



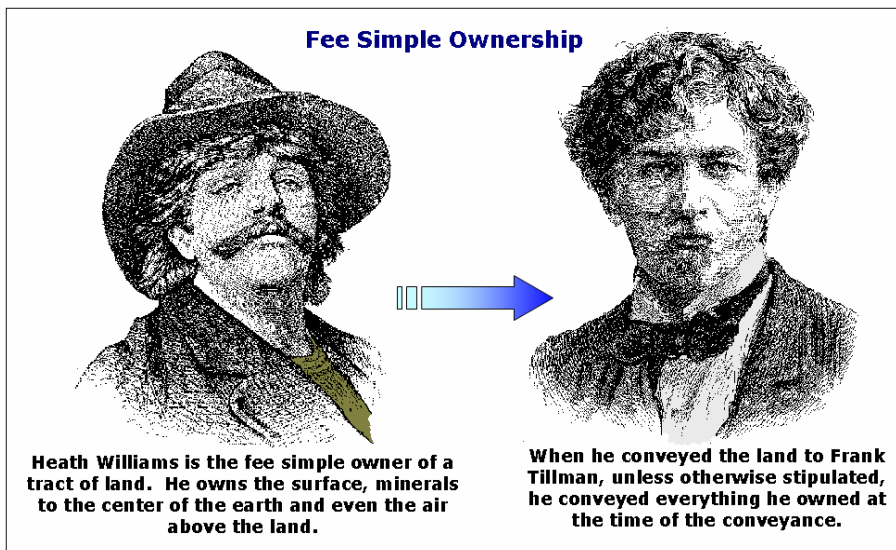
# Chapter 12

Surface

Rights

## FEE SIMPLE – COMPLETE OWNERSHIP

There are several types of property ownership in the United States. The most basic of these is what is known as a “fee simple estate”. In a fee simple estate, the owner owns the surface, the minerals to the center of the earth and even the air above the property. Before the value of oil and gas was realized in the United States, most transactions were “fee simple” transactions. If Heath Williams sold his farm to Frank Tillman, unless otherwise stipulated, Frank would receive 100% of everything Heath owned at the time of the transaction.



Since the late 1800's and the demand for petroleum products, transactions became more complex. Now, when selling land, many surface owners would keep either all or a portion of the minerals underlying the land. This is referred to as severing the minerals from the surface.

Other owners would keep the land, but

convey either all or a fractional portion of the minerals underlying the land. This transaction would also sever any minerals being sold away from the surface ownership.

Over time, most tracts of land in the United States have seen multiple transactions and it is not uncommon to see several owners (either surface or mineral) on any given tract of land. The surface and mineral estates for the Heath Williams land could, today, contain multiple owners.

For oil and gas purposes, when all of the minerals have been severed from the surface, on a tract of land, certain issues can arise. In order to understand these issues and why they exist, it becomes important to understand the history surrounding these split estate lands.

## **THE ORIGINS OF OUR LAWS CONCERNING SURFACE V. MINERAL RIGHTS**

Disputes between surface owners who own no minerals under their tract and land and the actual mineral owner go back hundreds of years. One of the first cases brought before a court happened in England in 1568. The outcome of this case as well as the outcome of other European cases helped shape and define our present day American laws.<sup>1</sup>

In the 1568 case of *Queen Elizabeth v. the Earl of Northumberland*, it was argued that the ownership of gold and silver belonged to the crown. Since the Queen did not own any of the surface rights to the land containing the precious minerals, a court of law was called upon to hear the case. The other issue involved the ownership of other minerals mixed in with the gold and silver. The court ultimately decided that the Queen had a "royal mining privilege" and allowed the crown access to lands in which gold and silver were present. The court also found that the crown possessed the right to carry away gold, silver and any other minerals that they were mixed with because it was necessary to extract the other minerals in order to retrieve the gold and silver.<sup>2</sup>

One of the first cases to be tried in the United States, happened in 1862. In the case of *Cowan v. Hardeman*, the Texas Supreme Court ruled that in order for a mineral owner to exercise the right of retrieval of minerals he or she must also have the right to access the land in which the minerals were located.<sup>3</sup>

## **THE MINERAL ESTATE IS THE DOMINATE ESTATE**

The outcome of such cases helped create a doctrine in our country whereby the mineral estate has become the dominate estate.

In many instances, the surface owner owns only a percentage of the minerals under his or her tract of land. In other instances the surface owner owns none of the minerals. When this occurs, the two estates (surface v. mineral) are referred to as "split estate lands". Split estate lands have come about through a variety of ways. In many cases, the United States government reserved all minerals at the time they granted lands to pioneers. In many other cases, the estates became split simply through conveyances as seen in the following example:

In 1968, Carrie Davis owned 240 acres that were located in the state of Kentucky. Along with the surface, Ms. Davis also owned all the minerals under the tract of land. She was a fee simple owner.

In 1977, she decided she wanted to move to Colorado to be closer to her children and grandchildren. So, Ms. Davis sold the land to Jim Jacobs, a farmer that had just moved to Kentucky from Oklahoma. Jim Jacobs was conveyed all 240 acres except when Ms. Davis sold her land, she reserved all right, title and interest in and to the mineral estate under the 240 acres. This created a split estate. It also severed all minerals from the surface.

After a few years Mr. Jacobs' mother had become ill and he needed to move back to Oklahoma to take care of her. So, he sold all 240 acres to Bill Thomas, a business man from Minnesota looking to build his dream home and retire.

Within a few years, your company approached Mr. Thomas, telling him that they wanted to drill an oil and gas well on his tract of land. Mr. Thomas knew nothing about the oil and gas business and refused to sign a surface rights agreement because your company told him they wanted to locate the well 100 yards directly in front of his living room's picture window. A few weeks later, your company offered again to discuss their access rights. Again nothing was signed.

Thirty days later, Mr. Thomas, looking out his picture window, saw your company building their drill site. He watched the well being drilled and when he heard that there was production he actually became a little excited in anticipation of receiving his first royalty check.

**Carrie Davis owned all surface and mineral rights in a 240-acre tract of land.**



**When Carrie Davis sold the land to Jim Jacobs she reserved all minerals in and under the land.**



**A few years later, Jim Jacobs conveyed the land to Bill Thomas a businessman from Minnesota.**



Weeks passed and no checks made their way to his mailbox. Bill was becoming very impatient. He found out from his neighbor that they had been receiving royalty checks for the last two months. When he called your company to complain, the only answer he received was that he owned the surface but no minerals and he was not entitled to any production.

Irritated and angry, he contacted his attorney. Within a day of research, the attorney informed him that his retirement property was, in fact, on split estate lands. A woman from Denver, Colorado owned the minerals – he only owned the surface. The oil company had every right to drill the well and pay him no money out of production.

The only oil and gas lease that your company would have taken on this 240 acre tract of land would have been from Carrie Davis. That being said, you may ask yourself, does Carrie Davis have the right to grant your company access to the 240 acres? She no longer owns any of the surface rights?

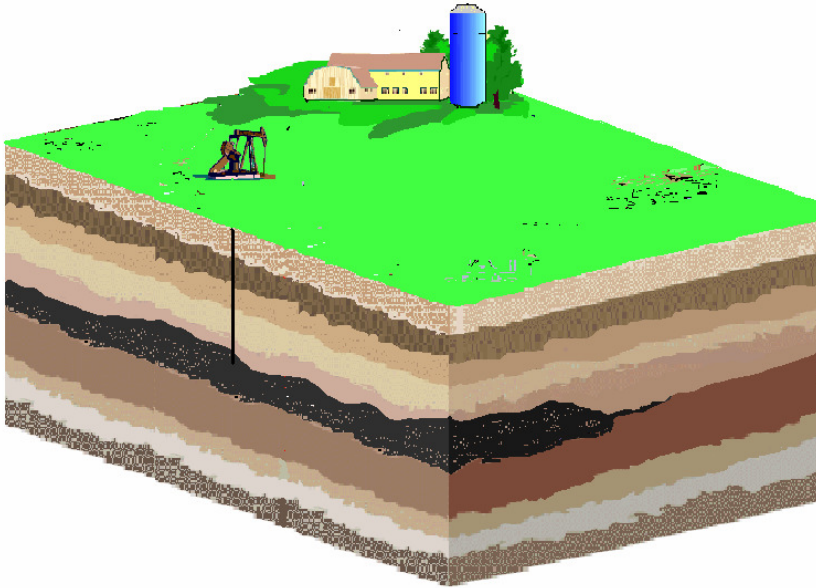
In order to understand the answer to this question, one must understand the following principal:

When a mineral estate is severed from the surface estate, the mineral estate is regarded as the *dominate* estate. This means that Carrie Davis, the *mineral* owner, has the right to use so much of the surface as is *reasonably necessary* for the use and development of the minerals and she has the right to grant these rights to your company (such as laying pipe line, building tanks, power stations and structures).<sup>4</sup>

This might appear unfair or unjust because, after all, Bill Thomas, the surface owner, lives on the land. In a case like this, are their limitations on access and why would the *mineral estate* be the *dominate estate*?

The reason is simple: If the *surface estate* were the *dominate estate* and the surface owner owned no minerals, then that owner could prevent the minerals from ever being developed. Even "If the lease merely grants the right to develop oil and gas, without addressing surface access rights to conduct operations, lessee has an implied right to make reasonable use of the surface to facilitate operations."<sup>5</sup>

## THREE LIMITATIONS ON MINERAL ESTATE DOMINANCE



- The surface area is limited to what is reasonably necessary for the development of minerals.
- Subsurface operations must occur in a genuine and faithful manner.
- Subsurface operations must occur with due regard for the surface owner and must accommodate the surface owner if reasonable.<sup>6</sup>

### KANSAS AND MINERAL ESTATES

Although most states consider the mineral estate to be the dominate estate, Kansas is one state that does not view the mineral estate as dominate. Their view is that both mineral and surface estates tend to be equal in nature as seen in *Rostocil v. Phillips Petroleum Company*, 210 Kan. 400, 502 P 2d 825 (1972):

"The obvious intent of the parties under . . . [an oil and gas] lease is that the licensed privileges of the lessee are to run hand in hand with those reserved to the lessor with neither interfering more than need be with the continuing uses of the other - the one for the exploration, production and transportation of minerals and the other for the pursuit of agriculture."

# HISTORY OF SPLIT ESTATE LANDS

## DOCTRINE OF REASONABLE NECESSITY

Many years ago, the doctrine of reasonable necessity was established. Under this doctrine, once the mineral estate became severed from the surface estate, a lessee, through an implied easement, was granted automatic access to the lands. This allowed the lessee to use as much of the land as necessary to retrieve the minerals. In many cases, an oil company also possesses an implied easement that would include materials taken from the leased land necessary to support reasonable operations. An example of this is found in the Texas court case *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972). The court found that the lessee possessed the rights to use fresh groundwater from the lands leased in order to conduct recovery operations.<sup>7</sup>

## DOCTRINE OF ACCOMMODATION OR ALTERNATIVE MEANS

As years passed, the doctrine began to weaken as states such as Texas, Utah, North Dakota, Arkansas, New Mexico and West Virginia, adopted their own brand of the doctrine, now referred to as the Doctrine of Accommodation or Alternative Means. In those states, although the lessee still has the rights of access they are required to consider the interests of the surface owner. The obligation of the operator is to look for reasonable, practical and alternative means for retrieving the minerals instead of disturbing the split estate surface owner's land.<sup>8</sup>

Under the Doctrine of Reasonable Necessity and the Doctrine of Accommodation or Alternative Means, there is still no provision or requirement to pay surface owners damages caused from non-negligent or reasonable use of the surface. Because there were no laws in

Protections include:	ND	SD	MT	TN	WV	OK	KY	IL	Wy	NM	CO
Mineral owner is liable for surface damages	X	X	X	X	X						
Mineral developer is liable for surface damages						X					
Mineral owner is required to notify surface owner prior to entry	X	X	X	X	X						
Operator is required to notify surface owner of drilling intent						X				X	X
Operator is required to notify surface owner 30 days before operations									X	X	X
Operator is required to submit a comprehensive proposed plan of development to the surface owner									X		
Operator must attempt to negotiate a surface damage agreement						X			X	X	
If no surface agreement is in place a surety bond must be obtained to secure payment of damages									X	X	X
If no surface agreement is in place operator must petition court who will determine actual damages						X					
If no surface agreement is in place an offer must be made for surface damages	X	X	X	X	X						
If no surface agreement is in place operator must notify surface owner prior to operations							X	X			
If no surface agreement is in place operator must offer to discuss access issues							X	X			
Surface owner can file suit for damages	X	X	X	X	X						
Compensation includes:											
Loss of agriculture production	X	X	X	X	X				X		
Loss of income									X		
Loss of land value	X	X	X	X	X				X		
Loss of surface use access	X	X	X	X	X						
Lost value of improvements	X	X	X	X	X				X		
Expenses incurred from land occupied by operations				X	X						X
Damages for crops, trees, fences, roads, structures, improvements, livestock	X	X	X	X	X	X	X	X	X	X	X
Triple damages can be awarded if there is no surface agreement, no surety bond or operator enters land without notice									X		

place to protect surface owners in these ways, many states began to adopt statutes that offered surface owners additional protection when damages occurred. The chart depicts additional protections to surface owners:

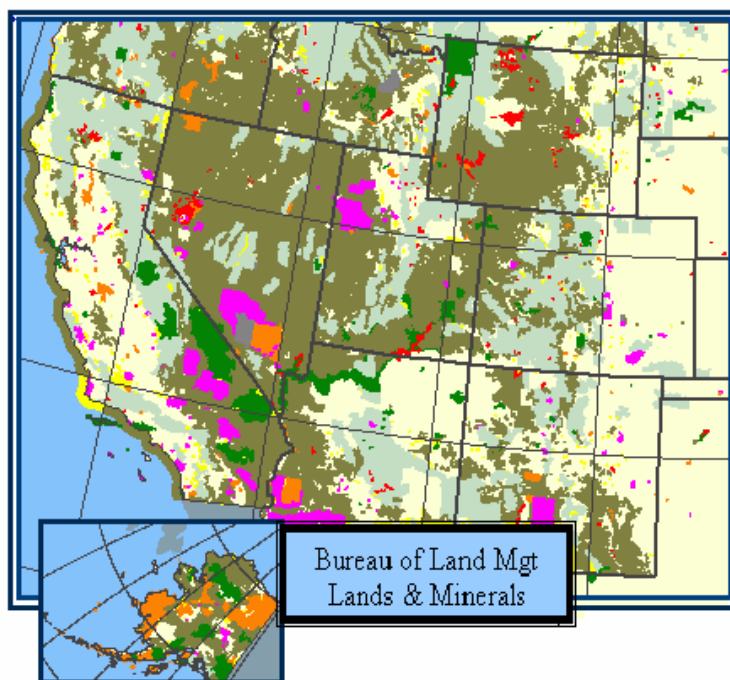
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## FEDERAL LANDS AND SPLIT ESTATE

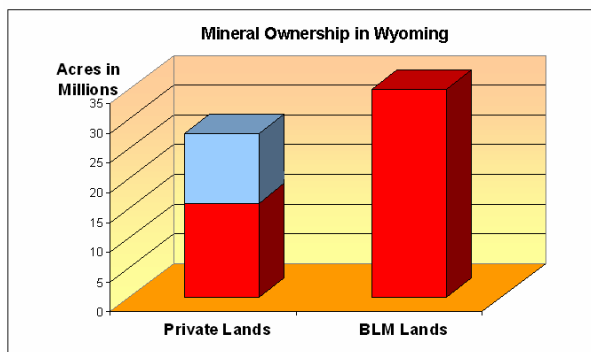
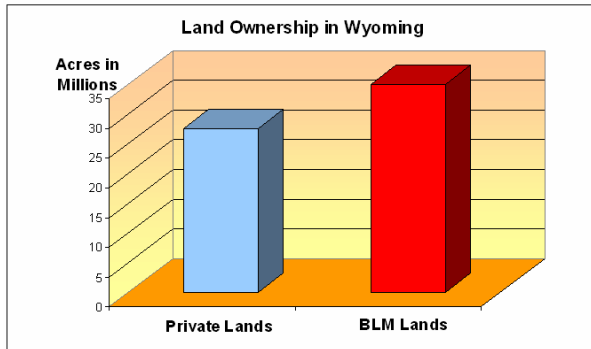
In the early 1900's, certain acts, such as the Stock Raising Homestead Acts of 1914 and 1916, and the Agricultural Entry Act of 1914 created split estate ownership with federally owned lands. These acts allowed a private party, such as a farmer or rancher, to own the surface rights to a particular tract of land while the federal government reserved the rights of ownership to the minerals. In order for these federal minerals to be developed, the lessee or operator must have a right to reasonable surface access.

When an oil company wants to drill a well on such a tract of land that was patented through the Stock Raising Homestead Act of 1914 and the company cannot obtain consent from the surface owner, the Bureau of Land Management (BLM) will still grant the company access to the land and rights to receive a drilling permit, if the operator can prove that in "good faith" they tried to contact the owner and attempted to negotiate access to the surface. In addition to this, the operator must also post a bond (SRHA 3114 bond) against damages caused to the land or growing crops while operations occur.

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As you can see from the map of the western United States the BLM manages federal lands and/or minerals almost everywhere. Those areas shaded in the darker color represent lands managed by the BLM.



■ Privately owned minerals  
■ Federally owned minerals

Wyoming is a classic example. The total land mass in Wyoming is 62.6 million acres. Of those 62.6 million acres, 44% of the land is privately owned. The remaining 56% is public land or land that is owned by the federal government, managed by the BLM.

Of the privately owned land, 48% or 12 million acres of it is split estate lands.<sup>11</sup>

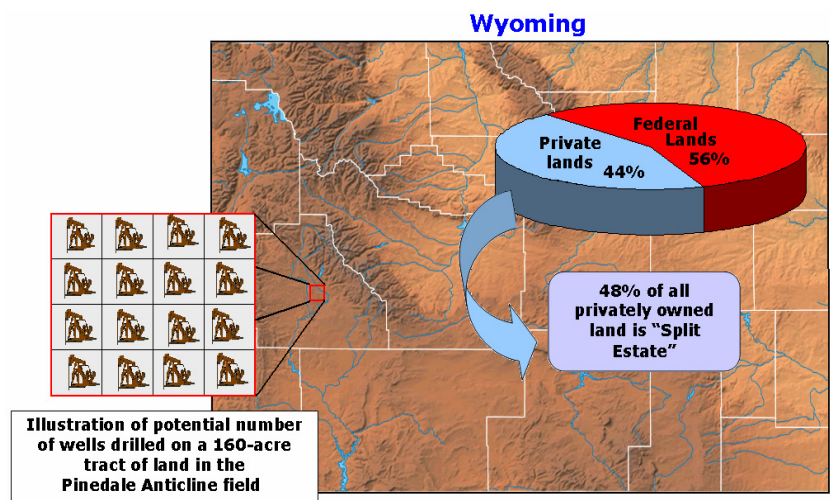
## PROBLEMS THAT CAN EXIST ON SPLIT ESTATE LAND

Because of the tremendous split estate issue in Wyoming, split estate surface owners are facing a significant issue.

The problem that is occurring in some areas is the number of wells located on surface owner lands. For example:

Older wells were drilled on traditional 40 acre spacing. That means only 16 wells could be drilled on any given section of land.

Due to the growing demand for natural gas and technological advancements, the Wyoming Oil and Gas Commission has



authorized spacing on every 10 acres in the Pinedale Anticline field. That means a potential for 64 wells on any given section of land or 4 times as many wells as were allowed to be drilled on the traditional spacing.

In the Johan field, the BLM has authorized spacing on every 5 acres. This means that a total of 128 wells could be drilled on every section of land or 8 times as many wells as were allowed to be drilled on the traditional spacing.

Split estate surface owners are not happy and have recently pushed the Wyoming legislature to help solve this issue and protect the private property rights of the surface landowners.

Similar issues are arising in other states prompting law makers to address split estate issues. As recently as March 1, 2007 the New Mexico legislation addressed split estate ownership problems by enacting a bill called the "Surface Owners Protection Act". Both Montana and Colorado have been trying to pass similar legislation and the state of Texas is currently wrestling with issues related to drilling in urban areas in and around the Dallas/Fort Worth area.

## FOOTNOTES:

<sup>1</sup>The Common Law of Access and Surface Use in Mining, The First Case in England -- Donald N. Zillman, Russell Tyler, University of Utah College of Law, Salt Lake City, Utah, 1984 Nov (Rights of Access and Surface Use), Chapter 1.

<sup>2</sup>75 Eng. Rep. 472 (1568).

<sup>3</sup>The Common Law of Access and Surface Use in Mining, The First Case in England -- Donald N. Zillman, Russell Tyler, University of Utah College of Law, Salt Lake City, Utah, 1984 Nov (Rights of Access and Surface Use), Chapter 1.

<sup>4</sup>[reyeslaw.com/case\\_mountainlakesranch.asp](http://reyeslaw.com/case_mountainlakesranch.asp)

<sup>5</sup>An Introduction to Kansas Oil & Gas Law, David E. Pierce, Washburn University School of Law, 1988, p.13.

<sup>6</sup>Rights and Conflicts among Surface Owners, Mineral Owners, and Lessees in Arkansas, *American Association of Professional Landmen*, G. Alan Perkins, (February, 2006).

<sup>7</sup>An Introduction to Kansas Oil & Gas Law, 1988 Washburn Law School Oil & Gas Law Series, David E. Pierce, November, 1988, p. 11.

<sup>8</sup>The Dominant Mineral Estate: Erosion the Sierra Club Doesn't Mind, Terry McInturff, Center for Energy Commerce, Rawls College of Business Texas

Tech University,  
landman.org/content/SWLI06/McInturffTheDominantMineralEstate.

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

<sup>11</sup>Landowners Association of Wyoming,  
[www.wyominglandowners.org/splitestates/index](http://www.wyominglandowners.org/splitestates/index).