Federal-Private Split Estate: Considerations for Living and Operating on Stock-Raising Homestead Act Lands

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How do these concepts impact the ag industry?

- Millions of acres across the U.S. are divided into split estates, particularly in the West (Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Wyoming).

- Split estates allow mineral entry and related surface use onto privately held land surfaces which can result in lost agricultural production and land value, and potentially natural resources concerns (e.g., air, water quality and quantity issues).

- Mineral development also presents opportunities for agriculturalists to diversify their income stream through surface leasing. Split estates create questions over a landowner's development power.

Where are we going?

SPLIT ESTATE BASICS

FRONTIER HISTORY

WHAT FARMERS AND RANCHERS NEED TO KNOW

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Split Estate Basics

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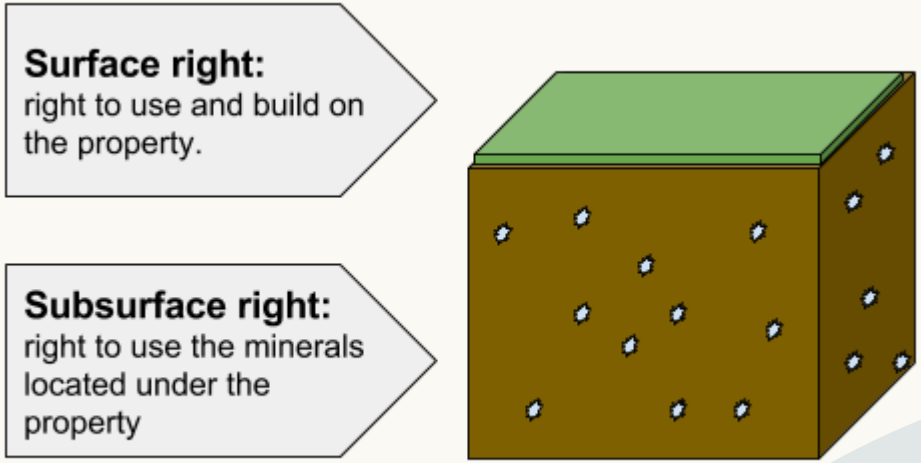
What is a split estate?

- A split estate exists when the ownership to surface rights (e.g., the right to construct buildings, farm crops, or graze livestock) and subsurface mineral rights (e.g., the right to extract minerals, like oil and gas) are held by different parties.



How are split estates created?

- Mineral Deeds
- Mineral Reservations

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What is the relationship between the surface and mineral estate?

- In many jurisdictions mineral rights are considered "dominant" over surface rights.
  - Mineral right owner is entitled to "reasonable use" of the land's surface.
- The surface estate is "servient" to the dominant mineral estate.
  - Surface owner entitled to use the full surface, so long as use does not preclude the mineral owner's use and access.

Frontier History

Image: McConnell's historical maps of the United States, Courtesy of the Library of Congress

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Preemption, Graduation, and Free Land

- Series of federal laws passed between during the late 1800s through the 1930s
  - Preemption Act of 1841
  - Donation Land Claim Act of 1850
  - Graduation Law of 1854
  - Land Grant Act of 1850
  - Homestead Act of 1862
  - Morill Land Grant Acts 1862, 1864
  - Pacific Railway Act, 1862, 1864
  - Southern Homestead Act of 1866
  - Timber Culture Act of 1873
  - The Desert Land Act of 1877
  - Forest Homestead Law of 1906
  - Enlarged Homestead Act of 1909
  - Three Year Homestead Law of 1912
  - Pittman Underground Water Act of 1919

Photo courtesy of the U.S. National Park Service

Stock-Raising Homestead Act of 1916, 43 U.S.C. § 291 *et seq.*

- Allowed settlers to acquire 640 acres of public land designated by the Secretary of the Interior as "stock raising land" for ranching purposes.
- No cultivation was required, but permanent improvements to the land were needed to "prove up" a claim.
- Allowed settlers to receive a land patent, but reserved minerals to the United States.

How much land was privatized under the SRHA?

- Arizona – 1,417,046.99 acres
- California – 1,741,784.84 acres
- Colorado – 4,187,569.01 acres
- Idaho – 1,259,849.84 acres
- Montana – 5,549,746.49 acres
- New Mexico – 6,557,255.27 acres
- Nevada – 183,806.74 acres
- Oregon – 1,881.265.45 acres
- Utah – 920,573.77 acres
- Wyoming - 9,281,120.59 acres

according to the Official Plat of the Survey of the said Land, on file in the GENERAL LAND OFFICE:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, 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 pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat., 862).

IN TESTIMONY WHEREOF, I, Calvin Coolidge,

President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the TWENTY-EIGHTH

(SEAL.) day of MAY In the year of our Lord one thousand

nine hundred and TWENTY-SEVEN and of the Independence of the

United States the one hundred and FIFTY-FIRST

By the President: Calvin Coolidge

By Dale B. Pugh, Secretary.

M. P. LeRoy

Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 1003204

The SRHA's Mineral Reservation, 43 U.S.C. § 299

- All entries made and patents issued under [the SRHA] shall be subject to and contain a reservation to the United States of ***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. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented . . . for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting.

What are the implications for ag producers living on Stock-Raising Homestead Act land?

Reduced resource availability and potential for inadvertent mineral trespass.

Potential resource development by third-parties where mineral interest may be adverse to agricultural interests.

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Landowner Need	Potential Strategy
Landowner needs to use mineral material	Landowner may need to seek authorization from BLM through materials permit/contract or other applicable land use authorization if personal use exceeds “minimal amount” or if minerals will be used by others
Landowner needs to exclude third parties to protect his or her own surface use	Unify mineral estate through purchase under BLM regulations specifically applicable to unifying the surface and mineral estate More creative options potentially available.
Mineral development is imminent, and landowner needs concerns recognized	Engage early in the resource management planning process, the lease sale, permitting, and bonding stages. Negotiate surface use agreement with mineral lessee. Appealing BLM approvals may help reach desired outcomes. Stay engaged during operations and reclamation.
Nearby BLM land could be subject to development	Land purchase or land exchange
Landowner wants to grant subsurface easement through federal mineral estate	Unclear – watch the 10th Circuit!

Mineral Trespass

- 43 C.F.R. § 3601.71: "[Y]ou must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit."
- Unauthorized users may be prosecuted by U.S. for civil damages or criminal damages (including administrative costs, costs associated with land rehabilitation.
  - If the violation is "nonwillful," 2x the fair market value
  - If violation is "willful," 3x fair market value

Mineral Trespass

- Agriculturalists may inadvertently commit mineral trespass by using mineral materials on their land if mineral material exceeds "minimal amount" needed for "[their] own personal use." Landowners sometimes frame this question in terms of excavation depth, as in "how far can I excavate before I must seek Bureau of Land Management's authorization?"

Saleable mineral inquiry under *Watt v. Western Nuclear*

- Is the material mineral in character?
- Can it be removed from the soil?
- Can it be used for commercial purposes?
- Is there a reason why this material should or should not be included in the surface estate?
- *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983)

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Mineral Trespass

- SRHA covers coal and other minerals
- "Other minerals" can encompass:
  - Saleable Minerals covered under the Materials Act
    - Common variety minerals like sand and gravel
    - *Watt v. W. Nuclear*, 462 U.S. 36 (1983).
  - "Leasable" minerals covered under the Mineral Leasing Act of 1920
    - Oil, gas, coal, phosphate, potassium, sodium, gilsonite, oil shale, and sulfur
  - "Locatable" minerals covered by the General Mining Law of 1872
    - Hardrock minerals, metallic and nonmetallic – gold, silver, copper, lead, zinc, nickel, fluorspar, gemstones, and uncommon varieties of sand, gravel and other materials if they have distinct and special value
  - Geothermal Resources (*Rosette Inc. v. United States*, 277 F.3d 1222, 1234-35 (10th Cir. 2002)(quiet title action)

Mineral Trespass
Takeaways

- Ensure use is minimal and personal.
- Otherwise seek counsel before extracting and removing and gravel on Stock-Raising Homestead Act lands.

Unifying the surface and mineral estate

- Through the Federal Land Policy and Management Act of 1976 (FLPMA), 43 C.F.R. § 1719 *et seq.*, the BLM may convey mineral interests where the "surface is or will be in non-Federal ownership." 43 C.F.R. § 2720.0-1.

Unifying the mineral and surface estate

- 43 C.F.R. Part 2720 allows consolidation where either:
  - (1) there are no known mineral values, **or**
  - (2) "in those instances where the [mineral] reservation interferes with or precludes appropriate non-mineral development **and** [the surface owner's] development is a more beneficial use of the land than the mineral development."

Steps to Unify

- Step 1:

  File an application with BLM to purchase the mineral interest showing either there are no known mineral values or interference/preclusion

Steps to Unify

- Step 2:

BLM determines a deposit amount. The deposit covers BLM's administrative costs, including the cost of an "exploratory program" to determine the "character of the mineral deposits in the land, evaluating the existing data . . . to aid in determining the fair market value of the mineral interests to be conveyed, and preparing and issuing the documents of conveyance."

Exploratory programs

- Can be completed by BLM (on BLM's timeframe).
- BLM's authorized officer can consent to the Applicant conducting the exploratory program, but this requires the Applicant/its consultants to develop an approved plan of operations (and the Applicant will also be responsible for paying for BLM's data review).

40 C.F.R. § 2720.1-3.

Steps to Unify

- Step 3: Once these steps are complete, BLM notifies the Applicant in writing of the fair market value of the federal mineral interests, including the administrative costs involved in development and issuance of conveyance documents, and gives a full and complete statement of the costs incurred in reaching its determination, including any sum due the United States or that may be unexpended from the deposit.
- Once payment is made to cover fair market value, BLM will issue the mineral patent.

Potential mineral development with no opportunity to unify?

- Comment early, comment often.
- Use BLM's protest procedures, as necessary.
- Engage with BLM and the Lessee for surface protection.
- Make bond sufficiency objections, as needed.
- Seek legal remedies for surface damages.

Nearby land at risk for mineral development?

- To protect nearby BLM land from development, a landowner can seek to exchange or purchase the land.

Sale of Public Lands, 43 C.F.R. Part 2710

- BLM identifies parcels suited for sale through its land use planning process in resource management plans ("RMPs").
- If land is not identified in an RMP, BLM can accept nominations for the sale of public lands.
- BLM has three methods for sales, determined on a case-by-case basis depending on the parcel at issue: (1) competitive bidding, (2) modified competitive bidding, and (3) direct sale.

Land Exchanges, 43 C.F.R. Part 2200

- FLPMA also allows BLM to exchange lands, provided certain conditions exist.
  - The lands must be scattered, isolated tracts that are difficult or uneconomic to manage; acquired for a specific purpose and no longer needed for that purpose; or disposing of the lands will serve important public objectives, such as community expansion or economic development.

Conclusion and Takeaways

Protective Measures

- Many states do not require realtors or sellers to inform potential real estate buyers of the mineral estate's ownership. Buyers should perform their own title research prior to purchase, using qualified and trustworthy title searchers so that the buyer can fully understand whether they are obtaining the "full bundle of sticks."
- If considering purchasing SRHA land, engage with BLM early and proactively to determine whether BLM may be willing to unify the surface and mineral estates through processes discussed here or if other resource protections may serve to restrict development.
- Surface use agreements may offer additional protection and clarity.

Conclusion and Takeaways

Responsive Measures

- If a producer already owns SRHA or lives near SRHA land, consider whether it may be valuable to unify the mineral and surface estate. As technology advances, so does development risk.
- As producers seek to diversify their income through surface leasing or developing resources on their land, mineral title research can help identify and head off potential risks.

The meek shall inherit the Earth, but not its mineral rights.

-J. Paul Getty

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