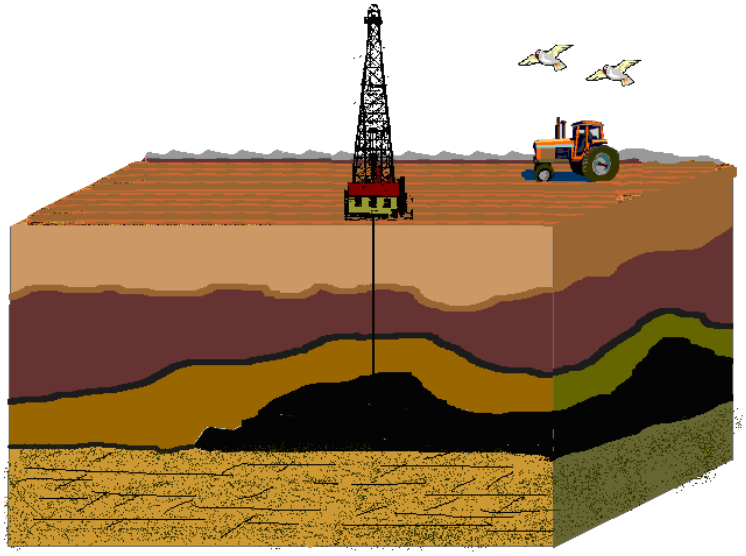
Chapter 3 - Mineral Ownership

Fee Simple Absolute Ownership

The most basic type of property ownership is known as “fee simple absolute”. This is also the highest type of ownership because it gives the owner the right to possess the property forever. In many cases, when the lands in the United States were first granted to individuals, they received ownership in fee simple to the surface and the minerals to the center of the earth. Such an owner would then own all rights to the surface, minerals, rights to sign an oil and gas lease, and rights to receive all bonus money and royalty payments.

In the United States, federal, state and local governments can own or manage surface and mineral interests; however, the majority share of both surface and subsurface estates are privately owned. This is unlike most other foreign nations whereby the mineral ownership is owned by the sovereign or ruling government. Also, unlike many parts of the world, in the United States, the mineral rights do not revert to the government when the owner dies.

When lands were first granted in the United States, most owners received a fee simple ownership in the surface and minerals to the center of the earth.



The ownership of a privately owned tract of land can be traced backward to the first grant or patent from the federal government or, in some areas of the country, a sovereign ruling government that existed at the time of the grant. At the point in time the grant was offered, unless, the minerals were

reserved or kept by the granting government, the minerals became a part of the grant.

State Owned Minerals

Through *the Land Ordinance of 1785* and *The Northwest Ordinance of 1787,* the federal government granted certain lands to the individual states for the purpose of education. These lands were designated as “School Lands” and could be used as school site locations sold by the state to a pioneer for the purpose of generating funds for the building or maintenance of a school.

The important thing to remember is that when these lands were granted to the states, oil and gas mineral reservations were seldom invoked by the federal government. Therefore, in most cases, these minerals passed to the states. During this period of settlement, over eighty million acres of surface and mineral lands were granted into these state trust lands.

Often, when states sold the surface lands to a pioneer they would keep, through a mineral reservation, all of the minerals under the tract of land. In cases such as this, the state may still own all mineral rights, yet own none of the surface rights.

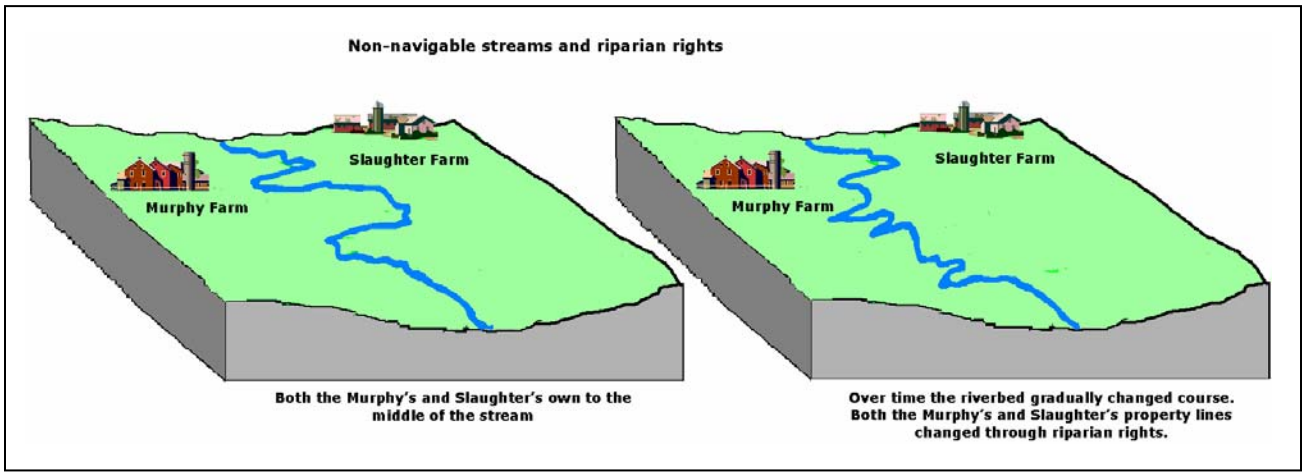
At statehood, states also received an implicit grant of the beds underlying inland navigable waters which were navigable at the date of statehood. The grant extended to the high-water mark of navigable streams and lakes. Navigable waters were not designated at the time of admission of the state. As a result, a critical question of fact always arises as to whether the waters overlying lands in question were navigable at the date of statehood. *Ordinarily, the title examiner cannot determine whether or not the waters overlying lands were or were not navigable at statehood. An abstract may show a perfect chain of title from the state, but, if the navigability inquiry is answered in the negative, the state's claim to title is destroyed.*

As with most every law, state laws governing ownership to rivers and streams vary. For instance:

1. Texas holds title to all of the minerals under navigable rivers or streams and has deemed all of them navigable if they can be navigated or have a width greater than 30 feet from the mouth up.
2. Except for a portion of the Arkansas River, Oklahoma has deemed all of its major rivers non-navigable.
3. Louisiana claims ownership to the “historic high water mark of a naturally navigable lake, to the current low water mark of a naturally navigable river or stream and to all lands in the vicinity of the open gulf directly affected by the ebb and flow of the tides.”

Non-Navigable Streams

Generally, non-navigable streams or rivers are owned by the adjacent property owners, with each party owning to the middle of the stream or river. Over time riverbeds gradually change as the natural flow of the water changes its course. When this happens, the property owners' rights to the river change with the natural flow of the water.



Railroad owned Minerals

Under the massive land grants given to the railroads in the late 1800's, the federal government did not, generally, reserve or keep any of the oil and gas minerals. Therefore, these minerals passed to the railroads. When these sales occurred, the railroad often kept all mineral rights and the landowner ended up with no mineral rights. Thus, the railroads ended up owning millions of mineral acres of western lands. Over the years, many of these railroad companies ventured into the oil and gas industry.

Federal owned Minerals

In most cases, when the government first granted lands to the settlers they did not reserve oil and gas minerals. The grantee received title to everything attached to the surface and they became fee simple absolute owners.

In and around 1908, things began to change as to how the United States government granted these lands.

The first automobile was invented in 1889 but not mass produced in the United States until 1901. Prior to this time, petroleum products had little known value in the world and when *The General Land Ordinance of 1785* was written, few men dreamed of the wealth that would eventually come

from the development of oil and gas minerals.

Prior to the invention of the automobile, when granting tracts of lands, the United States usually would reserve only *"ditches, canals or coal"*. The result was simple. The surface owner became the proud owner of the surface estate and everything else attached to the surface.

(RECORD OF PATENTS.)

The United States of America,

To all to whom these presents shall come, Greeting:

Homestead Certificate No. 1275.
Application 1714.

WHEREAS, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Sundance, Wyoming, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of

WALTER B. WILLIAMS

has been established and duly consummated, in conformity to law, for the southeast quarter of the southwest quarter, the west half of the southeast quarter, and the southeast quarter of the southeast quarter of Section thirty-one in Township forty-seven north of Range sixty-seven west of the Sixth Principal Meridian, Wyoming, containing one hundred sixty acres,

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said Walter B. Williams the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto th

"...a right of way thereon for ditches or canals constructed by the authority of the United States."

and to his heirs and assigns 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 also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. 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.

After 1908, the result was much different. Congress, realizing the value of oil began to develop what they called the "multiple use concept." Simply put, they began to reserve the minerals under lands. Reservations on these patents might have read,

"Excepting and reserving, however, to the United States all coal and other minerals".

The minerals under these tracts of land may still be owned by the United States government today.

The United States of America,

To all to whom these presents shall come, Greeting:

Homestead Certificate No. 1275.
Application 1714.

WHEREAS, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Johnson County, Wyoming whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of

James O'Connor

Township 57 North, Range 77 West, Section 32: NW/4, containing 160 acres more or less

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor General:

NOW KNOW YE, That t
said claimant the tract of
tract of Land, unto the s
forever; subject to any v
other purposes, and rights to ditches and reservoirs used in connection with such water rights. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented.

"Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented."

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, 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.

(SEAL)

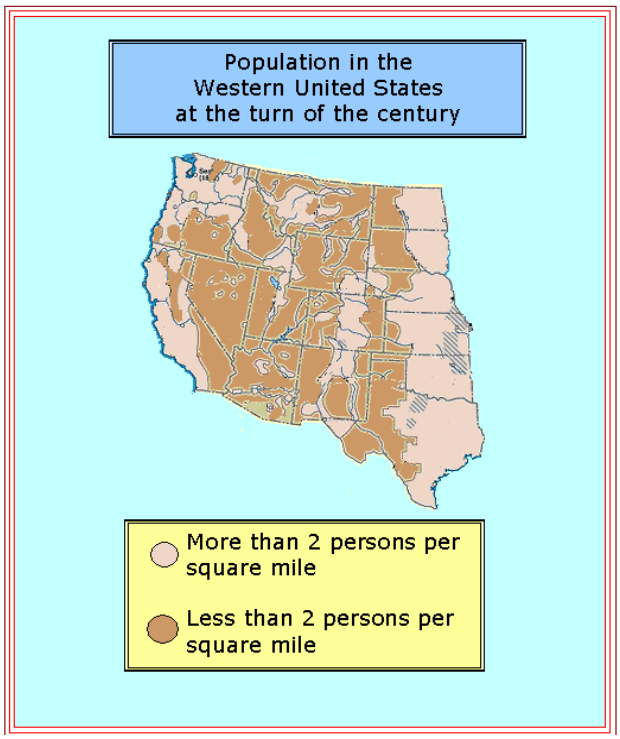
GIVEN under my hand, at the City of Washington, the first day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

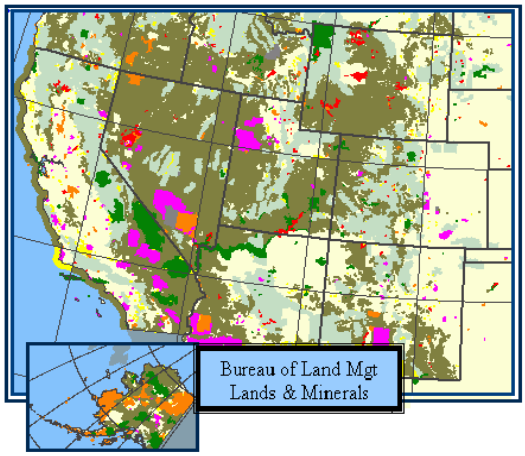
The Impact of Mineral Reservations

Following are two maps of the Western United States. The first shows the population in the year 1900 depicting regions with more than two persons per square mile and regions with less than two persons per square mile. It would appear that much of the darker shaded areas (those lands which contained less than two people per square mile) were yet to be patented lands in 1900.

The second map is a current map of all those lands and/or minerals either owned by or managed by the Bureau of Land Management.

The first map shows that most of Nevada, Wyoming, southeastern California and western Colorado were unsettled. Today, even though much of that land is patented land, the *minerals* are owned and are being managed by the Bureau of Land Management.





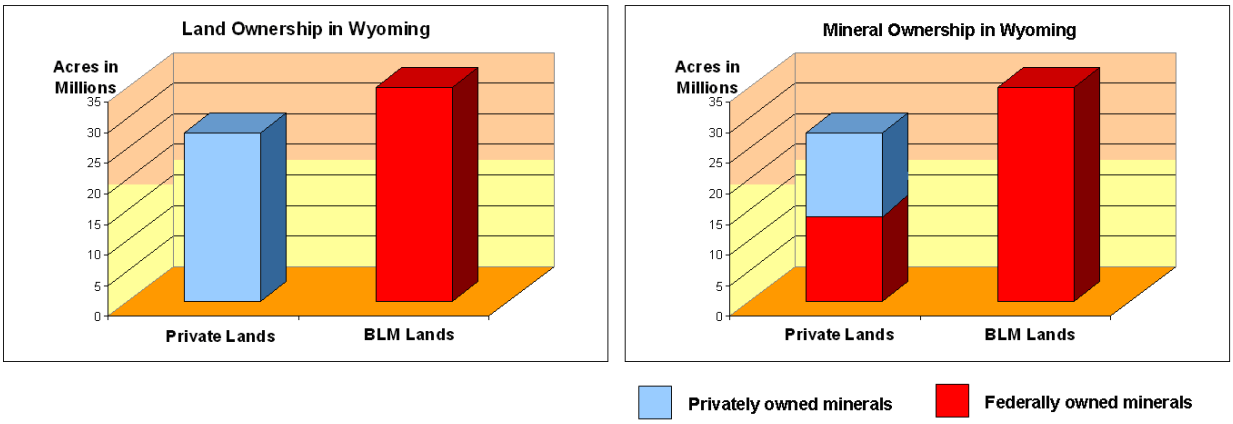
blm.gov/nhp/facts/index.htm

Today, the federal government manages 262 million acres of public lands located primarily in the western United States and Alaska. It also manages an additional 380 million subsurface mineral acres located throughout the country in national parks and forest lands, 56 million subsurface acres of Native American Indian lands, and 58 million subsurface acres of privately owned land. The government-owned mineral acres now total in excess of 756 million.

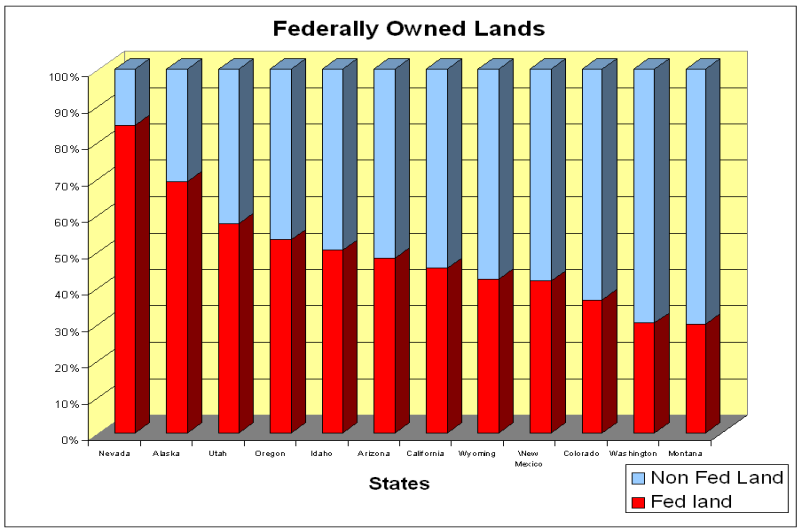
Split Estate Lands

When 100% of the minerals have been severed from the surface owner, the lands are referred to as split *estate lands*.

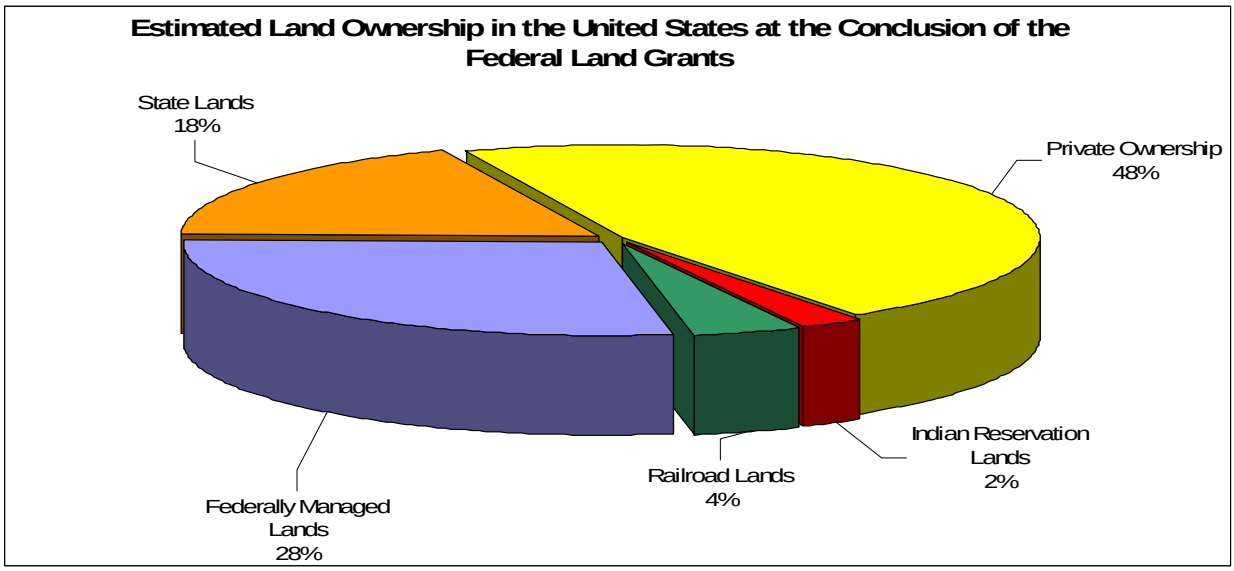
Wyoming is a classic example. The total land mass in Wyoming is 62.6 million acres. Of those 62.6 million acres, 44% of the land is privately owned. The remaining 56% is public land or land that is owned by the federal government, managed by the BLM. Of the privately owned land, 48% or 12 million acres of it is split estate lands.



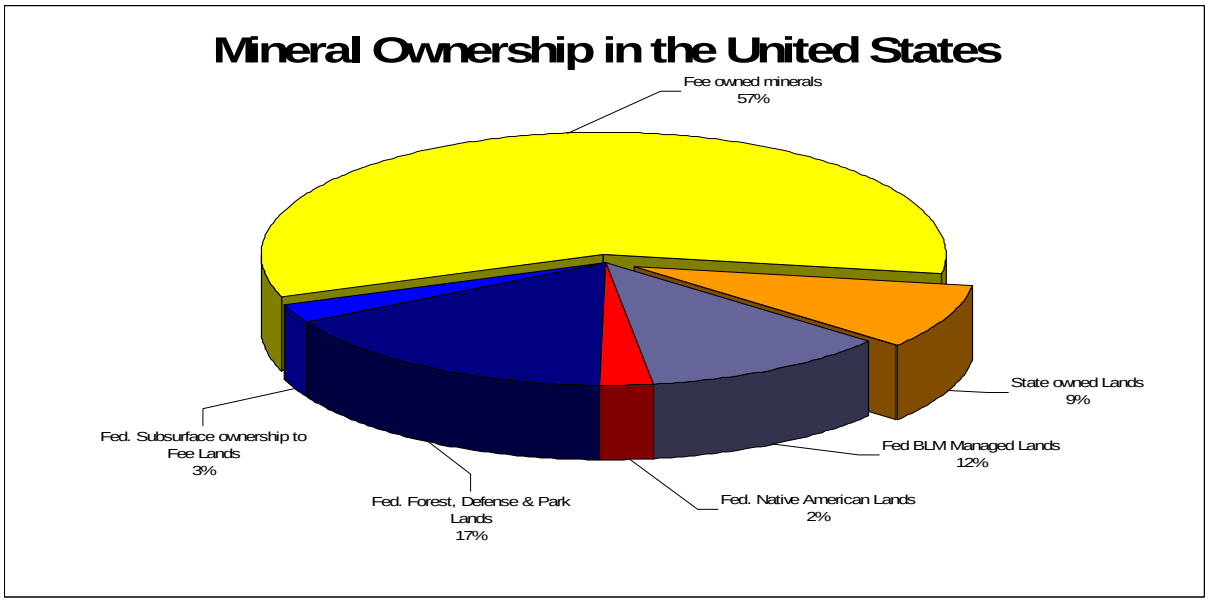
As can be seen on the following graph, the Federal government still owns vast portions of several western states. 84.5% of Nevada, 69.1% of Alaska, 57.5% of Utah, and 50.2% of Idaho are still owned by the United States Government.



The land mass of the United States totals close to 2.3 billion acres of land. The following chart depicts how the land ownership of the United States was owned at the conclusion of the Federal Land Grants.



Mineral ownership is quite another matter. The federal government reserved 58 million acres of subsurface minerals from the fee lands. States sold nearly half of their land to settlers, and in many cases the minerals were conveyed with the surface. The railroads also sold great portions of their surface acreage, keeping large portions of the minerals.



EXERCISE 5:

Examine the conveyances from Exercise 4 and determine who or what entity owns the minerals under the tract of land your pioneer originally choose.

Tract #_____

Surface Owner: _____

Mineral Owner: _____

Who owns the minerals under the Alpha Springs River? _____

_____

_____

The Severing of Minerals in the United States

Although the federal government, individual states and the railroads ended up with hundreds of millions of mineral acres across the United States, a very large portion of the lands were held as fee simple absolute tracts of land with the surface owner owning the oil and gas minerals to the center of the earth.

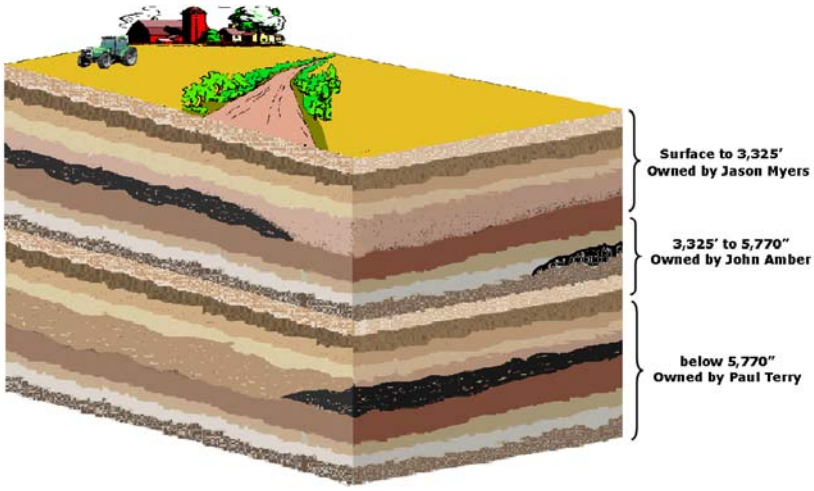
This mineral estate is considered to be real property and can be sold, divided, traded, leased or given away. Over the course of the last century, many of these fee simple tracts of lands saw what is known as the severing of the mineral ownership.

There are several ways in which a severance can occur.

- Severance will occur when the seller conveys the surface and keeps either all or a portion of the minerals through a reservation.
- Severance will occur when the surface owner conveys either all or a portion of the mineral estate. This would occur through a mineral conveyance.
- On occasions, mineral rights can be lost through tax forfeiture to a government entity.

Minerals can be severed as to depths or horizons

In this illustration, the surface owner has sold his mineral estate to different buyers as to different depths or horizons. In a case like this, the owner of the surface lands has severed 100% of the minerals.



EXERCISE 6:

Several of the owners in our pioneer town of Alpha Gulch have experienced either difficult times, hardships or other circumstances that will change their ownership in the lands they first acquired.

Using the bio attached to the pioneer you chose along with the appropriate deed, prepare the appropriate conveyance and then calculate the percent of mineral ownership your pioneer now owns under the designated tract of land. Use only one of the following types of deeds.

1. Warranty deed (without mineral reservation)
2. Mineral deed

Mineral Deed

KNOW ALL MEN BY THESE PRESENTS:

Date: _____

That _____, hereinafter called Grantor, for and in consideration of the sum of one or more dollars $1.00 cash in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, sell, convey, transfer, assign and deliver unto _____, hereinafter called Grantee an undivided

_____%

interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following tract of land situated in Millard County, North Dakota, to-wit:

Containing _____ acres more or less, together with the right of ingress and egress at all times.

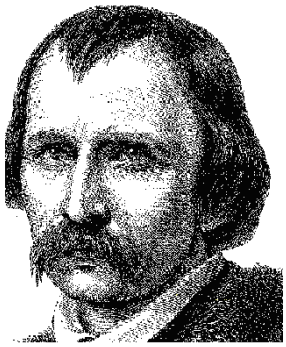
Warranty Deed

Know all men by these presents:

Date: _____

That _____, hereinafter called Grantor, for and in consideration of the sum of one or more dollars $1.00 cash in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, sell, convey, transfer, assign and deliver unto _____, hereinafter called Grantee, the following described real property and premises situate in Millard County, North Dakota to-wit:

Containing _____ acres more or less, together with the right of ingress and egress at all times.



Samuel Osborn
Tract 2

1898 has been a hard winter and dry summer. Mr. Osborn lost his crop due to hail and has no money to get through the winter and plant seed in the spring.

He has attempted to acquire seed and grain from Mr. Toby Jenkins, the owner of the Mercantile; however, Mr. Jenkins will only give him seed in exchange for 25% of the minerals under Tract 1.

Toby Jenkins

Toby Jenkins is a shrewd businessman and owner of the Mercantile. 1898 was a hard winter and dry summer for the farmers in the area. Many, like Samuel Osborn, are hurting for cash and do not have enough money to buy seed and supplies for the coming planting season.

Mr. Jenkins intends to use this to his advantage. He has agreed to give Samuel Osborn the needed seed and grain in exchange for a Mineral Deed to 25% of the minerals under Tract 1.

Sarah Murphy
Tract 3

Sarah Murphy and Debra Perkins have become best of friends. When Sarah became ill and could no longer teach school, it was Debra Perkins who helped her survive.

When Debra's house caught fire and burned to the ground, it was Sarah that opened up her home to Debra.

Together, they are attempting to live in Alpha Gulch by growing and harvesting crops from both Tract 3 and Tract 4.

In exchange, each has deeded a 50% interest in their respective tracts of land to the other.

Debra Perkins
Tract 4

Sarah Murphy and Debra Perkins have become best of friends. When Sarah became ill and could no longer teach school, it was Debra Perkins who helped her survive.

When Debra's house caught fire and burned to the ground, it was Sarah that opened up her home to Debra.

Together, they are attempting to live in Alpha Gulch by growing and harvesting crops from both Tract 3 and Tract 4.

In exchange, each has deeded a 50% interest in their respective tracts of land to the other.

Fractionalizing Minerals

Severed minerals can become valuable assets to those who own the minerals. Like any other type of property ownership, these rights can be sold or inherited. Over the years, the ownership of severed minerals may have passed to many descendants or owners and have become extremely fractionalized. Visualize the mineral ownership in a given tract of land that has remained in the same family for several generations. As one member passed away, that interest was divided to potentially multiple heirs. With each passing, the interests would become smaller and smaller. It is not uncommon to see a fractional interest such as .000345% in a given tract of land.

Illustration of Fractionalized Mineral Ownership

Bea Matthews

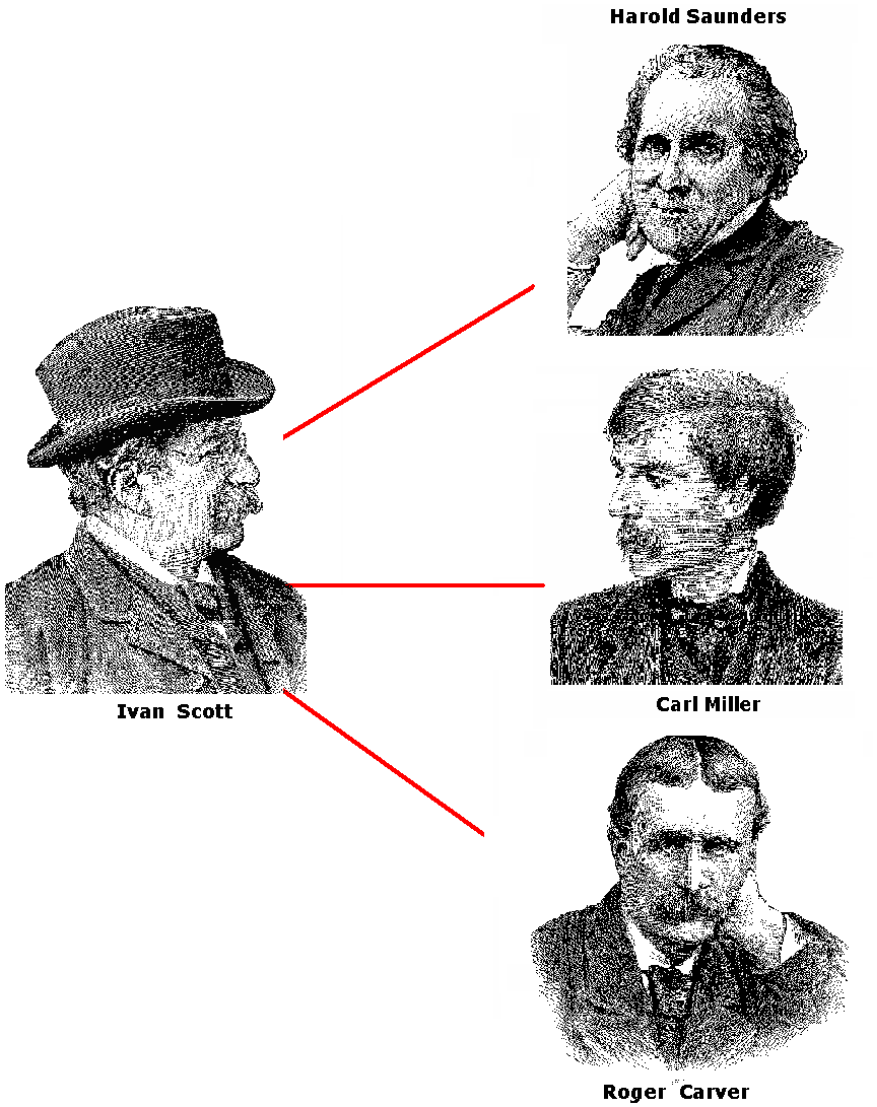
Ivan Scott

Picture a widow by the name of Bea Matthews. Times were rough during the depression years and she was in the position of losing her farm because of her inability to pay her property taxes. She only possessed one thing valuable enough to pay the taxes – her mineral rights. She was approached by a man named Ivan Scott. He was an oil and gas speculator who offered to purchase either all or part of the minerals from Bea. In order to pay her property taxes for the 160-acre farm, she sold 50% of the minerals to Ivan for $5.00 per mineral acre. She used the $400.00 to pay her taxes.

In this case, 50% of the minerals were *severed* from the surface and 50% of the minerals would still be considered whole with the surface.

Ivan then traveled back to the big city and offered to sell a portion of the 50% severed minerals to other investors. He might sell…

- 10% of his 50% to Harold Saunders
- 15% of his 50% to Carl Miller
- 2.5% of his 50% to Roger Carver



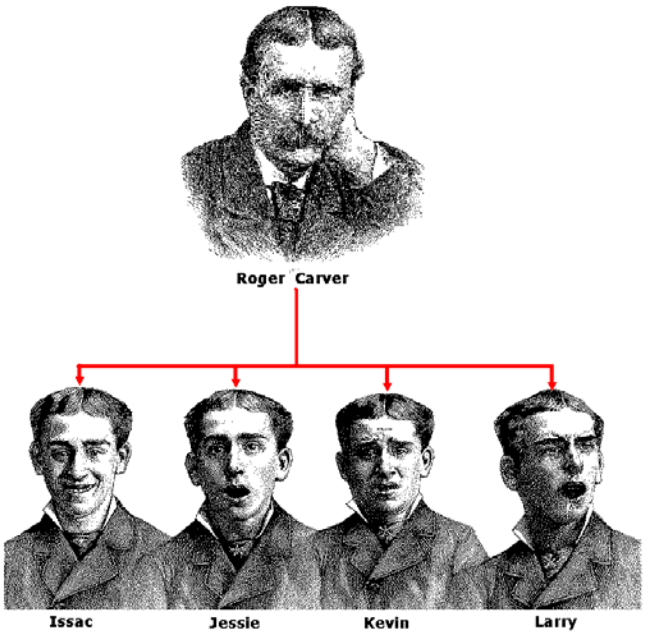
Ivan owns __36.25___% of the mineral estate

Harold owns __5___% of the mineral estate

Carl owns ____7.5__% of the mineral estate

Roger owns __1.25___% of the mineral estate

Assume Roger Carver died a year later and his four sons inherited equal shares of his interest.



Issac owns __.3125___% of the mineral estate

Jessie owns __.3125___% of the mineral estate

Kevin owns __.3125____% of the mineral estate

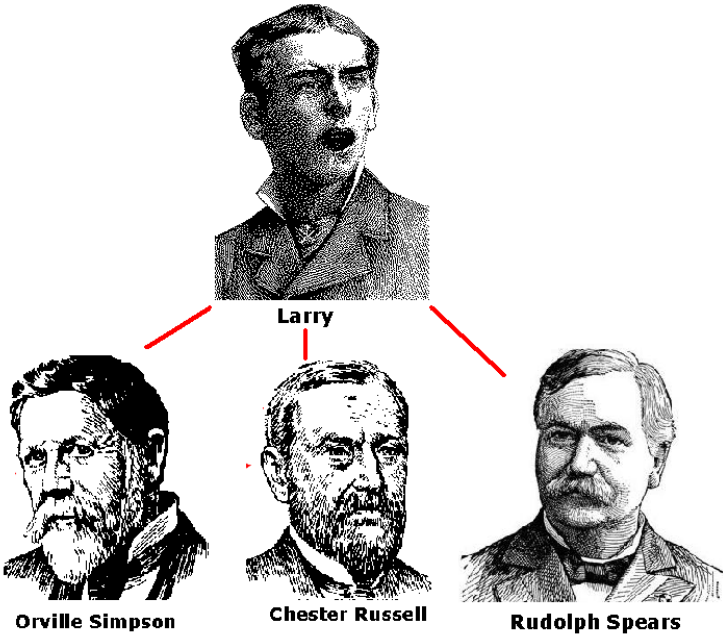
Larry owns __.3125____% of the mineral estate

Two years later, Larry sold his interest to Orville, Chester and Rudolph. Each purchased an undivided 33.3333% of his interest.

Orville owns ___.10416__% of the mineral estate

Chester owns __.10417__% of the mineral estate

Rudolph owns ___.104167__% of the mineral estate



If an oil and gas company wanted to drill a well on this parcel of land, they would need to contact every owner and negotiate an oil and gas lease with each of the mineral owners.

This type of scenario could happen several times under any given tract of

land and is not unlike what has happened under countless tracts of land in the United States. Calculating the ownership may seem complicated; however, being able to follow the chain of ownership and calculate the exact interest of each party is critical for the land professional.

If an oil and gas company wanted to drill a well on this parcel of land, they would need to contact each and every owner and negotiate an oil and gas lease with each of the mineral owners.

Dormant Minerals

Several states have adopted statutes that return severed minerals to the surface owner or surface owners if severed minerals sit dormant or unused for a period of time. Those states are Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, Virginia, Louisiana and Wisconsin. These statutes have various names, such as the *Century Code*, the *Natural Resources - Dormant Mineral act*, the *Adverse Mineral Possession Statute*, the *Mineral Lapse Act,* and the *Marketable Title Act*.

North Dakota has created a twenty-year fixed term on severed minerals through what they call the “Century Code.” The code specifies:

> Any mineral interest is, if *unused* for a period of twenty years immediately preceding the first publication of the notice . . . , deemed to be abandoned, unless a statement of claim is recorded. . . . Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment.

If minerals are considered “used” during the twenty-years, they would not qualify as abandoned minerals. *Used* minerals must meet one of the following:

1. The minerals are being produced
2. Operations are being conducted
3. The minerals are subject to a recorded lease, mortgage, assignment, or conveyance
4. The minerals are subject to a recorded order or agreement to pool or unitize
5. Taxes are being paid
6. A proper statement of claim has been recorded prior to the twenty-year period.

Michigan has a similar ruling called the Natural Resources - Dormant Mineral Act. This act requires that any owner of severed minerals record a valid claim of interest within 20 years of the last sale, lease, mortgage or transfer

or within three years of the date of the act, whichever is later. In Michigan, any such filing requires "an accurate and full description of all land affected by such notice, which description shall be set forth in particular terms and not by general inclusions." Any severed minerals which are not recorded are treated as abandoned, and they will revert to the surface owner.

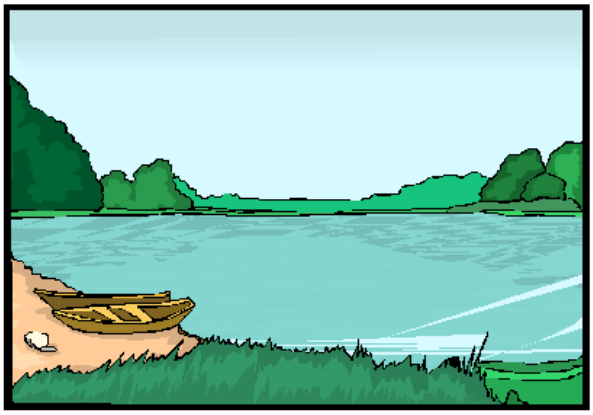
Minnesota addressed their concerns over severed minerals in the Severed Mineral Interests Law. Owners of severed minerals are required to register their interest with the state office in the county where the minerals are located. Those owners who had acquired their interest prior to December 31, 1973 were required to file notice of ownership on or before January 1, 1975. Owners acquiring severed minerals after December 31, 1973 are required to file such notice within one year of ownership acquisition. Once the notices are filed, the minerals are then assessed a tax.

Upon failure to file such notice, as set out by law, the state will notify the last owner of record of a hearing that will determine the ownership of the severed minerals. At the hearing, the court may, in fact, adjudicate absolute forfeiture of the minerals to the state of Minnesota.

Undivided Interests

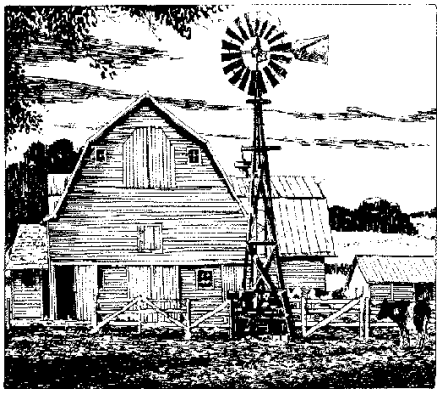
A concept that is critical for the land professional to know and understand is the concept of *"undivided interests".*

Picture a husband and wife who own a lake. They do not own any of the land around the lake—just the water in the lake. This couple has two grown sons. Like many siblings, these two sons do not get along and haven't spoken to each other in some time. In an attempt to help reconcile this relationship and since both of the boys love to canoe, the mother and father deeded the lake to their sons each share and share alike. What this means is that each of the boys own an *undivided 50% interest* in the lake. One son does not own the northern 50% or the western 50%. Each own 50% of every gallon of water in the lake no matter where the water is located.



Now picture the first morning that both sons show up to canoe on the lake. One yells at his brother, "Get off my half of the lake! You are canoeing on my half of the water!" Such a statement would be ridiculous because you can't divide the water—it is undividable.

This same concept is one that exists in hundreds of thousands of scenarios that involve property ownership and oil and gas mineral ownership.



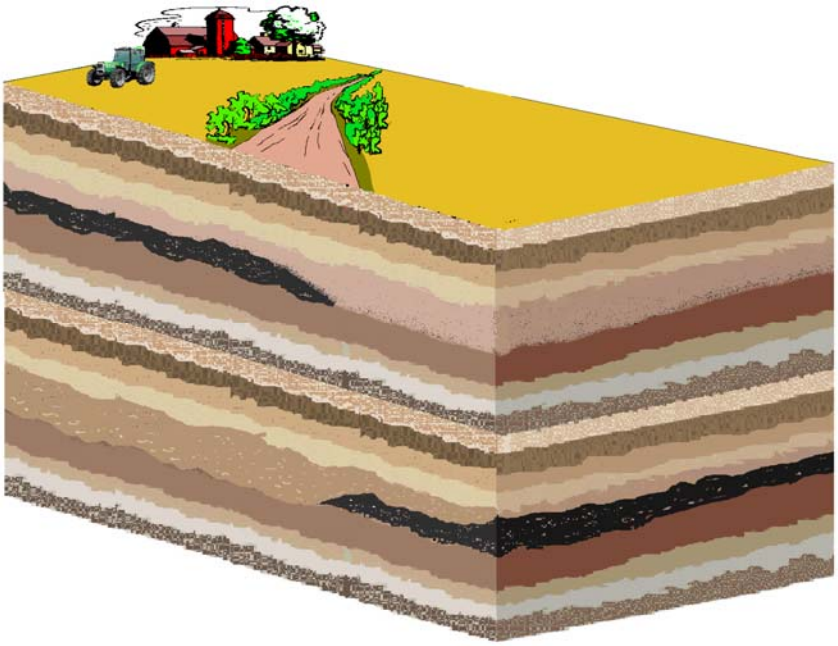
Picture a barn that was inherited by three siblings (2 brothers and 1 sister). Each of the siblings received an undivided 1/3rd interest in the barn. The barn has a hay loft. Which 1/3rd part of the hay loft does the sister own?

Which 1/3rd part of the barn door does the sister own?

Which 1/3rd part of the nails holding the barn together does the sister own?

She owns 1/3rd of every part of the hayloft, 1/3rd of every part of the barn door and 1/3rd part of every nail holding the barn together. She owns an undivided interest.

Now, picture a tract of land described as Section 8: E/2NW/4. This tract of land contains 80 acres and was owned in absolute fee simple by a man named Robert Bell. Because Mr. Bell had two sons, he chose to convey the land and everything attached to the land to his sons, share and share alike. Each of the boys now own an undivided 50% interest (or 40 net acres) in and to the surface and subsurface acreage.



If your company were to lease the oil and gas minerals from one of the sons, the legal description on the lease would describe the entire tract of land (Section 8: E/2NW/4 or 80 acres) even though this one son only owns an undivided 50% of the tract or 40 net acres. The reason is because he owns 50% of the minerals in every acre no matter where the acre is located.

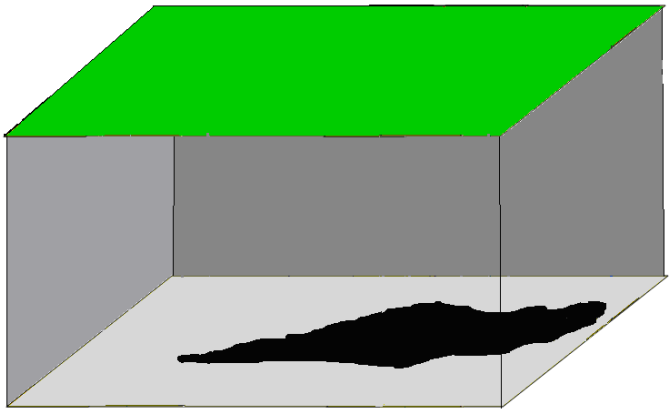
Therefore, the only way to describe what he owns is by describing every acre in which he owns an undivided interest.

When more than one party owns an interest in the same tract of land or minerals, they are said to be an undivided owner of the land or minerals.

If one of Robert Bell's sons were to sell one-half of his 50% *mineral* interest to three investors, each purchasing an undivided 33.333%, where would their 33.333% of the one-half of the son's original 50% be located in the picture?

Since they own an undivided interest in the whole, they each own 33.333% X 50% of each of the 80 acres or 13.33333 net acres. If an oil and gas company were to lease one of these investors, the legal description on the lease would describe the entire tract of land.

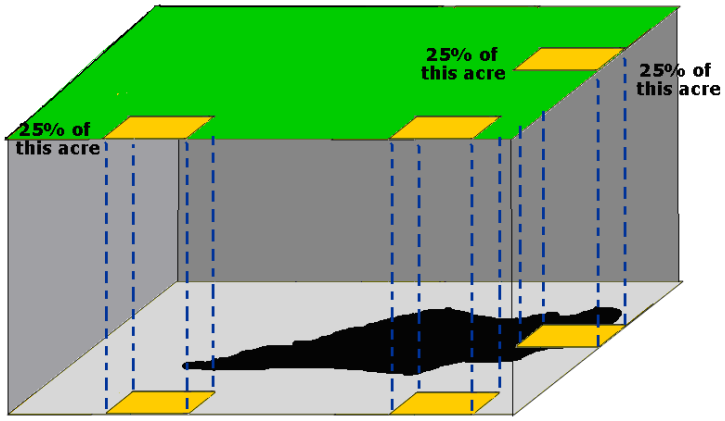
When more than one party owns an interest in the same tract of land or minerals, they are said to be an undivided owner of the land or minerals.



Example: This is an illustration of a 5-acre tract of land. Adam owns a 75% undivided interest in the surface and minerals in this tract of land. Beth owns a 25% undivided interest in the surface and subsurface.

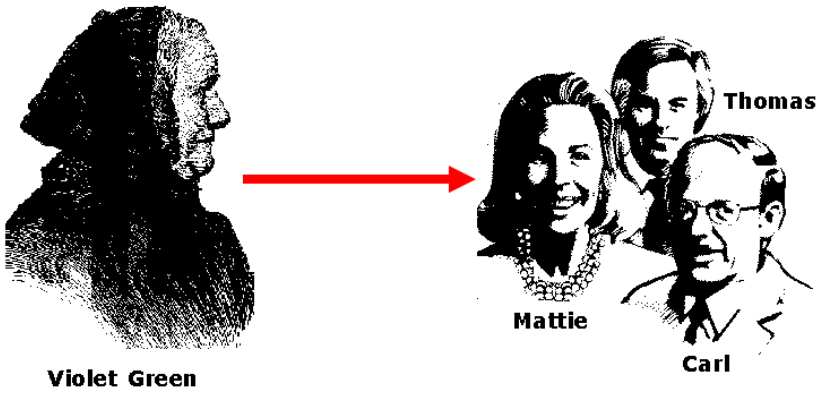
Question: Where is the 25% of the surface and subsurface that Beth owns? Where is the 75% that Adam owns?

Answer: Since Beth owns an undivided 25% of the whole tract of land, her ownership is not limited to one side of the tract of land or the other side of the tract of land. She owns 25% of every acre.

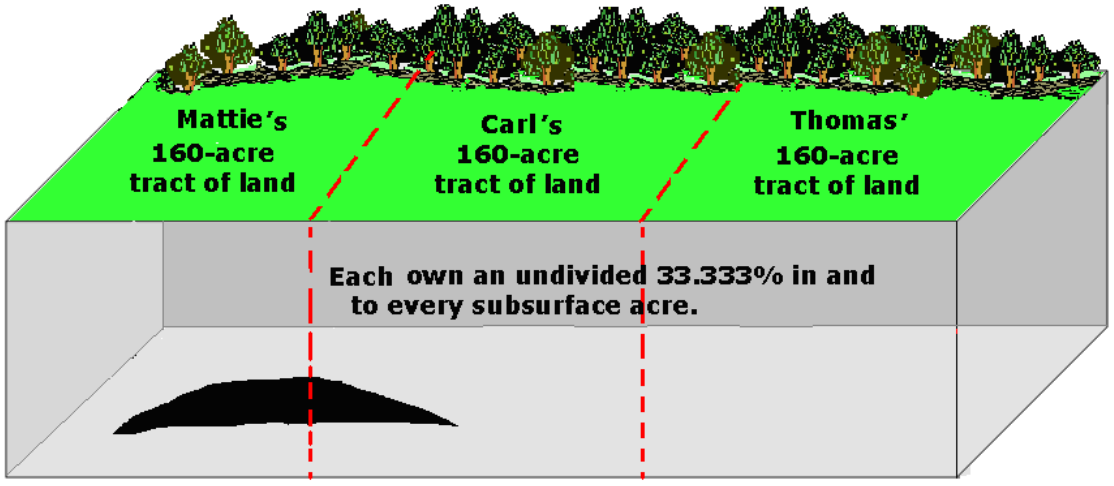


Divided Surface and Undivided Mineral Ownership

Another scenario is one in which a grandmother, Violet Green, who owned a 480-acre farm *divided* the surface estate into equal tracts of land by conveying them to her three grandchildren, Mattie, Thomas and Carl.



Each grandchild was deeded a separate 160-acre tract of land (as illustrated). What Violet did with the subsurface estate was different. She conveyed an undivided 33.333% interest in and to the entire 480-acre subsurface minerals to each of grandchildren. In this case, the surface has become divided and the subsurface has become undivided.



If an oil and gas company leased each of the grandchildren and drilled a producing well on Mattie's tract of land, all three grandchildren would share in royalty from that well. Even though the producing reservoir is not located under Thomas' tract of land, he would receive royalty from the producing well because he owns an undivided 33.333% of the minerals in and under Mattie's land.

Problem to solve - Read the following scenario and answer the questions below:

- Amy owns 100% of the surface and 100% of the minerals in this tract of land.

- Amy sold 25% of the minerals to her sister Carol.
- Amy later sold all right, title and interest in the S/2 to her sister Michelle.

Who owns a divided interest in this Section of Land?

_____

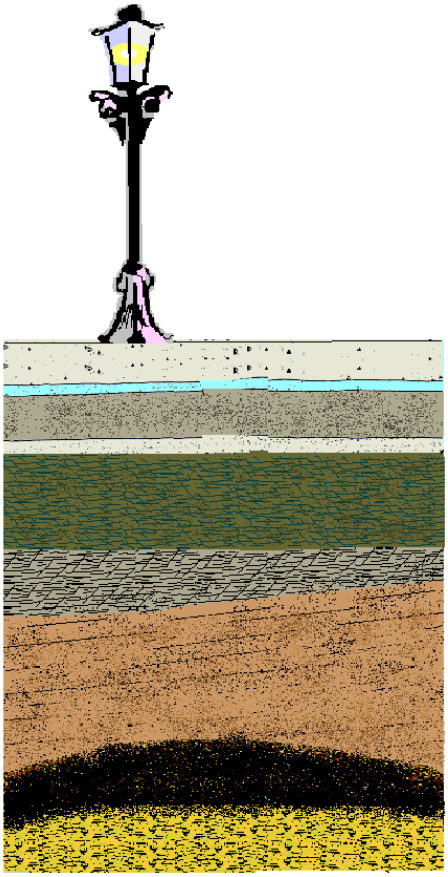
Who owns an undivided mineral interest in the S/2?

_____

Answer: Amy and Michelle own a divided interest in the land. Amy owns the surface of the N/2 and Michelle owns the surface in the S/2. Carol and Michelle own an undivided mineral interest in the S/2. Carol owns 25% and Michelle owns 75%. Amy owns an undivided 75% of the minerals in the N/2 and Carol owns an undivided 25% of the minerals in the N/2.

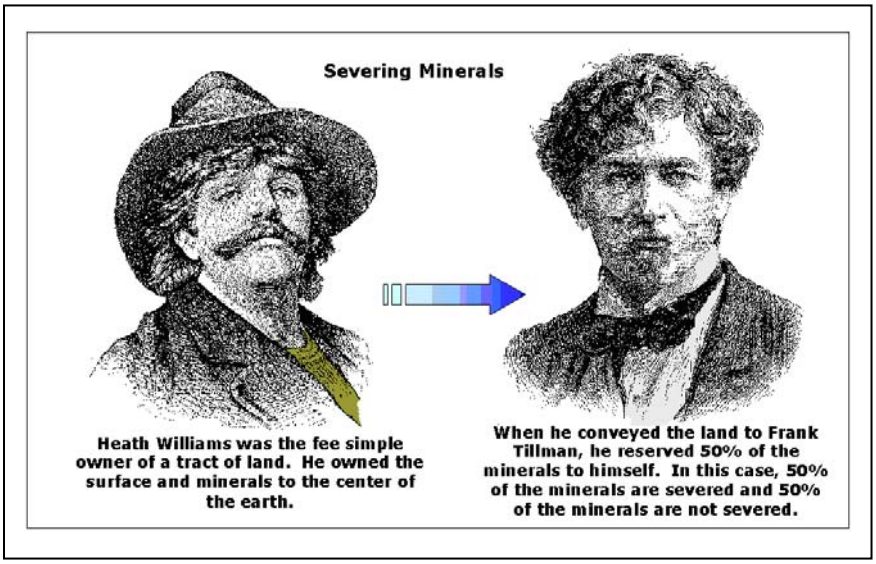
Reserving Minerals

Reserving minerals is much like what happens when someone decides to sell their home. Before the house ever goes on the market, a realtor meets with the sellers and asks them if there are any items attached to the property or house they want to keep. This is an important question because anything attached to the property is a part of the property.



The drapes are attached to the house and if the sellers want to keep the drapes, they must specifically state that the drapes are to be kept by the sellers. If there is an old antique street light bolted on a slab of cement in the backyard, the light is attached to the property. If the sellers want to keep the light they must specifically state that the light is not a part of the deal. They can unbolt the light from its foundation thus severing it from the land.

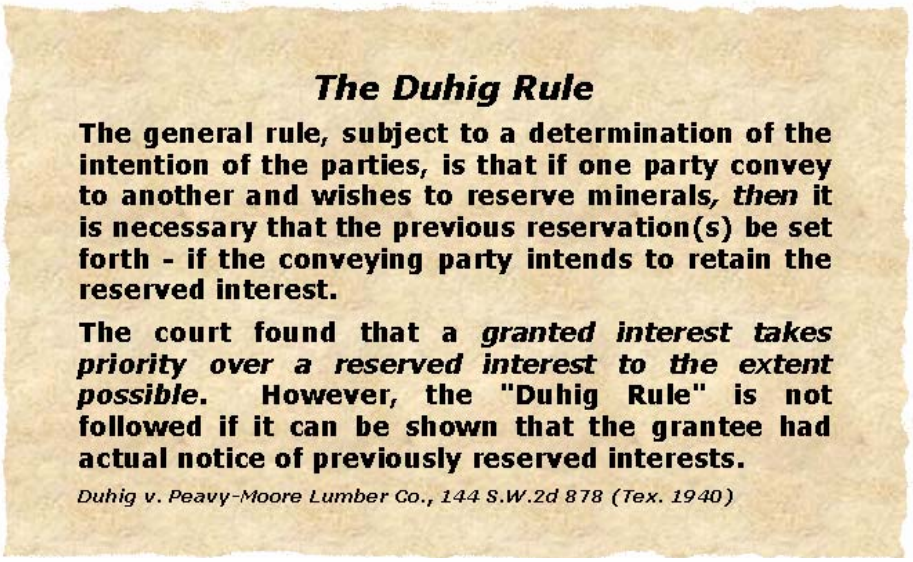
In the same way, subsurface minerals are attached to the land. If the sellers want to keep the minerals and only sell the surface, the seller must specifically state that the minerals are going to be kept. This is called a mineral *reservation and the end result is the severing of the minerals from the surface land*.



If at any time during the ownership of a tract of land, either all or a portion of the mineral estate has been sold or reserved a *severance* of the minerals has occurred. Severance simply means that the surface owner is a different person than the mineral owner.

The Mineral Reservation Rule

Many years ago the courts fashioned a rule referred to as the *Duhig Rule*. This rule has been upheld in courts throughout the land and states …



What does this mean?

In Texas, the court has fashioned a rule referred to as the *Duhig Rule*. This rule has been upheld in several states and asserts that if one party conveys to another through a warranty deed and wish to reserve minerals, then it is necessary that all prior reservations of record be set forth, if the conveying party intends to retain the reserved interest. Alabama, Colorado, Louisiana, Oklahoma, Mississippi, North Dakota, New Mexico, Texas and Wyoming are the states that have adopted the Duhig rule. Utah and Arkansas ignore the Duhig rule.

Assume that Frank Tillman is the owner of a tract of land. When he received title, the previous owner (Heath Williams) reserved or kept 50% of the minerals in and under the tract of land.

Twenty years later Frank Tillman, through a warranty deed, decides to sell the same tract of land to David Carlyle. Frank Tillman also decides to keep or reserve 50% of the minerals. However, in the deed to David Carlyle, Frank Tillman does not mention the prior 50% mineral reservation.

Since the prior reservation was not set out, you must ask yourself, “What interest *appears* to be granted to David Carlyle?” Clearly he is receiving 100% of the surface land. However, if you were David Carlyle and knew nothing about the previous 50% mineral reservation, from the *face of your deed,* what *mineral* interest would appear to be *granted:* 50%, 25% or none?

If David Carlyle knew nothing about the previous reservation, the conveyance would be granting 100% of the surface rights and appear to be granting 50% of the mineral rights. According to the Duhig rule, Frank Tillman would receive no mineral interest in the tract of land because *the granted interest* on the face of the conveying deed will take *priority over the reserved interest to the extent possible.*

The rule related to an "interest conveyed" v. "land described"

It is not uncommon for a surface owner to own less than 100% of the surface at the time of conveyance. In such cases, the wording in the conveyance or reservation becomes paramount to what is being conveyed or reserved.

Example 1:

In the following warranty deed, Thomas B. Rutledge owned an undivided 50% interest in the surface and the minerals or 160-net mineral acres out of the 320-acre tract.

WARRANTY DEED

Know all men by these presents:

That THOMAS B. RUTLEDGE of 146 S. Wood Street, Gamble City, South Dakota party of the first part, in consideration of the sum of ten and more dollars ($10.00) cash in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto Josh Hardin, a single man of 7223 S. Main Street, Gamble City, South Dakota party of the second part, the following described real property and premises situate in Morgan County, South Dakota to-wit:

an undivided fifty percent (50%) interest in and to:

Township 23 North, Range 15 East
Section 15: W2

excepting and reserving, however, unto Thomas B. Rutledge, his heirs and assigns, in addition to all minerals heretofore previously reserved or conveyed, an undivided twenty-five percent (25%) interest in and to all of the oil, gas, and other minerals in and under said land.

According to the reservation language, did Thomas reserve

A. 25% of his undivided 50% mineral interest? _____

B. 25% of the entire 320-acre mineral estate? _____

The language holds the key.

(Answer) In this case, Thomas is reserving an undivided twenty-five percent (25%) interest in and to all of the oil, gas, and other minerals in and under said *land*.

The wording in the deed is the key. A reservation of this type could also have been worded "in and under the *lands herby described*," or "in and *under said lands*." Because the reservation refers to the minerals "in and under the *land*," the twenty-five percent reserved is taken from the entire 320-acre mineral interest in the *land* and Thomas has reserved to himself a full 25% or 80 mineral acres.

Example 2:

Assume the reservation read as follows:

excepting and reserving, however, unto Thomas B. Rutledge, his heirs and assigns, in addition to all minerals heretofore previously reserved or conveyed, an undivided twenty-five percent (25%) interest in and to all of the oil, gas, and other minerals in and under said lands hereby described and conveyed.

According to the reservation language, did Thomas reserve 25% of his undivided 50% or 25% of the entire mineral estate under the tract of land?

The wording in the reservation again holds the key.

(Answer) Because the language limited the reservation to the **land described and *conveyed*, and since Thomas conveyed only 50% of the land, he can only keep 25% of what he conveyed.** He ends up with 12.5% or 40 mineral acres.

The Mineral Estate is the Dominate Estate

When a mineral estate is severed from the surface estate, the mineral estate is regarded as the *dominate estate*. This means that unless otherwise stated in the severance deed, 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. Under this concept, if there is no contrary language in the severance deed, the mineral owner has a right of entry or access to explore for and mine minerals beneath the surface of the land.

The Origins of Our Laws Concerning Surface v. Mineral Rights

The year was 1568. The issue revolved around gold. The Queen of England owned none of the surface. That was owned by the 3rd Earl of Northumberland. The question arose as to who owned the gold!

The court decided that the Queen had a "royal mining privilege" and allowed the crown access to lands in which gold and silver were present. This created a Doctrine whereby the mineral estate became the dominate estate

From a *business standpoint*, what does that mean?

_____

_____

What does that mean in light of today's opinion of "Big Oil"?

_____

_____

Case Law has established what is known as "Reasonable Surface Use or Reasonable Necessity"

1. The operator can use salt water produced from the well for operations;
2. The operator can take water necessary for the operations;
3. The operator can house employees on the premises;
4. The operator can construct roads to drill sites;
5. The operator can cut down trees at the site of a well

This might appear unfair or unjust because, after all, the surface owner (who may not own any of the minerals under the tract of land) makes his living by growing crops on the surface. Does it seem fair that the mineral owner (who may live in the *big city*) be able to tramp through the crops, build a road so that he can set up a drilling rig and then produce oil and gas for years to come?

In a case like this, why would the *mineral estate* be the *dominate estate*?

The reason is simple: If the *surface estate* was the *dominate estate* and the surface owner owned no minerals, then that owner could prevent the minerals from ever being developed.

The Granting Clause of the Oil & Gas lease will establish the lessee's surface rights.

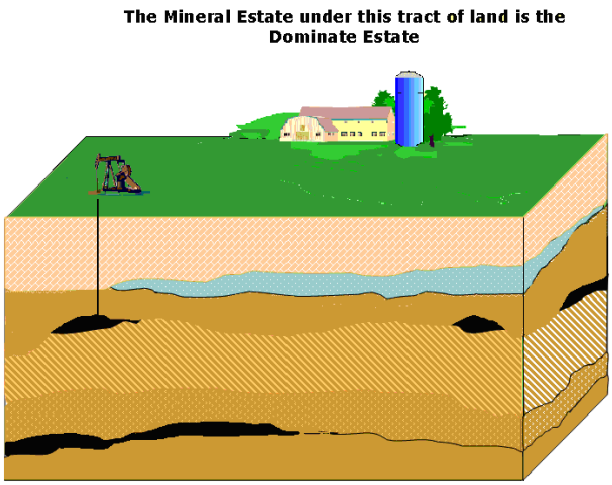
Read this clause and determine what surface rights have been granted to the lessee…

WITNESSETH, That the said lessor, for and in consideration of _____*****Ten and More*******_____DOLLARS, cash in hand paid, … has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of exploring … for oil (including but not limited to distillate and condensate), gas (including casinghead gas and all other constituents), and all other hydrocarbons, and for laying pipe lines, building tanks, power stations, facilities for storing oil, housing for employees, constructing telephone lines, and structures thereon, to produce, save and take care of said products, all that certain tract of land, together with any reversionary rights therein, situated in the County of …**

In this lease, the lessee has obtained rights to the following:

- laying pipe lines;
- building tanks;
- power stations;
- facilities for storing oil;
- housing for employees;
- constructing telephone lines; and
- other structures

Three limitations on mineral estate dominance:



1. The use of the surface area is limited to what is reasonably necessary for the development of minerals.
2. Subsurface operations must occur in a genuine and faithful manner.
3. Subsurface operations must occur with due regard for the surface owner and must accommodate the surface owner if reasonable.

The Doctrine of Accommodation and Alternative Means

States such as Texas, Utah, North Dakota, Arkansas, New Mexico and West Virginia, have adopted what is known as the Doctrine of Accommodation and Alternative Means.

Although the lessee still has the right 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.

Because there have been limited laws in place to protect surface owners in these ways, many states began to adopt statutes that offered surface owners additional protection when damages occurred.