

**PROTECTING SURFACE OWNERS AND PROMOTING RESPONSIBLE COAL  
BED METHANE DEVELOPMENT**  
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"The best way to ensure responsible coal bed methane development is to empower landowners to have a real say in the course of mineral development on their land."  
Northern Plains Resource Council, *Doing It Right: a blueprint for responsible coal bed methane development in Montana*

"In Western communities affected by proposed [natural-gas] developments, it is a matter of the land on which people live, the water they drink, their control over property and their ability to earn a living."  
Judith Graham, *Chicago Tribune* national correspondent

**SPLIT ESTATE**

In the West, it's common for the mineral and surface rights to the same parcel of land to be held by different parties (known as a "split estate"). The mineral estate is generally considered to be dominant over the surface. Under current law, oil and gas companies can conduct exploration activities, drill wells, build roads and pipelines, and conduct many other activities without obtaining permission from landowners, or even consulting with them about the placement of roads, drill sites, power lines, containment ponds, etc.

**FEDERAL MINERALS/PRIVATE SURFACE**

The most common split estate situation involves federal minerals under private surface. About 58 million acres of privately owned land in the United States are estimated to overlie federal minerals, with most of this acreage in the West.

In the Wyoming portion of the Powder River Basin private property owners hold 75 percent of the surface land (about 6 million acres), and the federal government owns approximately 63 percent of the mineral rights under the surface. A similar percentage of split-estate lands occur in the Montana portion of the Powder River Basin.

**FEDERAL MINERALS LEASED**

Further, nearly all of the federal oil and gas mineral estate in the Powder River Basin is under lease. In the Wyoming portion of the Powder River Basin, it's estimated that over 99% of the federal oil and gas estate has been leased, and approximately 60 percent is under lease in Montana.

**PENDING LEASE SALES**

Lastly, Bureau of Land Management (BLM) state offices in New Mexico, Montana, Wyoming, Colorado, Nevada, Utah, California, Alaska, and Oregon have scheduled 35 separate sale dates in 2002 to auction federal minerals for oil and gas leasing. (In 2001, BLM state offices sold 2,507 leases totaling 2.84 million acres in five western states: Colorado, Montana, New Mexico, Utah and Wyoming.)

The bottom line: There are millions of acres of private land in the West where the federal government owns the underlying oil and gas estate, much of this estate has been leased, and a significant number of additional federal oil and gas leases are likely to be sold in 2002 across the West!

### DAMAGE TO SURFACE OWNERS

Coal bed methane drilling requires the construction of access roads, drill pads, water containment ponds, pipelines, power lines, and compressor stations. Some of the damage that can occur to private surface owners from the development of the oil and gas estate includes:

- reduction in property values
- loss of income (esp. farm/ranch operations)
- impairment of water quality and quantity
- seepage of methane into drinking water wells and under people's homes
- loss of privacy
- the introduction and spread of noxious weeds
- noise from compressor stations, generators, traffic and drilling
- drilling rigs in close proximity to residences
- soil damage, contamination and erosion
- extensive road construction and heavy traffic
- damage to fences, and the resultant escape of livestock
- harm to wildlife species and habitat.

### STATE LAW AND SPLIT ESTATES

As the use of severed mineral estates increased throughout the United States, the following five general rules became commonly accepted.

1. The mineral estate is considered the dominant estate.
2. Surface owners cannot interfere with the legitimate and proper use of the surface by the mineral lessees or owners.
3. The mineral owner can only use as much of the surface as is reasonably necessary for exploration and development of the minerals.
4. The mineral owner is liable for damage to the surface if negligent use occurs, or if the mineral owner violates an express contractual obligation; however, it is the landowner's responsibility to prove damages in a court of law, which can cost \$30,000 to \$50,000.

5. The mineral owner may be responsible for the creation of a nuisance, depending upon the definition of nuisance in the state where the land is located. These general rules have offered the courts considerable guidance over the years in the resolution of surface/mineral estate disputes. However, they fail to address many situations and thus both courts and state legislatures have sought to further define the rights of surface and mineral estate owners.

## STATE SURFACE DAMAGE ACTS

Since 1975, nine states have adopted surface damage acts, including North Dakota, South Dakota and Montana. These laws recognize the mineral owner's right of entry, but increase the protection available to the owner of the surface by enlarging the traditional scope of compensable damages. There is also a judicial doctrine that requires mineral developers to accommodate surface uses by adopting alternative technologies or access where practicable.

## FEDERAL LAW AND SPLIT ESTATES

Many of the private lands in the West were acquired under the Stock Raising Homestead Act (SRHA) of 1916. The people who homesteaded this land received ownership of the surface, while the federal government retained ownership of the minerals. Once the minerals are leased, the SRHA provides a right of entry for the mineral owner.

The mineral operator may enter land for exploratory purposes by simply filing a notice of intention with the BLM, and providing a copy of the notice to the surface owner. Entry for this purpose, however, may cause no more than "a minimal disturbance of surface resources" and may not include the use of mechanized equipment, explosives, the construction of roads, drill pads, or the use of toxic and hazardous materials. Before entering a surface owner's property to begin drilling, the mineral operator must secure written consent or waiver from the landowner and obtain a surface damage agreement, OR post a bond to cover damages.

In other words, oil and gas operators on federal leases may, but are not required to, secure a written damage agreement with the landowner. Absent an agreement, the operator can simply rely on a bond, which is unlikely to be enough to cover potential reclamation costs or other surface damages. And in cases where agreements are actually obtained, bonds are hardly ever posted. Either way, landowners usually suffer.

The bond must exceed \$1,000 and is supposed to cover damage to crops, improvements, and any loss of income from using the land. For oil and gas wells located in one state, a company can post a blanket bond of \$25,000 no matter how many wells it plans to drill. A company that operates in more than one state can post a bond of \$150,000 regardless of the number of wells it plans to drill. These bonding levels are grossly inadequate.

For example, state and federal resource managers say a bankrupt Gillette Oil Company has left them with approximately \$250,000 in bonds to pay for an estimated \$4 million in reclamation costs on 120 abandoned oil wells in northern Campbell County, Wyoming. The federal government could be left holding the bag for \$2 million in clean-up costs.

In 1976, Congress passed the Surface Mining Control and Reclamation (SMCRA), which makes coal mine operators bear the full costs of reclamation as well as mining. A key provision of SMCRA, which requires surface owner consent before federal coal deposits can be leased, could easily be extended to protect the rights of surface owners faced with federal oil and gas leasing.

## NEED FOR EXPANDED SURFACE OWNER PROTECTIONS

State and federal laws and judicial doctrines designed to provide some protection to surface owners are inadequate because they do not entail a balancing of surface owner harm and inconvenience against mineral owner options. The burden is on the surface owner to show that the mineral developer's surface use is unreasonable and that other alternatives exist.

Thousands of landowners in the West face a growing threat to their livelihoods and quality of life from coal bed methane and other mineral development, not to mention the damage that could be done to land, air and water resources.

The preferred alternative in the recently released Wyoming Powder River Basin Draft Environmental Impact Statement calls for 39,367 new coal bed methane wells to be drilled in the next decade. These new wells are in addition to 12,077 wells that have already been drilled or permitted, bringing the total to 51,444 coal bed methane wells by the end of 2011.

The reasonably foreseeable development scenario for full field development in the Montana portion of the Powder River Basin is estimated between 14,000 and 39,000 producing wells, bringing the total number of producing coal bed methane wells in the Powder River Basin to almost 90,000 wells.

This staggering level of development will leave a huge footprint on the West. (For comparison, the BLM estimates that there are 57,800 producing oil and gas wells on public lands in the entire United States.)

Thousands of landowners across the West -- ranchers, farmers and residential homeowners -- with federal oil and gas leases are largely powerless to stop irresponsible development on their property. The companies can simply post a bond and start drilling. "The problem as I see it for ranchers is the overwhelming advantage of the mineral owner against the surface owner," said Nancy Sorenson, a Wyoming rancher and member of the Powder River Basin Resource Council. "I want regulations that give surface owners a more equitable bargaining position for surface damages." A federal law that expands surface owner protections could do just that.