



A Landowner Guide to the Wyoming Split Estate Statute

*A Publication of the Powder River Basin Resource Council
October, 2005*



“This is more than a monetary issue. It’s a moral issue. It’s about responsible stewardship of the land. And it’s about treating people and their land with respect.”

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Who We Are

Powder River Basin Resource Council is a grassroots organization of individuals and affiliate groups dedicated to good stewardship of Wyoming's natural resources. Powder River was formed in 1973 and stands for the preservation and enrichment of our agricultural heritage and rural lifestyle; the conservation of Wyoming's unique land, minerals, water and clean air consistent with responsible use of these resources to sustain the livelihood of present and future generations; and the 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.

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Background of the Law

The Wyoming split estate act is a tribute to dozens if not hundreds of individuals—both in the state legislature and in communities throughout the state—who worked countless hours for three years to produce a law that provides landowners with some rights over oil and gas development occurring on their land.

Split estate legislation was drafted both in 2003 and 2004. The first bill died in committee and the second, in 2004, failed introduction in spite of support from a Joint Interim Judiciary Committee that studied the bill after the first defeat.

In 2004, the legislature allocated \$45,000 to support an eleven-member “joint executive-legislative committee” to re-vamp the bill and draft language for the 2005 General Session. Committee members represented a balanced cross section of stakeholders, including three members of each legislative body, oil and gas industry representatives and Wyoming ranchers and landowners appointed by the governor because of their direct experience of split estate mineral development. Meanwhile, landowners launched a citizen initiative to place a split estate law on the ballot.

The committee held a series of public meetings to hear testimony from private citizens, the oil and gas industry, the agricultural community, public agencies, the conservation community, and a broad range of landowners affected by split estate development (including private mineral owners).

Before the 2005 General Session, the executive committee turned over its recommendations to the Joint Judiciary Committee, which approved the draft legislation. The bill passed both the House and Senate overwhelmingly.

The bill was signed into law by Governor Freudenthal on

Thursday, February 24 in the Capital Rotunda, with representatives from all sides of the issue present. As the Governor stated, this was a compromise bill and not as strong as many landowners would have liked, but it did have the support of the Wyoming Stockgrowers, the Wyoming Petroleum Association, the Landowners Association of Wyoming, and the Powder River Basin Resource Council.

Powder River Basin Resource Council is indebted to its hard-working members and friends who put their lives on hold to work for passage of this law. They donated not only their time, but their stories as testaments to the injustices of an over-dominant mineral estate—and the resulting lack of rights for landowners—and their ranches as often painful “laboratories” displaying the impacts of irresponsible development.

A split estate statute for oil and gas development in Wyoming is long overdue. A split estate law has been in place for decades to cover solid mineral extractions. Wyoming Statute 35-11-416 provides that an application for a permit to mine solid minerals in a split estate cannot be issued without a bond to secure payment for damages to the surface, to crops and forage, and to the tangible improvements of the surface owner. It also provides that financial loss resulting from disruption of the surface owner’s operation is part of the damage, and that as damage is determined it must be paid.

The solid minerals split estate law has led to very little litigation, and it certainly hasn’t hindered the coal mining industry from prospering in Wyoming. In fact, it might be argued that having a law in place that all operators must follow equalizes the playing field and allows the industry to proceed with fewer roadblocks, legal or otherwise. Coal mine operators are required to bear the costs of their operations on the surface estate, and so should the oil and gas



industry.

The language and concepts contained in the Wyoming split estate act originated in the “accommodation doctrine,” which acknowledges the need for mutual “respect” of competing uses of a piece of property. In practice, as the Wyoming Supreme Court has observed, the mineral estate and the surface estate are “mutually dominant and mutually servient” and must accommodate one another.

Surface uses of land may be—and often are—at least as valuable as the development of minerals below the surface. In fact, agricultural, recreational and residential uses may be more valuable because they can yield benefits indefinitely.

The dominance of the mineral estate over the past 15 years has resulted in severe and significant environmental problems throughout Wyoming, as well as lengthy, unresolved conflicts between landowners and the oil and gas industry. The split estate statute is designed to resolve those conflicts by restoring a balance of power between the minerals and surface estate. Only with this balance in place can each truly learn to accommodate the other.

Applications of the Law

The split estate statute applies to the following situations on split estate lands:

- Seismic and other forms of oil and gas exploration;
- Coalbed methane development and its associated infrastructure including roads, power lines, pipelines, compressor stations, well pads, drilling and water disposal pits, and other facilities used in oil and gas operations;
- Deep gas tight sands operations including associated infrastructure (see above);
- Oil development wells including secondary and tertiary recovery operations; and
- Oil shale operations including associated infrastructure.

BLM Director Kathleen Clarke has argued that Wyoming's split estate law does not apply to federal minerals, but her position has been strongly disputed by Wyoming's governor and attorney general.

“The Wyoming split estate statute is fair and reasonable, which means it doesn't place some undue burden on the federal government,” Governor Freudenthal said in a statement released by his office.

“The state is well within its rights to apply the law to split estates—even those with federal minerals,” Wyoming Attorney General Pat Crank has stated. “If it comes to a lawsuit, that's where we'll stand.”

ORIGINAL SENATE ENGROSSED
FILE NO. 0060
ENROLLED ACT NO. 45, SENATE
FIFTY-EIGHTH LEGISLATURE OF THE STATE OF
WYOMING
2005 GENERAL SESSION

AN ACT relating to oil and gas operations; establishing requirements prior to commencing oil and gas operations on split estates; providing an exception; requiring notice, good faith negotiation and surface use agreements or financial assurances, as specified; authorizing compensation to surface owners for damages due to oil and gas operations; providing definitions; providing a statute of limitations; specifying applicability of the act; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 30-5-401 through 30-5-410 are created to read:

ARTICLE 4

ENTRY TO CONDUCT OIL AND GAS OPERATIONS

30-5-401. Definitions.

(a) As used in this act:

(i) "Commission" means the Wyoming oil and gas conservation commission and its authorized employees;

(ii) "Compensate" and "compensation" mean monetary payment or other consideration that may include, but is not limited to, the furnishing of materials, labor or equipment;

(ii) "Oil" and "gas" mean as defined in W.S. 30-5-101 (a)(vii);

(iv) "Oil and gas operations" means the surface disturbing activities associated with drilling, producing and

transporting oil and gas, including the full range of development activity from exploration through production and reclamation of the disturbed surface;

(v) "Oil and gas operator" means a person engaged in oil and gas operations, his designated agents, contractors and representatives;

(vi) "Reclamation" means the restoring of the surface directly affected by oil and gas operations, as closely as reasonably practicable, to the condition that existed prior to oil and gas operations, or as otherwise agreed to in writing by the oil and gas operator and the surface owner;

(vii) "Surety bond or other guaranty" means as defined in W.S. 30-5-101(a)(x);

(viii) "Surface owner" means any person holding any recorded interest in the legal or equitable title, or both, to the land surface on which oil and gas operations occur, as filed of record with the county clerk of the county in which the land is located. "Surface owner" does not include any person or governmental entity that owns all of the land surface and all of the underlying oil and gas estate, or any person or governmental entity that owns only an easement, right-of-way, license, mortgage, lien, mineral interest or nonpossessory interest in the land surface;

(ix) "This act" means W.S. 30-5-401 through 30-5-410.

30-5-402. Entry upon land for oil and gas operations and nonsurface disturbing activities; notice; process; surety bond or other guaranty; negotiations.

(a) Any oil and gas operator having the right to any oil or gas underlying the surface of land may 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 that land. The oil and gas operator shall have the right at all times to enter upon the land for nonsurface

disturbing activities reasonable and necessary to determine the feasibility and location of oil and gas operations to extract the oil and gas thereunder. The oil and gas operator shall first comply with the provisions of this act and shall reasonably accommodate existing surface uses. The oil and gas operator may reenter and occupy so much of the surface of the land thereof as may be required for all purposes reasonable and necessary to conduct oil and gas operations on the land.

(b) An oil and gas operator may enter to conduct nonsurface disturbing activities, including inspections, staking, surveys, measurements and general evaluation of proposed routes and sites for oil and gas operations. Prior to initial entry upon the land for nonsurface disturbing activities, the oil and gas operator shall provide at least five (5) days notice to the surface owner. Prior to any subsequent entry upon the land for nonsurface disturbing activities not previously discussed, the oil and gas operator shall provide notice to the surface owner.

(c) Entry upon the land for oil and gas operations shall be conditioned on the oil and gas operator providing the required notice, attempting good faith negotiations and:

(i) Securing the written consent or waiver of the surface owner for entry onto the land for oil and gas operations;

(ii) Obtaining an executed surface use agreement providing for compensation to the surface owner for damages to the land and improvements as provided in W.S. 30-5-405(a);

(iii) Securing a waiver as provided in W.S. 30-5-408;
or

(iv) In lieu of complying with paragraph (i) or (ii) of this subsection, executing a good and sufficient surety bond or other guaranty to the commission for the use and benefit of the surface owner to secure payment of damages. The amount of the initial bond or other guaranty shall be

determined pursuant to W.S. 30-5-404(b).

(d) Before entering upon the land for oil or gas operations, the oil and gas operator shall give to all the surface owners a written notice of its proposed oil and gas operations on the land. This notice shall be given to the surface owners at the address shown by the records of the county where the land is located at the time notice is given.

(e) The notice of proposed oil and gas operations shall sufficiently disclose the plan of work and operations to enable the surface owner to evaluate the effect of oil and gas operations on the surface owner's use of the land. The notice shall be given no more than one hundred eighty (180) days nor less than thirty (30) days before commencement of any oil and gas operations on the land. The notice shall include, but is not limited to:

(i) The proposed dates on which planned operations shall commence;

(ii) To the extent reasonably known at the time, the proposed facility locations and access routes related to the proposed oil and gas operations, including locations of roads, wells, well pads, seismic locations, pits, reservoirs, power lines, pipelines, compressor pads, tank batteries and other facilities;

(iii) The name, address, telephone number and, if available, facsimile number and electronic mail address of the oil and gas operator and his designee, if any;

(iv) An offer to discuss and negotiate in good faith any proposed changes to the proposed plan of work and oil and gas operations prior to commencement of oil and gas operations;

(v) A copy of this act.

(f) After providing the notice of proposed oil and gas operations to the surface owner, the oil and gas operator and the surface owner shall attempt good faith negotiations to

reach a surface use agreement for the protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for damages caused by the oil and gas operations. At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 et seq. may be requested through the Wyoming agriculture and natural resource mediation board.

(g) The oil and gas operator shall not engage in work, location of facilities and access routes or oil and gas operations substantially and materially different from those disclosed to the surface owner in accordance with this section, without first providing additional written notice disclosing proposed changes and offering to schedule a meeting to comply with the requirements of subsection (f) of this section.

30-5-403. Application for permit drill; additional notice.

(a) Before an application for a permit to drill is approved by the commission, the oil and gas operator shall file a statement with the commission, including the surface owner's name, contact address, telephone number and any other relevant and necessary contact information known to the oil and gas operator, certifying that:

(i) Notice of proposed oil and gas operations was provided to the surface owner;

(ii) The parties attempted good faith negotiations as required under W.S. 30-5-402(f) to reach a surface use agreement;

(iii) The oil and gas operator has met the conditions of W.S. 30-5-402(c), specifying how the conditions have been met.

(b) The surface use agreement between the oil and gas operator and the surface owner shall not be filed with the oil and gas conservation commission and the terms of the agreement shall not be required as a condition of approval of an application for a permit to conduct oil and gas operations.

30-5-404. Surety bond or guaranty; approval; objections; release of surety bond or guaranty.

(a) The surety bond or other guaranty required under W.S. 30-5-402(c)(iv) shall be executed by the oil and gas operator, or a bonding company acceptable to the commission. Other forms of guaranty acceptable by the commission under article 1 of this chapter may be submitted by the oil and gas operator in lieu of a surety bond.

(b) The surety bond or other guaranty shall be in an amount of not less than two thousand dollars (\$2,000.00) per well site on the land. At the request of the oil and gas operator, after attempted consultation with the surface owner the commission may establish a blanket bond or other guaranty in an amount covering oil and gas operations on the surface owner's land as identified by an oil and gas operator in the written notice required under W.S. 30-5-402(e). Neither the minimum amount of the per well site bond or other guaranty specified in this subsection nor a blanket bond or other guaranty established by the commission is intended to establish any amount for reasonable and foreseeable damages.

(c) Within seven (7) days following receipt of a per well site surety bond or other guaranty or the establishment of a blanket bond or other guaranty, the commission shall notify the surface owner of receipt of the per well site surety bond or other guaranty or the establishment of a blanket bond or other guaranty based on the oil and gas operator's request and the written notice required under W.S. 30-5-402 (e). The commission's notice shall also include a description of the amount and the type of the bond or guaranty received

or established and provide to the surface owner a copy of the statement required under W.S. 30-5-403(a). If, at the expiration of thirty (30) days after receipt of the commission's notice by the surface owner, he makes no objection to the amount or the type of the surety bond or guaranty, the commission shall approve the surety bond or guaranty. If the surface owner objects in writing to the amount or the type of the surety bond or guaranty, the commission shall give immediate consideration to the surety bond or guaranty objected to and the accompanying papers filed by the oil and gas operator in support of the surety bond or guaranty amount and the type of surety bond or guaranty submitted or established, and the surface owner's objections, and the commission shall render a final decision as to the acceptability of the amount and type of the surety bond or guaranty and shall notify the parties of the decision. Proof of any additional surety bond or guaranty required by the commission shall be filed with the commission within thirty (30) days of the commission's final decision. Any aggrieved party may appeal the final decision of the commission to the district court in accordance with the Wyoming Administrative Procedure Act.

(d) Upon receipt or establishment of an acceptable surety bond or other guaranty by the commission as specified in subsection (b) of this section, and receipt of all required regulatory approvals to secure a drilling permit, the oil and gas operator shall be permitted entry upon the land to conduct oil and gas operations in accordance with terms of any existing contractual or legal right.

(e) Any surety bond, other guaranty or blanket bond, as applicable, for surface damages to particular lands will be released by the commission after:

- (i) Compensation for damages has occurred;
- (ii) Agreement for release by all parties;

(iii) Final resolution of the judicial appeal process for any action for damages and all damages have been paid; or

(iv) The oil and gas operator certifies in a sworn statement that the surface owner has failed to give the written notice required under W.S. 30-5-406(a) or has failed to bring an action for damages within the required time period.

(f) Prior to the release of any applicable bond or other guaranty, the commission shall make a reasonable effort to contact the surface owner and confirm that compensation has been received, an agreement entered into or that the surface owner has failed to give written notice required or failed to bring a timely action for damages. The commission may, in its sole discretion, release any surety bond, other guaranty or blanket bond related to particular lands if the oil and gas operator shows just cause for the release.

(g) Any surety bond or guaranty executed under this section shall be in addition to the surety bond or guaranty required under W.S. 30-5-104(d)(i)(D) for reclamation and compliance with rules and orders of the commission.

30-5-405. Surface damage and disruption payments; penalty for late payment.

(a) The oil and gas operator shall pay the surface owner as follows:

(i) A sum of money or other compensation equal to the amount of 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;

(ii) The amount of damages and method of compensation may be determined in any manner mutually agreeable to the surface owner and the oil and gas operator. When determining damages, consideration shall be given to the period of time during which the loss occurs;

(iii) The payments contemplated by this subsection shall only cover land directly affected by oil and gas operations. Payments under this subsection are intended to compensate the surface owner for damage and disruption. No

person shall sever from the land surface the right to receive surface damage payments.

(b) An oil and gas operator who fails to timely pay an installment under any annual damage agreement negotiated with a surface owner is liable for payment to the surface owner of twice the amount of the unpaid installment if the installment payment is not paid within sixty (60) days of receipt of notice of failure to pay from the surface owner.

30-5-406. Surface damage negotiations; notice of damages to oil and gas operator; right to bring action.

(a) If the oil and gas operator has commenced oil and gas operations in the absence of any agreement for compensation for all damages, a surface owner shall give written notice to the oil and gas operator and the commission of the 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.

(b) Unless both parties provide otherwise by written agreement, within sixty (60) days after the oil and gas operator receives notice of damages pursuant to subsection

(a) of this section, the oil and gas operator shall make a written offer of settlement to the surface owner as compensation for damages. The surface owner seeking compensation for damages under this section may accept or reject any offer made by the oil and gas operator.

(c) If the surface owner who submits a notice as required under subsection (a) of this section receives no reply to his notice, receives a written rejection or counter offer or rejects an offer or counter offer from the oil and gas operator, the surface owner may bring an action for compensation for damages in the district court in the county where the damage was sustained.

30-5-407. Remedies cumulative.

The remedies provided by this act do not preclude any

person from seeking other remedies allowed by law, nor does this act diminish rights previously granted by law or contract.

30-5-408. Waiver.

A surface owner may waive any rights afforded under this act by providing a written waiver of rights to the oil and gas operator, identifying which rights have been waived.

30-5-409. Statute of limitations for civil action.

A surface owner entitled to bring an action for damages under this act, or to seek any other remedy at law for damages caused by oil and gas operations, shall bring such action within two (2) years after the damage has been discovered, or should have been discovered through due diligence, by the surface owner. The limitation on bringing an action under this section shall be tolled for a period of four (4) months, if a written demand for compensation for damages is timely submitted by the surface owner under W.S. 30-5-406.

30-5-410. Applicability.

This act shall not apply to a public utility regulated by the Wyoming public service commission or to a natural gas pipeline regulated by the federal energy regulatory commission.

Section 2. Any written surface use agreement, consent, prior regulatory approval or judicial order or decree in effect prior to the effective date of this act shall not be subject to the provisions of this act.

Section 3. This act is effective July 1, 2005.

_____ (END) _____

Speaker of the House _____ President of the
Senate

Governor

TIME APPROVED: _____

DATE APPROVED: _____

I hereby certify that this act originated in the Senate.

Chief Clerk

A STEP-BY-STEP GUIDE THROUGH THE
SPLIT ESTATE STATUTE

30-5-401. Definitions.

This section of the statute establishes meanings for terms used throughout the act, and with the exception of “*oil and gas*” and “*surety bond or other guaranty*,” includes the definitions. The two exceptions are defined below:

- “*Oil and gas*” is defined in **Wyoming Statute (W.S.) 30-5-101(a)(vii)**: “The word ‘oil’ shall mean crude petroleum oil and any other hydrocarbons, regardless of gravities, which are produced at the well in liquid form by ordinary production methods, and which are not the result of condensation of gas before or after it leaves the reservoir. The word ‘gas’ shall mean all natural gases and all hydrocarbons not defined herein as oil.”
- “*Surety bond or other guaranty*” is defined in **W.S. 30-5-101(a)(x)**: “The term ‘surety bond or other guaranty’ means a surety bond, a first priority security interest in a deposit of the proceeds of a collected cashier’s check, a first priority security interest in a certificate of deposit or an irrevocable letter of credit, all in an amount and including other terms, conditions, and requirements determined by the Commission.”

30-5-402. Entry upon land for oil and gas operations and nonsurface disturbing activities; notice; process; surety bond or other guaranty; negotiations.

This section outlines the body of the statute and defines the rights and obligations of the parties within a specified time frame.

- **30-5-402(a)** confirms the right of the oil and gas operator to enter split estate lands in order to conduct “reasonable and necessary” activities for oil and gas removal while “reasonably” accommodating existing surface uses.
- **30-5-402(b)** requires the operator to give the surface owner *5 days notice* before entering the surface owner’s property to conduct “non-surface disturbing activities,” such as surveying, site inspections and general planning, and *requires notice for all subsequent entries*.
- **30-5-402(c)** stipulates that entry upon the land must be preceded by the *5-day notice*, attempted good faith negotiations, and:
 1. Written consent or a waiver by the surface owner for entry onto the land for all oil and gas operations;
 2. An “executed” surface use agreement providing compensation for damages as required in **30-5-405(a)**;
 3. A waiver of the requirement for a surface use agreement as provided in **30-5-408**; **or**
 4. A “good and sufficient” surety bond or other guaranty to secure the payment of damages to the surface owner, which the operator must file with the Wyoming Oil and Gas Commission.

- ! **Note:** See coverage of **30-5-404(c)** on Page 24 for how the Commission determines the bond amount and how you can be involved.
- **30-5-402(d)** requires the operator to provide written notice to all surface owners of the proposed *Plan of Work and Operations* prior to entry, “at the address shown by the records of the county where the land is located at the time notice is given.”
- **30-5-402(e)** requires the operator to provide the notice *no more than 180 days nor less than 30 days* before oil and gas operations commence. The notice must “sufficiently disclose the *Plan of Work and Operations* to enable the surface owner to evaluate the effect of oil and gas operations” on the use of the land, and *must include but is not limited to:*
- 1) Dates for all phases of proposed operations.
 - 2) Locations of all proposed roads, well sites, seismic locations, drilling and water disposal pits, power lines, pipelines, compressor pads and other infrastructure “to the extent reasonably known at the time.”
 - 3) *Written notice* of any proposed changes “substantially and materially different” from the initial plan, and good faith negotiations on those changes “*prior to commencement of oil and gas operations.*”
 - 4) Contact information of the oil and gas operator and “designee.”
 - 5) A copy of the *Split Estate Statute*.
- ! **Note:** Beware of the clause “to the extent reasonably known at the time” in #2 above. The *Plan of Work and Operations* is the most important element of this whole process, and you should insist that the operator provide sufficient detail at this

stage for you to effectively evaluate the impacts on your property. The law requires the operator to “reasonably accommodate” you and your uses of the surface estate, and this is the best time to ensure your needs are built into the plan. Make sure you receive the written notice required in #3 detailing any changes to the initial plan, and that you are provided adequate time to negotiate these changes with the operator.

- **30-5-402(f)** requires the operator and the surface owner to attempt good faith negotiations to reach a surface use agreement “for the protection of the surface resources, reclamation activities, timely completion of reclamation of the disturbed areas and payment for damages caused by the oil and gas operations.”
- ! **Note:** *Although the Oil and Gas Conservation Commission (OGCC) encourages the parties to negotiate in good faith for a **surface use agreement**, and the statute provides opportunities for dispute resolution “at any time in the negotiation,” through the Wyoming Agriculture and Natural Resource Mediation Board (see **30-5-402(f)**), the Commission does not file surface use agreements between oil and gas operators and surface owners, **nor does it require surface use agreements as a condition for approval of an application for a permit to conduct oil and gas operations.***
- **30-5-402(g)** reiterates #3 of **30-5-402(e)** above, which requires additional written notice and good faith negotiations for work, facilities locations, access routes or oil and gas operations “substantially and materially different” from those disclosed in the *Plan of Work and Operations*.

30-5-403. Application for permit to drill;

additional notice.

This section addresses the conditions that must be met before a permit to drill may be issued.

- **30-5-403(a)** states that the Oil and Gas Conservation Commission may not approve a permit to drill (APD) until the operator files certification with the Commission that:
 1. Appropriate notice of the proposed oil and gas operations was provided to the surface owner;
 2. Parties engaged in good faith negotiations to reach a surface use agreement (*see 30-5-402(f)*)
 3. The operator met conditions of **30-5-402 (c)** (i.e. was able to demonstrate *how* (1) and (2) above were satisfied.)
- **30-5-403(b)** states that the Commission will not file a surface use agreement between the operator and the surface owner, and will not require terms of the agreement as a condition for approval of a permit to conduct oil and gas activities.

30-5-404. Surety bond or guaranty; approval; objections; release of surety bond or guaranty.

This section addresses the use of a surety bond or other type of guaranty to cover damages—conditioned by certification to the Oil and Gas Commission that (1) the operator provided appropriate notice to the surface owner, and (2) the operator attempted good faith negotiations for a *surface use agreement* with the surface owner.

- **30-5-404(a)** stipulates that the surety bond or other form(s) of guaranty acceptable by the Commission (*see Chapter 3, Sections 5 and 6, Operational Rules and Drilling Rules of the Wyoming Oil and Gas Conservation Commission Rules and Regulations*) must be executed by the operator or by a bonding company

acceptable to the Commission.

- **30-5-404(b)** establishes a minimum bond amount of *not less than* \$2000 per well site, and grants the Commission, “at the request of the oil and gas operator, after attempted consultation with the surface owner,” authority to establish a blanket bond or other guaranty to cover all operations as identified in the *Work Plan*.

! **Note:** *Neither the minimum per-well bond nor the blanket bond or guaranty is “intended to establish any amount for reasonable and foreseeable damages.” The intent of this clause is to prevent a court from interpreting the acceptance of a bond as meaning that compensation for damages may not exceed the amount of the bond. It is hard to conceive of a situation whereby a \$2,000.00 bond for a well site would cover all the damages of development.*

- **30-5-404(c)** requires the Commission *within seven days* of receiving the bond or guaranty from the operator to provide *written notification* to the surface owner (*by certified mail with return receipt requested*¹⁾) and include:
 1. A description of the amount and type of bond or guaranty;
 2. A copy of the operator’s statement certifying that the operator provided the required notice and attempted to engage in good faith negotiations with the surface owner; and
 3. A statement that the surface owner has *30 days* from receipt of the notice to file an objection with the Commission.
- The surface owner has *30 days* to object to the OGCC, *in writing*, on the amount or type of bond.

! **Note:** *Objections should include specific documentation as to why the bond is not adequate to cover potential clean-up and/or plugging of wells and/or seismic holes, reclamation of roads, well pads, drilling and disposal pits, and other infrastructure. (In some instances, reclamation may include recontouring and reseeding the ground, and will require repeated weed control strategies.)*

If you fail to object to the amount or type of bond by the end of the 30-day period, the Commission may approve the surety bond or guaranty.

- In determining the amount of either a single well site or blanket bond the operator is required to provide, the state oil and gas supervisor must consider the proposed *Plan of Work and Operations* submitted by the operator in its notice to the surface owner, and may consider any other factors in order to determine the amount necessary to cover damages, *including but not limited to:*
1. Loss of production and income sustained by the surface owner;
 2. Loss of land value; and
 3. Loss of value of improvements caused by the oil and gas operations.²
- ! **Note:** *Reclamation is required to begin **within 1 year** of permanent abandonment of a well or last use of a pit, and must be completed in as timely a manner as climatic conditions allow. (For “just cause” an administrative variance may be granted providing for additional time.) Reclamation must be completed according to the surface owner’s “reasonable requests,” and/or resemble the original vegetation and contour of adjoining lands. “Where practical,” topsoil must be stock-*

*piled during construction for use in reclamation.*³

The stockpiling of topsoil is an important requirement; a Sheridan couple was awarded over \$800,000 in a jury trial when a company inflicted irreparable damage on their ranch, and one of the company's costliest mistakes was failing to stockpile the topsoil.

- If the surface owner files a written objection to the amount or type of bond within the *30-day period*, the Commission will consider the objection at its next regularly scheduled meeting. In determining the accepted amount and type of surety bond, the Commission must consider:
 - The surety bond or guaranty objected to;
 - Any supporting evidence submitted by the operator;
 - The surface owner's objections and supporting documents; and
 - Any other evidence the Commission deems relevant to determine the adequacy or inadequacy of the amount or type of bond.⁴

The Commission must then notify the parties *in writing* of the final decision.

- When the Commission requires a surety bond or guaranty in excess of \$2,000 per well, it must *within 30 days of the ruling* file proof of the bonding amounts required. Either party may appeal the final decision to the District Court in accordance with the *Wyoming Administrative Procedures Act*.
- **30-5-404(d)** gives the Commission authority to grant the operator entry onto the land to conduct oil and gas operations "in accordance with terms of any existing contractual or legal right," but only after the Commission has received what it has established as

an acceptable surety bond or guaranty (along with the necessary regulatory approvals to secure a drilling permit.)

- **30-5-404(e)** allows the Commission to release the bond or guaranty only after the following conditions are met:
 1. The operator must compensate the surface owner for damages;
 2. All parties must agree to the release of the bond or assurance;
 3. Final resolution must be reached on any judicial appeal process for damages and all damages must be paid; **or**
 4. The operator must certify that the surface owner failed to provide written notice to the operator and the Commission of damages sustained as a result of the operator's actions.
- ! *Note: The surface owner has 2 years to report these damages— (see 30-5-406(a) on Page 31.)*
- **30-5-404(f)** requires the Commission to “make a reasonable effort to contact the surface owner and confirm that compensation has been received, an agreement entered into or that the surface owner has failed to give written notice required or failed to bring a timely action for damages.”
- ! *Note: Upon receiving a request for bond release, the Commission must notify the surface owner by certified mail of the request, and supply a copy of the release request and supporting statement. The surface owner then has 15 days from receipt of the notice to dispute the release request.*

The Commission may, “in its sole discretion,” release any type of bond related to specified lands if the operator shows “just cause” for the release.

- **30-5-404(g)** points out the important fact that any surety bond or guaranty executed under this section of the Split Estate Statute is **in addition** to the reclamation bond required by the Commission under Wyoming Statute 30-5-104 (d)(i)(D).

! *Note: W.S. 30-5-104(d)(i)(D) reads: “The Commission has authority [t]o require [t]he furnishing of a surety bond or other guaranty, conditioned for or securing the performance of the duty to plug each dry or abandoned well or the repair of wells causing waste and compliance with the rules and orders of the Commission.”*

30-5-405. Surface damage and disruption payments; penalty for late payment.

This section addresses the operator’s liability to the surface owner for compensation for losses.

- **30-5-405(a)** requires the operator to pay the surface owner in the following manner:
 1. Compensation must be provided for loss of production and income, loss of land value, and loss of value of improvements caused by the oil and gas operations.
 2. The amount and method of compensation may be worked out by the surface owner and the operator to their mutual satisfaction, keeping in mind that the *time frame* of the losses should be included in calculating the damages.
- ! *Note: It makes no difference whether the operations are “reasonable and necessary,” how carefully they are conducted, or if they accommodate the surface owner; the law stipulates that the operator must pay the specified damages. **Stand***

by this requirement!

3. Payments in this section are intended to compensate the surface owner for lands “directly affected by oil and gas operations,” and include both direct damages and disruption of normal activities as a result of the oil and gas operations. The right of the surface owner to receive surface damage payments may not be severed from the land surface.

! **Note:** *The intent of the legislature for “directly affected” lands has been interpreted by an attorney who specializes in split estate cases as meaning that “the recovery of damages is not limited to lands on which surface disturbing activities occur but is expanded to encompass all lands ‘directly affected’ by the oil and gas operations whether surface disturbing activities occur on those lands or not. The fact that the split estate law so carefully defines surface disturbing activities but does not limit the damages to lands where the surface disturbing activities occur and instead allows recovery for damages for all lands directly affected indicates an intent to provide broad protection for the surface owner.”*⁵

He supports this statement by pointing out that language in a working draft of the law which imposed boundaries on lands physically disturbed in the conduct of oil and gas operations, did not survive in the final bill.

“There is a good reason why a physical occupancy or physical disturbance rule was rejected,” he says. ***“An operator may occupy or disturb only a few critical areas on a ranch and yet destroy the economic viability of hundreds of acres. If critical grazing areas or critical water supplies are lost, the value of an entire ranch may be destroyed.”***⁶

- **30-5-405(b)** stipulates that an operator who fails to “*timely*” pay an installment for damages as negotiated with the surface owner is liable for twice the unpaid amount if the installment is not paid *within 60 days* of receiving the notice of failure to pay from the surface owner.

! **Note:** *Although not specified in the statute or the rules governing the statute, the notice of failure to pay should be by certified mail with return receipt, for purposes of documentation.*

30-5-406. Surface damage negotiations; notice of damages to oil and gas operator; right to bring action.

This section addresses the right of the surface owner to pursue compensation for damages in the absence of any type of agreement.

- **30-5-406(a)** requires the surface owner to give *written notice* of damages to the operator and the Commission if oil and gas operations have commenced in the absence of any agreement. Notice must be given *within 2 years* of the date the surface owner became aware of the damages.
- **30-5-406(b)** requires the operator to *within 60 days* of receiving the notice of damages from the surface owner make a *written offer* of settlement to the surface owner, which the surface owner may accept or reject. Both parties may “provide otherwise” only by *written agreement*.
- **30-5-406(c)** allows the surface owner to bring an action for compensation for damages in the district court in the county where the damages were sustained if the surface owner (1) receives no reply to the notice of damages, (2) receives a written rejection or counter offer, or (3) rejects an offer or counter offer

from the operator.

30-5-407. Remedies cumulative.

This section addresses the right of the surface owner to pursue remedies other than those afforded by the statute.

- A surface owner damaged by the negligence or trespass of an operator is free to pursue other remedies to recover any damages allowed under laws and processes governing negligence and trespass.

! **Note:** *The language in 30-5-407 which states, “nor does this act diminish rights previously granted by law or contract” might be used to argue for oil and gas leaseholders that the statute does not apply to any leases existing before the effective date of July 1, 2005. This type of argument would not stand up in court for the following reasons:*

- 1) *If the legislature had intended to exempt all leases in effect on July 1, 2005, it would have listed them along with written surface use agreements not subject to provisions of the act in Session Laws of Wyoming, 2005 Ch. 81, Sec. 2;*
- 2) *The provision seeks to preserve remedies granted under existing law or contracts such as provide remedies for negligence and trespass; and*
- 3) *The split estate law can be applied to most split estate situations under existing leases because the law does not diminish the rights granted under existing law anyway.⁷*

30-5-408. Waiver.

This section addresses the right of the surface owner to waive any rights afforded under the act.

- The surface owner may waive all or selected rights provided in the statute by providing a *written waiver* to the operator identifying which rights have been waived.

! **Note: It is generally not a good idea to waive any of your rights as a surface owner!**

30-5-409. Statute of limitations for civil action.

This section defines and articulates the time frame during which the surface owner must bring an action for damages under the split estate act.

- The act gives the surface owner the right to bring an action for damages for a period of *two years* after the damages have been discovered.
- At the time that the surface owner submits a *written demand* for compensation for damages to the operator and the Commission under **30-5-406(a)**, the *two year statute of limitations* stops for a period of *four months*. This “tolling” allows for the *60 days* the operator is provided under **30-5-406(b)** to respond to the surface owner, and *additional time (60 days)* for the surface owner to accept or reject the operator’s offer, or to take other action.

30-5-410. Applicability.

This section identifies exceptions to the law’s application.

- Public utilities regulated by the *Wyoming Public Service Commission* are exempt from the split estate statute.
- Natural gas pipelines regulated by the *Federal Energy Regulatory Commission* are exempt from

the statute.

Section 2.

Any written surface use agreement, written consent of the surface owner, “prior regulatory approval or judicial order or decree” that were in effect prior to *July 1, 2005* are not subject to the provisions of the split estate law.

! *Note: This portion of the split estate law (Section 2) is not printed in the statute books, Wyoming Statutes Annotated (published by Lexis/Nexis), which would “seem to mean that a surface owner with an agreement entered into before July 1, 2005 (the effective date of the act) is not required to give notice of his damage to the operator and the commission before suing the operator and is not subject to the short two year statute of limitations. It also appears to mean that such a surface owner is not entitled to take advantage of the act’s provision that allows the surface owner to collect twice the amount of any unpaid installment owed under the agreement.”*⁸

Wyoming Oil & Gas Rules and Regulations Dealing with the Law

The split estate law is implemented and enforced through rules and regulations written by the (Wyoming Oil and Gas Conservation Commission.) Passage of the law required the Commission to change some of its existing rules and regulations, as indicated below.

Chapter 1, Section 2(ee): Defines “oil and gas operations” and tracks the definition used in the Wyoming Split Estate Act.

Chapter 1, Section 2(ww): Defines “surface owner” and tracks the definition used in the Wyoming Split Estate Act.

Chapter 1, Section 2(hhh): Defines “Wyoming Split Estate Act”.

Chapter 3, Section 1(a): Defines “oil and gas operations” and tracks the definition used in the Wyoming Split Estate Act.

Chapter 3, Section 4(i): Provides the minimum amount of bond and the forms of surety which may be accepted by the Commission in satisfaction of the requirements contained within the Wyoming Split Estate Act. It also provides that a field wide bond may be posted.

Chapter 3, Section 4(j)(i) through (iii): Provides that *within seven (7) days* of receipt the Commission shall notify the surface owner of receipt of the bond and provides the details which must be contained within the notice. It provides that the surface owner *has thirty (30) days* to object.

Chapter 3, Section 4(k)(i) through (iii): Provides the criteria which the Oil and Gas Supervisor shall consider when determining the amount of a bond posted pursuant to the Split Estate Act.

Chapter 3, Section 4(l)(i) through (iv): Provides a mechanism for the Commission to address bond amount disputes. It provides the criteria which the Commission must consider in determining the amount of bond required.

Chapter 3, Section 5(g): Provides the mechanism to release a cashier’s check or CD submitted pursuant to the Wyoming

Split Estate Act.

Chapter 3, Section 6(f): Provides the mechanism to release a letter of credit submitted pursuant to the Wyoming Split Estate Act.

Chapter 3, Section 7(a): Clarifies that surface remediation must be initiated *within one year* of permanent abandonment or last use and completed as timely as climatic conditions allow. It also clarifies how the remediation must be completed.

Chapter 3, Section 7(d)(i) through (v): Clarifies that a bond submitted pursuant to the Split Estate Act may only be released upon the submission of a certified statement that one of five actions has occurred.

Chapter 3, Section 7(e): Provides that upon receipt of a request for release of a Split Estate Act mandated surety, the Commission shall provide the surface owner notice. The surface owner then has *fifteen (15) days* to file an objection, or the bond may be released.

Chapter 3, Section 8(b): Provides that the Commission may accept a federal permit only if it is accompanied by a statement of compliance with the Wyoming Split Estate Act if there is a split estate situation with fee surface ownership.

Chapter 3, Section 8(d)(i) through (iii): Creates an additional requirement that a statement of compliance with the Wyoming Split Estates Act shall be submitted prior to the approval of an application for permit to drill. It also lists the information which must be included.

Chapter 3, Section 14: Adds the requirement that a transferee of a well must exhibit compliance with the Split Estates

Act Prior to a *Form 7* being approved.

Chapter 3, Section 17(b): Clarifies that surface remediation must be initiated *within one year* of permanent abandonment or last use and completed as timely as climatic conditions allow. It also clarifies how the remediation must be completed.

Chapter 4, Section 1(d): Creates the requirement that compliance with the Split Estate Act must be demonstrated prior to approval of a pit permit application.

Chapter 4, Section 6(b): Creates the requirement that compliance with the Split Estate Act must be demonstrated prior to approval of an application to conduct seismic shot exploration activities.

Chapter 4, Section 6(e): Creates the requirement that a sundry notice filed with the Supervisor regarding other seismic activities must contain a statement that the operator has complied with the Split Estate Act.

Conclusion

Your best approach when faced with oil and gas operators who possess the right to develop the mineral estate of your property is to first of all, be prepared. Know ahead of time what is best for you and your property, and make sure you have your own “plan” in place when you receive your first notice—Remember, they are only required to give you *five days*.

Second, you should be clear from the start and insist on negotiating a *surface use agreement* that accommodates both parties. The split estate statute gives you that power, and in spite of time constraints and the fact that operators can still

threaten to “bond on,” they aren’t any more interested in going through all the red tape than you are. Operators know that embracing the landowner as a partner in planning the development will lead to fewer problems. Securing a surface use agreement will save both parties an enormous amount of time, trouble, and attorney’s fees.

Powder River’s website contains a check list of elements that need to be in a *surface use agreement*, as well as examples of *surface use agreements*. Visit our website at powderriverbasin.org.

Whichever route you take (or are obliged to take depending on the circumstances), keeping good records of everything that occurs is of paramount importance—including copies of all correspondence and *notices* (with the dates), pre-development photographs, videotapes and other documentation once activity *of any kind* begins, and even taped conversations with the operator, “landman” (or woman), and with public agency personnel charged with overseeing the development. The new law is in its trial period, and the next several months to a few years will determine whether it is accomplishing what it was designed to do or whether it needs to go back to the legislative “drawing board.”

Finally, if you haven’t already done so, you should take the time to talk to your neighbors, especially those who are either “downstream” or “upstream” of your property, as you will likely be sharing the impacts of the development in one way or another, particularly if there is water to be discharged or impounded, pipelines or power lines to be constructed, or other types of infrastructure being proposed. Neighbors banded together can often strike a better deal with industry than individuals negotiating on their own behalf. And you can learn a lot from one another’s experiences.

The split estate statute represents a milestone in the history of oil and gas development in Wyoming, because for the first time it codifies the concept of an “accommodation doctrine” that did not exist in Wyoming before passage of the statute. This recognition— that the surface and the mineral estate

must exercise their rights in a manner consistent with one another, each being essentially “burdened” with the rights of the other—can only strengthen the state and its people over the long term. Because what is says is that we’re all in this together, as equals, and what each of us does affects the other. It instills in all of us a sense of mutual responsibility and mutual *accountability*, for what our future will hold.





“ I recognize the rights and duty of this generation to develop and use the natural resources of our land; but I do not recognize the right to waste them or to rob, by wasteful use, the generations that come after us.”

*Theodore Roosevelt,
August 31, 1910*

References

Wyoming Oil and Gas Conservation Commission *Rules and Regulations, Chapter 3* (Revised 08/02/05)

“The Arrogance of Dominance/ The Reason for Split Estate Legislation as presented to...” By Tom C. Toner, Attorney at Law, Sheridan Wyoming

Footnotes

1. OGCC Rules and Regulations, Chapter 3, p. 6, sec. 4 (j)
2. OGCC Rules and Regulations, Chapter 3, p. 7, sec. 4(k)
3. OGCC Rules and Regulations, Chapter 3, p. 10, sec. 7(a)
4. OGCC Rules and Regulations, Chapter 3, p. 7, sec. 4(l)
5. “The Arrogance of Dominance,” p. 5
6. “The Arrogance of Dominance,” p. 6
7. “The Arrogance of Dominance,” p. 9
8. “The Arrogance of Dominance,” pp. 8-9

Resources

Powder River Basin Resource Council
934 North Main
Sheridan, WY 82801
(307) 672-5809
www.powderriverbasin.org

Oil and Gas Accountability Project
PO Box 1102
Durango, Colorado
(970) 259-3353
www.ogap.org

Landowner Association of Wyoming
www.wyominglandowners.org

Northern Plains Resource Council
2401 Montana Avenue, Suite 200
Billings MT 59101
(406) 248-1154
www.northernplains.org

Wyoming Oil and Gas Conservation Commission
2211 King Blvd
P.O. Box 2640
Casper, WY 82602
(307) 234-7147
wogcc.state.wy.us
Wyoming Department of Environmental Quality
Herschler Building



122 West 25th Street
Cheyenne, WY 82001
(307) 777-7937
deq.state.wy.us

“Surface owners need statutory acknowledgement of their rights to use and enjoy their property. This includes the right to participate in the development of oil and gas underlying their property in split estate situations.”

Eric Barlow, Powder River Member

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