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Of Kings, Patents,  
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Titles

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# Of Kings, Patents, Swamps and Reprobates: A History of Title Departing the Sovereigns of Arkansas with Title Curative Tips

By J. Mark Robinette Jr.<sup>1</sup>

First and foremost, all title begins with a sovereign whether it is God Almighty or one of the many kingdoms of man. A version of an often repeated, humorous, and apocryphal story underscores this point:

**A Louisiana landman was hired to run title on a prospect outside of New Orleans. He presented the title lawyer with his runsheets, which ran back to 1803. Upon reviewing the abstract, the title lawyer issued his opinion with the following requirement:**

**“We were not provided with title instruments prior to 1803. You should provide us with all documents back to original sovereign authority.”**

**Annoyed, the landman responded as follows:**

**"Regarding your requirement about title to the original sovereign. I was unaware that any educated person in this area, would not know that Louisiana was purchased, by the U.S., from France in 1803, the year of origin identified in my runsheets.**

**For your edification, the title to the land prior to U.S. ownership was obtained from France, which had acquired it by Right of Conquest from Spain. The land came into the possession of Spain by Right of Discovery made in the year 1492 by a sea captain named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the Spanish monarch, Isabella. The good queen, Isabella secured the blessing of the Pope. The Pope is the emissary of Jesus Christ, the Son of God, and God, creator of the world, including, one presumes, Louisiana. God, therefore, would be the owner of origin and His origins date back to before the beginning of time. I hope you find God's original claim to be satisfactory”.**

**The attorney dropped the requirement.**

In the rush to capture valuable leaseholds, we tend place the less apparent claims of sovereign authorities as lightly the landman and the lawyer in this story. One should not, however, treat the claims of a sovereign authority, particularly the United States, lightly.

The United States of America enjoys complete immunity from adverse possession claims except as authorized by statute.<sup>2</sup> Whether done intentionally or not, producing minerals that belong to the USA incurs civil and possibly criminal liability. Under 43 C.F.R. 9230 et. Seq., the “extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass.”<sup>3</sup> Civil damages are authorized to be the amount due under state law.<sup>4</sup> The measure of damages under Arkansas law is either the value of the thing taken less expenses for extraction or a competitive royalty for

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<sup>2</sup>See e.g. United States v. Burrill, 78 A. 568 (1910).

<sup>3</sup>43 C.F.R. 9239.0-3.

<sup>4</sup>*Id.* at 43.9239.0-8.

innocent trespass<sup>5</sup> or treble the value of the thing taken for willful trespass.<sup>6</sup> Further, a trespasser is disqualified from obtaining leaseholds from the USA until the USA is satisfied that the trespasser has, can, or will pay for the damages done.<sup>7</sup> In addition to civil penalties, the trespasser faces criminal liability.<sup>8</sup> Under 18 U.S.C. 641, one who knowingly converts the property of the United States may be fined and imprisoned for up to 10 years. The fines range from the greater of \$500,000 or twice the amount of the pecuniary gain.<sup>9</sup>

The State of Arkansas also enjoys immunity from adverse possession.<sup>10</sup> Arkansas, like the United States, exacts criminal and civil penalties for trespass and taking of oil and gas. Removing oil or gas from state lands without a lease is a misdemeanor with a fine of \$300 per day to \$1000 per day.<sup>11</sup> The Attorney General has the duty “to recover any forgotten, lost, or other outstanding public interest or property or to quiet title to any lands.”<sup>12</sup> The AG may sue to recover the full value of the oil and gas removed plus severance taxes.<sup>13</sup> Presumably, the state may also pursue more stringent remedies for intentional trespass. This might include a felony charge if the actor knowingly produced the oil and gas from state lands.<sup>14</sup> Additionally, Arkansas has a treble damages statute for those who intentionally produce another's minerals.<sup>15</sup>

Failing to identify or cure a claim by the United States or the State of Arkansas to lands under development for oil and gas can have ruinous consequences. To protect clients, landmen and attorneys should learn to recognize these potential claims and means of extinguishing them. The object of this presentation is to raise awareness of both how title passes out of sovereign entities and how to find the necessary information to rule out claims of sovereign entities.

In the United States, title may pass from the original sovereign in three ways: 1) Confirmation of a claim by a previous foreign sovereign; 2) A direct patent of land from the United States to a private citizen; or, 3) A grant from the United States to one of the several States who then conveys the land to a private citizen. These are the basic transactional structures. The documentation and record repositories vary, and I will discuss the documentation in turn with the method.

## **CONFIRMATION OF A CLAIM BY A PREVIOUS FOREIGN SOVEREIGN**

Arkansas has had both the French and Spanish flags flying above it during its history. De Soto was the first European Explorer through Arkansas in 1541. The French laid claim to Arkansas from La Salle's expedition in 1682. La Salle named the region after Louis XIV as

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<sup>5</sup> See e.g. Killam v. Texas Oil & Gas Corp., 798 S.W.2d 419, 303 Ark. 658 (1990).

<sup>6</sup> Ark. Code Ann. § 18-60-102.

<sup>7</sup> See 43.9239.0-9

<sup>8</sup> *Id.* at 43.9239.1-2

<sup>9</sup> 18 U.S.C. 3571(c)(3) and (d), respectively

<sup>10</sup> Ark. Game and Fish Commn. v. Lindsey, 292 Ark. 314, 730 S.W.2d 474 (1987).

<sup>11</sup> Ark. Code Ann. § 22-5-803(a).

<sup>12</sup> *Id.* at § 22-5-401(a).

<sup>13</sup> *Id.* at § 22-5-803(b).

<sup>14</sup> *Id.* at § 5-36-103(a) and (b)

<sup>15</sup> *Id.* at § 18-60-102.

“Louisiana.” It was a large and indefinite claim which included what is now Arkansas, Louisiana, and much of the Mid-West.

Settlement of Arkansas by the Europeans began in 1686 with the establishment of Arkansas Post by Henri de Tonty.<sup>16</sup> This settlement was not successful. John Law re-established the post in 1721 only to fail in 1725.<sup>17</sup> In 1731, the French yet again occupied the post.<sup>18</sup> It moved about many times, depending on the defensive needs of the time.<sup>19</sup> The last vestiges of the old colony were demolished in 1980 to make way for a national memorial.<sup>20</sup>

The French ceded Louisiana to the Spanish by the secret Treaty of Fontainebleau in 1762. From 1762 to 1800, the Spanish reigned over Arkansas. During the Spanish period, numerous grants of Arkansas land were made to encourage settlement. Anyone examining title in North Arkansas has probably seen deeds tracing title from a grant from Spain to one Don Joseph Valliere:

**For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take various steps for surveying and granting the royal lands in the province. Therefore, I grant to Don Joseph Valliere, Captain of the regiment stationed in Louisiana, a portion of the land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco [White River], ten leagues on both sides, beginning at the origin of the most western branch of the Rio Blanco [White River], and running southwest ten leagues, descending from thence on the south by parallel lines with the Rio Blanco [White River] at the distance of ten leagues until it intersects the Rio Cibolus [Buffalo River] at a point ten leagues in direct line with Rio Blanco [White River], from thence descending the Rio Cibolus [Buffalo River] to its confluence with the Rio Blanco [White River], following this as far as the mouth of the Rio Norte Grande [North Fork White River], up the same to a point ten leagues in a direct line from its mouth, from thence ascending the Rio Blanco [White River] to the north in a westerly direction, ten leagues from the same as far as its source, which will be better seen on the figurative plan, made by my order, by the Surveyor-General Don Carlos Trudeau, of the Province, 24th October, last; (It being impossible for the Surveyor-General to make an actual survey at this time) and in virtue of my order in June of the current year, by which I made him a grant, and ordered the Surveyor-General to put him in possession in the usual form."**

**In consequence of the power which has been conferred on me by our Lord the King (God preserve) I grant in his royal name to the said Don Joseph Valliere, Captain of the Regiment of Infantry in Louisiana, the said portion of land described above, in order that he may dispose of it, he and his legitimate successors as property belonging to him. Done in New Orleans 22nd December, 1793.**

Don Valliere died in 1799, and his heirs failed to do anything with the grant<sup>21</sup> other than trade it around with others (the deeds you see filed in various county courthouses). The heirs eventually brought suit in Arkansas to vitiate the claim in 1847, but were rebuffed for allowing the claim to remain dormant for so long.<sup>22</sup>

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<sup>16</sup> Morris S. Arnold, *Colonial Arkansas 1686-1804: A Social and Cultural History*, 5 (University of Arkansas Press, 1991).

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 31.

<sup>19</sup> *See Id.* at 17.

<sup>20</sup> *Id.*

<sup>21</sup> William Neville Collier, *Ozark and Vicinity in the Nineteenth Century*, 2 *White River Historical Quarterly* at 21 (1967).

<sup>22</sup> *Id.* at 23.

A more infamous Spanish land grant in Arkansas, involving many reprobates, was the Bastrop Tract. The Baron De Bastrop, who was actually an ordinary Dutchman named Philip Hendrick Nering Bogel, was a local Dutch tax official who fled his homeland after being caught with his hand in the till. He re-invented himself as the Baron de Bastrop, a Dutch nobleman. He traveled to Spanish Louisiana in 1795, and he was granted a large tract straddling Louisiana and Arkansas, covering much of what is now Ashley County. The Baron sold many titles from his grant, which were traded with much enthusiasm. Bastrop's title was ultimately stuck down by the Supreme Court in the case of *United States v. The Cities of Philadelphia and New Orleans*, 52 U.S. 609 (1850).

One of the Baron's enthusiastic purchasers was none other than Aaron Burr, who used the settlement of the tract as a pretext to move men and arms down the Mississippi in what was either an attempt to incite a revolt in New Orleans and succession of Louisiana or to lead an invasion of Texas and Mexico. Burr was tried and acquitted for treason, but the mystery of his intentions remains.<sup>23</sup>

Spanish rule ended in 1800 by the Third Treaty of San Ildefonso where the Spanish returned Arkansas to the French. The French, under Napoleon, sold Arkansas to the USA in 1803. For a total purchase price of \$15,000,000 in 1803 dollars, the USA closed the deal at the Cabildo in New Orleans on December 20, 1803. Following the war of 1812, President Monroe ordered a survey of Louisiana Purchase lands. A monument to the beginning of this survey stands at the Louisiana Purchase State Park off Highway 49 between Brinkley and Helena. The survey used Jefferson's rectangular system to divide the lands into 36 square mile townships comprised of 1 square mile sections.

What happened to the French and Spanish settlers who lawfully occupied land under their respective governments prior to the US purchase? Claims of title from citizens living under former sovereign powers were not a new challenge to the government. A number of states have no patent records because the lands were originally granted to private individuals by foreign powers. For instance, the original 13 colonies had numerous occupants at the time of the Revolutionary war, and there are no federal land records in those states. The new state governments were the original sovereigns, not the US.<sup>24</sup>

To honor the land claims made by former French and Spanish subjects, Congress created commissions<sup>25</sup> who received land claims and then made recommendations to Congress as to whether to honor or reject the claims. If Congress confirmed the grant, the claimant was entitled to receive a patent to the land. The land claims process, however, languished for years after the

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<sup>23</sup> The author recommends two books on Burr. The first, *Burr*, by Gore Vidal is a historical fiction novel. Vidal does an excellent history of the American Revolution through the eyes of Burr who is depicted as a charming and witty rakehell. The second is a recent historical compilation of Burr titled *American Emperor: Aaron Burr's Challenge to Jefferson's America* by David O. Stewart.

<sup>24</sup> A notable oil patch standout is the State of Texas. Upon its admission to the Union in 1845, Texas reserved all unoccupied lands. Thus, land claims are litigated at the state level and based upon State records and records from the Spanish and Mexican governments. Louisiana is probably the greatest challenge because it contains foreign land grants under the Spanish, French, and Mexican governments along with federally disposed lands.

<sup>25</sup> 8 Stat. 234.

Purchase. This was due to an 1824 statute that allowed claimants file suit to confirm a grant. The claimant had to prove that their claim would have been approved by Spain or France but for the Louisiana Purchase. An example is *Muse v. Arlington Hotel Co.*, 68 F. 637 (1895) where a Spanish land grant claimant attempted to prove the validity of a claim on the land where the Arlington Hotel stands in Hot Springs.

Many of the Arkansas Spanish Land Grants have no corresponding patent. While the federal statute governing the issuance of patents to those holding confirmed claims was repealed in 1976,<sup>26</sup> there is a savings provision allowing the issuance of documentary patents provided that the claimant had a certificate of location issued prior to 1879.<sup>27</sup>

The easiest way of identifying a foreign land grant is to examine the U.S. Government Survey. The grant will be carved out of the Jeffersonian grid. If the grant appears in the Survey, it is almost certain that it is an approved claim. The claim can be corroborated by checking the state and federal records, and the claim can be documented by a patent, though it may be difficult and time-consuming to obtain the patent.

The Commissioner of State Lands has a full collection of Spanish Land Grant Certificates at <http://www.cosl.org/history/spanish.aspx>. Federal records can be accessed from National Archives.<sup>28</sup>

## **DIRECT PATENT OF LAND FROM THE UNITED STATES TO A PRIVATE CITIZEN**

Land patents are the ordinary means title passing from the USA into private hands in Arkansas. Patents were authorized under many acts of Congress. The early acts included land grants to reward military service (Military Bounty Lands), and the US was in need of cash, so the government also authorized the sale of Western lands (Cash and Credit Entries) to raise revenue.

The citizens of the early US were as cash strapped as their government. Both the cash entry and credit entry laws failed to raise the revenue projected, the government eventually decided that settlement would lead the way to more revenue. Thus, the Homestead Act of 1862 was born. It is the seminal law in the disposal of public domain lands into private hands. Under the Act, anyone 21 years of age or older who was head of his household could claim up to 160 acres by simply living on and cultivating the land for 5 years and paying a \$15 fee. Most patents in the State of Arkansas were issued under the authority of the 1862 Act. The Act did not limit the grant to less than fee simple, but it also did not authorize settlement of Mineral Lands. This rarely was an issue with Homestead Act because of the unscientific nature of determining Mineral Lands during the time period. Minerals discovered on Homestead Lands subsequent to the issued patent incontrovertibly passed to the patentee.<sup>29</sup>

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<sup>26</sup>90 Stat. 2792

<sup>27</sup>43 U.S.C. 1701

<sup>28</sup> The author suggests two excellent treatises for further study: Henry Putney Beers, *French and Spanish Records of Louisiana*, Louisiana State University Press (1989) and E. Wade Hone, *Land and Property Research in the United States*, Ancestry Incorporated (1997).

<sup>29</sup>See *Burke v. Southern Pacific Rail Road*, 234 U.S. 669 (1914) for a general discussion of “Mineral Lands” exclusions in patenting laws.

In 1866, The Mining Act allowed disposal of mineral lands. A prospector could obtain fee title to the surface and minerals by locating mineral deposits. There are a handful of these patents in Arkansas. Congress supplemented this law with the Place Mining Act of 1870 and General Mining Law of 1872. Notably, the 1872 law is still in effect, though no new patents have been issued through it for decades. This is due to Congress refusing to fund the program in a direct political move to hold on to public lands.

In the early 20<sup>th</sup> century, President Theodore Roosevelt led the charge to keep mineral resources in the hands of the government. In 1906, President Roosevelt utilized his executive power to withdraw vast amounts of land thought to be valuable for coal from settlement or prospecting.<sup>30</sup> President Taft followed suit in 1909 by withdrawing lands believed to be valuable for petroleum from settlement or prospecting.<sup>31</sup> In response to this executive action, Congress compromised and agreed to enact legislation requiring the US to reserve minerals. Among these acts were:

- The Coal Lands Act of 1909 and 1910
- The Pickett Act of 1910
- The Agricultural Entry Act of 1914
- The Stock Raising Homestead Act of 1916
- The Taylor Grazing Act of 1934

The scope of a reservation of “minerals” in a patent is extremely broad. The succinct explanation is found in *Watt v. Western Nuclear*, 462 U.S. 36 (1983): “[W]e interpret the mineral reservation in the Act to include substances that are mineral in character (i. e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate.” In the *Watt* case, the United States successfully claimed a deposit of gravel under a patent reserving “minerals.” Under the *Watt* reasoning, the topsoil is probably the only thing safe from the ownership of the government.

Copies of patents are not always recorded in county records. An excellent resource to research patents and view copies of patents is the web site of the Government Land Office at <http://www.gloreCORDS.blm.gov/>.

## **A GRANT FROM THE UNITED STATES TO ONE OF THE SEVERAL STATES WHO THEN CONVEYS THE LAND TO A PRIVATE CITIZEN**

These grants are sprinkled widely in the oil and gas areas of Arkansas. The government granted the State of Arkansas lands for state government uses, to encourage settlement, and to advance the national policies of the day. The majority state grants that routinely appear in Arkansas are: Internal Improvement Lands, School Lands, Swamp Lands, and Railroad Grants. There are other authorities, but their effect is usually obvious or the occurrence too infrequent to address in a presentation this short. Among these are: New Madrid Claims, Seminary Lands, land grant universities, the seat of state government, and saline lands.

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<sup>30</sup> Paul Wallace Gates, *History of Public Land Law Development*, 726, (1968).

<sup>31</sup> *Id.* at 732-33.



## **Internal Improvement Lands**

The federal government granted the State 500,000 acres of land to be sold for internal improvements. Records of these disposals by the State of Arkansas can be found at <http://www.cosl.org/history/internalimprov.aspx>. It is notable that little of the internal improvement lands monies made it to their intended purpose.<sup>32</sup>

## **School Lands**

By Act of June 23, 1836, the United States granted the State of Arkansas every sixteenth section of land for the use of schools. In 1843, the United States authorized the States of Illinois, Arkansas, Louisiana, and Tennessee to dispose of school lands and invest the proceeds in “some productive fund” for the benefit of the townships where sold. Under the 1843 Act, the lands could not be sold without the consent of the inhabitants of the township. The states were free to prescribe the means by which the township inhabitants could approve the sale. Laws enacted or sales conducted inconsistently with the 1843 Act are presumptively void.

Under an 1885 Act entitled “An Act Regulating the Sale of Sixteenth Sections, etc.,” the State required a petition by the majority of male inhabitants of the township to the County Collector to sell the sixteenth section in the township. After that, the Collector was to subdivide the lands in tracts of no more than 40 acres, have the land appraised by 3 disinterested parties, advertise the sale, and accept bids for no less than  $\frac{3}{4}$  of the appraised value. After the sale, the Collector was to report the sale to the County Court who issued a certificate confirming the sale. The purchaser then had to present the certificate to the Commissioner of State Lands for a deed. Following of these procedures is necessary to give the Collector the power to sell the lands in the name of the State. The Commissioner of State Lands maintains an online repository of sale certificates at <http://www.cosl.org/history/16thsection.aspx>. The records of the various County Courts and Collectors should be searched to verify obtain evidence showing the sale procedures were followed at the County level.

The danger in having unpatented school lands is a claim by the State. There was a trend in some states to recover school lands that sold for less than adequate consideration.<sup>33</sup> This hasn't happened in Arkansas, though it is theoretically possible.

## **Swamp Lands**

Perhaps the biggest debacle in land policy in United States history are the Swamp Buster Acts of the mid 19<sup>th</sup> century. In 1850, the federal government gave the state of Arkansas all of

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<sup>32</sup> Robert W. Harrison and Walter M. Kollmorgen, Land Reclamation in Arkansas Under the Swamp Land Grant of 1850, 6 Ark. Hist. Quart. 369, 372-373. “Investigate the character of this fund...and trace it in all of the perils and dangers of its way through the hand of more than four hundred public officers, lawyers, and agents, and will discover surely...it will melt away at every stage.”

<sup>33</sup> See C. Maison Heidelberg, Closing the Book on the School Trust Lands, 45 Vand. L. Rev. 1581 (1992).

the “swamp and overflowed lands” within its borders. Arkansas was thus enabled to grant title to many public lands provided that the state utilize the funds from selling swamp and overflowed lands to make the lands inhabitable. To accomplish this, the state created a swamp land board with “nearly absolute power.”<sup>34</sup> The commissioners sent out agents to inventory the swamp lands.<sup>35</sup> Charges of fraud almost immediately followed.<sup>36</sup> The result was the federal land office rejecting the state’s initial claim.

Governor Conway took office in 1852, and he promptly attempted to emasculate the Swamp Land Commission in favor of using the Swamp Land Secretary.<sup>37</sup> He also dispensed with using state agents to inventory swamp lands, instead relying on the federal government’s plats.<sup>38</sup> Under the new legislation, the Swamp Land Commission was thus relegated to supervising the improvements constructed using funds from swamp land sales.<sup>39</sup> The Swamp Land Commission refused to give up its power quietly. The Commissioners interpreted the new legislation to not change their role in issuing titles.<sup>40</sup> The result was a period where both the Commissioners and the State Land Agent were issuing titles.<sup>41</sup>

In 1854, the legislature suspended the activities of the Swamp Land Commission.<sup>42</sup> With 1,200,000 acres of land sold, there was very little show for the effort.<sup>43</sup> The outcry over the Swamp Land Commission’s poor oversight would be its undoing. In 1856, the legislature abolished the Commission in favor of the State Land Agent.<sup>44</sup> Swamp land activity stagnated (no pun intended) until after the Civil War.<sup>45</sup> The legislature created the Commissioner of State Lands in 1868<sup>46</sup> who continues to have jurisdiction over swamp land matters to this day.

At the heart of the grant was the factual determination of what was a “swamp.” Naturally, fraud was rampant. This was so much so that the federal government eventually threw up its hands and confirmed all state swamp land patents. In exchange, the states had to give back their swamp lands. By an Act of Congress dated April 29, 1898, the US confirmed swamp titles issued by Arkansas up to that date and Arkansas relinquished its title in its remaining swamp lands back to the United States.<sup>47</sup>

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<sup>34</sup> Harrison and Kollmorgen, *supra* note 32 at 375. The board was paid in swamp land scrips—the very thing they were charged with administering!

<sup>35</sup> *Id.* at 376,

<sup>36</sup> *Id.* at 376. The land agent of the federal government at Champagnalle was the first to cry fraud. *Id.* The surveyor general substantiated this claim. *Id.*

<sup>37</sup> *Id.* at 381.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 382.

<sup>40</sup> Harrison and Kollmorgen, *supra* note 32 at 383-84.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 387-88

<sup>43</sup> *See Id.* 390-96.

<sup>44</sup> *Id.* at 396

<sup>45</sup> *Id.* at 407.

<sup>46</sup> Harrison and Kollmorgen, *supra* note 32 at 408.

<sup>47</sup> This is codified at 43 U.S.C. 991.

Records of swamp land patents from the State of Arkansas can be found at <http://www.cosl.org/history/swamp.aspx>. Care should be taken to note the date. Swamp titles issued by Arkansas after the April 29, 1898 quitclaim to the US are void.

## **Railroad Land Grants**

The early American West, including Arkansas, was a desolate place. With little economic activity and no fast and ready link to the populated and vibrant East, the US decided that railways would provide the link necessary to invigorate the West. The problem, of course, is that nobody had the cash to foot the bill for a massive capital investment. What the US did have, however, was land, land, and more land to give the railroads.

Beginning in the 1850's, the US began granting states land for railroads. The government withdrew huge areas of public domain land from settlement to accommodate the railroads. This act engendered general resentment and anger towards railroads that later came to a head, ending the railroad land grants in the late 1800's. The states accepted the grants on behalf of the railroad, documented by patent from the US. Arkansas's railroad granting Acts were:

1) Act of Feb. 9, 1853 (10 Stat. 155): Even numbered sections on either side of the road six sections in width subject to preexisting rights with right to indemnity lands. This line was to extend through Little Rock to Fulton, Arkansas and the Texas border with branches to Fort Smith and Mississippi river. The indemnity lands could be up to 15 miles away from the road. The Arkansas legislature prescribed the survey procedures, and once surveyed, the GLO was to receive a copy for its records. The State was to dole out the lands 20 miles at a time. Upon completion of 20 miles of road, the State could grant another 120 sections of land to the railroad. Congress revived this Act 4 more times. Significantly, beginning with the Act of July 28, 1866, "mineral lands" were withdrawn from the grants.

2) Act of July 4, 1866 (14 Stat. 83): Grant of even numbered sections on either side of the road ten sections in width subject to preexisting rights with right to indemnity lands. This line was from the Iron Mountain line's intersection with Missouri to Helena, Arkansas. The indemnity lands could be up to 20 miles away from the road. The Arkansas legislature prescribed the survey procedures, and once surveyed, the GLO was to receive a copy for its records. The State was to initially dole out the lands 10 miles at a time. Upon completion of 10 miles of road, the State could grant another 100 sections of land to the railroad by certifying completion to the Secretary of the Interior who in turn gave the lands to Arkansas. This limit was ratcheted up as the railroad completed more line. "Mineral lands" were withdrawn from the grants of these lands from the beginning.

Upon the definite location of the segment of rail line, the railroad received title to the right of way, and upon completion of the line, the railroad received its fee title in the subsidy lands. The railroad had to file a survey with the Secretary of Interior showing the sections and rights-of-way taken.<sup>48</sup>

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<sup>48</sup> The author has tried to locate a source of these plats, and a source remains elusive.

The mineral lands exception in the railroad subsidy lands is not much of a concern. Like the Homestead Act of 1862, the railroad subsidy fee grants were to exclude “Mineral Lands.” Again as with the Homestead Act, the limitations on manpower and technology made it unlikely that the government could successfully identify valuable mineral deposits prior to issuing the patent. The U.S. Supreme Court later decided that the government had the burden of identifying whether lands were “mineral” prior to issuing the patent.<sup>49</sup> Thus, in the absence of a return from the government surveyor that the lands were mineral or a mining claim on site, the railroad received the lands in fee. To hedge their bets against the possibility of the government renegeing because later discoveries of minerals, many railroad companies had a business policy of reserving minerals to avoid later claims by the government.<sup>50</sup> Thus, the railroads' reservations had the unintended consequence of further enriching the railroads and their descendant companies.

The railroad patents to Arkansas can be viewed at the GLO records office website. There is no comprehensive online resource to view the railroad right of way maps. There are a few railroad maps of parts of Arkansas scattered about the internet. Some inquiry to the State and the US government will have to be made to locate more viable resources.

## **WHEN THERE JUST ISN'T ANY EVIDENCE OF TITLE LEAVING THE UNITED STATES**

Sometimes, title is what it is. If there is nothing getting the title out of the United States, the United States owns it. There is a statutory cure in place that gives some hope of getting the title out of the US without a mineral reservation. This is the Federal Color of Title Act.<sup>51</sup> Under this Act, a claimant may take one of two routes:

**Class I Claims:** Held under a claim or color of title in peaceful adverse possession and in good faith for more than 20 years with valuable improvements or some part of the land in cultivation.

**Class II Claims:** Held under a claim or color of title in peaceful adverse possession and in good faith by the claimant and his remote grantors since at least January 1, 1901 to the date of the application during which time, they paid taxes continuously.

“Good Faith” = Without knowledge the US owns the land.<sup>52</sup>

“Peaceful, adverse possession” = Claim not initiated when the land was withdrawn or reserved for federal purposes.

It takes around 2 years to process a color of title claim. Claims are limited to 160 acres. The applicant can receive title to the minerals if the claimant has a record chain of title originating prior to January 1, 1901. If there is no record title prior to 1901, the patent will

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<sup>49</sup>See *e.g.* *Burke v. Southern Pac. R. Co.*, 234 U.S. 669 (1914).

<sup>50</sup>The notorious *Strohacker* case contains much testimony on the subject of why the railroads reserved minerals.

<sup>51</sup>See 43 C.F.R. 2540 et. seq.

<sup>52</sup> *United States v. Wharton*, 514 F.2d 406, 408-09 (9<sup>th</sup> Cir. 1975).

contain a mineral reservation. Mineral reservation or not, the applicant must pay “fair market value” for the land. The BLM will take improvements into account, and the BLM considers the general equities of the case.

## **CONCLUSION**

There are many ways that the lands of Arkansas came into private ownership. A landman can ordinarily find the additional information needed to complete a title chain to the sovereign in the records of the Commissioner of State Lands and the Government Land Office. Doing a bit of extra work outside of the county land records to provide title attorneys with the extra information will foreclose a significant downside for all involved.