

“The Law West of the Pecos” conjures images of Judge Roy Bean and his unorthodox administration of the law. “Mineral classified land,” to those familiar with the term, brings to mind the unique application of mineral law in the same region. Anyone owning, selling, buying, brokering or appraising land in Far West Texas should be aware of the rules to avoid problems with clients and the state.

A Bit of Texas History

At one time, all land was owned by the state (or sovereign). Private ownership began when the state conveyed the property to a private individual. This transaction is sometimes referred to as the *patent* or *land grant*. Over time, different sovereigns patented land in Texas.

Spain issued the first patent in 1730. By 1830, Spain and Mexico combined had patented more than 26 million acres. Under these Spanish land grants, title to the minerals remained with the sovereign even though not specifically reserved. When Texas won its independence, it acquired vast amounts of un-surveyed land. The state recognized the former Spanish land grants and continued to reserve the minerals in its patents.



The railroads agreed to survey this remote area in return for receiving ownership of every other section of land. Unlike the metes-and-bounds legal description used in the Spanish land grants, the railroad surveys divided the acreage into blocks and sections. A block contained 36 sections; a section contained 640 acres.

For the most part, Texas kept the even-numbered sections and granted the odd-numbered ones to the railroads without retaining the minerals. This created a checkerboard effect on mineral ownership maps.

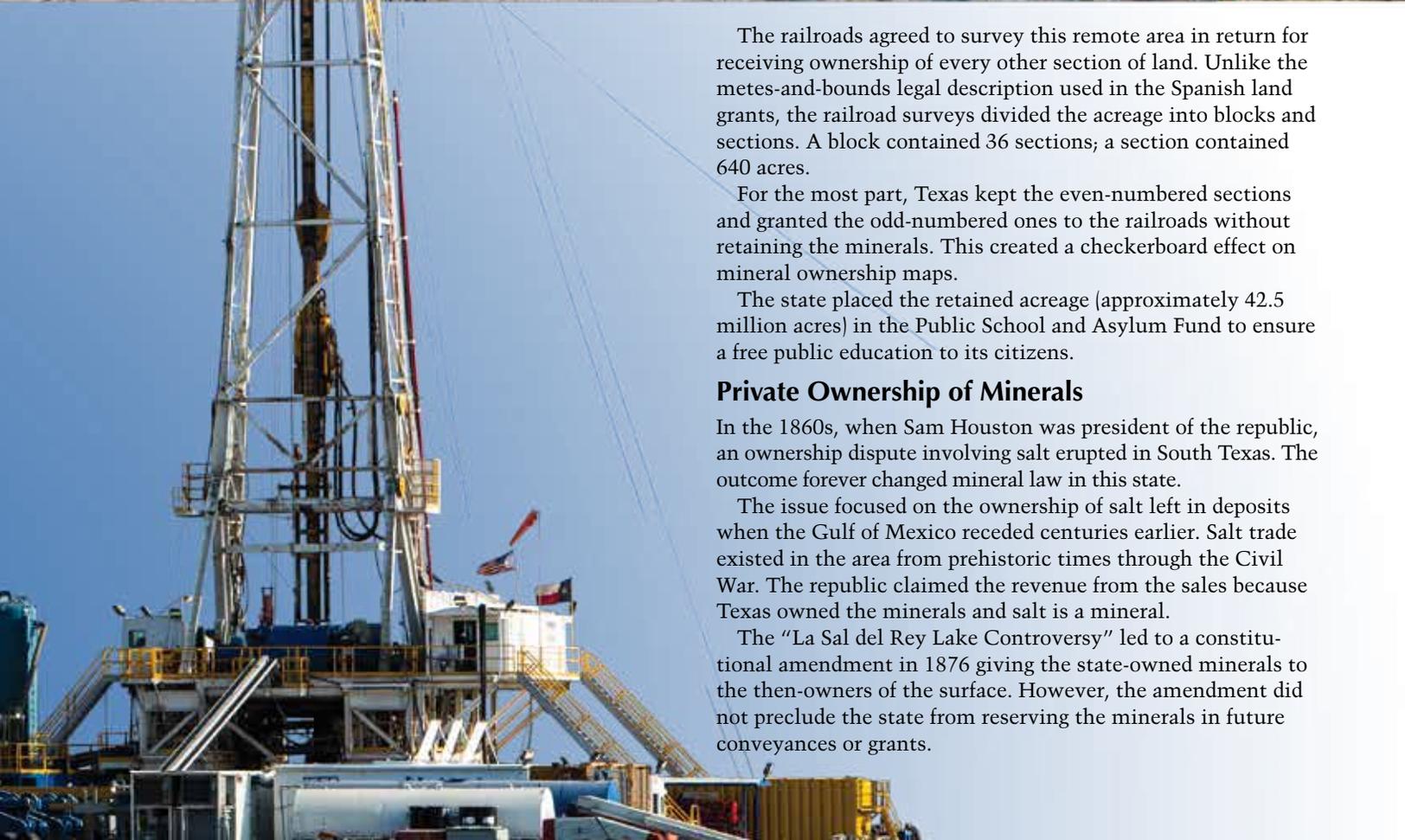
The state placed the retained acreage (approximately 42.5 million acres) in the Public School and Asylum Fund to ensure a free public education to its citizens.

Private Ownership of Minerals

In the 1860s, when Sam Houston was president of the republic, an ownership dispute involving salt erupted in South Texas. The outcome forever changed mineral law in this state.

The issue focused on the ownership of salt left in deposits when the Gulf of Mexico receded centuries earlier. Salt trade existed in the area from prehistoric times through the Civil War. The republic claimed the revenue from the sales because Texas owned the minerals and salt is a mineral.

The “La Sal del Rey Lake Controversy” led to a constitutional amendment in 1876 giving the state-owned minerals to the then-owners of the surface. However, the amendment did not preclude the state from reserving the minerals in future conveyances or grants.





The constitutional mandate in 1876 also required the land that had been placed in the Public School and Asylum Fund to be sold and the proceeds deposited into the fund. However, before it could be sold, the state (and evidently the General Land Office [GLO]) classified it as “grazing or pasture land,” “timberland,” “agricultural land,” “mineral land” or combinations thereof.

Land classified as mineral land was not sold but leased for mineral development. This changed in 1907. Thereafter, it could be sold, but the minerals were reserved by the state.

On the other classified lands, the state still retained the minerals but by more indirect means. For example, in some instances purchasers were required to sign affidavits relinquishing to the state all rights to any minerals subsequently discovered on the property. Any land on which the state retained the minerals after 1876 was called “mineral classified land.” Most of this land is located in the Trans-Pecos Region.

As interest in development of oil and gas grew, the state began leasing more and more of the retained mineral acreage (mineral classified land) to oil companies. The surface owners (settlers) protested, viewing this as an intrusion on their peaceful possession of the property. The settlers refused oil companies entry and in some cases threatened violence.

The Relinquishment Act

The Relinquishment Act (the act), passed in 1919, resolved the controversy (Section 52.171 et seq., Texas Natural Resource Code). The statute granted (relinquished) a portion of the minerals to the surface owners on mineral classified land patented by the state between Sept. 1, 1895, and Aug. 21, 1931. The act applied only to oil and gas. The state continued to own all the other minerals. The determination of these “other” substances created a modern-day dilemma (discussed later).

The language of the act appears to grant surface owners fifteen-sixteenths of the oil and gas in and under the property. The state retained the remaining one-sixteenth. Because of constitutional issues with the wording, subsequent case law casts a different interpretation.

The courts determined that the act conveyed no interest to the surface owners. Title to the oil and gas remained with the state for the benefit of the Public School and Asylum Fund. The surface owners simply became an agent of the state to lease the oil and gas.

Case law and statutes address the division of the lease payments. To compensate the surface owners for leasing and for surface damages stemming from the oil and gas activity, the surface owners receive half of the bonus, rentals and royalties. They are entitled to no other compensation.

The law placed restrictions on how the surface owners could convey and reserve these rights. Prior to entering an oil and gas lease, surface owners cannot assign, convey or reserve any

Interpreting ‘Mineral Classified Land’

Here are some rules from the *Schwarz* and *Cemex* cases used by the courts to determine what substances are *minerals* on mineral classified land.

- The sale of public school land is governed by the law (statute) in effect at the time of the sale and not necessarily the language contained in the patent.
- Two statutes, the Mining Act and the Land Sales Act, governed the sale of public lands from 1895 until 1913. Both were repealed in 1913. The Mining Act lists specific substances being reserved, including clay, marble, natural cement, coal, valuable stone for building purposes and other valuable building materials. The Land Sales Act lists none.
- When construing land grants, the courts ascertain the legislative express intent. Any ambiguity in the statute must be interpreted in favor of the state.
- When construing the reservations of minerals in patents by the state after 1876, whatever is not unequivocally granted in clear and explicit terms is withheld (reserved by the state).

mineral rights, including the executive rights. Once the surface is sold, the executive rights follow the surface ownership.

However, if the land is under lease or in production, the seller may assign, convey or reserve his or her interest in the lease *but only for the duration of the lease*. (This primarily entails the right to receive half of royalties from future production). This right terminates when the lease ends. Thereafter, the right reverts to the state.

The GLO commissioner oversees the leasing of relinquished lands. Certified copies of all mineral leases must be filed with and approved by the GLO to be effective. The basic terms of the oil and gas leases are set forth on the GLO's website. The state, not the surface owner, is the named lessor. The state alone possesses the power to enforce or cancel the lease. Surface owners have no rights except to protect the surface from trespassers.

As a result of these decisions, the mineral rights attached to the surface ownership on relinquished land may (or should) be capitalized into the sales price, making the land more valuable.

Mineral Substances

Interestingly, Texas courts recognize two definitions (or lists) of substances included in the term *minerals*. One attaches to land where the state retained no minerals or where they were released in 1876. The other definition applies to mineral classified land.

On lands where the state retained no minerals (or where they were subsequently released), the term includes oil, gas, sulfur, salt and possibly uranium. *Unless specifically named in the reservation or conveyance*, no other substances are included.

The term, as a matter of law, does not include limestone, caliche, surface shale, building stones, sand, gravel and groundwater. Likewise, the term does not include coal, lignite and iron ore that lies on or within 200 feet of the surface that will destroy or deplete the surface when produced. These substances belong to the surface owners.

A completely different picture emerges on mineral classified land. Here, the courts ruled that the substances retained by the state depend primarily on the statute in effect when the patent occurred. Various statutes have been in effect since 1876, making determination difficult.

For example, the Texas Mining Act, in effect from 1895 to 1913, specifically lists clay, marble, natural cement, coal, valuable stone for building purposes and other valuable building materials as a mineral. After 1913, different statutes were in effect with different wording. As yet, no appellate decisions have ascertained the substances retained in mineral reservations by the state after 1913.

In 1986, the Texas Supreme Court ruled in *Schwarz v. State* that coal and lignite belong to the state on mineral classified

land. The Mining Act in effect at the time specifically listed coal and lignite as a mineral. The rule applies even though the surface will be destroyed or depleted when the coal and lignite are produced. In 2011, the Eighth Court of Appeals in El Paso ruled in *State v. Cemex Construction Materials South* that the Land Sales Act of 1895, in effect at the time of the patent, included "dirt, caliche, sand, gravel, limestone, and other materials at issue, even though the state did not expressly reserve such materials."

The *Cemex* case was appealed to the Texas Supreme Court. Prior to the high court hearing the case, the parties reached an out-of-court settlement. In these instances, Rule 56.3 of the Texas Rules of Appellate Procedure applies, holding that unless the supreme court vacates the appellate court's *opinion*, it stands. On March 16, 2012, the high court did just that. It vacated the Eighth Court of Appeal's *judgment* but sustained the *opinion*.

Thus, as one GLO attorney summarized the status of the case, the *opinion* stands as binding authority in the Eighth Court of Appeals and persuasive authority throughout the rest of the state.

Seventeen counties lie in the Texas Eighth Court of Appeals' jurisdiction: Hudspeth, Jeff Davis, Loving, Presidio, Reagan,

Reeves, Upton, Ward, Winkler, Andrews, El Paso, Pecos, Terrell, Brewster, Crane, Crockett and Culberson. All these counties are in the Trans-Pecos Region, with ten located west of the Pecos and the others just across the river.

Because the state owns the coal, lignite, sand, gravel, surface shale and even dirt that will destroy or deplete the surface when produced on mineral classified land, does this destruction offset any

increases associated with the partial ownership of oil and gas via the Relinquishment Act? Only a knowledgeable appraiser knows the answer.

Leasing Minerals on Mineral Classified Land

The Relinquishment Act clarified how oil and gas is leased and how the revenue is shared on relinquished land patented between 1895 and 1931. Texas legislators passed other statutes addressing how other substances are to be leased and the revenue shared on mineral classified land. The process is found in the Relinquishment Act (Sections 53.061–53.066, Texas Natural Resources Code).

The state constitutes (appoints) the owner of the surface as its agent to lease any minerals, except oil and gas, subject to the Relinquishment Act, that may be found within all or a part of a survey previously sold with a mineral reservation to the state. These substances may be leased either separately or together on a form or forms prepared by the GLO.

As the leasing agent of the state, surface owners receive 40 percent of all bonuses, rentals and royalties payable under

As the leasing agent of the state, surface owners receive 40 percent of all bonuses, rentals and royalties payable under leases entered before Sept. 1, 1987, and 20 percent on all leases entered thereafter.

leases entered before Sept. 1, 1987, and 20 percent on all leases entered thereafter. However, for leases allowing the surface mining of coal, lignite, potash, sulphur, thorium or uranium entered on or after Sept. 1, 1999, surface owners are entitled to 40 percent of the bonuses, rentals and royalties.

Payments received by the surface owners are in lieu of all damages to the soil. The surface owner(s) are not entitled to further compensation.

Groundwater Ownership

If the state owns the coal, lignite, dirt, caliche, sand, gravel, limestone and other valuable substances on mineral classified lands, does this ownership extend to groundwater? If so, what is left?

The answer lies again in the Natural Resources Code, which provides that “unless otherwise expressly provided by statute, deed, patent, or other grant from the State of Texas, groundwater *shall not be considered a mineral* in any past or future reservation of title or rights to minerals by the State of Texas” (Section 53.1631; emphasis added). However, according to the statute, the state retains the right to use a reasonable amount of both the surface and the groundwater for mineral development and production purposes.

As a general rule, the term *development* means for drilling when it comes to oil and gas production. The term *production* encompasses fracking (or fracturing). Consequently, significant

amounts of groundwater could be used for oil and gas production without compensating surface owners.

According to Ken Slavin, one of the El Paso attorneys who represented the GLO in the *Cemex* case, mineral law takes a different twist once you reach the Pecos River (the Trans-Pecos Region) going west. The statutes and case law governing ownership, reservation and leasing of minerals are different than what most people are used to.

Anyone owning, purchasing, selling, brokering or appraising land located in the Trans-Pecos Region should check the maps online with the GLO to see if the land is subject to any mineral classification or reservation by the state. The maps are at <http://gisweb.glo.texas.gov/glomap/index.html>. The GLO does not guarantee that the maps are accurate. 📍

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THE TAKEAWAY

Laws governing mineral rights in Texas' Trans-Pecos region are extraordinarily complicated. Who retains the rights to minerals and what specific minerals are included varies widely in this area.



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About the Real Estate Center

The Real Estate Center at Texas A&M University is the nation's largest publicly funded organization devoted to real estate research. The Center was created by the Texas Legislature in 1971 to conduct research on real estate topics to meet the needs of the real estate industry, instructors and the public.

Most of the Center's funding comes from real estate license fees paid by more than 135,000 professionals. A nine-member advisory committee appointed by the governor provides research guidance and approves the budget and plan of work.

Learn more at www.recenter.tamu.edu

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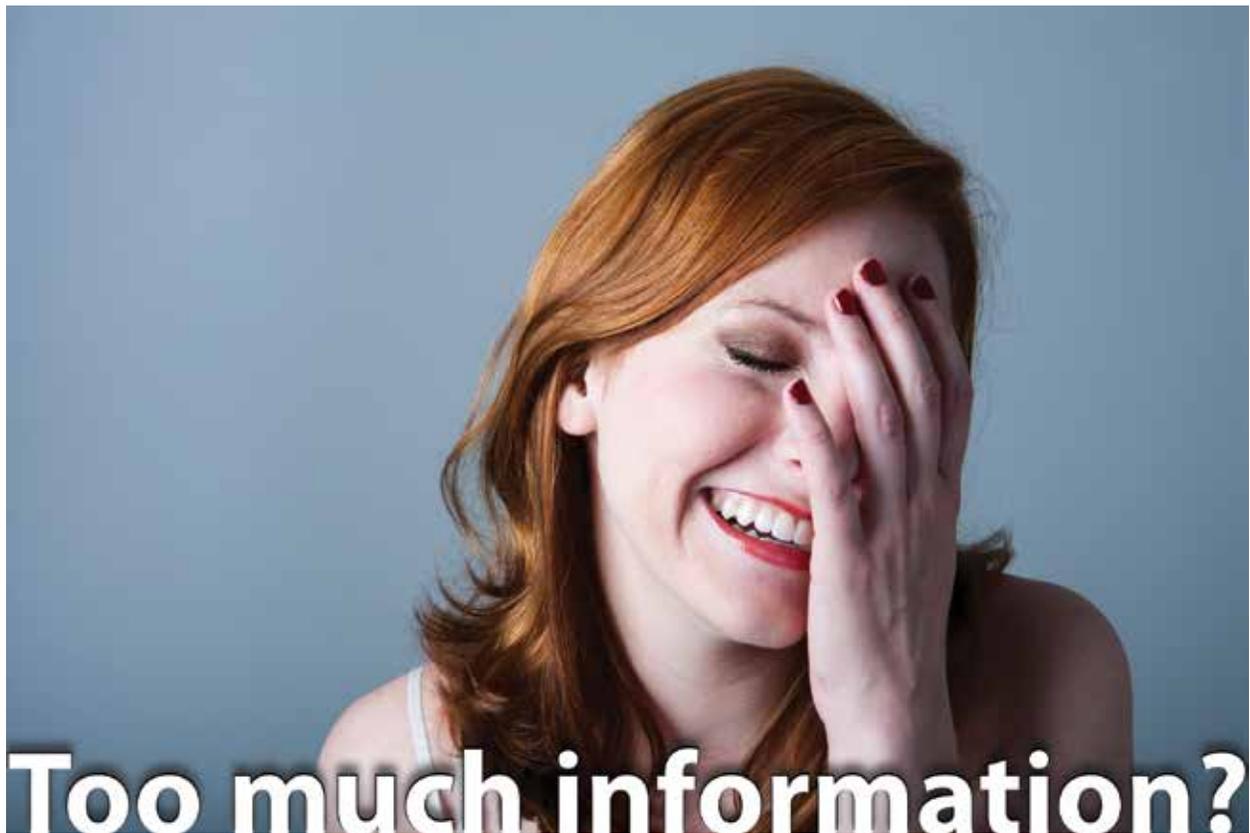
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Don't worry.

We're not going to tell you anything that will make you blush. But you'll definitely get excited about the "next generation" of our popular Market Reports, cleverly named

Market Data Sources.

This new resource provides links to all the data sources from our old annual Market Reports. It's even better, though, because links will be updated throughout the year, whenever new data are posted.

We're talking lots of information here.

Demographics, education, employment, housing, hotel, industrial, multifamily, office and retail for all Texas metropolitan statistical areas.

Lots, but not "too much."

Go to
www.recenter.tamu.edu
In the DATA menu,
click Market Data Sources.

The screenshot shows the TAMU Real Estate Center website. The top navigation bar includes 'NEWS', 'OUR CATALOG', 'DATA', 'EDUCATION', and 'ABOUT US'. The 'DATA' menu is expanded, showing options like 'Building Permits', 'Employment & Unemployment', 'Housing Activity & Affordability', 'Market Data Sources', 'Population', and 'Rural Land'. The 'Market Data Sources' page is visible, featuring a large heading, a sub-heading 'MSA data updated year-round.', and a list of market reports including 'TIERRA GRANDE' and 'CATALOG'. Red arrows point from the text on the left to the 'DATA' menu item and the 'Market Data Sources' link in the navigation bar.