

W O R C

Western Organization of Resource Councils

NORTHWEST COLORADO OIL AND GAS WORKSHOP

PROTECTING SURFACE OWNERS IN SPLIT ESTATE SITUATIONS

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INTRODUCTION

Thank you. I appreciate the invitation to speak about split estate issues from the perspective of someone who works with surface owners all across the West.

My name is Kevin Williams, and I am the field organizer for WORC, the Western Organization of Resource Councils.

WORC is a network of grassroots organizations from seven states that include 8,250 members and 46 local community groups. WORC helps its member groups succeed by providing training and coordinating regional issue campaigns.

Our main office is in Billings, Montana, and we have an office in Washington, DC as well. Our work revolves primarily around family farm and energy policy issues. Over 300 split estate landowners in ten western states have endorsed WORC's Surface Owner Rights Amendment, which is a strong indication of the breadth and depth of concern by surface owners across the West with oil and gas development on split estate lands.

In the limited time I have today I would like to:

1. Review the implementation of BLM's new split estate directive,
2. Offer some thoughts about what "good faith" negotiations might entail,
3. Outline what we consider to be MINIMUM standards for surface use and damage agreements, and
4. Highlight the need for better landowner notification.

Then I will turn the microphone over to Joanne Savage, a rancher and directly affected landowner in Garfield County, who will offer some of her own thoughts and

recommendations regarding how oil and gas development can be done right on split estate lands.

HISTORY OF SPLIT ESTATES

But first, I have a bonus question. Who knows where the concept of a split or severed property interest in minerals originated, and how it came to be law in the United States?

Answer: Under English common law, an owner controlled his/her property from the “center of the earth to the heavens.” Some historians trace the concept of a split estate to the Roman Empire, which claimed “all beneath the surface...by right of conquest.” In England, a royal right to precious metals like gold and silver was long recognized, and it was considered just if for no other reason than the King or Queen: “the person who is most excellent” – should possess “the most excellent things which the soil contains.” This royal right was brought to the American colonies, and most of the charters under which the eastern US was settled reserved one-fifth of all gold and silver to the King or Queen of England. Spain and Mexico also claimed property rights in minerals as an incident of sovereignty, but these rights did not long apply in the American states and territories. A royal right to minerals eventually made its way into American law, largely as a result of the industrial revolution, the westward expansion of the United States, and pressure by corporate interests. There’s nothing in the US Constitution that establishes a split property interest in minerals and, in fact, the concept itself is the antithesis of English common law! Perhaps it’s time to revise the split estate doctrine based on the realities of the 21st Century, especially considering its roots in royalty and privilege.

BLM’S SPLIT ESTATE DIRECTIVE

On April 2, 2003, the BLM issued an Instruction Memorandum (IM) that “clarifies the policy, procedures and conditions for approving oil and gas operations on split estate lands...” The headline on the BLM news release announcing the new directive was this: “BLM Vows to Protect Rights of Surface Owners on Split-Estate Lands.” We want the agency to live up to this vow, and the oil and gas industry to cooperate with landowners to the fullest extent.

While the BLM directive is helpful in some respects, in our opinion it falls short of what is needed to protect surface owner rights. However, there are some potentially helpful provisions I would like to highlight today:

1. Adequate bonds

The BLM does not consider an APD to be complete until the federal lessee or its operator certifies the existence of an agreement with the surface owner, OR until an “adequate” surface owner bond is posted. The BLM has prepared guidance for the lessee or its operator regarding what an “adequate” bond must entail.

→ **We encourage every company to become familiar with this guidance and comply with it, and we ask the BLM to enforce it.**

2. “Good faith” negotiations

The lessee or its operator must enter into “good-faith” negotiations with a private surface owner. The BLM does not specify what a “good-faith” effort must entail. In our view, “good faith” negotiation means, at a minimum, that a lessee or its operator negotiates with an open mind and genuine desire to reach agreement and, where appropriate, be prepared to compromise. This does not mean that the parties must reach agreement.

However, negotiation in good faith involves the lessee or its operator acting honestly and reasonably in all circumstances. If the lessee or its operator receives a proposal from the surface owner they must give genuine consideration to it. In addition, the lessee or its operator must:

- Maintain a level of active communication with the surface owner,
- Respond promptly to phone calls, letters and other forms of communication,
- Provide relevant and accurate information to the surface owner about the proposed activities and plan of operations, and disclose all significant facts (such as the surface owner’s right to protest and/or appeal a bond),
- Attend and constructively participate in meetings when they are arranged,
- Forswear any form of intimidation or threats,
- Ensure that people with real decision-making authority are involved in the negotiations,
- Put forward genuine offers and counter proposals, and be willing to put a verbal agreement into writing,
- Be prepared to move from their original position, and not change their position just as an agreement is in sight,
- Not make an issue of trivial items of disagreement, and
- Conduct themselves appropriately outside the negotiations, for example, making comments to the media.

→ **We challenge the industry to live up to these guidelines, and encourage the BLM to adopt and implement them.**

3. Posting two bonds in the absence of a surface use agreement

In the absence of an agreement with the surface owner, the BLM will require the lessee or its operator to post two bonds, one bond for surface owners under the Stock Raising Homestead Act (known as a 3814 bond), and a second reclamation bond under the Mineral Leasing Act (known as a 3104 bond).

→ **This is an important requirement that we hope and expect is already being put into practice by the BLM.**

4. Surface owner right to protest and/or appeal the bond amount

The surface owner has a right to protest and/or appeal the amount of the 3814 bond. The surface owner has 30 days from the date he/she receives a copy of the bond within which to protest to the authorized BLM officer. The bond will not be approved or accepted before the end of this period. The authorized officer can decide that the bond is either sufficient or insufficient. If the bond is determined to be sufficient, the surface owner can appeal this decision to the State BLM Office.

The BLM will independently notify the surface owner, in writing, of her/his rights regarding protests and appeals to the sufficiency of the surface owner bond. The problem from our point of view, however, is that the BLM will notify the surface owner about her/his rights after a bond has been served on the surface owner by the lessee or its operator.

→ **We encourage the lessee or its operator to be proactive and notify the surface owner of her/his rights to protest and/or appeal the bond at the beginning of negotiations, rather than wait for the BLM to notify them after the fact.**

5. On-site inspections

Finally, the BLM is required to schedule an on-site inspection with the lessee or its operator for the purposes of planning the development of oil and gas resources and invite the surface owner to participate. That's the good news. The bad news is that this on-site inspection can occur as late as 15 days after the APD is deemed to be complete.

We encourage the BLM to schedule an on-site inspection immediately after it receives a complete APD, and go the extra mile to make sure the affected surface owner(s) are invited and attend.

MINIMUM STANDARDS FOR SURFACE USE AGREEMENTS

In order to level the playing field, we believe that surface use and damage agreements ought to be required between surface owners and lessees or operators prior to any occupancy of the surface for oil and gas development.

Landowners sign surface use and damage agreements with companies because these agreements are one of their only avenues to influence decisions that impact their property. Many current agreements do not adequately address all impacts and adequately compensate landowners for damages, however, because the “bond on” option puts landowners in a limited negotiating position since a company can essentially say “take it or leave it.”

Requiring surface use and damage agreements to be negotiated before lessees or operators can enter and occupy the surface would put surface owners in a position to ensure that impacts from oil and gas development are minimized and that all damages are

fairly compensated. Specifying a time line for negotiation and arbitration would ensure that the process does not unreasonably delay permitting and development.

WORC supports written surface use agreements that at a minimum:

1. provide for surface owner concurrence as to the placement of all roads, wells, drill pads, pipelines, power lines, compressor stations, and all other oil and gas operations improvements;
2. compensate the surface owner for damages to the site that are caused by the operator's proposed operations based on agreed upon fee schedules;
3. detail a comprehensive water management plan, including provisions for baseline documentation and monitoring of water sources and handling the discharge of any water (including waste water from coal bed methane development);
4. require the operator to replace the water supply of a surface owner who obtains all or part of her/his supply of water for domestic, agricultural, or other legitimate uses from an underground or surface source that has been affected by contamination, diminution or interruption from drilling operations;
5. identify areas to be reclaimed after the completion of drilling operations in full compliance with local, state and federal laws and regulations;
6. require the operator to obtain a reclamation release from the surface owner, and offers the surface owner the option of assuming ownership of any of the operator's improvements; and
7. include indemnification and binding effect clauses for the protection of the surface owner.

BETTER LANDOWNER NOTIFICATION

Finally, a word about landowner notification. Many surface owners are unaware that Federal oil and gas resources under their land have been leased, nor do they have any knowledge of or input into lease requirements, lease modifications and drilling permits. Proper and timely notification is a minimal requirement that would significantly improve the ability of landowners to participate in major decisions that will impact their private property and could reduce conflict.

As noted by the U.S. Institute for Environmental Conflict Resolution in its report on split estate issues in the Powder River Basin, "many of those interviewed, especially state and local government officials, acknowledged that additional notice, public outreach and education to landowners would serve a valuable purpose and could reduce conflict." (pg. 53-54)

Accordingly, WORC recommends that the BLM notify surface owners in writing:

- (a) at least 45 days in advance of lease sales and, once leases are issued, about who owns the minerals under their property,
- (b) about any decisions regarding the lease (such as modifying or waiving stipulations, approving rights of way, etc.), and
- (c) on the same days that an Application Permit to Drill (APD) is submitted to, and issued by, the BLM.

CONCLUSION

In closing, WORC and its member groups support responsible energy development. Responsible development isn't rocket science: at its heart is respect for the private property rights of surface owners, protection of the West's precious air and water resources, compliance with existing laws, a belief that we must leave things better for our children and grandchildren, and a willingness to go the extra mile and enforce the laws we've got. It requires discipline, foresight and leadership on the part of the BLM and industry.

We support more efficient and perhaps even speedier permitting processes as long as surface owners and the environment don't get steam rolled in the process. We note that the BLM has formed so called "tiger teams" to get more drilling permits out the door. However, when it comes to surface owner protections, tougher bonding and reclamation requirements, improved inspection and enforcement activities, etc. the agency's efforts appear to be half-hearted at best. In the interest of fairness and balance, we suggest the BLM not only form "tiger teams" for streamlining permits, but also to ensure that oil and gas development is done right!

Thank you for your time and attention, and I am happy to take questions.