

The State of the Split Estate

A Landowner Perspective: Five Years After Passage of the Wyoming Split Estate Statute



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Resource Council

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WHO WE ARE:

Powder River Basin Resource Council is a citizen-based organization of individuals and affiliate groups dedicated to the stewardship of Wyoming's natural resources. Powder River was founded in 1973. Our mission includes preservation and enrichment of our agricultural heritage and rural lifestyle; conservation of Wyoming's unique land, minerals, water and clean air consistent with the responsible use of these resources to sustain the livelihood of present and future generations; and education and empowerment of Wyoming's citizens to raise a coherent voice in the decisions that will impact Wyoming residents' environment and lifestyle.

The services provided by Powder River include public education, community organizing and lobbying as permitted on behalf of its membership. Powder River is a non-profit, 501(c)(3) tax-exempt organization.

BACKGROUND FOR THIS REPORT:

Our landowner members were instrumental - in the late 1990's and through 2005 with the culmination of passage of the Wyoming Split Estate Statute - in giving a voice and a face to the injustices wrought by increasing oil and gas development in Wyoming and the inequities that occur with a politically and economically powerful oil and gas industry. The Wyoming Split Estate law was long overdue in terms of recognizing landowner rights and assuring adequate compensation for effects of oil and gas development on their land. As oil and gas development spreads across Wyoming it is imperative that we continue to examine whether this recent split estate law is adequate and where it still falls short. This report compiles information and real life experiences to illuminate that issue. We invite you to contact us with your own experiences and feedback.

CREDITS:

Special credit goes to our talented 2010 summer law clerk, Abby Kirkbride, who is the primary researcher and author of this publication. Additional thanks goes to the many landowners and attorneys who are living the split estate issue and who devoted their time and energy to sharing experiences and expertise so we could identify the shortcomings in the Wyoming Split Estate Statute. Additional thanks goes to our staff, Shannon Anderson and Jill Morrison and our 2010 Board Chair Bob LeResche for editing and to our office manager, Stephanie Avey, for formatting this publication and making it presentable.

Notes

The State of the Split Estate: A Landowner Perspective

INTRODUCTION

On February 24, 2005 Governor Dave Freudenthal signed the Wyoming Split Estate Act (“the Act”) into law. This legislation represented the efforts of a large group of Wyomingites to create greater equity in the relationship between surface owners and oil and gas operators on split estate lands—lands where one party owns the surface, and another party owns the subsurface mineral rights. Although the law has been called a “compromise bill,” it did codify several key landowner rights that previously were unrecognized in oil and gas development.

For example, the Act articulates Wyoming’s acceptance of the “accommodation doctrine,” in contrast to the historic stance that the mineral estate is dominant. The Act says that the oil and gas operator “. . . shall reasonably accommodate existing surface uses.” *Wyo. Stat.* § 30-5-402(a). The *Final Report of the Joint-Executive-Legislative Committee on Split Estates* stated, “That clarification of an accommodation doctrine between surface owners and owners of mineral rights in Wyoming can best be achieved through codification of an accommodation doctrine by the Wyoming Legislature.” The Act also compiled the damages that a surface owner may recover from an oil and gas operator: loss of production and income, loss of land value, and loss of value of improvements. *Wyo. Stat.* § 30-5-405(a)(i). In addition, surface owners may still collect damages under civil claims such as negligence or trespass. *Wyo. Stat.* § 30-5-407. All of this was accomplished while leaving intact the right of oil and gas operators “. . . to locate and enter the land for all purposes reasonable and necessary to conduct oil and gas operations to remove the oil or gas underlying the surface of the land.” *Wyo. Stat.* § 30-5-402(a).

The purpose of this report is not to discuss the split estate law in theory: This has already been done several times.¹ It is instead an effort to document how the law is actually impacting landowners, the individuals it was meant to empower. The findings are drawn from hours of interviews with a dozen surface owners who have been “bonded-on,” and with five of their attorneys. Bonding on is the process in which an oil or gas operator may pay a surety bond or guaranty to the Wyoming Oil and Gas Conservation Commission (WOGCC) in order to extract minerals without a surface use agreement (SUA) for the payment of damages to the landowner. These interviews represent the first attempt to systematically gather firsthand information from those who have utilized the provisions of the Act. Notably, the report includes findings based on interviews with five landowners who have protested their bond amount to the WOGCC,² of which there are only a handful statewide.

The bond-on process is considered necessary for mineral owners and leaseholders to exert their rights to extract minerals. It overrides unreasonable attempts by landowners to deny the operator access to its property. However, starting with the first landowner effort to appeal what he considered an unreasonably low bond in November 2005, problems with the Act have emerged that demonstrate it has not yet achieved its goal of providing fair compensation and bargaining power to surface owners faced with split estate mineral development. *Adami Interview.*

¹ See “The Arrogance of Dominance/The Reason for Split Estate Legislation,” by Tom C. Toner, A Presentation to the 2005 Wyoming State Bar Annual Meeting; “Surface Damages, Site-Remediation and Well Bonding in Wyoming-Results and Analysis of Recent Regulations,” by Dr. Christopher S. Kulander, 9 *Wyo. L. Rev.* 414 (2009) and “A Landowner Guide to the Wyoming Split Estate Statute,” by Powder River Basin Resource Council, October 2005. <http://www.powderriverbasin.org/assets/Uploads/files/cbm-publications/splitestate.pdf>

² See Split Estate Bond records available from the WOGCC, <http://wogcc.state.wy.us/SplitEstatesBonds21506.htm>.

Five problems with the Act emerged with compelling consistency during the interviews:	The Report suggests a solution to each of these problems:
The bond amount is too low.	The most pressing issue is to increase the bond amount.
The burden of proof at every stage of the bond-on process is weighted against the interest of the landowner.	Shifting the burden of proving good faith negotiations to the operator is the second most pressing issue.
The process the Act provides for landowners to defend their rights is to prohibitively expensive for most landowners to pursue.	A provision allowing for the recovery of litigation expenses would help address this problem—a similar provision already exists in Wyoming’s eminent domain law. Also key in addressing the problems of prohibitively expensive litigation is to broaden the definition of recoverable damages.
The notice provisions are not scheduled to adequately alert the landowner of impending developments.	A change to the notice provisions so that oil and gas operators cannot begin operations before a surface owner has been notified of the bond would create a more fair process.
The Wyoming Oil and Gas Conservation Commission (WOGCC) is not the appropriate body to hear these disputes, given its statutory mandate to “serve the oil and gas industry.”	Even though removing the process from the WOGCC’s oversight may be a priority for many landowners, there is not another state administrative body to deal with these cases. The creation of a “landowner advocate” role within the WOGCC might be a feasible compromise.

Report Format

The report follows the chronological process that a landowner would experience from the time that an oil and gas operator gives notice for entry to conduct nonsurface disturbing activities, through the bond-on process, to a civil suit where a landowner might try to collect damages. At the beginning of each section, the relevant statute or regulation is listed, and discussion of particular points follows. Some areas were identified as especially problematic by landowners, and therefore are discussed in more detail than others.

The bold-type, italicized paragraphs discuss potential solutions to the identified problems. All of the information is built on anecdotal evidence from individuals who have participated in the bond-on process, and data is compiled from the entire pool of respondents.

FINDINGS

IMMEDIATE CHALLENGES

Before the Act can be discussed in detail, it is important to recognize the largest threat to its protection of landowners: the assertion in District Court that the Act does not apply to surface estate above federal mineral lands. On July 21, 2010, attorney Matt Micheli of *Holland & Hart, LLP* filed an answer in a bond-on damages suit on behalf of Williams Production RMT Company and Lance Oil & Gas Company, Inc. In that answer, he argued that, “Plaintiff’s claims are preempted by the federal Stock Raising Homestead Act and related federal regulations.” *Maycock v. Williams*, Civil Action No. 31-2-19, District Court of Campbell County, Defendant’s Answer at 3, ¶ 2.

This is the first formal challenge to the Act’s legal application on lands where the minerals are owned by the federal government, and the surface is owned by a private citizen. If Williams’ claim succeeds, the Act will not apply on nearly 90 percent of split estate lands in Wyoming. Dustin Bleizeffer, “State Stands Behind Split Estate Law” *Casper Star Tribune*, July 20, 2005, http://trib.com/news/state-and-regional/article_fda269d7-ff40-50f9-97cf-c018f00cd13c.html. Without the Act, landowners would be left with meager federal options under the Stock Raising Homestead Act for collecting damages to their land from oil and gas operations, i.e. the value of lost grazing capacity and lost crops. Although Governor Freudenthal has said that the state will take the federal government to court if it tries to assert this position, *Id.*, it is yet to be determined if the state will now act on its promise. As of August 1, 2010 the state has not moved to intervene in the case, said attorney Tom Toner of *Yonkee & Toner, LLP* in Sheridan, the Plaintiff’s counsel in the case.

This is the type of state sovereignty challenge that could go before the Wyoming Supreme Court, and even the U.S. Supreme Court. If the challenge is upheld, then much of what Wyoming had hoped to accomplish with the Act will be lost. It is vitally important that the state join Maycock in fighting Williams’ claim.

INITIAL ENTRY ONTO SURFACE OWNER’S LAND BY OPERATOR & NEGOTIATIONS

Prior to initial entry upon the land for nonsurface disturbing activities, the oil and gas operator shall provide at least (5) days notice to the surface owner. *Wyo. Stat.* § 30-5-402(b). Before entering the land for oil and gas operations, the operator will give surface owners written notice of proposed oil and gas operations. From the notice, the surface owner should be able to evaluate the effect of the operations on current uses of the land. Notice must be delivered between one hundred eighty (180) and thirty (30) days before commencement of operations. *Wyo. Stat.* § 30-5-402(d-e).

Entry upon the land for oil and gas operations is conditioned on providing required notice, attempting good-faith negotiations, and securing one of the following: consent or waiver, a surface use agreement, waiver of rights, or a good and sufficient bond. *Wyo. Stat.* § 30-5-402(c)(i-iv).

Although this list of requirements that an operator must meet before entering the surface owner’s property is thorough, the burden of proving that the operator has failed to meet them falls heavily onto the landowner to litigate. For example, on Form 1A—the standardized bond-on form that the WOGCCC requires operators to fill out before a bond is granted—the operator simply marks a box claiming that “[t]he parties attempted good faith negotiations. . .to reach a surface agreement.” The operator is not required to provide any documentation that demonstrates how the negotiations were conducted in good faith, or if any were conducted at all.

Every landowner interviewed for this report, with the exception of one individual, claims that the bonding oil and gas operator failed to negotiate in “good faith.” Interviewees most commonly defined a lack of “good faith” as the operator failing to follow through on verbal promises. *E.g., Dan Ingalls Interview.* However, the WOGCC refuses to hear claims on this basis because of the language in *Wyo. Stat. § 30-5-404(c)* that says the Commission may only hear protests on the “type” or “amount” of the bond. That means in order to protest a bond based on the failure of an operator to negotiate in good faith, the surface owner must sue the operator in district court. The challenges of this requirement are twofold. First, the expense of litigating that claim is often prohibitive for the most commonly impacted landowners—ranchers making their livings from family-run agricultural operations. One rancher estimated his attorney fees just to protest a bond in front of the Commission would have been \$10,000, and the cost of litigating damages from the bond could have gone up to \$100,000. *Booth Interview.*

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Even if a landowner can support the cost of a lawsuit, or find an attorney to take his case on a contingency-fee basis, it is difficult to actually litigate the issue of whether or not “good faith” negotiations took place. “To get this [the ‘good faith’ issue] before a judge, the landowner basically has to prove someone has blatantly lied,” said attorney Tony Wendtland of Wendtland & Wendtland, *LLP* in Sheridan, who has represented a client through the bond-on process. This narrow definition of good faith prevents landowners from taking a gamble in suing an operator they consider to have acted unscrupulously. *E.g., Barney Interview.*

RECOMMENDATIONS

One way to address the evidentiary burden issue is to insert language in the statute to clarify that the oil and gas operator carries the burden to prove it has negotiated in good faith. Practically, the WOGCC could require operators to submit evidence of negotiations when applying for a bond with the Form 1A, such as documents exchanged between the parties, a schedule of meetings, or other information.

There are two ways to address the problem of the expense of suing the operator, which currently prevents landowners from seeking proper legal remedies. First, *Wyo. Stat. § 30-5-404(c)* could be amended to clarify that the law gives the Commission power to hear issues beyond the “amount” and “type” of the bond. That way a landowner would not have to sue in district court on good faith negotiation disputes. However, this change would not address the fact that the Commission is widely considered to be hostile to landowners (see discussion below at p. 9 ¶ 9).

Perhaps a better option would be to add a provision to *Wyo. Stat. § 30-5-405* stating that if an operator is sued in district court and cannot prove it has negotiated in good faith, the landowner can recover litigation expenses. This could be a key step in empowering landowners to seek their legal remedies, and might also address the current shortage of attorneys willing to accept these cases. Because a similar provision already exists in Wyoming’s eminent domain statute, *Wyo. Stat. § 1-26-509(g)*, it would make sense to add it as an amendment to the Split Estate Act.

AFTER OPERATOR AND SURFACE OWNER FAIL TO NEGOTIATE A SURFACE USE AGREEMENT

1. If the operator and surface owner are unable to come to an agreement on a surface use agreement or other form of consent, the operator submits a Form 1A to the WOGCC certifying that all of the

required steps in Wyo. Stat. § 30-5-402(c)(i-iv) (above at 4 ¶ 3) have been met, and submits a “good and sufficient bond” Wyo. Stat. § 30-5-403; Wyoming Oil & Gas Conservation Commission Rules & Regulations, Ch. 3, § 4(i) (2010).

The types of bonds accepted by the WOGCC include: a cashier’s check, certificate of deposit, or letter of credit. WOGCC R.R., Ch. 3, § 4(i).

The bond is for the use and benefit of the surface owner to secure payment of damages. Wyo. Stat. § 30-5-402(iv).

Three interviewees brought up concerns with the payment methods currently allowed to secure a bond. Although their reasons varied, each would prefer to see a cash bond as the only accepted type. One attorney has seen letter of credit-type bonds fail in other legal dealings; one landowner wonders if his bond will be collectable because the operator has declared bankruptcy; and another landowner believes that operators would not be as quick to use the bond-on process if, to do so, they had to procure a cash bond. *Interviews with Toner; Dan Ingalls; Adami.*

In the situation of an oil and gas operator going bankrupt, a cash bond held by the WOGCC might be the only compensation that a landowner would ever get for damages. This is especially true given that bonding-on seems to be a more viable option in cases where the companies operate few wells in Wyoming or have not planned development according to the time restrictions of their lease—in other words, operators that have not demonstrated dependability. *Ingalls Interview; Booth Interview.*

Although this situation may appear unlikely, one bonded-on family has nearly experienced it. Redwine Resources Inc. bonded on to Dan and Alaine Ingalls’ ranch located south of Kaycee in December 2007. The parties later negotiated a surface use agreement, but the family may not be able to collect according to that contract. Redwine declared bankruptcy in June 2010, with an oil well, evaporation pit, and associated infrastructure still in place on the Ingalls’ property.

RECOMMENDATIONS

Requiring a cash bond would be a function of the WOGCC changing the requirements in its Rules and Regulations. This change would incentivize good faith negotiations, in addition to offering more protection for landowners in the case that an operator goes bankrupt. The WOGCC also needs to make sure that their current system does not allow other creditors to claim a bankrupt company’s bond in front of the landowner.

II. Once the WOGCC receives a correctly completed Form 1A and verifies a surety bond of not less than \$2,000 per well site has been posted, the operator receives notice by phone that the bond has been approved, and may immediately enter upon the surface owner’s land and begin oil and gas operations. Wyo. Stat. § 30-5-404(b, d), WOGCC R.R., Ch. 3, § 4(i).

At the request of the operator, the Commission may establish a blanket bond or other guaranty after attempting to consult the surface owner. Wyo. Stat. § 30-5-404(b); WOGCC R.R., Ch. 3, § 4(i). Factors in determining the amount of bond to be posted, and whether the bond should be a single well site bond or a blanket bond, include: the proposed plan of work and operations, and “any other factors which would materially impact the bond amount needed to secure payment of damages.” WOGCC R.R., Ch. 3, § 4(k).

The bond or other guaranty is not intended to establish any amount for reasonable and foreseeable damages. Wyo. Stat. § 30-5-404(b).

The largest single concern with the Act as it impacts landowners is that \$2,000 is unrealistically low compensation for damages from oil and gas operations. Supposedly this amount is sufficient because the

Act infers that \$2,000 is a minimum amount for compensation, but does not presume to cover all potential damages. *Wyo. Stat.* § 30-5-404(b) (“the bond . . . is not intended to establish any amount of reasonable or foreseeable damages). However, the bond is inarguably meant to serve a meaningful function in compensating landowners for damages, and it should be an amount that corresponds to the reality of the damages landowners incur from oil and gas operations.

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With the exception of two landowners who had been bonded on only for seismic operations, every landowner and attorney interviewed for this report said unequivocally that the bond amount is not commensurate with surface owner damages. For example, in the bond-on protest by rancher Steve Adami, he estimated an increase of expenses of \$338,596 as a result of oil and gas operations on his land. The WOGCC awarded him a bond of \$12,000. *See* WOGCC Docket No. 745-2005. In another case, rancher Jim Dager protested his bond amount with the services of a hired professional appraiser. The estimated damages to Dager were \$403,000. The WOGCC increased the bond amount to \$13,000. *See* WOGCC Docket No. 342-2006. If these landowners would not have challenged the bond amount, it would have been left at a mere \$2,000 per well.

A sampling of responses demonstrates landowners’ depth of feeling on this issue:

- “\$50,000 might cover the disruption [from oil and gas operations] and our legal fees, but the current amount is a joke. It might as well be a penny,” said rancher Alaine Ingalls.
- “I’m not saying that \$2,000 per well is nothing, but I could have come up with the \$20,000 it took to bond onto my land, let alone a gas company,” said rancher and coal miner Randy Barney.
- “I can’t even put a figure on what the value of my land would be with a poison gas well [from H₂S]. I think it would be zero,” said rancher Ron Brown.

The low bond amount has two important practical implications. First, it is so low that bonding-on can be more economically beneficial to operators than engaging in good faith negotiations with a landowner. Out of 11 interview respondents who had dealt specifically with this issue, 10 of them said that operators use the threat of bonding-on to weigh negotiations in their favor. As attorney Dennis Kirven of *Kirven & Kirven, PC* in Buffalo put it, “The best choice for a landowner is, “Take this deal now. If you go to the state [to appeal the bond], you aren’t going to get anything.” Second, the bond is low enough to deter landowners from actually trying to claim it, because in order to do so they would have to sue in district court. While it is likely that an award for damages from a court would be higher than the \$2,000, such a low minimum guaranty is poor incentive for a landowner because an award might not even cover legal costs. All nine respondents who had considered suing for damages said the expense of the litigation combined with the risk of not collecting a substantial damage award prevented them from pursuing all of their legal remedies. Only one bonded on landowner, William Maycock, has ever litigated for damages in court. The case is ongoing. (*See* discussion at p. 7).

RECOMMENDATIONS

The simple solution to this politically complex problem is to raise the bond amount. A higher bond would give operators more reason to negotiate fairly with landowners. A bond that is commensurate with landowner damages would also create more incentive for landowners to sue for the bonds in court, an option that is currently loaded with risk. Respondent landowners and

attorneys suggested bonds ranging from \$5,000 to \$100,000 per well site.

Another issue regarding bond amounts that needs to be addressed is education of landowners regarding what the bond is actually for. The “bond-on” bond exists to cover damages. Many landowners interviewed for this report said they were concerned that \$2,000 would not cover reclamation costs. However, there is a separate bond that the WOGCC holds for reclamation. There is a general misunderstanding among landowners on this point, and perhaps a solution is for the WOGCC to include more relevant information about the role of the bond in its correspondence with landowners.

Another area of concern is the ability of the WOGCC to establish blanket bonds. *Wyo. Stat. § 30-5-404(b); WOGCC R.R., Ch. 3, § 4(i)*. First, it appears that the law may not be consistently followed, because the Commission is supposed to “attempt” to consult with the landowner before approving a blanket bond. However, the two respondents for this report that were bonded-on with a blanket bond had never been contacted by the Commission. Instead, their first contact was receiving a letter informing them of the blanket bond. *Breeden Interview; Warren Interview.*

Second, a blanket bond leaves both the owner and the state with very limited options in terms of recovering damages from the bond itself. Thus far blanket bonds have only been used by the WOGCC with seismic operations, but there is no reason they could not be applied to wells. Analogous to this issue are blanket reclamation bonds. As stated by one researcher, “Wyoming’s regulatory position would be much stronger if a requirement existed mandating the collection of money via a bond to plug a well if the producer proves unable to do so. Each well could have money specifically earmarked for that particular well, rather than a pool of money provided by a blanket bond. In other words, Wyoming should act as if every well will be orphaned and the state will have to pay to plug it.” “Surface Damages, Site-Remediation and Well Bonding in Wyoming—Results and Analysis of Recent Regulations,” by Dr. Christopher S. Kulander, 9 *Wyo. L. Rev.* 414 at 443 (2009).

Wyoming should act as if every well will be orphaned and the state will have to pay to plug it.

RECOMMENDATIONS

A solution to this problem would involve removing the language that allows for blanket bonds from the Act and from the WOGCC Rules & Regulations. Another option would be to amend the statute to restrict blanket bonding to seismic operations, as is the current practice.

A LANDOWNER’S OPPORTUNITY TO RESPOND

- I. Within seven days following receipt of a per well site surety bond or other guaranty, the Commission shall notify the surface owner of the bond. This is done through certified mail. *Wyo. Stat. § 30-5-404(c); WOGCC R.R., Ch. 3, § 4(j)*.

To understand the problem with this notification provision, compare the wording of the statute and the WOGCC Rules & Regulations with the practice of the Commission. According to the former, the surface owner only need receive notice of the bond within seven days of its receipt by the Commission; according to the latter, operators are given immediate permission by phone to begin operations after a bond is posted and the 1A Form approved. The result is that, in some cases, the operator can begin surface-disturbing activities before the landowner knows that they had been legally bonded-on. This was

the case with four landowners interviewed for this report. As might be expected, this created accusations of trespassing, caused a high level of anxiety for the landowners, and incited animosity toward the operators. In three of the cases, operators moved their equipment in overnight to begin drilling immediately in the morning. *Adami Interview; Barney Interview; Packard Interview.*

RECOMMENDATIONS

The solution to this problem is to change either the wording of Wyo. Stat. § 30-5-404(c) or WOGCC R.R., Ch. 3, § 4(j) so that the surface owner must have received notice of the bond by certified mail before operations can begin.

II. The surface owner has 30 days after receipt of the Commission's notice to object in writing to the "amount or type" of the surety bond or guaranty. If there is no objection in that time period, then the Commission shall approve the surety bond or guaranty. Wyo. Stat. § 30-5-404(c); WOGCC R.R., Ch. 3, § 4(j)(iii).

If the surface owner does object in writing, the surface owner and operator are put on the docket for the next regularly scheduled WOGCC meeting. WOGCC R.R., Ch. 3, § 4(l).

Each party will have an opportunity to present evident in support or in opposition to the bond amount, WOGCC R.R., Ch. 3, § 4(l), before the Commission renders its "final decision as to the acceptability of the amount and type of the surety bond or guaranty." Wyo. Stat. § 30-5-404(c).

The Commission will notify the parties of its decision in writing. WOGCC R.R., Ch. 3, § 4(l)(iii).

Any aggrieved party may appeal the final decision of the Commission to district court. Wyo. Stat. § 30-5-404(c).

All 11 respondents who either personally protested their bond before the Commission, or who received legal counsel in considering a protest, believe that the WOGCC is not a fair body to render judgment on bond protests. This concern stems from the statute establishing the Commission, which states that all Commission members must, ". . . be qualified to *serve the oil and gas industry* of this state." *Wyo. Stat. § 30-5-103(a)* (emphasis added). The mandate to serve the oil and gas industry, and not the citizens of Wyoming, is something of which landowners are keenly aware. The resounding sentiment among landowners is that members of the Commission "play golf and go to the club [with members of industry]," and that "[w]hen it comes to the Commission, the oil companies rule and the landowner be damned."

Brown Interview; Dan Ingalls Interview.

In fairness, these are statements from individuals with extreme experiences relating to the WOGCC. However, a few background facts add perspective to the landowners' positions. First, every interviewed landowner, with one exception, supports oil and gas development. One landowner makes his living as a coal miner, several have other successful oil and gas developments on their property, and others have family members who make their living in the oil and gas industry. These are not statements of impassioned environmentalists—they are the frustrations of landowners who have been badly dealt with by strong-handed oil and gas companies, and who have not found a legal system prepared to address their problems.

Second, it is not only the landowners who are averse to taking their arguments before the Commission. The legal community of Wyoming seems to have made up its mind that their clients will not receive a fair hearing in front of the Commission, and so have now begun to advise them to forgo that option. "We were concerned that probably the Commission would not be very hard on the operator. We were advised by attorneys in Cheyenne that the operator would just get to bond-on," said rancher Mark Booth, who

settled a surface use agreement prior to his hearing before the Commission. This sentiment is echoed by Tom Toner, who said, "I absolutely stand by my advice [that landowners should not appeal their bonds to the WOGCC.] The Commission isn't listening to landowners."

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Much of what drives this sentiment is the extremely heavy evidentiary burden that landowners carry before the Commission to increase bond amounts. For example, damages on agricultural land are strictly figured on the basis of grazing values. Thus, the most a bond has ever been increased is \$11,500, and it is difficult to surmise what would sway the Commission to raise this ceiling. The fact that citizens do not have the same ability to represent themselves before the Commission as an attorney is further alienating, as it creates an immediate access barrier for individuals who cannot afford to hire an attorney. *Booth Interview; Brown Interview.*

Citizens of Wyoming who are supposed to get a fair hearing on their concerns before the Commission are increasingly avoiding this option at the encouragement of the attorneys advising them. While the mandate of the Commission to "serve" the oil and gas industry remains, it is difficult to envision a way that it can also fairly represent landowners.

RECOMMENDATIONS

Several landowners suggested creating a neutral body, like the Wyoming Environmental Quality Council, to handle bond-on protests. Unfortunately, creating a new administrative body would require a significant fiscal investment and continued support. Short of that proposal, rancher Dan Ingalls suggested creating the position of a "landowner advocate" within the Commission. It could perhaps be similar to the Office of Consumer Advocate, which participates on the behalf of ratepayers in Public Service Commission cases. This person would act as a liaison and moderator tasked with taking up the position of the landowner in bond-on proceedings.

RECOVERING DAMAGES IN THE WAKE OF A BOND-ON

- I.** If the oil and gas operator has commenced operations in absence of an agreement for compensation for damages, a surface owner shall give written notice to the operator and the Commission of damages sustained by the surface owner within two (2) years after the damage has been discovered, or should have been discovered through due diligence, by the surface owner. Wyo. Stat. § 30-5-406(a)

The wording in this section of the Act has created a curious difference of opinion about the applicable statute of limitations. The WOGCC believes that the landowner has two years past the time that the operator requests the release of its bond to bring a suit for any damages, as long as the landowner has not released the operator from liability in writing. This view seems to give the operator a strong mootness argument: It could claim that with the oil and gas infrastructure reclaimed (an operator can only ask for release of its bond once reclamation is complete), the landowner damages are moot.

Toner represents the second view. He believes the statute leaves open the possibility that a single landowner could have the burden to sue the same operator several times to recover damages. The plain language of the statute seems to support this position where it says, "a surface owner shall give written notice to the operator . . . within two (2) years after the damage is discovered" *Wyo. Stat. §30-5-406(a)*. In theory, every two years that oil and gas operations are ongoing there could be new damages to the landowner, and a new lawsuit would have to be filed at each time increment.

RECOMMENDATIONS

For the time being, it is important for landowners to adhere to Toner's view of the statute of limitations. An operator would have a very strong defense based on the language of the statute if a landowner waited to sue for damages until the oil and gas infrastructure on their property has been reclaimed.

The solution is to have the statute of limitations extended. That would lessen the burden on the landowner by reducing the chance that multiple lawsuits would be necessary for a single bond-on action. Legislative clarity is needed for landowners to know when they need to act.

- II.** A surface owner is entitled to compensation equal to damages sustained by the surface owner for loss of production and income, loss of land value, and loss of value of improvements caused by oil and gas operations. Payment shall only cover land directly affected by oil and gas operations, and are meant to compensate the surface owner for damage and disruption. Wyo. Stat. § 30-5-405(a)(i).

Although this provision represents, in some aspects, an improvement over the federal formulation in the Stock Raising Homestead Act, landowners who have protested their bonds to the Commission still find the damage assessments to be extremely low compared to estimates by private appraisers, and compared to the high personal costs of pursuing valid legal remedies. Since the passage of the Act, every case where a landowner has appealed the bond to the Commission has been on agricultural land. In these cases, the Commission estimated the difference in land value based on the presence of oil and gas operations as the number of acres lost for grazing purposes. In addition, the Commission has narrowly interpreted the phrase "payment shall only cover land directly affected by oil and gas operations," to mean the literal acreage on which well infrastructure sits. This formula fails to account for a myriad of costs that the landowner experiences: collision deaths of livestock, disrupted grazing patterns, trash, traffic, and many others.

RECOMMENDATIONS

There are two possible solutions to this concern. The first is to dictate that land is no longer considered agricultural for valuation purposes once oil and gas development is initiated. Instead, landowners would be compensated according to commercial land estimations. This would require either new caselaw precedent or a statutory amendment. There is strong landowner support for this proposal. Booth Interview.

The second option is to expand the definition of what is encompassed by "loss of production and income," or "land directly affected by oil and gas operations." For example, during his bond protest Steve Adami was not allowed to submit evidence of how accommodating oil and gas operations had increased his workload on the ranch. Other landowners have had to implement expensive and burdensome ranching practices, such as changing grazing rotations and moving branding operations. Kirven Interview. Currently there is no allowance for compensation for increased costs, and instead landowners collect damages solely on the basis of land worth set at \$250/acre for grazing. This is not a true estimation of either the value of the land to a rancher, nor of the intangible and real costs of revising agricultural practices to accommodate oil and gas operations. A way to address this problem is to add a list of what are collectable damages in Wyo. Stat. § 30-5-405(a)(i). Chief among these should be the concept of "increased costs."

- III.** The remedies provided by this act do not preclude any person from seeking other remedies allowed by law (e.g. negligence or trespass), nor does this act diminish rights previously granted by law or contract. Wyo. Stat. § 30-5-407. Actions under this provision are also under a two-year statute

of limitations. Wyo. Stat. § 30-5-409.

10.3. The two-year limitation will be “tolled” (extended) for a period of four months if a written demand for compensation for damages is timely submitted by the surface owner. Wyo. Stat. § 30-5-409.

Within 60 days after receiving notice of damages, the operator shall make a written offer of settlement to the surface owner. The surface owner may accept or reject this offer. Wyo. Stat. § 30-5-406(b)(a).

If at the end of 60 days after giving notice to the Commission and operator of damages, the operator has not replied to the notice, or given an unacceptable written rejection or counter offer, the surface owner may bring an action for compensation for damages in the district court in the county where the damage was sustained. Wyo. Stat. § 30-5-406(c).

Because so few landowners have pursued reclaiming damages in district court, there is not a great deal of information available on these sections of the Act.

RECLAMATION AND SUBSEQUENT RELEASE OF THE BOND

Site reclamation must be initiated within one (1) year of permanent abandonment of the well. Reclamation must be completed in accordance with the landowner’s reasonable requests, and/or resemble the original vegetation and contour of adjoining lands. WOGCC R.R., Ch. 3, § 7(a).

Release of a bond is conditioned on compensation for damages occurring, all parties agreeing to the release, all judicial processes for damages being complete, or the operator certifying in a sworn statement that the surface owner has failed to bring a proper action for damages. Wyo. Stat. § 30-5-404(e)(i-iv). WOGCC R.R., Ch. 3, § 7(d)(i-v).

Prior to the release of the bond, the Commission shall make reasonable effort to contact the surface owner and confirm compensation has been received, an agreement entered into, or that the surface owner has failed to properly initiate proceedings for damages. The Commission may, in its sole discretion, release any bond if the oil and gas operator shows just cause for the release. Wyo. Stat. § 30-5-404(f).

The release process functions as follows: After reclaiming to the operator’s standards, an operator requests release of its bond from the WOGCC. The Commission sends an inspector to the site, where the well is examined per standards outlined in *WOGCC R.R.*, Ch. 3, § 7(a). Neither the operator nor the landowner is present at this inspection. If the site is sufficiently reclaimed, a form called the “Release of Oil and Gas Operation,” is sent to the surface owner via certified letter. If the surface owner agrees that no damages are owed by the operator, they may sign the form and send it back. In that case, the bond is immediately released. If the surface owner believes compensation is still owed, they do not sign the form, and, according to the WOGCC, the two-year statute of limitations begins running 30 days after the surface owner receives the letter. During this time, the landowner must litigate for damages he believes he has incurred.

Again, because the Act is relatively new, few landowners have experienced the latter stages of the bond on process. No doubt more information will be available about how bond release and reclamation are working for landowners in the coming years.

CONCLUSION

The Split Estate Act marked a transition from the dominance of the mineral estate to an understanding that surface owners and mineral owners have a mutual obligation in order for each party to realize the rights accorded to them. Unfortunately, a myriad of obstacles has thwarted the first wave of landowners from effectively protecting their rights.

Once again, the most significant concerns with the Wyoming Split Estate Act from a landowner perspective are that:

The bond amount is too low: ***The possible remedy of increasing the bond amount is the highest priority amongst landowners.***

The burden of proof at every stage of the bond-on process is weighted against the interests of the landowner: ***The second highest priority is to shift the burden of proving good faith negotiations to the operator.***

The remedies provided in the Act are too prohibitively expensive for most landowners to afford: ***A provision allowing for the recovery of litigation expenses would help address this problem—a similar provision already exists in Wyoming's eminent domain law. Also key in addressing the problem of prohibitively expensive litigation is to broaden the definition of recoverable damages.***

Notice provisions are not coordinated to adequately alert the landowner of impending developments: ***A change to the notice provisions so that oil and gas operators cannot begin operations before a surface owner has been notified of the bond would create a more fair process.***

The WOGCC is not the appropriate body to hear these disputes, given its statutory mandate to “serve the oil and gas industry”: ***Removing the process from the WOGCC's oversight is a priority for many landowners. If this does not happen, the legislature should create a “landowner advocate” role within the WOGCC.***

It is Powder River Basin Resource Council's hope that this report provides data and proposals that will inform knowledgeable, precise reforms. The current problems with the Act are not caused by people—people on every side of this issue are trying to do what is best for Wyoming and best for their communities. Rather, these are natural gaps in a new law. Five years after the Act's passage there is finally enough information to understand what those gaps are, and implementing these refinements is the next step in realizing the potential of the Split Estate Act.

APPENDIX A

Process Followed Under the Wyoming Split Estate Act

1. Prior to initial entry upon the land for nonsurface disturbing activities, the oil and gas operator shall provide at least (5) days notice to the surface owner. *Wyo. Stat.* §30-5-402(b).
2. Before entering the land for oil and gas operations, the operator will give surface owners written notice of proposed oil and gas operations. From the notice, the surface owner should be able to evaluate the effect of the operations on current uses of the land. Notice must be delivered between one hundred eighty (180) and thirty (30) days before commencement of operations. *Wyo. Stat.* § 30-5-402(d-e).
3. Entry upon the land for oil and gas operations is conditioned on providing required notice, attempting good-faith negotiations, and securing one of the following: consent or waiver, a surface use agreement, waiver of rights, or a good and sufficient bond. *Wyo. Stat.* § 30-5-402(c)(i-iv).
4. If the operator and surface owner are unable to come to an agreement on a surface use agreement or other form of consent, the operator submits a Form 1A to the WOGCC certifying that all of the required steps in *Wyo. Stat.* § 30-5-402(c)(i-iv) (above at 4 ¶ 3) have been met, and submits a “good and sufficient bond.” *Wyo. Stat.* § 30-5-403; Wyoming Oil & Gas Conservation Commission Rules & Regulations, Ch. 3, § 4(i) (2010).
 - 4.1 The types of bonds accepted by the WOGCC include: a cashier’s check, certificate of deposit, or letter of credit. WOGCC R.R., Ch. 3, § 4(i).
 - 4.2 The bond is for the use and benefit of the surface owner to secure payment of damages. *Wyo. Stat.* § 30-5-402(iv).
5. Once the WOGCC receives a correctly completed Form 1A and verifies a surety bond of not less than \$2,000 per well site has been posted, the operator receives notice by phone that the bond has been approved, and may immediately enter upon the surface owner’s land and begin oil and gas operations. *Wyo. Stat.* § 30-5-404(b, d), WOGCC R.R., Ch. 3, § 4(i).
 - 5.1 At the request of the operator, the Commission may establish a blanket bond or other guaranty after attempting to consult the surface owner. *Wyo. Stat.* § 30-5-404(b); WOGCC R.R., Ch. 3, § 4(i).
 - 5.2 Factors in determining the amount of bond to be posted, and whether the bond should be a single well site bond or a blanket bond, include: the proposed plan of work and operations, and “any other factors which would materially impact the bond amount needed to secure payment of damages.” WOGCC R.R., Ch. 3, § 4(k).
 - 5.3 The bond or other guaranty is not intended to establish any amount for reasonable and foreseeable damages. *Wyo. Stat.* § 30-5-404(b).
6. Within seven days following receipt of a per well site surety bond or other guaranty, the Commission shall notify the surface owner of the bond. This is done through certified mail. *Wyo. Stat.* § 30-5-404(c); WOGCC R.R., Ch. 3, § 4(j).
7. The surface owner has 30 days after receipt of the Commission’s notice to object in writing to the

“amount or type” of the surety bond or guaranty. If there is no objection in that time period, then the Commission shall approve the surety bond or guaranty. Wyo. Stat. § 30-5-404(c); WOGCC R.R., Ch. 3, § 4(j)(iii).

8. If the surface owner does object in writing, the surface owner and operator are put on the docket for the next regularly scheduled WOGCC meeting. WOGCC R.R., Ch. 3, § 4(l).

9. Each party will have an opportunity to present evident in support or in opposition to the bond amount, WOGCC R.R., Ch. 3, § 4(l), before the Commission renders its “final decision as to the acceptability of the amount and type of the surety bond or guaranty.” Wyo. Stat. § 30-5-404(c).

9.1 The Commission will notify the parties of its decision in writing. WOGCC R.R., Ch. 3, § 4(l)(iii). Any aggrieved party may appeal the final decision of the Commission to district court. Wyo. Stat. § 30-5-404(c).

10. A surface owner is entitled to compensation equal to damages sustained by the surface owner for loss of production and income, loss of land value, and loss of value of improvements caused by oil and gas operations. Payment shall only cover land directly affected by oil and gas operations, and are meant to compensate the surface owner for damage and disruption. Wyo. Stat. § 30-5-405(a)(i).

11. Within 60 days after receiving notice of damages, the operator shall make a written offer of settlement to the surface owner. The surface owner may accept or reject this offer. Wyo. Stat. § 30-5-406(b)(a).

12. If at the end of 60 days after giving notice to the Commission and operator of damages, the “operator has not replied to the notice, or given an unacceptable written rejection or counter offer, the surface owner may bring an action for compensation for damages in the district court in the county where the damage was sustained. Wyo. Stat. § 30-5-406(c).

13. Site reclamation must be initiated within one (1) year of permanent abandonment of the well. Reclamation must be completed in accordance with the landowner’s reasonable requests, and/or resemble the original vegetation and contour of adjoining lands. WOGCC R.R., Ch. 3, § 7(a).

14. Release of a bond is conditioned on compensation for damages occurring, all parties agreeing to the release, all judicial processes for damages being complete, or the operator certifying in a sworn statement that the surface owner has failed to bring a proper action for damages. Wyo. Stat. § 30-5-404(e)(i-iv). WOGCC R.R., Ch. 3, § 7(d)(i-v).

14.1. Prior to the release of the bond, the Commission shall make reasonable effort to contact the surface owner and confirm compensation has been received, an agreement entered into, or that the surface owner has failed to properly initiate proceedings for damages. The Commission may, in its sole discretion, release any bond if the oil and gas operator shows just cause for the release. Wyo. Stat. § 30-5-404(f).