The Federal Land Rights Series Edition 18 – Mineral Rights Arrive at the Crossroads of Federal and State Law and Contribute to the Developing Federal Circuit Split Regarding Applicability of the Federal Quiet Title Act

While conflicts are constantly developing in the exceedingly broad land rights arena, over the legitimacy of fee titles, the validity of conveyance documentation, the actual location of ambiguous or disputed boundaries, and the nature or scope of easements and covenants defining rights of land use, controversies stemming from the physical composition of the land itself bring yet another layer of legal complexity to the realm of land rights. Mineral rights have long been recognized as a highly important component of land rights law, commencing in the Nineteenth Century a focused effort was made by federal personnel to properly distinguish and define mineral lands within the public domain, when title to innumerable portions of that vast expanse was federally relinquished and a large amount of that land became subject to private control through federal disposal, resulting in thousands of federally patented mineral properties throughout the West. Federal law, enabling land upon or within which naturally occurring substances of particular value had been discovered to be privately acquired for mineral extraction purposes, was established during that era, but beyond the relatively limited areas where early mining activities took place in the western territory the presence of many valuable materials remained largely unknown or unrecognized. Cognizant of the potential presence of undiscovered natural substances of special value, in countless locations all across the western landscape, for several decades federal personnel often utilized mineral reservations in federal patents, as they had been congressionally authorized to do, thereby preventing the valuable right to exploit patented land through mineral extraction from leaving federal control. Thus legal separation of mineral and surface estates in the western territory initially came about as a direct result of federal land disposal policy, and as the spectrum of natural substances holding commercial value significantly broadened during the early portion of the Twentieth Century, reservation of mineral rights of various kinds by non-federal grantors became commonplace, populating most western states with an immense number of mineral estates which had been legitimately separated for purposes of title from the corresponding surface estate.

Mineral materials in the ground, when not known to exist, and therefore left entirely unaddressed in conveyance documentation, pass to the grantee of any particular land as a component of the fee title thus acquired, having never been severed from that fee estate. Alternatively, when minerals and the right to extract them are expressly addressed in conveyance documentation, because certain mineral substances are either known or suspected to exist in any given location, and are intentionally retained by the grantor, forming a separate and distinct mineral estate, both the minerals themselves and the right to remove them nonetheless comprise a fee estate, augmented by rights in the nature of an easement, enabling any party who acquires that mineral interest to access the relevant land for extraction purposes. Neither mineral materials themselves nor the right to conduct mining activities can be properly categorized as an easement, because the easement concept, by definition, is limited to matters involving land use, and does not contemplate, envision or facilitate physical removal of any property, either real or personal, from any given servient estate by an easement holder. Rights involving physical removal of any objects or materials, either natural or artificial, from land that is not owned by the holder of such a right of removal, are typically classified as profits, which under the law are widely regarded as being separate and distinct from easements. Thus mineral estates, regardless of how they were created or who created them, represent fee interests in real property, which are not inferior or subordinate to corresponding surface fee estates in any respect, resulting in the existence in many locations of deeply intermingled fee property rights, differentiated only by the physical composition of the relevant land. In addition, the term "mineral" can

potentially embrace virtually any naturally occurring non-soil substance which holds commercial value, positioning mineral rights squarely at the intersection of land rights and finance, a place where monetary valuation holds the capacity to determine what does or does not constitute part of any given legal estate in land. With those parameters in mind, let us proceed to review an interesting historical sequence of events that took place in Arizona, from which developed the QTA case entitled Northern Improvement Company (NIC) v United States (FN 1).

The draying teams which worked out of the McCormick Dray Barn prior to the advent of the automotive era. This enterprise was destined to be transformed into the Northern Improvement Company of today.

1923 to 1924 - An unspecified amount of land in Mohave County, located in mineral rich northwestern Arizona, was patented to the Santa Fe Pacific Railroad (SF) by the US, and those federal patents obtained by SF contained no mineral reservation of any kind, because no indication that any of the lands thus conveyed could be properly characterized as being mineral in character under federal standards had been observed by federal personnel or brought to their attention. Thus SF acquired fee title to both surface and subsurface estates, thereby obtaining complete control over all existing materials and substances that might be found either in or upon the ground within the boundaries of any of those acquired tracts. Although the status of SF as a railroad corporation was instrumental to the selection and acquisition of those particular lands under federal law, these fee acquisitions were evidently made with no specific intent on the part of SF to construct rail lines or other railroad facilities upon every one of the numerous acquired sections, they were instead obtained by SF as investment properties, being situated in close proximity to one or more existing railroad corridors which were being operated by that corporation at this time. Thus fee ownership of these lands by SF was legally equivalent to land ownership by any other corporate entity, but trouble was destined to arise, nearly 8 decades down the road, in Section 19, Township 21 North, Range 15 West, Gila & Salt River Meridian, which was among the large number of Arizona tracts that came under the control of SF at this time.

Township twenty-one north of Range fifteen west.

The Lots one, two, three and four, the northeast quarter of the northwest quarter, the northeast quarter of the southeast quarter and the northeast quarter of Section nineteen, the north half of the northeast quarter, the southwest quarter of the northeast quarter, the northwest quarter of the southwest quarter and the northwest quarter of Section twenty-seven, the east half of the northeast quarter, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter, the south half of the southwest quarter, the northeast quarter of the southwest quarter and the southeast quarter of Section twenty-nine, the Section thirty-one, the south half of Section thirty-three, and the east half of the northeast quarter, the southwest quarter of the northeast quarter, the west half of the southwest quarter and the southwest quarter of the northwest quarter of Section thirty-five.

The descriptive portion of the relevant federal patent to Santa Fe, embracing land which the GLO deemed to be non-mineral in composition, under federal mineral guidelines, as they stood during the 1920s.

1938 - SF conveyed a substantial tract in the aforementioned Section 19 to a presumably typical private party, who like SF evidently acquired fee title to that land only for investment purposes, thus the subject property remained vacant desert land going forward. In so doing however, cognizant that such land might hold value for mineral extraction purposes at some future time, SF adhered to its usual practice when making such conveyances, which included the use of 2 typical reservation clauses, of the kind routinely utilized by railroads when conveying land to private parties. One of those standard reservation clauses enabled SF to retain the mineral estate while parting with the surface estate, and the other one enabled SF to burden the conveyed tract with a railroad right-of-way at any future time, should the railroad company or any legal successor thereof ever deem it necessary to do so.

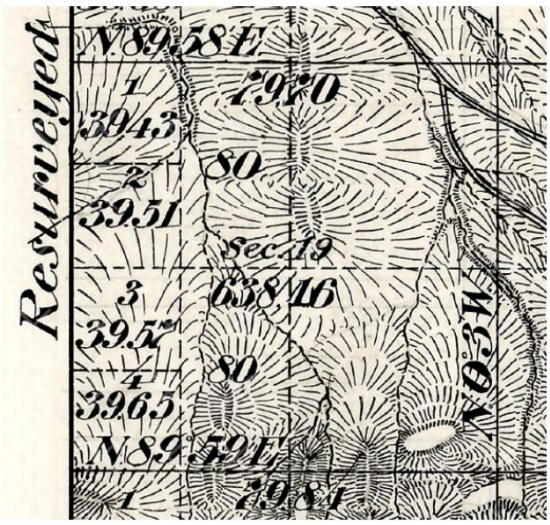
1939 to 1980 - The separate surface estate within Section 19 which had been created in 1938 passed by deed from one private party to another an unspecified number of times during this period, and in the documentation of each of those subsequent conveyances both reservations set forth in the 1938 deed were duly reiterated, effectively reminding each successive recipient of the surface estate about the limitations that remained legally associated with that particular tract and the ongoing existence of a railroad interest therein. There is no indication however, that any actual use of the subject property took place during this period, nor did SF ever elect to exercise any of the rights reserved in 1938, thus any mineral value that might appertain to the subject property remained at least unutilized, if not entirely unrecognized, throughout this time period.

1981 - To facilitate one or more typical road construction projects, Mohave County obtained gravel leases from various surface owners in the aforementioned township and other nearby townships, upon lands which bore mineral interests that had been retained by SF, and gravel extraction operations of unspecified magnitude were performed upon those lands by county personnel, without any objection from SF. For unknown reasons however, the relevant tract in Section 19 was not among those so utilized by the county

at this time, presumably because other more conveniently accessible properties adequately fulfilled the county's relatively modest needs.

1984 - The case of Spurlock v Santa Fe (694 P2d 299) in which a typical property owner challenged land rights held by SF, after discovering that SF had engaged in helium extraction upon the 37,000 acre Spurlock Ranch, reached the Court of Appeals of Arizona (ACOA). In that case, the SF legal team chose to make no assertion that the mineral rights held by SF included any common surface materials, and instead took the position that the only surface rights held by SF were those relating to railroad construction work. Thus SF clarified that the intent embodied in the standard mineral reservation, which the company had historically employed in hundreds if not thousands of deeds, was simply to facilitate underground mining for subsurface substances, such as drilling for oil, gas, helium and nitrogen. In addition, the legal position openly taken by SF at this time further clarified that the other reservation clause, which the company had used with equal frequency when deeding land, was intended by SF only to facilitate the use of the surface by SF for purposes of railroad construction. As a result, the ACOA determined that SF held no mineral interest in any typical surface material within the Spurlock property, such as sand and gravel, and also concluded that SF had legally abandoned any interest it may once have had in any such commonly occurring substances by virtue of the reservation clause regarding railroad construction, because SF had never made any use of the relevant land for railroad construction, and SF conceded that it had no intention of ever building any rail lines across the Spurlock property.

1988 - BLM orchestrated a land exchange involving multiple property owners, including the owner of the aforementioned tract in Section 19, and that transaction was finalized at this time. Thus by means of exchange deeds, which duly acknowledged the prior severance of the relevant surface and mineral estates, BLM acquired fee title to the tract that had been created in 1938 among others, and this federal reacquisition of land in which SF held a legal interest became a matter of public record at this point in time. This federally conducted land exchange was duly authorized, its objective being to bring pristine desert lands under federal control for land preservation purposes, and federal protection of such lands was among the congressionally approved duties of BLM personnel under the Federal Land Policy and Management Act of 1976. Having taken notice of the aforementioned 1984 ruling of the ACOA in the Spurlock case, BLM personnel were understandably convinced that they had obtained complete control over all use of the surface of the lands which were federally reacquired at this time, upon observing that SF had publicly confirmed that the SF mineral estate included no typical surface materials, such as sand and gravel.



Section 19 T21N R15W
Gila & Salt River Meridian,
as platted by the GLO in 1912,
just a month after the arrival of
statehood, which completed
the “Lower 48”.

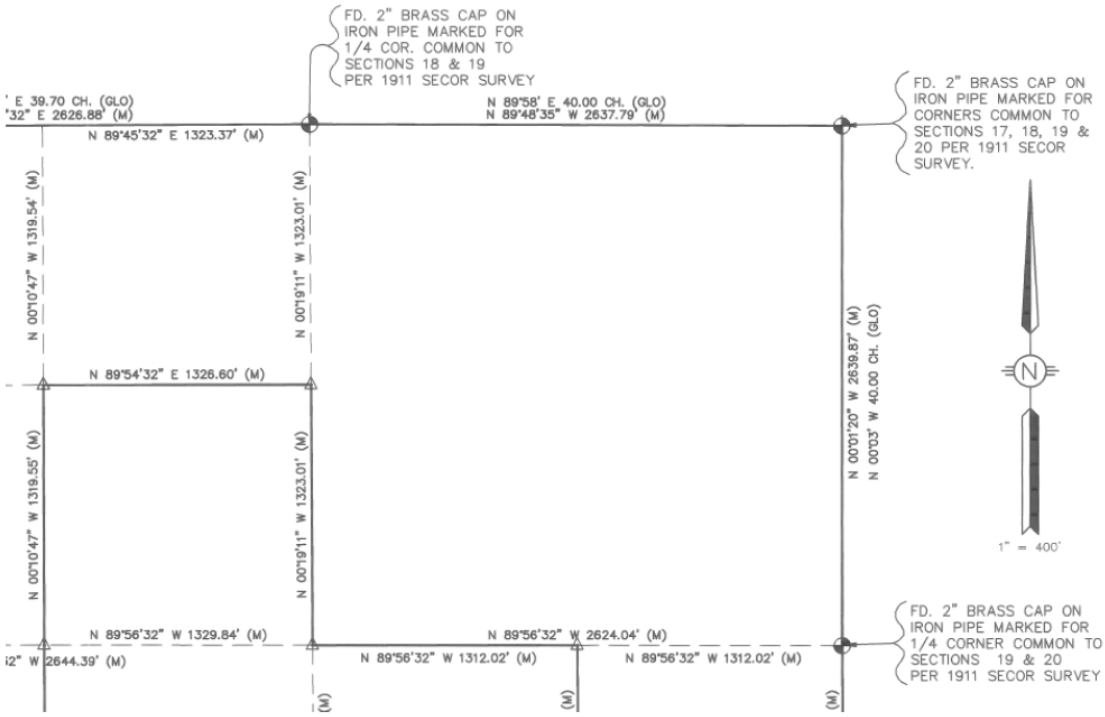
1991 - The City of Kingman evidently needed some sand and gravel to support an unspecified construction project, so city personnel, being uncertain about the legal status of such substances within the mineral spectrum, filed an inquiry with SF, in an effort to ascertain the availability of such useful materials in those many nearby locations where SF had reserved mineral rights. A representative of SF responded, informing them that the SF mineral estate did not include sand and gravel, which was regarded by the company as part of the privately held surface estate, thereby advising the city that any such material which the city might need could be taken by the city from any location, without any objection from SF. Whether the city ever actually performed any extraction work based upon this response from SF is unknown, but assuming that such work did in fact take place in some location or locations, it did not occur upon the federal tract in Section 19, where both the surface and the subsurface remained undisturbed.

1996 - The Interior Board of Land Appeals (IBLA) (FN 2) handed down a decision in a case involving other Arizona property (136 IBLA 77) which just like Section 19 had been federally reacquired in 1988 and stood subject to a comparable non-federal reservation of mineral rights, holding that sand and gravel are not typically regarded as minerals under Arizona case law. Thus the ongoing treatment of common surface materials as non-mineral substances by BLM personnel obtained explicit approval at this point in time.

1999 - Another conflict between other litigants, who held rights involving land in another Arizona location that had once been owned by SF and bore reservations created by SF, which was focused upon whether or not gravel can be properly classified as a mineral, was addressed by the ACOA at this time. In resolving that case, the ACOA held that when gravel is expressly referenced in a non-mineral reservation, appearing in a deed which also contains a separate mineral reservation, the gravel cannot be regarded as part of the mineral estate and must be deemed to be part of the surface estate, because the citation of that specific substance by the parties to the deed, outside the scope of the mineral reservation, shows that those parties did not view gravel as a mineral. Thus the ACOA highlighted its acceptance of the proposition that the intent embodied in deed language, including the language of multiple reservation clauses viewed in context with one another, represents a principal factor in judicial determination of whether or not certain materials constitute mineral assets in any given location.

2002 - SF quitclaimed any and all mineral rights still held by SF in Section 19 to a construction company, but there is no indication that the grantee of SF made any actual use of the mineral estate thus acquired, or engaged in any communication with BLM about potential use of the federally held surface estate in connection with any mining activities that company may have planned or desired to begin conducting, so no issues regarding Section 19 arose at this point, and the relevant land remained in its natural condition.

2004 - The ACOA addressed the subject of mineral rights yet again, in the context of a condemnation case which did not involve land bearing any federal interest, but did involve land to which the aforementioned standard SF deed reservations were applicable. In so doing, the ACOA verified that certain forms of rock, commonly found at the surface level, can be legally classified as minerals, making them property of the mineral estate holder rather than the surface estate holder, if those rocks can be shown to hold value as decorative items capable of serving ornamental purposes. Also during this year, apparently convinced that the material comprising the surface of Section 19 was legally mineral in character, and was therefore not federal property, NIC acquired the mineral interest in that section which had been created by SF in 1938. Just days after making that acquisition, NIC inquired with BLM by letter about the federal interest in the subject property, and a BLM representative responded by confirming that BLM acknowledged the existence and the legitimacy of the mineral estate which NIC had acquired in Section 19, thereby providing NIC with written assurance that BLM had no objection to any legitimate use of that mineral estate.



A 2009 boundary survey revealed no boundary issues in Section 19.

2005 to 2012 - At an unspecified date during this period the tract which had been created 7 decades earlier in Section 19 by SF was finally put to use, as NIC commenced commercial sand and gravel extraction operations there, developing a quarry that steadily grew in terms of both surface acreage and depth, as substantial quantities of material were trucked away for use on a highway construction project. In 2010 however, BLM personnel instructed NIC to cease all activity in Section 19 and fined NIC for trespassing. NIC promptly took the matter to the IBLA, which in 2011 upheld the BLM decision to shut down the unauthorized mining operation that NIC had established. Because NIC had failed to definitively prove that the materials which had been removed from the subject property, comprised primarily of sand and gravel, were mineral in character, by means of a successful quiet title action, the IBLA verified, the BLM personnel had acted properly, in fulfillment of their duty to prevent NIC from altering the surface of the federal property in question for a purpose which did not clearly qualify as genuine mineral extraction. NIC was free to file a quiet title action for that purpose, the IBLA indicated, but until such time as NIC might successfully prove that the sand and gravel upon the subject property were in fact minerals, and were thus part of the privately held mineral estate, rather than the federally held surface estate, BLM had correctly declined to allow NIC to engage in any disturbance of the relevant federal land. Thus NIC learned from the IBLA that the only available legal option, if that company wished to overcome the land use limitation which had been imposed by BLM, was the federal Quiet Title Act (QTA) and NIC elected to pursue that option, directly taking on BLM in federal court at the end of this period (FN 3).

Since the QTA was congressionally designed to encompass all controversies involving the legal impact of federal land rights interests of a broad variety upon non-federal land rights, with a narrow range of statutorily defined exceptions, the QTA unquestionably applies to mineral interests, as well as boundary and easement disputes, along with other conflicts over the validity or physical extent of title. In a large percentage of all QTA cases however, such as the NIC case, no uncertainty over the existence of either the

relevant federal fee title or the relevant non-federal fee title exists, the controversy is instead limited to the scope or the attributes of at least one of the titles in contention, or potentially both of them, as was the case here. Neither NIC nor BLM denied the validity of the fee title held by the opposing side, the source of the controversy in which they became embroiled, as we have seen, stemmed from ambiguity regarding the true legal status of sand and gravel in the mineral realm. Those substances clearly belonged to NIC, along with a right to extract them, if they were in fact minerals, or alternatively, they clearly belonged to BLM, along with a right to prevent their removal, if they were not genuine minerals. Therefore, the first hurdle facing the federal judge was the question of subject matter jurisdiction, since the central issue could be legitimately decided in a QTA action only if defining the precise or specific contents of a mineral estate, down to the most granular level, qualified as a form of title dispute, and the federal judge determined that it did, thereby confirming that the decision made by the NIC legal team to utilize the QTA forum was sound, enabling this litigation to proceed. Under that relatively broad judicial view, federal assertions of land rights which operate to cloud any non-federal title, thereby rendering use of the impacted non-federal property problematic, as the 2010 BLM decision to halt the land use being made by NIC had done, can support use of the QTA. Another major obstacle, which has demolished the hopes of many QTA claimants, stood in the path to success for NIC however, and that was the 12 year QTA bar, which was congressionally instituted as a fundamental component of the QTA to motivate and require owners of non-federal land rights interests, such as NIC in this instance, to take action to protect those interests in a federal courtroom with reasonable promptness, and obviously to prevent a multitude of plainly stale attacks upon federal land rights from congesting the federal judicial system as well.

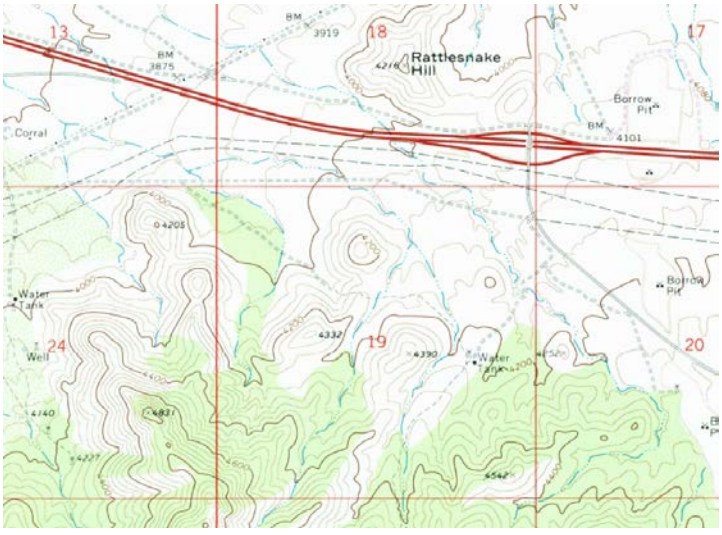
The primary objective of the federal legal team therefore, when this controversy finally reached the point of adjudication early in 2019, was to demonstrate that NIC, or any one of the prior holders of the mineral estate which SF had created in 1938, had either actual knowledge, or a valid means of knowing, that sand and gravel are not minerals under Arizona law, at any point in time more than 12 years before this QTA action was filed by NIC in 2012. In resisting a QTA action, a federal agency can elect to prevent the claimant's position from gaining any traction, and can prevail, by simply denying that any direct legal conflict or any actual dispute exists, but since that possibility had been foreclosed here as discussed above, the 12 QTA limitation period became the focal point of this litigation, as is very often the case. If conditions providing open notice of the legal conflict at the core of any QTA dispute were in place more than 12 years before the QTA claimant acted, and were therefore unjustifiably ignored by the claimant or those in his chain of title for that length of time, then the law legally silences the claimant's position, making it impossible for the non-federal litigant to prevail, by imposing what amounts to a statutorily sanctioned estoppel. Conversely of course, the efforts of every QTA claimant are necessarily directed toward proving that no grounds for any genuine conflict existed, until some point in time within the last 12 years before the action was launched, while also demonstrating that some distinct triggering event did in fact occur within that same 12 year period, and only through such proof can a non-federal claimant effectively open the 12 year QTA window, thereby carving out a potential path to victory. In such event, it becomes the goal of the federal legal team to prove that the claimant, or those in whose shoes the claimant stands, allowed at least 12 years to pass before raising any challenge to the contested federal position, resulting in judicial application of the QTA bar, thus in any QTA scenario of this variety historical evidence demonstrating negligent inaction on the part of the claimant is always key to federal success. Recognizing that the rights of both sides in this litigation, which emanated with equal certainty from the 1938 SF conveyance that severed the competing surface and mineral estates, were entirely dependent upon state law rather than federal law, the federal legal team naturally concentrated their research efforts upon the aforementioned rulings of the ACOA, touching the subject of mineral rights at the surface level.

Recordation of the 1988 land exchange, representing as it did the return of federal land rights to Section 19, after an absence of over 6 decades following the federal patents of the early 1920s, was legally sufficient to set the 12 year QTA bar in motion against all non-federal parties at that date, but only if those parties should have understood exactly which materials the federal surface estate that was acquired at that time legally contained. Therefore, the federal legal team quite logically focused their attention upon the status of existing Arizona case law in 1988, making the 1984 ACOA ruling in the Spurlock case central to their chances of successfully presenting the federal position. During that case, the federal legal team maintained, it was revealed that SF never intended to treat sand and gravel as minerals, viewing those substances instead only as ballast materials, which were not to be mined, but were merely to be used in building the bed of a railroad line, in those locations where the need to construct a railroad grade might arise. Because the results of the 1984 Spurlock case were published, the federal legal team asserted, by 1988 all Arizonans either realized or should have realized that the standard SF mineral reservation did not cover or include common surface materials such as sand and gravel, because SF never regarded those substances as minerals, and plainly viewed them only as being potentially useful for building embankments. In addition, the federal legal team pointed out, the fact that SF raised no objection to sand and gravel extraction from lands which bore SF mineral reservations in 1981 by Mohave County operated to reinforce the intent of SF to disregard typical surface materials in the mineral context, making it very clear, well before 1988, that the mineral rights reserved by SF were limited to underground pockets of gaseous and liquid substances, such as the helium which triggered the Spurlock case. Thus the federal position rested upon the proposition that no legal action taken after 2000, 12 years after 1988, could escape the nugatory legal consequences of the QTA bar, because by 2000 the federal surface interest had stood unchallenged and unviolated for a full 12 year period, during which time all relevant parties either knew or should have known that the 1988 federal acquisition had given BLM full control over all common surface materials within the federally acquired portion of Section 19.

Other evidence that might well prove to be persuasive, which arose subsequent to 1988 as we have seen, was also present however, and upon observing the potentially supportive value of certain subsequent events the federal legal team quite naturally set out to leverage that additional evidence as well. The federal position acknowledged the premise that the parties to any given land rights transaction are free to treat marginal naturally occurring materials, such as sand and gravel, as being either mineral or non-mineral in character, and accordingly those on the federal side charged that the 1991 SF disclaimer clearly verified that SF never had any intention of treating either sand or gravel as a mineral substance. Moreover, implicit in the federal position was the suggestion that SF had long acquiesced in the premise that typical surface materials such as sand and gravel actually comprise a form of soil in desert regions, and are therefore best classified as being non-mineral in nature, making them components of the surface estate, and indeed SF had registered no objection to the 1996 IBLA ruling expressly deeming sand and gravel to be non-mineral, per Arizona law. The 1999 ACOA ruling, indicating that intent controls what does or does not constitute mineral material on a case by case basis, was also viewed as supportive by those presenting the federal position, who agreed with the ACOA conclusion on that occasion, holding that in the railroad context sand and gravel are generally regarded as mere ballast materials, therefore the presence of a reservation covering ballast, such as the second reservation in the 1938 SF deed, negates potential inclusion of sand and gravel in any accompanying mineral reservation. If any of these events legally opened the 12 year QTA window, by putting NIC or its predecessors on legal notice of the limited nature of the mineral estate that had been created in Section 19 by SF, the federal attorneys realized, then the QTA action filed by NIC was futile, coming as it did more than 12 years after all of these events occurred, and the federal judge would therefore be required to deem the position of the plaintiff corporation unsustainable. As can readily be seen however, because the relevant conveyance language here was not of federal origin, the federal legal team, rather than

relying upon federal intent along with strict interpretation of federal documentation, as they typically would, were required instead to take the somewhat incongruous position that extrinsic evidence, arising primarily from ambiguous case law at the state level, effectively rendered the documented mineral rights asserted by NIC inapplicable to sand and gravel.

As already noted, no federal personnel, acting either as federal attorneys or BLM employees, denied that sand and gravel can be legally categorized as minerals, in Arizona or elsewhere, in fact everyone representing BLM in this matter agreed that SF could have legally treated the contested materials as minerals for conveyance purposes in 1938, but those on the federal side of this litigation were convinced that SF had not done so, due to the use of the second deed reservation by SF, which plainly indicated that SF retained only a right to conduct typical railroad construction work at the surface level. A legal question of vital importance in the mineral rights context was thus raised, regarding the impact of one deed reservation upon another, when any given substance can be regarded as being subject to either of those reservations, or potentially even being within the scope of both reservations. The presence of such ambiguity, in the eyes of the federal legal team, justified their efforts to leverage extrinsic evidence relating to the contents of the contested legal estates, and the fact that in 2002, when SF legally relinquished the rights it had retained decades earlier in Section 19, it chose to quitclaim those rights, thereby washing away any liability that corporation might otherwise have incurred, presented yet another factor supporting the federal position, on the key topic of ambiguity. Not surprisingly, the federal legal team took the position that complete disuse by SF of the contested substances for several decades constituted legal abandonment of any reserved right to make use of any such material, thus by 2002, from the federal viewpoint, SF had recognized that it had no rights to any surface material, and the corporate decision to utilize quitclaim deeds to dispose of such an uncertain legal interest reflected that corporate knowledge. Before they could prevail on that highly important point however, it would be necessary to convince the federal judge that the quitclaim transaction signaled awareness on the part of SF that the rights conveyed in 2002 were fundamentally ambiguous in nature. Quitclaim deeds legally convey all relevant rights of the grantor, but as the federal judge realized, they can also very often signify a known or suspected absence of rights, thus the proposition that the 2002 SF mineral deed showed that SF had learned, at the hands of Arizona courts, that SF had never legally reserved any sand or gravel as minerals, was not without a valid basis. Nonetheless, NIC was in a better position than most QTA claimants, because the federal rights in question here were linked to reacquired federal land, as opposed to original unconveyed public domain, leaving those federal rights exposed to the vicissitudes of state law.



Before moving on to review the outcome of this case, we pause to focus on the importance of limitation statutes that have been put in place at the state level, which in essence are operatively identical to the one found within the QTA, reminding ourselves that they can operate as either a curse or a blessing to any professional, including land surveyors of course, just as surely as they apply to all property owners. Despite the fact that the federal rights at issue were governed by state law, NIC could not avoid the rigors of the federally imposed QTA time bar by taking legal action against BLM in state court, because federal law rather than state law controls judicial jurisdiction, whenever a federal agency becomes a litigant. Quite ironically, 2 recent cases from opposite ends of our continent poignantly demonstrate the monumental significance of properly understanding the operation of limitation periods, highlighting the fact that the same limits upon legal action which so often either support or crush land owners, and had to be surmounted by NIC, can either save or devastate land surveyors. Early in 2019, a firm engaged in development related survey work on the East Coast learned that the mere passage of time, since the moment when a survey error was made, does not assure the professional who bears the responsibility for that mistake of statutory protection. In that case, the pivotal question was the applicability of the discovery rule to professionals who have experience dealing with land rights issues, and there a lower court decision, freeing the defendant survey firm of liability, on the basis of the expiration of a certain statutory period, was overturned at the appellate level, as the plaintiff successfully invoked the discovery rule, preventing the defendant from deriving any benefit from the passage of the several years that transpired before his mistake was detected, and thereby bringing enormous liability down upon the shoulders of a surveyor (FN 4). Less than a month later however, across the country in the Gem State, another surveyor successfully escaped the consequences of some highly problematic survey decisions which he had made several years earlier, in the course of conducting boundary retracement work, as it was determined, by the highest court of that state, that a revocation of his license by state authorities could not legally stand, because they had neglected to take action against him with sufficient promptness. Thus in that instance the burden to take prompt punitive action against a surveyor was deemed to rest squarely upon the shoulders of those charged with formally addressing such matters, because they possess a level of knowledge enabling them to recognize survey errors, unlike the plaintiffs in the other case cited here, illustrating that hesitation, resulting in undue delay, can be fatal even to the efforts of those occupying positions of established authority over the work of land surveyors (FN 5).

Although NIC had rather brazenly ravaged land which BLM had the authority to protect, in reliance upon rights obtained by means of a quitclaim deed, and had been convicted by the IBLA of wrongly doing so, without formally granted permission from BLM, NIC nonetheless had a clear path to victory in this QTA action, but only if the QTA bar did not prevent NIC from making any case in support of the mineral status of sand and gravel. As a QTA claimant, NIC had to prove that no clear knowledge regarding any definitive limitations upon the specific material contents of the SF mineral estate was available prior to 2000, 12 years before the NIC action was filed, and additionally NIC had to prove that legal friction, which was of a nature sufficient to qualify as the basis for a genuine land rights dispute between BLM and NIC, had arisen at some point after 2000, within the 12 year QTA window defined by the 2012 filing date of this litigation. If in judicial eyes this controversy actually stemmed from inadequate understanding or knowledge, on the part of NIC or its predecessors, of events which supplied clear knowledge of the exact contents of the SF mineral estate prior to 2000, then NIC had acted too late, and under the law could not be allowed to present evidence of any kind or make any case at all for that reason. But despite holding only rights of a potentially dubious nature, having been obtained through a quitclaim, NIC had clearly shown a reasonable degree of good faith after making that acquisition, by seeking guidance directly from BLM in 2004, thereby giving BLM an opportunity to inform NIC about any limitations which BLM personnel deemed to be applicable to the mineral estate acquired by NIC at that time. In the eyes of the federal judge, the fact that

BLM provided NIC with no warning at that time, regarding any specific limitations upon use of the NIC mineral estate, demonstrated that no clear grounds for any dispute had yet arisen at that point in time, as BLM had evidently accepted the proposition that the federal surface estate and the private mineral estate could harmoniously co-exist in Section 19. In addition, moving forward from that time, the federal judge was cognizant, over 6 years elapsed before BLM personnel decided in 2010 to openly assert that the estate acquired by NIC included no sand or gravel, and only in 2011 did NIC learn from the IBLA that the restrictive BLM view of the property and the rights NIC had acquired was legally binding upon NIC. Founded upon that observation, a judicial conclusion that NIC had in fact turned to the QTA with due promptness in 2012 was inevitable, thus NIC had escaped the silencing impact of the QTA bar, and was therefore free to engage in argumentation targeted at negating the federal position which clouded the NIC mineral title.

The federal judge quite appropriately began his analysis of the applicability of the QTA to this scenario by citing the limited nature of QTA jurisdiction, emphasizing that the burden of demonstrating that the QTA pathway is suitable to the circumstances always rests upon the claimant, who in filing a QTA action is essentially attacking and seeking to overcome a legal position regarding land rights that has been set forth or relied upon by the federal government, which the claimant believes to be defective in some respect. In so doing however, the court expressly noted that there has historically been substantial inconsistency in judicial application of the QTA, not only at the national level, between the rulings of the courts comprising the several federal judicial regions, known as circuits, but even within the Ninth Circuit itself, which covers the westernmost states, where a very large percentage of all QTA cases have played out. At the core of this judicial inconsistency lies the exceedingly broad range of land rights issues over which conflict can arise, and the fundamental problem confronting courts in addressing those issues stems from the fact that the Supreme Court of the United States has expressly mandated that stern limits must be judicially enforced, in order to prevent abuse of the QTA (FN 6). As the court observed on this occasion, past Ninth Circuit rulings have indicated both laxity and stringency at varying times, with regard to the scope of the QTA, creating uncertainty over exactly which real world events do or do not legally operate to introduce QTA jurisdiction. For example, Ninth Circuit precedent suggests, as the court accurately noted, that federal legal positions afflicted with some degree of ambiguity, which is very often the case, may or may not trigger the QTA period, and this is highly problematic, because if a federal position does open the QTA window, but the legal significance of such an ambiguous event goes unrecognized by potential claimants for 12 years, their capacity to benefit from the QTA is lost. In addition, the legal definition of adversity, with respect to the interaction of federal and non-federal land rights, is equally crucial to proper application of the QTA, because in the absence of any legally adverse conditions no opportunity to utilize the QTA ever arises. On that vital subject, the court also noted, prior Ninth Circuit rulings once again indicate equivocation and ambivalence, leaving the exact nature of the requisite adversity quite unclear to potential claimants. Thus each QTA claimant must be both vigilant and astute enough to recognize events of federal origin, or events having some relevant connection to federal land rights, that operate to open the QTA window of opportunity, and must then act accordingly with promptness, within the statutory time period, as NIC did, although perhaps in this instance only due to sound guidance provided by the IBLA, in order to have any chance of success in this unique federally devised land rights forum.

Once the initial federal assertion that NIC could not qualify to utilize the QTA, due to a failure on the part of the predecessors in title of that company to realize, for a period of more than 12 years, that the presence of federal surface rights in Section 19 had placed any rights which SF had previously created at the surface level in that section in a state of legal jeopardy since 1988, had been judicially rejected, although perhaps only upon somewhat questionable grounds, each of the specific contentions supporting the federal

position, that sand and gravel was never meant to be part of the mineral estate which was created in 1938 by SF, became subject to judicial scrutiny. Although the legal status of sand and gravel was not explicitly defined in either of the 2 reservation clauses employed by SF, after analyzing the language of each clause the court found the intent of SF, as revealed by objectively reading each clause in proper context, to be satisfactorily evident. The relevant language of each of these 2 key paragraphs, through which SF placed distinct restrictions upon the scope of the fee title acquired by the predecessor of NIC in 1938, reads as follows:

> *"Grantor expressly reserves and excepts all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for ... digging, drilling and working of any mines or wells".*

> *"The Atchison, Topeka & Santa Fe Railway Company, or its successors or assigns ... may at any time ... construct railroad tracks ... pipelines, roadways, ditches ... and ballast pits and quarries and take material therefrom for railroad purposes".*

In the eyes of the federal judge, there was no significant ambiguity in either of these clauses, despite the fact that neither of them expressly identified sand and gravel as being either mineral substances or non-mineral construction materials. The purpose of each clause was plainly apparent and those purposes were entirely distinct, the court observed, as the first clause enabled SF to conduct mining activities, should the conveyed land ever be found to hold value for mineral extraction purposes of any kind, while the second clause allowed construction of a railroad, should additional facilities of that kind ever be needed in the relevant location, to expand the primary business in which SF was engaged. By 1938 however, the railroad boom years had already passed, and going forward from that date the increasing use of other forms of transportation would make a great many existing rail lines obsolete, eventually leading to their removal, so the second clause was destined never to be utilized. Nonetheless, the reference to "ballast pits and quarries" in the second clause suggested that potential use of typical surface materials like sand and gravel was envisioned and contemplated by SF, and this gave rise to an important legal question, regarding the interaction of these 2 clauses. If the reference to ballast in the second clause was meant to encompass all uses of common substances like sand and gravel, then they had clearly not been regarded as minerals by the composers of this reservation language, in which event the second clause effectively withdrew and eliminated any such materials from the scope of the first clause. But the second clause also contained the qualifying phrase "for railroad purposes", making judicial assessment of the legal meaning and impact of that particular phrase vital to the resolution of the legal status of the contested materials.

In the judicial determination of which of these clauses legally controlled the fate of the sand and gravel that formed the surface of the subject property, by implicitly defining those substances as being either mineral or non-mineral in character, judicial recognition of the basic distinction between rights of fee ownership and easement rights played a crucial role. While the right to enter the property of another party and perform mineral extraction activities thereupon equates to an easement, ownership of the minerals physically comprising part of that land is a right which is held in fee, but a right-of-way, facilitating the construction of a railroad upon any land not owned in fee by the railroad builder, does not legally require the creation of any fee title interest vested in the builder or operator of that railroad. Thus the court reached the conclusion that the first reservation clause vested a fee title, in the form of a mineral estate, in SF, while the second clause merely created an easement, also vested in SF, comprised of a right to burden the subject

property with a railroad right-of-way, thereby clarifying that these potentially overlapping clauses actually served entirely separate purposes, one constituting a fee interest while the other did not. In so doing, the federal judge took specific notice of the key legal difference between the operational activities described in the second clause, which outlined the type of work required to put a new rail line in place, and naturally occurring minerals that existed either "upon or under" the conveyed surface estate:

> *"ordinary dictionary definitions provide little help ... on the issue of whether a railroad reservation narrows a mineral estate owner's rights to sand and gravel ... the government (BLM) concedes that, absent the railroad reservation, the mineral reservation would entitle plaintiffs to the sand and gravel (under Arizona law) ... the sole question is whether the railroad reservation demonstrates the original parties intent to narrow the scope of the rights granted in the mineral reservation ... the government asserts that ... the deeds specifically provided for sand and gravel (through the ballast reference) in the railroad reservations ... the court does not agree ... SF reserved a right to engage in various railroad operations on the conveyed land such as ... operating gravel and ballast pits and quarries for railroad purposes, if SF chose to engage in those activities the railroad reservation provided ... for those activities ... in effect the railroad reservation granted the railroad a right to interfere with the surface estate ... the intent (of that clause) was not to grant ... sand and gravel ... the reference (to ballast) was merely one in a list of possible "railroad purposes" to which the surface estate could be subjected ... ballast ... is the crushed rock and gravel used to construct the bed of a railroad ... the railroad reservation ... describes materials and activities ... SF was reserving ... unrelated to the commercially valuable substances owned by the holder of the mineral estate ... ballast clearly relates to a railroad purpose ... distinguished from ... reservation of minerals including sand and gravel."*

Emphasizing that the railroad reservation of "ballast pits and quarries", being clearly intended only to facilitate the construction of a rail line if necessary, revealed no intent to alter the contents of the mineral estate, and therefore did not operate to remove sand and gravel from their default legal position as part of that mineral estate, the court determined that any such material cited in the second clause was subordinate to the construction activities which were also mentioned in that clause, while in the case of the first clause the converse was true, the activities referenced therein were subordinate and merely ancillary to the right of fee ownership embodied in the minerals themselves. The "right to interfere with the surface estate" as the court described it, which was the product of the second reservation clause, was a mere right of land use, amounting to nothing more than an easement, and serving only the contingency of railroad construction upon the subject property, which had never occurred, as opposed to a right enabling the removal of any materials from the premises for profitable use in some other location. Being a mere easement, the court understood, the right to build a railroad grade, by using common naturally occurring surface materials that happened to be present in abundance upon the subject property, could not legally include removal of any such material from that property, leading to the conclusion that no legal conflict or tension actually existed between those 2 reservation clauses. The fact that the railroad reservation created no rights beyond the easement level left any rights which may once have existed pursuant to that particular clause, unlike the fee rights produced by the prior reservation clause, subject to loss by SF through abandonment, which had in fact transpired decades earlier, as documented by the 1984 admission of SF to that effect in the Spurlock case. But as can readily be seen, the loss of those reserved railroad construction rights operated as no obstacle to success for NIC, and held no benefit for those on the federal side in this litigation, under the judicial view expressed here, because the demise of the easement rights that were envisioned during the composition of the second reservation clause could have no legally detrimental impact upon the scope of

the fee estate, which had already been legitimately established through the employment of the mineral reservation clause.

Having determined that the presence of the 2 clauses in contention, both of which had long been routinely employed by SF, in the chain of title that was held by both NIC and BLM, although possibly misleading to those with meager knowledge of mineral and easement law, and therefore potentially problematic, was legally insufficient to erode the contents of the mineral estate that NIC had acquired, by rendering the mineral status of the relevant sand and gravel fatally ambiguous, as BLM personnel had concluded, the focus of the court turned to the extrinsic evidence of intent, on the part of SF as the mineral grantor, regarding those specific substances, which arose after 1938 and was quite heavily relied upon by BLM.

1981 - The earliest potentially relevant event pointed out by BLM occurred at this time, when SF took no action in response to gravel removal activities that were conducted by Mohave County, which represented a violation of the reserved SF mineral estate in numerous locations, unless SF never regarded gravel as a mineral substance, and raised no objection simply because SF considered gravel to be a component of the surface estate, which SF had relinquished in each of those locations. Cognizant however, that SF is a large corporate entity, with no capacity to constantly monitor all activity upon all of its properties, the federal judge declined to accept the federally presented proposition that this event demonstrated knowledge on the part of SF that gravel was not among the materials encompassed by the SF mineral reservation. It was more likely, the judge noted, that SF either never knew about this county activity, or simply considered it to be of no particular significance, and took no restrictive or punitive action against Mohave County for consuming a negligibly small portion of the SF mineral estate in various locations for that reason.

1984 - The federal legal team, through astute exploration of Arizona case law on the subject of mineral rights, observed that SF had openly demonstrated at this time that it did not regard any typical surface materials as minerals, when that corporation was compelled to defend itself in court by the owner of the Spurlock Ranch, who believed that SF had improperly engaged in mineral extraction upon his property. But noting that helium extraction, rather than removal of sand or gravel, was both the source and the crux of the controversy between SF and Spurlock, the federal judge declined to accept the federal assertion that any statements made, or any legal positions taken, by the SF legal team during the Spurlock litigation, were legally binding upon SF with respect to the present QTA action. Thus in the eyes of the court, the federal legal team could not legitimately leverage any implications emerging from either the development or the outcome of the Spurlock case, as definitive evidence that SF never intended to treat sand and gravel as mineral substances.

1988 - Although BLM began exerting protective control over the surface of the relevant tract in Section 19 at this time, pursuant to federal law, there was no indication that SF ever had any need or any desire to perform any sand or gravel extraction work upon the subject property after that date, leaving the federal judge unable to conclude that the ongoing disuse of the area in contention by SF represented deliberate or intentional relinquishment by SF of any rights to any surface minerals which it had reserved in this location half a century earlier. Although BLM personnel may well have believed, at all times since 1988, that they were authorized to prevent any parties, including SF as the mineral estate holder, from disturbing the surface of the subject property in any unauthorized manner, and they may even have assumed that the long absence of SF amounted to recognition by SF of total federal control over the land in question, in reality SF never accessed Section 19 only because SF had no desire and no need to do so, thus the ongoing federal surface control program carried out by BLM in that section was never legally adverse to the interests of SF in any respect.

1991 – The direct denial that the standard SF mineral reservation clause covered either sand or gravel, which was communicated by a voice of authority representing that corporation to city authorities at this time, in response to a specific inquiry made by city personnel, was perhaps the strongest evidence regarding the intent of SF that was discovered by the federal legal team. Such evidence could well have supported judicial imposition of an estoppel against SF, had SF ever sought to change its position on the legal status of sand and gravel, in the course of any subsequent dealings with representatives of Kingman. Nonetheless, this evidence, like all the rest of the evidence compiled by those working on the federal side, was extrinsic in nature, and any estoppel against SF that might have been legally effective with respect to interaction between SF and Kingman, could not serve as a basis for estoppel in the present action, between 2 different litigants, neither of whom ever had any need or any obligation to rely upon any information that a mistaken SF employee may once have communicated, either verbally or in written form, to any non-federal public authorities. Therefore, the federal attempt to leverage this particular evidence also gained no traction, and at this point it became clear that the federal position, predicated entirely upon extrinsic evidence, was proving to be less judicially convincing than the federal legal team had anticipated.

1996 – Although BLM personnel are authorized, and indeed are expected, to follow IBLA guidance on legal issues, the decisions and rulings of that federal panel are not equivalent to those of either state or federal courts, thus the IBLA decision to view and to treat sand and gravel as non-mineral substances in a particular IBLA case, as IBLA did at this point in time, in an effort to adhere to Arizona law, was not legally binding upon SF, so SF was under no obligation to step forward in protest of the relevant 1996 IBLA ruling. In reality, it made no difference whether any SF personnel were ever even aware of the existence or the outcome of the noted IBLA case, the federal judge realized, because even if SF personnel knew that the IBLA had declined to acknowledge that sand and gravel can comprise minerals, such knowledge did not necessitate any response from SF to secure, or to preserve the legal status of, any existing SF mineral rights. This IBLA ruling was therefore not adverse to SF, the federal judge recognized, so SF and its mineral successors, such as NIC, remained free to maintain at any future time that the 1996 IBLA conclusion regarding surface minerals was simply erroneous, and to take the position that SF did indeed intend to reserve surface minerals in 1938, and in fact did so, on a valid legal basis.

1999 – Upon reviewing the ACOA ruling in the 1999 mineral rights case which the federal legal team brought to the court's attention, the federal judge found himself inclined to disagree with the ACOA position on the legal interaction of multiple reservation clauses. Reminding the litigants that the second reservation clause, relating as it did only to land disturbance activities, including the potential rearrangement of existing surface materials within the subject property, in the event of railroad construction at that location, was incapable of altering the legal scope of any separate mineral reservation, the federal judge flatly rejected the ACOA conclusion that a reference to a particular mineral substance in one deed reservation necessarily prevents legal inclusion of that same mineral in any standard mineral reservation appearing in the same deed. Thus the path to victory for NIC remained open and unbarred, as this hurdle was passed, because the federal judge drew the key distinction between an easement, allowing the use of any existing surface material as ballast during railroad construction, and a mineral reservation, allowing removal of surface minerals from the subject property as commercially valuable substances.

2002 – Why SF chose to use the quitclaim option when deeding away mineral rights at this point in time is unknown, but while a quitclaim deed invariably raises justifiable suspicion, about both the motives and the knowledge of the relevant parties, the federal judge found no basis upon which to conclude that the use of a quitclaim deed by SF for that purpose was motivated by anything other than a very understandable desire

on the part of that corporation to shed all potential liability associated with that transaction, which constitutes the primary benefit accruing to any grantor who employs a deed of that particular format. In fact, there would never be any reason for any grantor who intends to relinquish all rights in any given location to utilize a deed of any other format, if every grantee were willing to accept a quitclaim deed, while paying the same amount of money that the grantor could demand for a warranty deed, because the quitclaim format effectively absolves the grantor of any and all liability which might result from some obscure deficiency in the subject conveyance. In any event, since the federal legal team was unable to convince the federal judge that SF used the quitclaim format because SF knew that its retained mineral rights were legally questionable in some respect, NIC moved one step closer to successfully reaching the finish line.

2004 – The outcome of the 2004 ACOA case that was presented as evidence by the federal legal team, which was focused upon rocks that hold value from an artistic perspective, and therefore qualify as legitimate minerals on that basis, actually favored the position occupied by NIC, yet the federal judge deemed that ACOA ruling to be nothing more than "academic" and entirely irrelevant to the resolution of the NIC case. But by this point the die was cast, NIC required no further assistance to prevail, because none of the federally presented evidence had proven to be satisfactory or sufficient in the eyes of the court. Even when viewed in its totality, strongly suggesting that at least some, if not most, SF personnel operated under a substantial misapprehension of the legal extent of the SF mineral estate for decades, the federal evidence was nonetheless all extrinsic in nature, leaving the federal judge disinclined to allow such evidence to facilitate any judicially decreed diminution of the mineral estate which had been explicitly retained by SF 80 years before.

2011 – The IBLA correctly recognized at this time that NIC had a potentially valid and successful QTA case, and effectively redirected the efforts of the NIC legal team to that higher judicial forum, leaving BLM to decide whether or not to challenge NIC in federal court. The federal success rate in QTA actions is monumental, to the point of being overwhelming to the typical QTA claimant, so the fact that BLM elected to try to block this effort to uncloud the NIC mineral title in Section 19 is actually much less surprising than the fact that NIC deemed it worthwhile to proceed with this action, rather than simply acquiescing to BLM and conceding that the 2002 NIC quitclaim acquisition was worthless. Through perseverance however, and due in large part to the substantial legal resources which are available to such a corporation, NIC thus scored a rare QTA triumph, provided of course that BLM does not opt to extend this action, by elevating it to the Ninth Circuit.

Provided that BLM either decides not to appeal this ruling, or meets with defeat once again upon appeal, this case will become a source of support for the broad view of mineral rights throughout the western states, serving as confirmation of judicial openness to the proposition that virtually all valuable substances in or on the ground, other than plain fertile soil, can be legally characterized as minerals, and thereby potentially spurring broadened surface mineral utilization by holders of severed mineral estates. Therefore, those in the conservation easement industry may well need to more closely scrutinize any existing mineral rights associated with the potential sites of such easements going forward, in order to insure that the proposed easement area in any given location is not legally subject to disturbance through mineral extraction activities, which could render any surface preservation impossible. As the outcome here informs us in the QTA context, although state law controls land rights once they have passed from federal hands, the presence of potentially conflicting theories or interpretations of the meaning or legal impact of state case law may not be enough to open the QTA window, a direct federal denial of the validity of specific non-federal land rights however, such as that which BLM delivered to NIC in 2010, most definitely does

trigger the QTA limitation period, enabling the federally assailed party or entity to legitimately turn to the QTA forum. Not every mineral estate holder whose rights are challenged by BLM, and who traverses the same legal path down which NIC proceeded, is destined to taste success however, as this case also notifies us. The Schritters, holders of an identical mineral estate in a nearby township, whose mineral rights were judicially examined alongside those of NIC, were unable to achieve success at the federal court level, as NIC did, because they made the critical mistake of disclaiming any surface mineral rights during the IBLA phase of their litigation, and the federal judge was unwilling to allow them to retract that fatal disclaimer. Thus we conclude with the ironic observation that even when land rights governed entirely by state law are in play, any statements made with regard to such rights in any federal legal forum can prove to be utterly devastating to the holder of those rights.

Footnotes

1) Northern Improvement Company v United States, US District Court for the District of Arizona (2019 US Dist Lexis 96808 & 2019 WL 2423507 - 6/10/19). Preliminary stages of this case are also noted in 2 earlier reported locations (2018 US Dist Lexis 200399 & 2018 WL 6181280 - 11/27/18 and 2019 US Dist Lexis 66904 & 2019 WL 1755873 - 4/19/19). All of the relevant information presented in those 2 earlier judicial documents is reiterated however, in the court's final disposition of this case, dated 6/10/19, making it unnecessary for readers to review all 3 of these cited documents in order to fully understand the development and outcome of this controversy. This district court ruling stood subject to potential appellate review of course, but no indication of any intention to appeal this matter to the Ninth Circuit has been noted.

2) The IBLA is a federal administrative law panel, tasked with reviewing, and either approving or disapproving, decisions regarding land rights which have been made by BLM personnel in the process of executing their assigned duties, along with related matters, when the legality of such a federal decision is formally challenged by any non-federal party or entity. IBLA rulings are subject to appeal and can be either upheld or overturned by federal courts. For further information on the historical development, composition and functions of the IBLA, readers are invited to visit the IBLA website: www.doi.gov/oha/organization/ibla.

3) Various aspects of the QTA have been discussed in considerable depth in several prior editions of the Federal Land Rights Series, and a very substantial body of case law judicially interpreting and defining the QTA is also readily available to interested readers. Those who may have missed the prior editions of this series which were focused on understanding the role of the QTA in boundary and easement litigation are encouraged to request the free zip file containing the complete series from the author, whose e-mail address appears below.

4) See Commonwealth Land Title v KCI Technologies - United States District Court for the District of Columbia (2018 WL 1307638 - 3/13/18) & United States Court of Appeals for the District of Columbia Circuit (922 F3d 459 - 4/26/19).

5) See Erickson v Idaho Board of Licensure - Supreme Court of Idaho (2019 WL 2098461 - 5/14/19).

6) See Block v North Dakota - Supreme Court of the United States (461 US 273 - 5/2/83).

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