NATURAL RESOURCES & ENVIRONMENT

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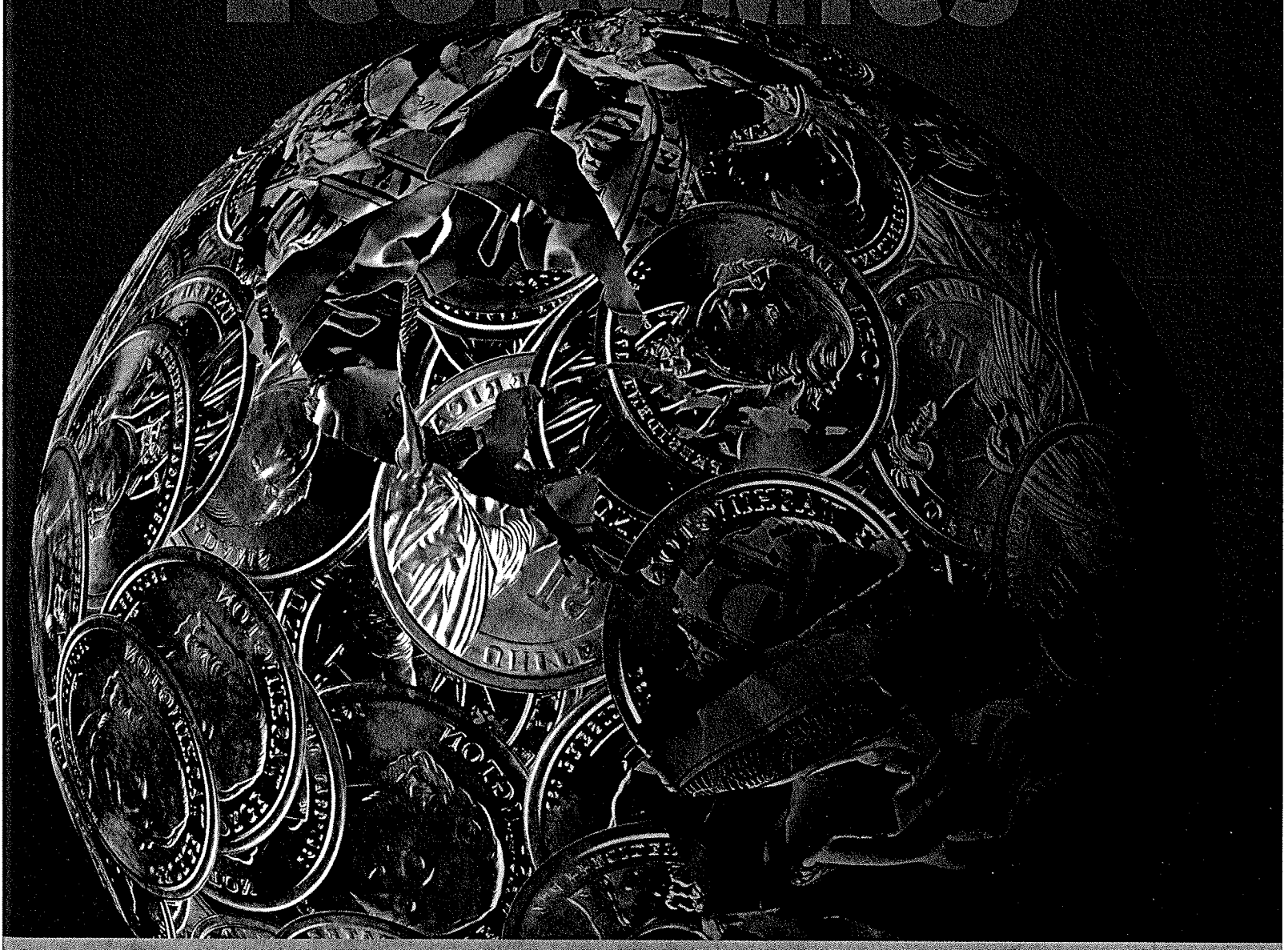
ENVIRONMENTAL ECONOMICS



- NAAQS, NATURAL RESOURCE DAMAGES
- E-WASTE, FARM BILL 2014
- METHANE REGULATION, FEDERAL LAND SEIZURE STATUTES
- WATER QUALITY TRADING, CONSERVATION EASEMENTS

concluded that, as a matter of law, Miller failed to exercise diligence and good faith to notify the Wilsons of his quiet title action against them. In particular, Miller had not looked for the Wilsons outside of New Mexico, and there was no evidence they had ever lived in that state. The court inferred that Miller knew or should have known of Mabel Weeber's location because the Wilsons' city of residence appeared in the chain of title. In reaching this conclusion, the court cited the fact that the deed to David Miller was notarized in San Diego, and noted address listings for the Wilsons in the San Diego city directory, information on Eva Wilson's death certificate that Mrs. Weeber (who lived at the same address as the deceased) was the informant, and Eva Wilson's 1944 obituary, which stated that she was survived by her daughter, Mrs. Mabel W. Weeber. The court also held that plaintiffs' claims were not barred by the equitable doctrines of laches, waiver or judicial estoppel. As the *McElvain* case shows, in bringing a quiet title action, the plaintiff and the plaintiff's attorney not only need to follow meticulously the minimum procedural requirements of the applicable state for constructive service of process, but also must make a real effort to discover the identity and location of, and serve process on, all possible claimants.

Third, before recommending or bringing a quiet title action, the attorney should confirm that the subject matter of the disputed interest is appropriate for a quiet action under the law of the state in which the property is located. For example, whether or not a quiet title action is an available remedy for certain defects of title may depend on whether the interest in question is considered real property or personal property in the applicable state. For a discussion of how various states characterize mineral, royalty, and leasehold interests and whether title to such interests can be established through a quiet title actions, see Franklin, Angela L. and Mowry, Amy M., "Balancing Risk in Title Opinions," *Advanced Mineral Title Examination*, Paper No. 15, Pages 20–24 (Rocky Mt. Min. L. Fdn. 2014).

In conclusion, while quiet title actions are a useful tool in curing serious title defects, they are not the appropriate solution for all title defects and clouds on title. Importantly, a quiet title decree that is assumed to be final and conclusive in establishing title to property may be overturned if it was obtained by default on a claimant who received constructive notice without adequate effort having been made to serve that claimant personally. Further, even if a quiet title decree is not subject to challenge, it is of limited use if the named defendants did not include all potential claimants of a disputed interest.

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Severed Minerals and Renewable Energy Projects

S. Lauren Reber

Commercial scale renewable energy projects have become increasingly prevalent in the United States, particularly in the western states, given the demand for clean, renewable energy. Developing these projects, which in recent years have shifted to predominantly solar projects in the western states, can be a complicated and lengthy process. Typically, one of the initial matters for development is finding a suitable site for a project that can be acquired either by purchase, easement, or ground lease. Once a suitable site is found, but before securing land rights, it is essential to have a title search conducted on the subject real property to determine any conflicting interests or encumbrances that could interfere with the project, including precluding the project from obtaining financing.

One type of conflicting interest that is quite common on land that is suitable for solar projects (and other renewable energy projects)—agricultural land or desert—are mineral rights severed from the surface rights. Generally, the owner of a parcel owns both the surface estate and the mineral estate. The surface estate is what most people think of when they think of owning land and the rights associated with owning land because it provides the right to occupy and make use of the surface of the land. Conversely, the mineral estate provides the right to enter upon and to explore for and extract oil, gas and other natural resources underneath the surface of the land. When the minerals have been "severed" from the surface, the mineral estate is owned by a party other than the party that owns the surface. Severance can occur in various ways including express transfer by deed, lease of only the mineral estate, or reservation of the minerals by the grantor when conveying the property.

If the minerals have been severed on the proposed land for the project, then only the surface estate could be acquired or leased from the surface owner and the mineral rights would be owned by one or more third parties. The rights of the mineral owner(s) to use the surface for exploring and developing the minerals are determined by the instrument that created the severed rights and applicable state law. If the instrument expressly provides that the mineral estate holder has no rights to access the surface property, the severed minerals may not be problematic for a project. However, if the instrument does allow for surface use or access or if it is silent (which is often the case), then the mineral owner's rights could be problematic for the project and would need to be resolved prior to development.

An example showing the difficulty of addressing severed minerals occurred in a recent financing for a solar project in Utah. In this situation, part of the leased property for the project had severed minerals which were held by nineteen different people or entities. Tracking down the mineral owners and negotiating surface waivers (discussed below) or purchase agreements was a lengthy, and at times frustrating, process. In the end, the majority of the mineral owners agreed to waive their surface rights for a lump-sum payment, and because the part of the lease affected by these mineral rights was not a large part of the project area, the title company was willing to insure the minerals despite the fact that not all of the nineteen mineral owners waived their rights.

While the law varies from state to state, most western states provide an implied right to use the surface of the property for the exploration and development of the mineral estate. In Utah, and some other states, the implied surface rights are quite strong and the mineral estate is considered the dominant estate. *See Flying Diamond Corp. v. Rust*, 551 P.2d 509, 512 (Utah 1976). This means that the surface owner may not prevent the mineral estate owner from reasonable use of the surface for exploring for and developing minerals. This is particularly problematic for

solar projects because the coverage of the surface in those projects can include whole parcels of land—not leaving any room for the mineral estate owner to utilize the surface.

The concern presented by severed minerals is that the development and operation of a project may be affected by the use of the surface by the mineral estate owner or that a mineral owner or lessee will seek to enjoin the development or seek to have the project removed because the project has made it impossible or unreasonable for them to use the surface to access the minerals. Financing and tax equity parties generally require appropriate protections where the project overlies severed minerals and will not likely move forward with a project unless the issue is resolved by acceptable methods, some of which are described below. Significant delays in financing can occur while the mineral issues are addressed.

It is helpful to discover severed minerals early in the development process to allow plenty of time to resolve any existing issues and to minimize the cost as much as possible. It will also minimize money spent in the event of discovering that the issue is not economically resolvable. Because of this (and as general good practice), it is important to obtain a title report and also perform, or have performed, mineral title searches as soon as the potential project site has been determined. Many title companies will exclude minerals in their reports and will not search mineral ownership records, making it important to perform the mineral title searches in addition to obtaining the title report.

Once a title report has been obtained and mineral title searches have been performed and they reveal that severed mineral rights exist on some or all of the desired land, the next step is to decide how to resolve the existence of rights held by third parties. There are multiple ways to ensure severed mineral rights will not be problematic when developing and securing financing for a project. Each method will almost certainly require payment of some amount of money, which is why knowing early is helpful to allow plenty of time to negotiate. The simplest method, when possible, is purchasing the mineral rights. Purchasing the mineral rights ensures that there will be no issues in the future and will not require an ongoing relationship with the third party. Another method is obtaining a surface waiver under which the third party waives any rights to use the surface. It is also possible to enter into a surface rights agreement or mutual accommodation agreement with the mineral holder. These agreements generally provide that the project developer will limit the project footprint to an agreed upon area and the mineral rights holder will limit its surface access to an agreed upon area outside the project area. Another option is acquiring title insurance that insures against damages caused by the mineral estate holder's exercise of rights to use the surface. If a situation arises in which a mineral owner or lessee refuses to cooperate or cannot be located, some states, although not Utah, allow alternative methods for resolving issues with severed minerals, including defeasance of the mineral estate or elimination of a mineral lease or royalty.

In a recent financing of four solar projects in Utah, multiple methods were used to secure the mineral rights identified in the title commitments for the leased property. Surface waivers were negotiated and obtained from at least three of the mineral owners. Some of the negotiations for those waivers lasted for months, with many drafts of the surface waiver and agreement being exchanged. There were also some mineral leases that appeared on the title commitments that were no longer in effect and had expired by their own terms, but which were still of record. In those cases, affidavits of non-development were prepared for the current landowner to sign stating that, to their knowledge, no mineral development had occurred since the mineral lease was granted. While this method does not remove the mineral lease from title or address the mineral rights with the mineral rights owner, it can provide the title company enough comfort to issue the mineral coverage in the title policy. In the end, all of the mineral rights affecting the leased property were satisfactorily addressed and the title policies included mineral coverage.

The methods available will depend on various factors (including state law), with one of the biggest challenges being the ability to locate the holder(s) of the mineral rights. It may be that there are multiple holders because the interests have been fractionalized over time—which is what happened in the situation relayed above with the nineteen mineral owners. The original holders may have died, leaving the interest to their heirs and making it necessary to locate each heir, some of which may not even know of their ownership. While this may seem like a good thing, if (or when) the mineral rights holder(s) becomes aware of the ownership, the holder(s) could use that ownership to impede the project or to obtain a negotiating advantage. This situation may also entail probate proceedings to determine ownership. For example, addressing mineral rights for a recent financing of a solar project required locating an heir to a mineral deed, negotiating a purchase agreement for a surface waiver, having probate proceedings filed in Utah and obtaining a personal representative's deed—all of which was paid for by the project developer. Furthermore, it is common when there are multiple interest holders to hold their interest as tenants in common, with each holder having the right to explore for and develop the minerals, making it necessary to resolve mineral rights issues with each holder.

While our energy outlook continues to change and technology becomes more efficient, renewable energy project development is expected to continue to increase. Severed mineral rights can be challenging because surface owners are at a comparative legal disadvantage to mineral estate owners in many states. However, if the right methods are deployed early, these problems can be successfully addressed and costly delays avoided, allowing the project and its financing to move forward.

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Planning Rule Challenged: No Timber Group Standing

Erin Flannery Keith

On April 28, 2015, the U.S. District Court for the District of Columbia ruled that a group of timber and ranching interests lacked standing to challenge the U.S. Forest Service's (Forest Service) 2012 Planning Rule because they did not allege that the rule, a framework meant to guide future forest and rangeland management decisions, caused an imminent,