

**Representing the Surface Owner
on Severed Estate Lands in Arizona**

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Table of Contents

- I. Introduction**
 - A. General Considerations**
 - B. Severances**
- II. Severance by Deed**
- III. Severance by Patent**
 - A. Reservations and Types of Federal Minerals**
- IV. Evaluating and Confronting a Mineral Reservation**
 - A. Geological Evaluation of a Severed Mineral Estate**
 - B. Severance by Deed**
 - C. Severance by Patent**
 - 1. Application for Conveyance of Minerals**
 - 2. Private Contests**
- V. Conclusion**

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 This ongoing struggle between surface and mineral estate owners pre-dates the Arizona Territory.²

The situation develops because the surface estate of a tract of land can be severed from the mineral estate by 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 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.⁴

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. 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.⁵

The existence of separate estates necessarily creates difficult questions regarding their concurrent use and development. 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.⁶ The scale of the problem is significant as approximately 1,653,491 or 13.3% of Arizona's 12,400,000 acres of private land⁷ remain subject to severance by patent.⁸ 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.⁹ Even if a patent 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.¹⁰

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.¹¹ 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.¹²

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.¹³

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 general intention of the parties to create and enjoy two co-existing, individually valuable estates be given effect.¹⁴

III. Severance by Patent

A significant portion 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 patents issued pursuant to federal statutes which created surface ownership only, reserving the mineral estate to the United States.

Most of these severed estate lands originated in patents issued under the Stock-Raising Homestead Act of 1916¹⁵ (SRHA) or the Taylor Grazing Act of 1934¹⁶ (TGA). These statutes generally reserved all three classifications of federal minerals: locatable, salable, and leasable minerals.¹⁷ Both statutes contemplated agricultural and stockraising surface uses and are therefore commonly found in formerly rural areas.

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

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

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.¹⁸

Locatable minerals include any valuable mineral deposit that is not saleable or leasable and is locatable under the Mining Law of 1872,¹⁹ 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 1947,²⁰ 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 1920²¹ provides for disposal of leasable minerals thorough competitive and non-competitive leasing systems.

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

The mineral estate may have value and be an exploitable asset. Or it may have no value. In either case, 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.

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 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.

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.

The application for conveyance is conducted pursuant to Section 209 of the Federal Land Policy and Management Act of 1976 (FLPMA).²² 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.²³

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

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 DOI Office of Hearings and Appeals to invalidate mining claims.²⁴ 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.

A valid mining claim exists only where there has been a "discovery" of a "valuable mineral deposit . . . within the limits of the claim located."²⁵ A discovery of a valuable mineral deposit has been made "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine."²⁶ The complementary "marketability test" provides that a valid mining claim is one in which the mineral deposit can be mined, removed and marketed at a profit.²⁷

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 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.

¹ Susan Carroll, "Community Struggles to Keep Rights to Land" *Arizona Republic*, 13 February 2006, A1.

² *Gallagher v. Boquillas Land & Cattle Company*, 28 Ariz. 560, 238 P. 395 (1925).

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 Lacey, John C., *Conflicting Surface Interests: Shotgun Diplomacy Revisited*, 22 Rocky Mt. Min. L. Inst. 731 (1976).

⁶ 6 Am. L. of Mining § 200.02 (2nd ed. 1984).

⁷ *Arizona State Land Department Annual Report 2011 – 2012*; Arizona State Land Department; http://www.azland.gov/report/report2012_full.pdf.

⁸ U.S. Department of the Interior Legacy Rehost 2000 (LR2000).

⁹ 1 Am. L. of Mining § 9.01.1 (2nd ed. 1984).

¹⁰ 1 Am. L. of Mining § 9.02.4 (2nd ed. 1984).

¹¹ *Spurlock v. Santa Fe Pacific R. Co.*, 694 P.2d 299, 143 Ariz. 469 (Ariz. App., 1984).

¹² *Ibid*, 143 Ariz. 469, 481.

¹³ *Ibid*, 143 Ariz. 469, 478.

¹⁴ *Ibid*.

¹⁵ 39 Stat. 862, 43 U.S.C. § 299, et seq.

¹⁶ 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).

¹⁷ 1 Am. L. of Mining § 9.03.3 (2nd ed. 1984).

¹⁸ 1 Am. L. of Mining § 9.04.2 (2nd ed. 1984).

¹⁹ 30 U.S.C. § 22, et seq.

²⁰ 30 U.S.C. § 601, et seq.

²¹ 30 U.S.C. § 181, et seq.

²² Public Law 94-579, as amended (October 21, 1976), 43 U.S.C. § 1701, et seq.

²³ 43 U.S.C § 1719.

²⁴ 2 Am. L. of Mining § 50.01 (2nd ed. 1984).

²⁵ 30 U.S.C. § 22, 23.

²⁶ *Castle v. Womble*, 19 L.D.455, 457 (1894).

²⁷ *United States v. Coleman*, 390 U.S. 599, 602 (1968).

APPENDIX A

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

<u>COUNTY</u>	<u>SRHA PATENTS</u>		<u>TGA PATENTS</u>		<u>TOTAL SEVERED ESTATES ACREAGE</u>	<u>CMI PATENTS</u>		<u>COUNTY NON-GOVERNMENTAL PRIVATE PROPERTY</u>	
	<u>Number</u>	<u>Acreage</u>	<u>Number</u>	<u>Acreage</u>		<u>Number</u>	<u>Acreage</u>	<u>Acreage</u>	<u>% Severed Estate</u>
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