the contestant in a private contest to prove that no minerals are present on a contested mining claim. Rather, the contestant must merely establish by a preponderance of the evidence that there has been no timely and sufficient discovery of a valuable mineral deposit.[68] In the last analysis, preponderance of the evidence means nothing more than "probability of the truth."[69]

V. **Conclusion**

A property owner or prospective purchaser in a formerly rural area should carefully examine his chain of title and closing documents. Mineral severances or reservations can be present in many forms, often involving unfamiliar language.

A cautious surface owner should also be as proactive as possible, seeking accommodation with the mineral estate owner in the case of severance by deed and utilizing the existing regulatory mechanisms in the case of severance by patent. Waiting for a mineral estate owner or user to show his hand will limit the surface owner's options.

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[64] 30 U.S.C. § 22.
[65] United States v. Coleman, 390 U.S. 599, 602 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894); Thomas v. Morton, 408 F.Supp. 1361 (D. Ariz. 1976), aff'd 552 F.2d 871 (9th Cir. 1977).
[66] United States v. Coleman, 390 U.S. 599 at 603 (1968); United States v. Taylor et al., 19 IBLA 9 at 19-20 (1975).
[67] In Re Pacific Coast Molybdenum Co., 90 I.D. 352, 357 n. 4 (1983); Massirio v. Western Hills Mining Association, 78 IBLA 155, 160 (1983).
[68] Morales v. Baudendistel, 105 IBLA 211, 214 (1988).
[69] Asher v. Fox, 134 F. Supp. 27 (E.D. Ky. 1955).

APPENDIX A

STATE OF ARIZONA STOCKRAISING HOMESTEAD ACT, TAYLOR GRAZING ACT, AND MINERAL INTEREST CONVEYANCE PATENTS SUMMARY

COUNTY	SRHA PATENTS		TGA PATENTS		TOTAL SEVERED ESTATES ACREAGE	CMI PATENTS		COUNTY NON-GOVERNMENTAL PRIVATE PROPERTY	
	Number	Acreage	Number	Acreage		Number	Acreage	Acreage	% Severed Estate
APACHE	122	60,238	4	31,707	91,945	0	0	885,435	10.38%
COCHISE	830	334,145	28	7,103	341,248	15	7,668	1,587,041	21.02%
COCONINO	74	37,793	4	35,750	73,543	0	0		
GILA	33	15,709	3	680	16,389	1	1,751	80,631	18.15%
GRAHAM	106	50,921	18	17,960	68,881	3	1,930	265,618	25.21%
GREENLEE	42	21,012	6	7,838	28,850	5	12,518	71,936	22.70%
LA PAZ	25	8,830	27	18,618	27,448	3	4,667	149,075	15.28%
MARICOPA	176	79,528	84	136,139	215,667	85	56,563	1,506,645	10.56%
MOHAVE	202	109,539	37	72,131	181,670	3	714	1,387,968	13.04%
NAVAJO	77	36,938	1	1,520	38,458	1	50		
PIMA	621	326,295	35	24,054	350,349	14	15,128	686,911	48.80%
PINAL	325	155,616	36	28,148	183,764	13	35,165	863,052	17.22%
SANTA CRUZ	79	30,877	2	240	31,117	7	1,544	331,326	8.93%
YAVAPAI	296	150,710	37	46,845	197,555	60	47,532	1,119,436	13.40%
YUMA	0	0	162	33,069	33,069	1	160	341,148	9.65%
TOTAL	3,008	1,418,151	484	461,801	1,879,952	211	185,390	9,276,222	18.27%

Sources:

1. U.S. Department of the Interior Legacy Rehost (LR2000)
2. County Assessors' Offices