

A SOUTHEASTERN WYOMING RC&D
COUNCIL PROJECT



**LANDOWNER
GUIDELINES FOR
NEGOTIATING A
MINERAL LEASE OR
SURFACE USE
AGREEMENT**

DEVELOPED BY:

SOUTHEASTERN WYOMING MINERAL DEVELOPMENT COALITION

1/1/2011

The purpose of these guidelines is to provide helpful tips to landowners who are negotiating mineral leases or surface use agreements. The guidelines have been developed in coordination and with assistance from the Converse County Landowners Association, Oil and Gas Accountability Project, and the Powder River Resource Council. Nothing in this document constitutes legal advice. The information conveyed through this document is intended for informational purposes only.

(307)322-2187 • 1502 Progress Ct., Wheatland, Wyoming • <http://sewrcd.com/>

Table of Contents

Introduction.....	3
Purpose.....	3
Goal.....	3
Change in How Agricultural Operations Are Managed.....	3
Helpful Hints in Getting Started.....	4
Payment Guidelines for Surface Use Agreements.....	6
Detailed Checklist When Negotiating Your Surface Use Agreements.....	8
DEQ Water Well Testing Guidelines.....	14
List of Water Quality Analysis Labs.....	18
Mineral Development on State lands.....	19
Surface Use Agreement Provisions to Consider.....	20
Other Provisions That You May Want In Your Surface Use Agreement... (But were afraid to ask!)	24
Issues Specific to Tillable Farm Ground.....	25
What Leverage Do Surface Owners Have When Negotiating..... a Surface Use Agreement?	26
Mineral Lease Provisions to Consider.....	28
A Landowner Guide to the Wyoming Split Estate Statute.....	30
Wyoming Oil and Gas Pooling Statutes.....	48
One For All and All for All (Pooling Article).....	51
Sample Surface Use and Damage Agreement.....	59
Sample Seismic Surface Use Agreement.....	68
Map of the Niobrara Oil Formation.....	73

INTRODUCTION:

Several landowners in the area have formed the Southeastern Wyoming Mineral Development Coalition to discuss emerging energy issues; gather and disseminate information; foster partnerships; and to develop management strategies that benefit landowners, local communities, and natural resources. The coalition has worked with numerous organizations and agencies in developing these guidelines to assist landowners in making informed management decisions regarding mineral development. A copy of these guidelines can be obtained by visiting our website at <http://sewrcd.com/>.

PURPOSE:

The purpose of these guidelines is to provide helpful guidance to landowners who are negotiating mineral leases or surface use agreements to increase opportunities to protect or enhance the natural resource base while stimulating local economies. **Nothing in this document constitutes legal advice.** Please seek an attorney that has knowledge in mineral development for legal advice. The information conveyed through this document is intended for informational purposes only. This is a dynamic document and may be modified periodically to reflect updates and policy changes.

GOAL:

Inform, educate and unify landowners regarding mineral development issues by gathering and disseminating information, conducting workshops, organizing meetings, and communicating with landowners through a myriad of media strategies.

CHANGE IN HOW AGRICULTURAL OPERATIONS ARE MANAGED:

Over the years, agricultural producers in southeastern Wyoming have been very successful in managing livestock, crops, wildlife, fences, water, rangelands and virtually all aspects of their operation. With the current mineral development activity, producers must now **MANAGE MINERAL DEVELOPMENT IN ADDITION TO THEIR CURRENT AGRICULTURAL OPERATIONS.** This presents a challenge and will change the way producers currently view their landscapes and how management decisions will be made. It is important to talk with your neighbors, stakeholders, decision makers and others to become knowledgeable about mineral development and how it can potentially provide an economic benefit if properly managed in coordination with current agricultural operations. It will be extremely important to conduct title searches to obtain legal descriptions of land and minerals to assist in determining your negotiating position.

It may be advantageous to hire a broker to conduct your title searches rather than spending hours of your time at the court house. It may also be helpful to develop a complete resource inventory of your property to include a detailed map of your ranch or farm to include wildlife species, rangeland, irrigated land, dry cropland, soil types, vegetation, and other resources and attributes.

HELPFUL HINTS IN GETTING

STARTED: (Obtained from the Powder River Resource Council's Website)

1. Lawyer up! Choose an attorney that specializes in mineral development for land owners. Become familiar with the Wyoming Split Estate Law, which is based on the concept of mutual accommodation.
2. Don't be in a hurry. Talk in detail with your neighbors and others who have been in negotiations. Those who sign a mineral lease, surface use agreement, easement or right of way early are not usually the ones who get the best deal.
3. Get to know the phone numbers of the Wyoming State Lands and Investments Office, the Wyoming Oil and Gas Conservation Commission, The Wyoming Department of Environmental Quality, folks at the University of Wyoming. Stay fully engaged with your community. There is strength in numbers.
4. Get to know your company representative or "landman." Ask if he or she has the authority to make decisions for his or her company. If not, a lot of time is wasted getting approval and much confusion is created due to misunderstanding.
5. Remember, everything is on the table for negotiation – water, land and minerals. Do not lease your minerals or sign away any of your rights until you have negotiated protections for your surface and water rights. You should negotiate a surface use or damage agreement that protects your surface interests in conjunction with a mineral lease or the mineral lease should require negotiations of a surface use agreement before any drilling takes place.
6. Negotiate the royalty on fee minerals. Usually, folks get anywhere from 12.5% to 20%. **Try to get an override on split estate minerals.** You may not get this, but you never know until you ask. Ask for annual payments on any surface agreement, easement or right of way.
7. Put together a list of issues important to you before you sit down and negotiate.
8. Include mutual accommodations doctrine language in the surface use agreement to allow mineral development while also allowing the surface owner to enter into future wind, solar, and/or other surface use agreements in such a manner as to permit both activities to be pursued simultaneously. The agreement should include provisions that reasonably accommodate and avoid impairment of the development of other energy

resources such as wind, solar, geothermal, etc. (added by the Southeastern Wyoming Mineral Development Coalition).

9. Make sure your agreement addresses water quality, quantity, well locations, roads, powerlines, noise, use and storage of chemicals on your property and disclosure of those chemicals. Any increased costs to you due to the mineral development. Make sure your water wells and reservoirs are registered with the appropriate state or local agency.

10. Require the company to gather monitoring and baseline data by a consultant of your choice prior to anything happening on your property or gather that data yourself. Know the water quality of your domestic well. Know the water quality of the water to be discharged, get a lab analysis of this water and then be specific about what you want done with the produced water to avoid damages on your property.

11. Photograph your land before and during development. Keep a record!

12. Establish damage standards as part of the agreement. For example, if your water well drops below a certain level or changes in quality occur, spell out in the agreement exactly what level or quality change constitutes damage. Include a damage indemnity or bond in your agreement.

13. Make sure everybody knows up front that if the drilling or development activity damages a water well or the land, the company is required to replace the well and/or repair or compensate you for the loss and damages.

14. Look carefully at the agreement to remove any broad language or rights granted to the company. A common one is the right to place a well, pit or compressor station on your property.

15. Know the land (legal descriptions) that is covered and exclude where your house or other important areas are located.

16. Detail what specifically constitutes a breach of the agreement and give a limited time to cure a breach – include a penalty for violation of the agreement. (Gates left open, fences cut, erosion, going off right of way.)

17. Make sure the company is required to pay taxes on improvements and removes equipment when done.

18. Be specific about reclamation and what reclamation should be done and when. Include reseeding and if you want complete authority to conduct and be paid for reclamation – be specific. Deal with noxious weeds. Try to get a right of first refusal for supplying water and gravel or for reseeding, fencing, or anything else you would like to be paid for doing.

19. Consider estate and financial planning to secure your future.

20. Last but not least, don't be afraid to speak out publicly if it becomes necessary. It has never hurt us to be forthright about the problems with mineral development.

PAYMENT GUIDELINES FOR SURFACE USE AND/OR DAMAGE AGREEMENTS:

(Obtained from the Converse County Landowners Association)

UPDATED JANUARY 25, 2011

Below is a list of payments that a surface owner may or may not receive pending negotiation strategies, current agricultural operations, and mineral development requirements. However, this is a list of payments for consideration and will be modified periodically to reflect current prices.

1. New Leases: It is suggested that for any new mineral leases these guidelines be attached as an addendum to the leases as already negotiated damages.
2. Indexing: Is recommended for all annual payments. Landowner's choice of fixed index (i.e. 10% increase every five years) or CPI indexing.
3. Well Locations: \$6,500 minimum for a maximum two acre site. Anything over two acres at \$3,250 per acre, or portion thereof. Annual damage payment of \$750 per acre, or portion thereof. Initial payment good for first ninety days of rig activity. If rig is on location for more than ninety days, then an additional fee of \$1,000 per month until rig leaves the location. Fence out of location at landowners discretion.
4. Tank Batteries: \$1,500 initial with annual damage payment of \$1,000. If tank battery is off the original well location, \$2,000 per year minimum payment.
5. Road Right of Way: Damage and easement payments of \$12.50 per rod. Annual damage payment of \$3.00 per running rod for each company using the right-of-way. Every additional well after three an additional \$1.00 per running rod (wells 1-3=\$3.00 annual, well 4=\$4.00, well 5=\$5.00, etc.). Width not to exceed on rod of travel bed. All production roads to be graveled and maintained as an all weather road by the mineral company.
6. Oil Field Flowlines and Gathering lines: \$20.00 per rod minimum. A one-line use only and one-time only. Annual damage payment of \$3.00 per rod. One line and one time use only. Pipeline salvage or take up at a minimum of \$20.00 per rod. Fifty foot construction, reverts back to one rod in width for operation. \$17.50 per square rod minimum for anything over 50 ft. during construction. Any subsequent damages arising from operations to be negotiated when they occur.
7. Powerlines: Secondary electrical service (three phase or smaller) to be underground at landowner's option. \$20.00 per rod, one line and one use only. Power line salvage at a minimum of \$20.00 per rod. Maximum width of fifty feet during construction, then one rod. Any construction outside 50 ft., \$17.50 per square rod minimum, reverting to one rod width after construction. \$3.00 minimum per rod annual.
8. Restoration: To be done within one year per landowner's recommendations, utilizing DEQ, Conservation Districts, or County Extension Agents as resources. \$50.00 per year per acre minimum for grassland loss if not restored.

9. Weeds: It is the responsibility of all companies to control any weeds caused by their activities whether on or off areas disturbed by them and for 5 years after abandonment.
10. Drilling Water: Fifty cents per barrel with a minimum of 20,000 barrels per well plus pumping costs.
11. Disposal Water: A trespass fee of fifteen cents per barrel minimum on DEQ approved disposal pits or injection wells in addition to any applicable annual payments due. Lessee to indemnify landowner.
12. 3D Seismic: Minimum of \$10.00 per acre. No stacking of charges or double charging.
13. Seismic Vertical Array: \$750.00 minimum for 1100 ft. hole, \$150.00 per hole for 10 ft. to 200 ft. hole with 20# of standard blasting powder per hole as maximum charge. Any line extending from deep hole \$2,000 per mile minimum or \$7.00 per rod minimum for any portion of a mile. Access road, \$7.50 per rod minimum. Holes must be plugged as per State guidelines.
14. Linear Seismic: \$4,000 per mile with a drive around fee of \$500 per mile. Guarantee water well integrity if within $\frac{1}{4}$ of a mile. Post an escrow fee of \$5,000 in local bank to cover potential extra damages or water well damages.
15. Aerial Surveys: Neither aerial surveys nor pipeline checks will be performed without prior notification of landowner and permission from landowner.
16. High Pressure Gas Lines: A minimum of 75 cents per foot of construction width per running rod for construction. This fee would include as permanent easement 64% of construction width, up to, but no more than 50 feet. A minimum of \$20.00 per running rod for any pipeline. A minimum of \$17.50 per square rod for any use or damage outside of construction corridor. One time and one line only. A minimum of \$17.50 per square rod, for any use or damage on easement for repair or maintenance. Annual damage payments of \$5 per running rod.
17. High Voltage Transmission Lines: Same as high pressure gas lines. Annual payments of \$8.00 per rod for aesthetic loss.
18. Communication lines: A minimum of \$15.00 per running rod for underground lines. A minimum of \$17.50 per square rod for any damages outside of a construction corridor 16.5 ft. in width. \$2.00 minimum per running rod annual.
19. Irrigated Lands: Compensation for irrigated lands to be triple normal rates to account for higher land values. A minimum of \$2.25 per ft. of width per running rod, plus payment for loss of crop for three years based on per acre yield (i.e. \$90.00 per ton of hay at three tons per acre equals \$270.00 per year for three years). A minimum of \$52.50 per square rod for any use or damage outside of agreed upon construction corridor. A minimum of \$52.50 per square rod for any use or damage on easement for repair or maintenance, and three year payment for crop loss. Refer to "Issues Specific to Tillable Farm Ground" section for more information.
20. CRP Lands: If mineral development occurs on CRP land, the company reimburses the owner for all penalties, lost proceeds, and damages plus a minimum of 15% of said damages.
21. Generators: All generators, pump engines, compressor engines, pump jack engines or any other device which produces noise will be muffled to comply with "hospital zone" mufflers and maintained as such at all times.
22. Surveyors: Damage fees of \$200.00 per day per vehicle (includes ATVs), or any portion of a day for survey crews and/or archeological surveys, or \$75.00 per well whichever is greater. Use of ATVs or other low impact vehicles encouraged.

23. All Other Roads: All other roads will be constructed as all weather roads, and maintained as such. All pre-existing roads will be converted to all weather roads and maintained as such. Roads will be maintained on a regular schedule and at landowner's request.
24. Gates Left Open or Fences Left Down: \$100/hour/person to gather and return livestock to their proper pastures.
25. Attorney Fees: All attorney fees will be paid by the developer.
26. General Terms: Alteration, replacement, or removal will fall under the above guidelines. Fee is for one line only. No structures or appurtenances will be placed on the easement without permission and annual payment. \$1500 per tree destroyed. Topsoil will be separated from fill dirt and kept separate, and replaced as topsoil. Dust control as needed and at landowner's request. Complete re-vegetation to landowner's satisfaction.
27. Release of Liability: All companies will provide a complete release of liability to landowner for their actions and operations.
28. Other: Surface casing to a depth to protect artesian water sources, generally 1,000 feet. Under balanced wells to a depth to prevent gas from escaping, generally 2,000 feet. Line all mud pits to protect water sources. Recommend closed loop/pitless drilling systems.

Detailed Checklist When Negotiating Your Surface Use

Agreement: (Obtained from the Powder River Resource Council Website)

DAMAGES

A. Realities of Money

1. When:
 - a. Before work
 - b. After work
 - c. Split payments
 - d. Annuals
2. How much
 - a. Risk
 - b. Real damages
 - c. Intangible damages
 - d. Value to buyer
3. How
 - a. Check
 - b. Cash
 - c. Sight draft
 - d. Time draft

4. Who
 - a. Lessee
 - b. Contractor
 - c. Agent
5. Credit worthiness of payor
6. Well Sites
7. Deep well
 - a. Initial damages
 - b. Annual damages
8. Methane well
 - a. Initial damages
 - b. Annual damages
9. Strat well
 - a. Initial damages

B. Roads

1. Permanent shaled
 - a. Initial damages
 - b. Annual damages
2. Permanent two track
 - a. Initial damages

C. Annual damages

D. Pipelines

1. Flowlines
 - a. Initial damages
 - b. Annual damages
2. Water Disposal Lines
 - a. Initial damages
 - b. Annual damages
3. Large 4" or greater oil lines
 - a. Initial damages
 - b. Annual damages
4. Large 4" or greater gas lines
 - a. Initial damage
 - b. Annual damage

E. Compressor Stations

1. Initial damages
2. Annual damages

F. Electrical lines Above the Ground

1. Initial damages
2. Annual damages

G. Electrical Lines Below Ground

1. Initial damages
2. Annual damages

H. Service access points

ACTIVITY OF CONCERN

A. Surveyors

1. When can they go?
2. How will they go?
3. How will they mark?
4. Who will pick up junk?
5. Will they get permission?
6. How much will be paid for access?

B. Seismic activities

1. Hole
2. Vibrosize
3. 3D
4. Types of damage
 - a. Surface
 1. Soil compaction
 2. Destruction of plant life
 3. Junk
 4. Time of operations
 - b. Water
 1. Drainage between formations
 2. Damage to existing wells or springs
 3. Who will pay?

C. Drilling operations

1. Depth
2. Length to time of operations
3. Time of year of operations
 - a. Size of pad
 - b. Width of easements
 - c. Location of drilling operations
 - d. Location of road
 1. Fences
 2. Snow
 3. Type of construction
4. Weight to be carried on road
5. Crossing of road
6. Grade and Crown
7. Soils
 - a. Sandy
 - b. Clays

- c. Expansive
- d. Compaction
- e. Erosion
 - (i) Wind
 - (ii) Water
- 8. Culverts
- 9. Gates
- 10. Cattle Guards
- 11. Deviation from established roads

D. Junk

- 1. Oil
- 2. Mechanical work in field
- 3. Survey and pin flags
- 4. Placement of signage
- 5. Duty to pick up trash

E. Recreational uses

- 1. Guns bows and crossbows
- 2. Dogs
- 3. Drugs
- 4. Alcohol
- 5. Recreation vehicles
 - a. Four wheelers and Motorcycles
 - b. 4 Wheel Drives
- 6. Fishing
- 7. Hunting
- 8. Searching for artifacts
 - a. Paleo
 - b. Arch

F. Operations in mud and snow

G. Water Protection

- 1. Drilling water
- 2. Disposal of water
 - a. Quality of water
 - 1. Heavy metals
 - 2. Salts
 - 3. Temperature
 - b. Volume of Water
 - 1. Slope
 - c. Soil conditions
 - d. Protection of water resources
- 1. Federal law to be considered
 - (1). Federal Water Pollution control Act (Clean Water Resources Act) of 1972 [PL92-500]

(2). Coastal Zone Management Act of 1990(CZAR) [101-508] applies to coastal states and Great Lakes states

(3). Federal Agriculture Improvement Act of 1996 (1996 Farm Bill)

e. Endangered Species Act of 1973 [PL93-205]

f. Ownership of Federal Property

1. Bureau of Land Management

2. Forest Service

3. Park Service

4. Bureau of Reclamation

5. Department of Defense

6. General Services Administration

7. Corps of Engineers

8. Indian Lands

(a) Tribe

(b) Bureau of Indian Affairs

9. State law to be considered (Beneficial Use)

a. Beneficial Use

(i) Riparian Doctrine

(ii) Appropriation Doctrine

(iii) Correlative Doctrine (ground water)

b. State Water Quality Law and Program

c. Storage of Water

(i) State Engineer

(ii) Corps of Engineers

H. Soil pollution

I. Noise pollution

J. Light pollution

K. Air pollution

L. Protection of viewscape

M. Protection of vegetative resource

1. Growing crops

a. Harvest Time

b. Soil erosion

c. Turning expense

2. Grass

3. Fire

a. Vegetation

b. Timber

c. Structures

d. Livestock

M. Extraordinary loss

1. Livestock

2. Wildlife

3. Human

N. Cooperation with others as to roads and water storage

O. Reclamation

1. Protection of soil and vegetative resource
2. How graded
3. How long open
4. When seeded
5. What seeded
6. How seeded
7. Wildlife areas
 - a. Riparian areas
 - b. Duck islands
 - c. Fish
8. Noxious Weeds
 - a. 21 introduced species - 1 native
 - b. How spread
 - c. Control
- P. Parking of equipment off road
- Q. Access Points (Security and protection of hunting)
- R. Time of operations
 1. Time of year
 2. Mud and snow
 3. Time of day
- S. Cooperation with other companies
- T. Changes in location of roads, electric lines, wells
- U. Dealing with Agencies
 1. BLM
 - a. On site inspection
 - b. Cultural surveys
 2. State Engineer
 3. Department of Environmental Quality
 4. Oil and Gas Commission

Legal Concerns

- A. ID of parties, addresses, phone #'s, tax ID
- B. Legal descriptions
- C. Notices
- D. Force Majure
 1. Choice of jurisdiction and venue
 2. Release of liability and indemnification
- E. Statutory law citation
 1. Federal
 2. NEPA (National Environmental Protection Act) [PL93-205]
 3. Clean Water Act Federal Water Pollution Control Act (Clean Water Resources Act) of 1972 [PL92-500]
 4. Cultural Survey
 5. National Historic Preservation Act of 1966 (P.L.89-665; 16 U.S.C. 470)
 6. Implementing regulation (36 CFR part 800)
 7. Executive Order No. 11593 -Protection and Enhancement of the Cultural Environment 2 CFR 154(1971) 16 U.S.C. 470
 8. BLM Manual 8100.07- Responsibilities for Nonfederal Cultural Resources
 - (i). 8143.06F
 - (ii). BLM Manual Supp. (Wyo) 8143.11

1. Instruction Memorandum

- a. WY-86-457
- b. WY-93-121
- c. WY -93-138
- d. OnShore Oil and Gas Order No. 1 (48 F.R.48916) 21 Nov. 1983

DEQ Water Well Testing Guidelines

Wyoming Department of Environmental Quality Water Quality Division Sampling and Testing Water Wells in Areas of Oil and Gas Development

The Wyoming Department of Environmental Quality (WDEQ) has developed this guideline in response to public concern about potential impacts to water wells due to industrial activity, such as oil and gas exploration and development. Water well owners are concerned with maintaining the quality of their water. Periodic sampling and testing of well water is important to initially determine that well water is suitable and safe for drinking water purposes, and to monitor for potential changes in water quality or presence of contaminants over time. Testing can help answer the question of whether a well has been impacted by industrial activity. Water samples may be collected by the well owner or by an independent third party, however, test results from water samples collected by a well owner may not be recognized in legal proceedings.

It is important to collect water well samples prior to drilling or other industrial activity to establish 'baseline' water quality conditions. Mineral and surface owners may be able to negotiate water well testing, both pre-and post-drilling, as part of their mineral lease or surface use agreement.

Water can be tested for hundreds of water quality analytes and parameters. Ideally, well water should be tested as described in WDEQ's *Guideline for Sampling and Testing Well Water Quality* (see link below). However, for those who do not wish to go to this extent and expense, the following relatively inexpensive 'indicator' analytes, parameters, and chemical compounds may provide a level of comfort for monitoring potential effects from oil and gas development:

Mineral and metal indicators: conductivity, pH, Total Dissolved Solids (TDS), alkalinity, barium, calcium, magnesium, sodium, chloride, sulfate, fluoride, nitrate, lead, arsenic, iron, and total organic carbon.

Chemical indicators: TPH-DRO and TPH-GRO (Total Petroleum Hydrocarbons – Diesel Range Organics and Gasoline Range Organics); and BTEX (Benzene, toluene, ethylbenzene, and xylenes).

Laboratories can provide information on how to collect a water sample, or provide for sample collection. Laboratories can also help with the selection of additional, or alternative water quality analytes and 'indicators' for other types of potential contaminants.

Laboratory analyses for mineral and metal water quality 'indicators' can be obtained for as little as \$150 from the Wyoming Department of Agriculture lab at (307) 742-2984. Lab analyses for chemical indicators is more expensive and may cost a few hundred dollars, or more, but are more likely to detect contamination associated with a variety of different oil and gas related activities.

For more information regarding potential sources of contamination, establishing baseline quality of well water, sampling frequency, evaluation of sample results, and laboratories available to the public please refer to WDEQ's *Guideline for Sampling and Testing Well Water Quality* available on WDEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp>.



Wyoming Department of Environmental Quality Water Quality Division

Guideline for Sampling and Testing Well Water Quality

The Wyoming Department of Environmental Quality (WDEQ) has developed this Guideline to provide basic information to well owners interested in evaluating water well quality for domestic use. Well owners may find the information in this guideline useful in understanding how and when to collect water well samples, what to sample for, and laboratories that perform water quality analyses. The information presented in this guideline is intended to assist well owners in making informed decisions, but well owners are also encouraged to seek professional advice and assistance related to their specific situation or concern.

Potential Sources of Groundwater Contamination

Virtually all types of land use activities have the potential to impact water supplies. Common land use activities that are known to have impacted water supplies include: agricultural, residential, government, commercial, and industrial (including mining and oil and gas development). Water wells can also be impacted by naturally occurring sources of contamination (e.g. arsenic, selenium, fluoride, radium, etc.) at levels that may cause health concerns. Well owners should become familiar with the various types of land use activities within their area in order to understand the types of chemical constituents that are often associated with them and that may impact groundwater. Please refer to the table of potential sources and contaminants available on DEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp> that further describes potential sources of contamination and the types of materials and chemical constituents that are commonly associated with them.

Establishing 'Baseline' Quality of Well Water

DEQ recommends that all domestic wells be initially sampled and analyzed for Tier 1 (with the exception of disinfection by-products and disinfectants), Tier 2 and Tier 3 constituents as described below:

Tier 1 (Safe Drinking Water) constituents include those potential drinking water contaminants for which the US EPA has established safe drinking water levels (*National Primary Drinking Water Standards*), and levels that ensure the aesthetic (taste, odor, etc.) quality of drinking water (*Secondary Drinking Water Standards*). These include certain microorganisms, metals, inorganic minerals and chemical compounds, organic chemicals, and radionuclides known to be potentially harmful or otherwise affect the aesthetic quality of drinking water. A copy is available on DEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp>. A Tier 1 analysis is very expensive and may cost upwards of a few thousand dollars to complete.

Tier 2 and Tier 3 ('Indicators') constituents are a limited set of potential contaminants that can be used to indicate changes in well water quality, and possibly detect the presence of water well contamination. They typically consist of several minerals and metals that occur naturally in ground water, physical parameters (e.g. pH), and one or more chemical constituents usually associated with potential sources of contamination in the area of the well. Different 'indicators' recommended by other agencies and laboratories may be equally suitable for establishing baseline water well quality and monitoring for potential contamination over time. The more comprehensive the list of constituents, the better, when determining whether well water is suitable for domestic use or has been impacted by a potential source of contamination.

Tier 2 constituents include: conductivity, pH, Total Dissolved Solids (TDS), alkalinity, barium, calcium, magnesium, sodium, chloride, sulfate, fluoride, nitrate, lead, arsenic, iron, and total organic carbon. A Tier 2 analysis is relatively inexpensive and will likely cost less than a couple hundred dollars to complete.

Tier 3 constituents are 'indicator' chemical compounds often associated with a potential source of contamination. A Tier 3 analysis can cost between a couple hundred to several thousand dollars to complete, depending upon the type and number of constituents to be analyzed by the laboratory.

Sampling Frequency

Upon completion of **Tier 1, Tier 2 and Tier 3** analyses to establish 'baseline' conditions, it is important to continue to periodically collect samples from the well in order to evaluate whether well water quality has changed over time, or not. Ideally, follow up samples should be analyzed for **Tier 1** constituents on a schedule similar to that required for public water systems, or more frequently if there is a noticeable change in the taste, color, or odor of well water. Generally, for groundwater-supplied public water systems EPA requires sampling and analyses for inorganic and synthetic organic contaminants and radionuclides every three years; volatile organic contaminants every 5 years (or annually if detected in prior samples); and nitrate and nitrite annually. Well owners may consider eliminating the need to analyze for constituents associated with sources of contamination which they believe pose little, if any threat to their water supply.

Unfortunately, the cost for Tier 1 analysis can be very expensive. Alternatively, less expensive sampling and lab analyses can be a useful way to periodically screen for changes in water well quality provided that the well owner understands the limitations of not completing a Tier 1 analyses on schedule. One alternative may be to rotate the sampling schedule by completing a Tier 1 analysis as scheduled in order to evaluate the safety of the well water for drinking water purposes, then complete less expensive Tier 2 and Ties 3 'indicator' sampling during Year 2 and annually or bi-annually thereafter in order to evaluate 'indicators' of potential contamination.

Well owners may wish to consider negotiating water well testing, both pre-and post-drilling, as a condition to their mineral lease, or surface use agreement. Obtaining baseline water well quality and periodic sampling and analysis may be beneficial to both parties.

Sample Collection and Laboratory Analysis

Water well testing should be arranged through a certified water testing laboratory and water well samples should be collected by an unbiased professional. This could be an employee of the water testing laboratory. Doing so can add significantly to the cost of water well testing but may be vital to the admissibility of the sample results if a legal action related to pollution of the water well ensues. It is unlikely that test results from water samples collected by the water well owner will be recognized in legal proceedings, however, well owners are encouraged to consult their own attorneys for professional advice.

It is also important to request laboratory methods that achieve a low detection limit in order to detect the presence of contaminants at low levels. Generally, the lower the detection limit, the more expensive the water quality analysis.

Before selecting a lab it may be prudent to check the laboratory's certifications. Preferred labs are certified by US EPA. Consult the 'Environmental' or 'Water Testing' sections of your local Yellow Pages for a list of laboratories within your area.

The Wyoming Department of Agriculture laboratory in Laramie also provides some analytical services and is EPA certified. For more information, contact the lab at 307-742-2984 or visit them online at: <http://wyagric.state.wy.us/images/stories/pdf/forms/aslab/labfees.pdf>.

Evaluating Sample Results

Tier 1 sample results should be compared to the safe drinking water levels listed on US EPA's Primary Drinking Water Standards table available on DEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp>. If a sample result for any "primary" constituent exceeds its safe drinking water level (Maximum Contaminant Level (MCL)) listed on the table, the US EPA considers the water not safe for drinking water purposes. In these situations, well owners should discontinue use of the well until an assessment of water treatment alternatives has been completed. The cause may, or may not be associated with man-made contamination. For instance, some areas in Wyoming have naturally occurring constituents in ground water (e.g. arsenic, selenium, fluoride, radium, etc.) that exceed the safe drinking water level. If the cause of contamination is suspected to be a result of some type of human activity, well owners are encouraged to contact DEQ's Spill and Complaint hotline at 307-777-7781 or provide information online at DEQ's website (<http://deq.state.wy.us/>) by clicking on the link "Got a Spill?".

Tier 1 sample results should also be compared to the aesthetic drinking water levels listed on US EPA's Secondary Drinking Water Standards table available on DEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp>. If a sample result for any "secondary" constituent exceeds its aesthetic drinking water level (Secondary Standard) listed on the table, the water may be safe for drinking water purposes, but may have problems with taste, appearance, or odor. Again, the cause may, or may not be associated with manmade contamination. Well owners should contact their local health department or county conservation district office, or visit DEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp> for further information on water treatment.

Usually one sees only minor fluctuations in Tier 2 water quality results over time. Tier 2 sample results should also be compared to US EPA's Primary and Secondary Drinking Water Standards table as described above. If Tier 2 sample results illustrate an increasing trend in constituent concentration over time (i.e. over several sampling periods) the well owner is encouraged to consult with the local DEQ Water Quality Division office in Cheyenne, Sheridan, Lander, or Casper.

Tier 3 sample results should be compared to US EPA's latest edition of "Drinking Water Standards and Health Advisories" available on DEQ's website at <http://deq.state.wy.us/wqd/groundwater/index.asp>. If a sample result for any constituent exceeds its safe drinking water level (Maximum Contaminant Level (MCL)) or its drinking water equivalent level (DWEL) listed on the table, the US EPA considers the water to be not safe for drinking water purposes. In these situations, well owners should discontinue use of the well until an assessment of water treatment alternatives has been completed. The cause may, or may not be associated with man-made contamination. If the cause of contamination is suspected to be a result of some type of human activity, well owners are encouraged to contact DEQ's Spill and Complaint hotline at 307-777-7781 or provide information online at DEQ's website (<http://deq.state.wy.us/>) by clicking on the link "Got a Spill?".

For Further Information:

Wyoming Department of Environmental Quality
Water Quality Division
122 W. 25th St. – 4W
Cheyenne, WY 82002
307-777-7781

List of Water Quality Analysis Labs

Below is a list of Labs that you can contact to analyze water quality to monitor surface or ground water. Please contact your local Conservation District or DEQ for more information.

ChemSolutions
7332 S. Alton Way, Ste 13G
Centennial, CO 80112
Contact: Mr. John Graves
Phone: (303) 771-5570
E-mail: john@chemmobile.com

Wyoming Department of Agriculture
Analytical Services/State Chemical Lab
1174 Snowy Range Road
Laramie, WY 82070
Phone: (307) 742-2984
mleath@wyaslab.net

Environmental Science Corporation
12065 Lebanon Road
Mt. Juliet, TN 37122
Contact: Ms. Judith Morgan
Phone: (615) 758-5858
E-mail: jmorgan@envsci.com

Inter-Mountain Labs
555 Absaraka
Sheridan, WY 82801
Contact: Mr. Tom Patten
Phone: (307) 672-8945
E-mail: organics@imlinc.com

Pace Analytical Services, Inc.
9608 Loiret Blvd.
Lenexa, KS 66219
Contact: Mr. Charles Girgin
Phone: (913) 563-1444
E-mail: Charles.Girgin@pacelabs.com

Precision Analysis
29 Country Acres Road
Riverton, WY 82501
Contact: Mr. Jamie Freeman
Phone: (307) 856-0866
E-mail: Jamie@precision-labs.com

TestAmerica Analytical Testing Corp.
2960 Foster Creighton Drive
Nashville, TN 37204
Contact: Ms. Andrea Runnels
Phone: 800-765-0980
E-mail: arunnels@testamericainc.com

Accreditation Organization:

American Association for Laboratory Accreditation (A2LA)
5301 Buckeystown Pike
Suite 350
Frederick, MD 21704
Contact: Randy Querry
Phone: (301) 644-3221
E-mail: rquerry@a2la.org

Mineral Development on State Lands

The Office of State Lands and Investments is responsible for negotiating mineral leases on state land. Upon the State signing a mineral lease with a company, **the lessee may negotiate a Surface Impact Payment (similar to a Surface Use Agreement on private lands) on State Lands as per rules and regulations below.** Companies will be responsible for contacting the lessee to negotiate the Surface Impact Payment. Before entering into negotiations, it would be wise for lessees to contact the Office of State Lands and Investments Real Estate Division at (307)777-6358 to discuss the most common types of impacts that are typically negotiated by the lessee. Negotiated Surface Impact Payments include, but are not limited to, well sites, roads, and pipelines. The Lessee may also negotiate non-monetary agreements which may include keeping gates closed, installation of cattle guards, or other operational requirements to minimize impacts on the lessee. The rules and regulations for Surface Impact Payments are as follows:

Section 14. Surface Impact Payments

- (a) Anyone desiring to enter upon the leased premises shall contact the lessee prior to entry, unless otherwise provided in subsection (c) of this section.
- (b) For all entries, the lessee may negotiate a surface impact payment provided that any payment is consistent with payments for impacts to adjacent lands. By separate checks or money orders, the payor shall remit the lessee's share of the surface impact payment directly to the lessee and the Board's share of the surface impact payment directly to the Office, in accordance with the following schedule:
 - (i) For the first five thousand dollars (\$5,000), the lessee's share shall be forty percent (40%), and the Board's share shall be sixty percent (60%).
 - (ii) For that portion of a payment exceeding five thousand dollars (\$5,000), through ten thousand dollars (\$10,000), the lessee's share shall be thirty percent (30%), and the Board's share shall be seventy percent (70%).
 - (iii) For that portion of a payment exceeding ten thousand dollars (\$10,000), the lessee's share shall be twenty percent (20%), and the Board's share shall be eighty percent (80%).
 - (iv) For annual payments, the lessee's share shall be twenty percent (20%), and the Board's share shall be eighty percent (80%). For purposes of this section, "annual payments" means any portion of a surface impact payment remitted subsequent to the initial remittance on periodic basis, regardless of the length of the period.
- (c) The following shall not be subject to the requirements of this section:
 - (i) The Board and its representatives when entering for purposes of management or administration of state lands.
 - (ii) Members of the public when entering for purposes of hunting and fishing and casual recreational use pursuant to the provisions of Chapter 13 of these rules.
 - (iii) Applicants for, or holders of, an easement issued under Chapter 3 of the Board's rules.
 - (iv) Applicants for, or holders of, a temporary use permit issued under Chapter 14 of the Board's rules.

(d) If the person desiring entry upon state lands is unable to reach an agreement with a lessee regarding a surface impact payment after having negotiated with the lessee in good faith for a period of ninety (90) days, the person desiring entry or the lessee may submit evidence to the Office to establish the surface impact payment.

(i) The evidence and any information the Director deems relevant will be analyzed by the Director, whereupon, the Director will enter an order establishing the surface impact payment and recommend the decision to the Board for final approval.

(ii) Either party may appeal the Director's decision. The petition shall be treated as a contested case pursuant to W.S. 16-3-107 et seq. A hearing officer shall preside over the contested case hearing and make a recommended decision. The decision of the Board establishing the surface impact payment shall constitute final agency action. 4-8 (iii) The person desiring entry may immediately enter the state lands while negotiations with the lessee are proceeding, upon providing the Office with a deposit for the surface impact payment in an amount determined by the Office. When the Director enters an order establishing the surface impact payment, the Office shall forward the lessee's share of the surface impact payment to the lessee and return any excess money on deposit to the petitioner, without interest.

(iv) The costs of the contested case hearing, including hiring a hearing officer, shall be paid in equal shares by the person desiring entry and the lessee.

Surface Use Agreement Provisions to

Consider: (Obtained from the Oil and Gas Accountability Project)

Introduction

•Keep in mind that a negotiated Surface Use Agreement is almost always better than allowing a company to “Bond On” which results in the landowner waiting up to two years past the time the operator requests release of its bond to receive minimal or zero surface damage payments. (Refer to the Landowner Guide to the Split Estate Statute) (added by the Southeastern Wyoming Mineral Development Coalition)

Development plan

• Surface owners may want to require from the company an overall development plan showing the location of wells, roads, pipelines, compressors, water disposal/discharge, etc. before development starts, with allowance for changes as development progresses.

Use of Surface to Develop Other Energy Resources (added by the Southeastern Wyoming Mineral Development Coalition)

•Include mutual accommodations language in the surface use agreement to allow mineral development while also allowing the surface owner to enter into future wind, solar, and/or other surface use agreements in such a manner as to permit both activities to be pursued simultaneously. The agreement should include provisions that reasonably accommodate and avoid impairment of the development of other energy resources such as wind, solar, geothermal, etc.

Water issues

- Address both water quality and quantity issues.
- Establish damage standards as part of the agreement. Spell out in the agreement how much of a change constitutes damage (e.g., if your water well drops below a certain level or water quality declines by a certain amount). Include remedies for what the company will do if damages occur (e.g., the company will pay for the successful drilling of a new drinking water well).
- Be clear from the opening discussion and put into the agreement that if drilling or other development activities damage a water well or the land, the company is required to replace the well and repair or compensate for the damages.
- Water well location (make sure your water wells are registered with the state engineer, so that you have proof of location).
- Require the company to gather baseline water quality and quantity data by a consultant of your choice PRIOR TO any activities on your property. Require the company to conduct periodic monitoring of water quality and quantity, to gauge whether the company's activities are having an effect on your water. Make sure water sampling includes quality and quantity of: domestic well water, surface waters, springs, and groundwater flows. And require the company to provide regular reports of the test results.
- Require that the company disclose the quality and quantity of the water from oil and gas operations to be discharged or reinjected by the company. Ask for a lab analysis of the water (from an independent lab, if possible), and then be specific about where you want the water to be discharged or piped to avoid damages to your property. Also, retain the right to require the operator to move the point of discharge if it is causing environmental or biological damage (e.g., killing hay meadows, streamside vegetation, fish in the stream).
- Groundwater withdrawal from aquifers is an important issue for landowners who rely on groundwater for livestock and for irrigation. Some gas operators have cooperated with landowners by diverting produced water from CBM wells into stock tanks or other holding areas for their livestock. Depending upon the quality of the produced water, this may be something to add into your SUA.

Land use issues

- Propose development alternatives that make sense in terms of your agricultural or land use operations. For example, don't be afraid to propose alternative routes or pump locations. Don't let them chop up your field with a road or pump that is better located elsewhere.
- You may want to include techniques for preventing/controlling erosion and dust from roads or drill sites.
- Right-of-way easements. Some companies may try and get you to put this easement in their name. It is in your best interest to do this agreement with your power company, not the oil and gas company.
- When leasing land for certain facilities, e.g., compressors, you will likely lease that land by the acre. You should be specific on the wording of this lease as to what materials are going to be on the acreage involved. If you are not specific, companies may take advantage of it and put as much hardware as they can on the acreage.

Conservation Reserve Program (CRP) Land

The following is language that you may want to include in your Surface Use Agreement if mineral development is proposed on CRP lands (language provided by Steve Sherard, Attorney at Law):

“Operator understands and agrees that Owner has enrolled the property described herein in the Conservation Reserve Program ("CRP") with the Federal Government. If Owner is penalized or forfeits any proceeds due her under this program, Operator shall reimburse Owner any and all fines, fees and damages that are levied against Owner for Operator's violation of the CRP contract by virtue of Operator's use of the surface estate, (plus fifteen per cent (15%) of said total damages). Upon abandonment of any oil/gas well (or upon lease termination) and associated facilities, Operator shall return the CRP property to its original condition as specified under the CRP contract.”

Reclamation

- Be specific about reclamation and how it should be done (e.g., you want original land contours restored; and native vegetation planted). Include agreements on reseeded. If you so desire, require that you be authorized to conduct and be paid for carrying out the reclamation.
- Include whether or not you want the option to convert a gas well to a water well.
- You may want to include a clause stating that the company will remain responsible for closure and restoration of containment pits, regardless of whether the landowner uses the produced water they hold; as well as for clean-up of any hazardous materials left in the bottom of the pits upon closure.
- Look for income opportunities by contracting with the company to provide services to include reclamation of roads, fence maintenance, reseeded, etc. (added by the Southeastern Wyoming Mineral Development Coalition)

Rights and responsibilities of the company

- Look carefully at the agreement, and remove any broad language or rights granted to the company. For example, it is common for companies to include the right to place a gas plant on your property.
- Make sure the company is required to pay taxes on improvements (e.g., roads).
- Make sure company removes equipment when activities are completed.
- Include a damage indemnity or bond in the agreement. Most state agencies require companies to post a bond, but often these amounts are not sufficient to ensure that wells will be plugged and abandoned properly.
- Require the company to purchase or show evidence of liability insurance to adequately cover catastrophic events such as a prairie fire caused by a company owned vehicle. (Added by the Southeastern Wyoming Mineral Development Coalition)

Benefits granted to the surface owner

- Some landowners have asked to be able to use parts of the well pad for parking vehicles, trailers or equipment.
- Site-specific surface enhancement issues may also be included (e.g., new fences, new gates/cattle guards).

INDEMNIFICATION

Landowners should be sure to request an indemnification clause so that they will not be held responsible for pollution or other longterm liabilities created by the oil or gas company.

Quality of life, health and safety issues

- Often, oil and gas companies spray pesticides to keep weeds down along roadsides. If this is not something you want on your land, be sure to specify this in the agreement.
- Include provisions that protect and preserve aesthetic values (e.g., hide compressors behind hills, reduce and consolidate the number of above-ground power lines, maximize use of buried power lines).
- If noise reduction from pumps and compressor stations is a concern, require the use noise reducing equipment and materials.

General

- Detail what specifically constitutes a breach of the agreement, and give 30 days to cure the breach.

Enforceability of the agreement

This has definitely been a problem for landowners. Even when landowners have had good experiences with oil or gas development on their property, non-compliance with surface use agreements is commonplace. Surface owners have had to resort to legal action when companies have failed to comply with the agreement, even though it contained protective provisions. Some landowners have made suggestions for surface use agreement breach of contract provisions that might make the agreement easier to enforce, including:

- penalty clauses or stipulated damage provisions for violations of the agreement (e.g., \$300/day while a pit is leaking);
- operator payment of the landowner's attorney fees if the landowner prevails in a suit to enforce the agreement; and
- escrow account or other financial guarantee to be created by the initial operator, which can be drawn against to correct violations of the agreement that are not cured within a reasonable amount of time.

Separate Agreements (added by the Southeastern Wyoming Mineral Development Coalition)

- It is common for the surface owner to negotiate separate agreements for conducting seismic operations and providing easements for compressor stations due to the unique nature of these specialized operations and the fact that surface owners may be dealing with a myriad of different companies. This may require more time but provides the surface owner with specific agreements that will hold these companies accountable when conducting operations. Please refer to the "Sample Seismic Agreement" section to obtain more information.

Other Provisions That You May Want in Your Surface Use Agreement: (But Were Afraid to Ask!)

Below is a list of provisions that you may want to consider for inclusion into your Surface Use Agreement. These provisions are not common in most agreements and may not be considered by the developer. However, they could be very beneficial to you and your family....and you will never know until you ask!

- Ask for an override for split estate minerals. An override is defined as the following:

Overriding royalty interest. - Is similar to a basic royalty interest except that it is created out of the working interest. For example, an operator possesses a standard lease providing for a basic royalty to the lessor or mineral rights owner of 1/8 of 8/8. This then entitles the operator to retain 7/8 of the total oil and natural gas produced. The 7/8 in this case is the 100% working interest the operator owns. This operator may assign his working interest to another operator subject to a retained 1/8 overriding royalty of the 8/8. This would then result in a basic royalty of 1/8, an overriding royalty of 1/8 and a working interest of 3/4. Overriding royalty interest owners have no obligation or responsibility for developing and operating the property. The only expenses borne by the overriding royalty owner are a share of the production or severance taxes and sometimes costs incurred to make the oil or gas salable.
- Ask the developer to pay for all Attorney fees.
- Ask for an annual cost of living increase to be attached to all annual payments to include right of ways, easements, and other annual payments.
- Consider requesting the first right of refusal to sell the company water and gravel for oil and gas development purposes.
- Ask for loss of production payments to include reduced livestock carrying capacity and/or less crop yields due to development.
- Ask to be compensated for current and future CRP payments, if the development occurs on currently enrolled CRP lands.
- Look for income opportunities by contracting with the Operator/Company to provide a variety of services to include reclamation of roads, fence maintenance, reseeding, etc.
- Ask for a “Most Favored Nation” clause which requires the developer to offer you the same agreement (to include payments and surface protection agreements) that is negotiated by another landowner which may be considered more “favorable.”

An example of a “Most Favored Nation” clause is as follows:
If (name of company) executes additional lessor options with any landowners whose property lies within (number of miles) of landowner’s property boundary and in the same state as landowner (the neighbor’s option), and if the neighbor’s option would have been more favorable to

landowner had landowner executed an option similar to the neighbor's option, then (name of company) and landowner will amend this agreement such that it reflects terms similar to the neighbor's option, and (name of company) will pay to landowner the additional money, if any, that landowner would have been paid had landowner signed an option similar to the neighbors agreement.

- Require the company to gather baseline water quality and quantity data by a consultant of your choice PRIOR TO any activities on your property. Require the company to conduct periodic monitoring of water quality and quantity, to gauge whether the company's activities are having an effect on your water. Make sure water sampling includes quality and quantity of: domestic well water, surface waters, springs, and groundwater flows. And require the company to provide regular reports of the test results.

ISSUES SPECIFIC TO TILLABLE FARM GROUND:

- Value of destroyed growing wheat based on KCBT or organic wheat sales contract with verifiable yield data from FSA or FCIC.
- Value of disturbed summer fallow based on most recent UW Custom Rate Guide per operation.
- Top soil removed from drill site is stock piled separately
- A perimeter fence should be built around drill site to define specific boundaries.
- Operator should pay for soil samples taken and tested for specific oil drilling chemicals by a reputable laboratory. Clean up is responsibility of operator to EPA rules.
- Each drill site should have its own SUA. (non-inclusive SUA)
- Easements for roads, pipelines, etc. should be non-exclusive.
- Operator should conduct and pay for each domestic and stock water well testing by a reputable laboratory within one mile of drill site.
- If water well is drilled on site, the surface owner or lessee has the option to keep the water well after drilling requirements are met.
- Gravel placed on drill site and roads will be removed if oil well is non-producing.
- Compaction of all affected farm ground will ripped to a depth of 3' and soil chunks worked down to tillable levels.
- All rocks on surface after reclamation larger than 4" diameter will be removed. If pipeline or electrical trenches are dug, a "double ditching" technique should be used.
- There should be a minimum payment of \$1000 for any road built regardless of length.
- Wind erosion from bare drilling site should be compensated for all affected areas.
- Lease holders of farm ground owned by absentee landowners or the state should be compensated for surface damages based on crop share agreement. Can there be some wording in SUA agreement to ensure this?

- If a pit is dug on a drilling site, all foreign material, chemicals, and pit liner will be removed from leased property after drilling is complete and comply with EPA clean up rules.
- A trash service will be obtained for each drill site and any trash that blows onto adjoining land will be removed by operator.
- Settling of a drilling pit site must be filled in by operator for a period of five years after drilling is complete at surface owner or lessee's discretion.
- Operator should pay all liquidated damages to USDA-FSA resulting from drill sites located on land enrolled in CRP contracts.
- Operator should compensate surface owner/lessee for all farm subsidy payments lost on affected acres.
- Surface owner or lessee should have first right of refusal on all reclamation work.
- Surface owner or lessee might be retained by operator to oversee and mitigate any discrepancies of a SUA on affected land.

What Leverage Do Landowners Have When Negotiating A Surface Use Agreement When They Do Not Own The Minerals Or Have Already Signed a Mineral Lease?:

First, remember the following in negotiating with oil companies:

- **Time** is money to the company. Landowners should not get in a hurry to sign a Surface Use Agreement that doesn't protect surface interests or fit their operation.
- **Visit With Your Neighbors.** Work with your neighbors or landowners who are currently negotiating a surface use agreement. Ask your neighbors and/or landowner group to reach agreement on what you believe are fair and reasonable payments (see Payment Guidelines for Surface Use Agreements section). Request a meeting with the oil company(s) and then re-negotiate with a unified voice.

The split estate statute gives the surface owner some leverage and control, 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 surface owner 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. The following is a brief list of requirements provided by the Split Estate Law that may assist in negotiating with operators:

- Read and understand the Split Estate Law (A Step-by-Step Guide Through the Split Estate Statute has been provided in this document).
- The Split Estate Law requires the operator or developer to give the surface owner 5 days notice before entering the surface owner’s property to conduct non-disturbance activities to include surveying, site inspections and general planning. It also 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.
- The Split Estate Law requires the operator to provide written notice to all surface owners 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 owners to evaluate the effect of oil and gas operations” on the use of 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*
- The Split Estate Law requires that the operator and surface owners must engage in good faith efforts 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.” The Operator must demonstrate how “good faith” efforts were accomplished.
- The surface owner may request mediation through the Wyoming Department of Agriculture to resolve disputes regarding a surface use agreement.
- The Split Estate Law requires the use of a surety bond or other type of guaranty to cover damages – conditioned to the Oil and Gas Conservation 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.
- The Split Estate Law gives the Oil and Gas Conservation 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).

- The surface owner may object (in writing) to the Oil and Gas Conservation Commission the amount and type of bond if the surface owner feels that it is inadequate.

Mineral Lease Provisions to Consider: _

(Obtained from the Oil and Gas Accountability Project)

These are just a few examples of provisions to include in a lease. A lease agreement contains a number of stipulations, including but not limited to:

- Legal description of the area, and number of acres involved
- An effective date of the lease agreement, and the anniversary date for the lease. This is important because lease rental payments must be paid on or before this date in order to keep the lease in force.
- A statement of the primary term of the lease. This may be any period of time, but it is commonly between 1 and 10 years. If you want a well to be drilled soon, make sure the term is short. Companies may tell you that they will drill quickly, but only a short term lease will ensure that action. Watch out for standard lease provisions that renew the lease or hold it in force without your permission. If these are present, you may ask for them to be removed. Also, recognize that once production is established, oil and gas leases will normally continue for the life of the production.
- Lease Rentals. These rentals are paid to maintain the lease during the primary term. The rental charges vary from lease to lease. Talk with other landowners to find out what is typical for your region. Typically, the first year's lease rental and any bonus should be paid when the lease is negotiated.
- Signing bonus. It is common for a bonus is paid upon signing the lease. In competitive production areas these bonuses can be significant.
- Use of Surface to Develop Other Energy Resources (added by the Southeastern Wyoming Mineral Development Coalition). Include mutual accommodations language in the surface use agreement to allow mineral development while also allowing the surface owner to enter into future wind, solar, and/or other surface use agreements in such a manner as to permit both activities to be pursued simultaneously. The agreement should include provisions that reasonably accommodate and avoid impairment of the development of other energy resources such as wind, solar, geothermal, etc.
- A royalty clause. Royalty is a major consideration for a mineral owner, especially if the lease is highly productive. Look closely at the royalty provision, and understand how it is calculated. The royalty is the share of the oil and gas production that is reserved to the mineral rights owner. It is usually indicated as a fraction or percentage of the proceeds received from the oil or gas that is produced. It is common to have a royalty between 1/8 (12.5%) and 1/4 (25%). Royalty may be received in-kind, which means that the lessor may take physical possession of the oil or gas. Usually, however, the oil or gas is sold to a refinery and the lessor receives payment for his or her share.
- Payment of Royalties. Often, it is stipulated that payment must be received within 30 days of production, and each 30 days thereafter. Payment of royalties directly to the landowner by the gas purchasing company is desirable, so that there is no delay while the oil or gas company does its accounting.
- Shut-in Royalty. If a landowner wants a well to produce gas for his home/farm operation, it should be understood that it will be an interruptible supply because of the

nature of the gas production and distribution system. Consequently, the landowner may want to write a lease that provides high enough shut-in royalty to provide for alternative fuels. Landowners may be interested in adding a provision to have the option of taking over a well if it is not in production for 12 consecutive months, or prior to the removal of equipment from the well. If a landowner takes over a well, however, he or she also takes on the responsibility for plugging the well. The landowner should contact the state agencies to find out what their plugging obligations will be, and whether or not the well can be converted to a water well.

- Requiring landowner approval before a lease can be sold to another company. This prevents the lease from being sold to an undesirable company. Sometimes companies will transfer leases without telling the landowner. In a few states there are laws requiring that landowners be notified within 30 days of a lease transfer. If your state has such a law, you can include a provision that automatically cancels the lease if the company fails to notify you of such a transfer.

- Landowner approval in writing of well, tank, access road and pipeline sites. It should be stipulated that written landowner approval must be granted before any construction or drilling occurs. A plat map attached to a lease may be desirable where special land features (orchards, springs, etc.) should be protected. The maximum width of a combined access road and pipeline easement should be established in the lease (e.g., often it is 40 feet during drilling operations and 20 feet after a well is completed). The size of the well drilling site should also be specified.

- Payment of damages for property and crops destroyed by the operations. Many leases contain an indemnification provision, which makes the operator liable for any and all damage and liability resulting from their oil and gas operations. This provision should include wording that makes the company liable for damage to growing crops, trees, fences, buildings, tile lines and drainage ditches, springs, water wells for homes and livestock, other items of significance to the landowner, and all damages to the surface of the lessor's property. A landowner should not accept a lease that only provides payment for growing crops. Such a lease will not entitle the landowner to any other damages, no matter how serious they may be. The landowner may want to include provisions allowing him or her to harvest timber in the area of a proposed well site prior to the company bringing in drilling equipment; and requiring that well heads be fenced in, landscaped, and have sound barriers erected.

- Pipeline Restrictions. Many leases authorize installation of pipelines or transmission lines that may be required. A provision authorizing ONLY pipelines that serve the wells on the landowner's property is desirable. Additional pipeline easements should be negotiated separately.

- Burying pipelines at a specified depth. Since pipelines may or may not be buried according to state regulations, the landowner may want to ask the company to bury the line at a depth that he or she desires (e.g., below tillage depth). The company laying the pipeline should be required to file a map of line location with the landowner.

- Depth of minerals. The mineral owner can specify the depth of the mineral being leased. There are other minerals that may be located at other depths, and those may be leased separately.

- Implied Covenants. In virtually all states, significant mineral owner protections are implied by law in oil and gas leases (for example, requirement of prudent operations, protection against drainage, exploration and development, and marketing of oil or gas). The lease should not limit the covenants normally implied in oil and gas leases.

Terms to Avoid in Your Mineral Lease Agreement

- Avoid warranty clauses that guarantees a landowner has title to the minerals. This could create a problem if mineral rights are found to be owned by someone else. The landowner may be legally required to correct the problem.
- Avoid royalty clauses which state the landowner will share drilling costs. Avoid sharing the costs for anything!
- Avoid accepting drafts for payment. Instead, request a certified check for payment.
- Avoid reaching agreement based entirely on the bonus payment.
- Research Limited Liability Corporations (LLCs) that want to lease your minerals. They could be representing large oil companies that are using an LLC as a front to reduce liability which could result in agreements that may be difficult to enforce.

A Landowner Guide to the Wyoming Split Estate Statute: (Obtained from the Powder River Resource Council Website)

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 revamp 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 Capitol 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.

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;

(iii) "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 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 stockpiled 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 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 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 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 it 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

Wyoming Oil and Gas Pooling Statutes:

30-5-109. Rules and regulations governing drilling units.

(a) When required, to protect correlative rights or, to prevent or to assist in preventing any of the various types of waste of oil or gas prohibited by this act, or by any statute of this state, the commission, upon its own motion or on a proper application of an

interested party, but after notice and hearing as herein provided shall have the power to establish drilling units of specified and approximately uniform size covering any pool.

(b) In establishing a drilling unit, the acreage to be embraced within each unit and the shape thereof shall be determined by the commission from the evidence introduced at the hearing but shall not be smaller than the maximum area that can be efficiently drained by one (1) well.

(c)(i) Subject to the provisions of this act, the order establishing drilling units for a pool or part thereof shall direct that no more than one (1) well shall be drilled to and produced from such pool on any unit, and that the well shall be drilled at a location authorized by the order, with such exception as may be reasonably necessary where the drilling unit is located on the edge of the pool and adjacent to a producing unit, or, for some other reason, the requirement to drill the well at the authorized location on the unit would be inequitable or unreasonable;

(ii) The state oil and gas supervisor, upon proper application therefor in accordance with the commission's rules, may grant exceptions from such authorized location for good cause shown, either (A) where written consents to the exception applied for have been given by all owners of drilling units directly or diagonally offsetting the unit for which the exception is requested and, as to lands for which drilling units have not been so established for such pool, by the owners of those lands which would comprise the directly and diagonally offsetting drilling units if the drilling unit order for the pool involved were extended to include such additional lands, in which case said supervisor may grant such exception immediately, or (B) if less than all of such owners have so consented to such exception, where the applicant shows to the satisfaction of said supervisor (by affidavit stating the time, place and manner of mailing, or such further proof as said supervisor may require) that notice of the filing of such application for exception has been mailed by registered or certified mail with return receipt to all of such owners failing to so consent and that fifteen (15) days have elapsed since the date of such mailing without any of such owners having filed with said supervisor written objections to the granting of such exception, in which case the exception may be granted upon the expiration of such fifteen (15) day period;

(iii) If any of the owners specified in paragraph (ii) above of this subsection (c), who have not in writing consented to the exception applied for, file written objections to the requested exception with the state oil and gas supervisor during said fifteen (15) day period following the applicant's mailing of the notice of filing, or if for any other reason said supervisor fails to grant such requested exception, then no well shall be drilled on the drilling unit involved except at the location authorized by the order establishing such unit, unless and until the commission shall grant such exception after notice and hearing upon the application as required by this act. Provided that in addition to any other notice required by W.S. 30-5-111(d) as amended, or any other provision of law or the commission's rules, the commission shall cause notice of any hearing before it on an application for such exception to be mailed by registered or certified mail with return receipt to each of the owners specified in paragraph (ii) above of this subsection (c) at least ten (10) days before the date of such hearing.

(d) The commission, upon application, notice, and hearing, may decrease the size of the drilling units or permit additional wells to be drilled within the established units in order to prevent or assist in preventing any of the various types of waste prohibited by

this act or in order to protect correlative rights, and the commission may enlarge the area covered by the order fixing drilling units, if the commission determines that the common source of supply underlies an area not covered by the order.

(e) After an order fixing drilling units has been entered by the commission, the commencement of drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, at a location other than authorized by the order, is hereby prohibited. The operation of any well drilled in violation of an order fixing drilling units is prohibited.

(f) When two (2) or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or a part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, the commission, upon the application of any interested person, may enter an order pooling all interests in the drilling unit for the development and operation thereof. Each such pooling order shall be made after notice and hearing and shall be upon terms and conditions that are just and reasonable. Operations incident to the drilling of a well upon any portion of a unit covered by a pooling order shall be deemed for all purposes to be the conduct of such operations upon each separately owned tract in the unit by the several owners thereof. That portion of the production allocated or applicable to each tract included in a unit covered by a pooling order shall, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.

(g) Each pooling order shall provide for the drilling and operation of a well on the drilling unit, and for the payment of the cost thereof, as provided in this subsection. The commission is specifically authorized to provide that the owner or owners drilling or paying for the drilling or for the operation of a well for the benefit of all owners shall be entitled to all production from the well which would be received by the owner or owners, for whose benefit the well was drilled or operated, after payment of royalty as provided in the lease, if any, applicable to each tract or interest, and obligations payable out of production, until the owner or owners drilling or operating the well or both have been paid the amount due under the terms of the pooling order or order settling the dispute. In the event of any disputed cost, the commission shall determine the proper cost. The order shall determine the interest of each owner in the unit, and may provide that each owner who agrees with the person or persons drilling and operating the well for the payment by the owner of his share of the costs, unless he has agreed otherwise, shall be entitled to receive, subject to royalty or similar obligations, the share of the production of the well applicable to the tract of the nonconsenting owner. Each owner who does not agree, shall be entitled to receive from the person or persons drilling and operating the well on the unit his share of the production applicable to his interest after the person or persons drilling and operating the well have recovered the following:

(i) One hundred percent (100%) of each such nonconsenting owner's share of the cost of any newly acquired surface equipment beyond the wellhead connections (including, but not limited to, stock tanks, separators, treaters, pumping equipment and piping), plus one hundred percent (100%) of each such nonconsenting owner's share of the cost of operation of the well commencing with first production and continuing until each such nonconsenting owner's relinquished interest shall revert to it under other provisions in this section, it being intended that each nonconsenting owner's share of such

costs and equipment will be that interest which would have been chargeable to each nonconsenting owner had it initially agreed to pay its share of the costs of said well from the beginning of the operation; and

(ii) Up to three hundred percent (300%) of that portion of the costs and expenses of drilling, reworking, deepening or plugging back, testing and completing, after deducting any cash contributions received and up to two hundred percent (200%) of that portion of the cost of newly acquired equipment in the well, to and including the wellhead connections, which would have been chargeable to the nonconsenting owner if he had participated therein.

ONE FOR ALL AND ALL FOR ALL? POOLING AND OTHER GROUPINGS OF MINERAL INTERESTS IN TEXAS

(Written by Lisa K. Vaughn,
Shannon, Gracey, Ratliff and Miller, LLP)

Author's Note: Because the facts and legal issues raised by each individual's situation can be different, this article is not intended as legal advice; instead, qualified legal counsel should be consulted for advice specific to the reader's situation.

With the widespread leasing of mineral interests in various shale plays across the United States, many now understand that individual tracts of land are nearly always “pooled” with other tracts – that is, they are grouped together to form a drilling and production unit for a gas or oil well. Each party who contributes land to the pool then receives a share of production proportionate to the amount of land contributed, regardless of on whose land the well may be pooled. This paper explores pooling in Texas: what pooling is and is not, why ownership interests are pooled, how pooling is accomplished, and what can happen when there are problems with pooling.

I. Defining Pooling and Distinguishing it from Related Concepts

At its simplest, pooling is nothing more than grouping together two or more tracts of land for the exploration and production of oil and gas. Once pooled, all pooled lands are treated by the Railroad Commission (“RRC”) as a single tract. From the mineral owner’s perspective, this single-tract treatment means that he can now exploit his minerals even if the tract on its own is physically too small to meet the acreage requirement set by the RRC, or he desires to have the actual drilling take place far from his tract. From the operator’s perspective, the single-tract treatment of a pool allows it to keep all of the pooled leases in force by drilling a single well. If the tracts are in an area where the amount of minerals produced is tied to the amount of land in the pool, pooling can also increase per-well profits by increasing “production allowables” -- the amount of minerals that the RRC allows to be produced from that well. Other operator benefits of pooling include avoiding the delay and expense of applying for an exception to RRC rules

governing how close wells can be to a lease line (which with pooling is defined as the edge of the pooled acreage), or having to defend against expensive lawsuits alleging underground horizontal drilling trespassed their land or somehow breached other operator duties. As useful as pooling is, its generic name often leads to confusion with other similar but also generically named concepts such as “unitization” and “production sharing agreements.” These concepts are discussed below.

A. Pooling vs. Unitization

“Technically, ‘pooling means the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules,’ and ‘unitization means the joint operation of all or some part of a producing reservoir.’” Confusion between the precise meaning of the two terms (in journals, judicial opinions, and even RRC forms) has created an inextricable tangle. Some courts have simply acquiesced to this reality, noting that “[a]lthough pooling and unitization technically have different meanings, the terms are often used interchangeably to describe cross-conveyances of mineral or royalty interests by separate owners in order to share the income from production of wells drilled anywhere on the consolidated tract.” The practical effect of this confusion is unknown and likely unknowable. To be precise, “pooling” refers only to the gathering of acreage so that the pooled tract can meet RRC spacing requirements, increase production allowables, and minimize the overall number of wells that need to be drilled to produce the minerals. On the other hand, “unitization” should be used only to designate groupings of tracts and pools covering a specific common source of supply so that the supply source can be more effectively produced, such as by water-flooding a field.

B. Pooling vs. Production Sharing Agreements

Production Sharing Agreements (“PSAs”) are relatively new tools, often used in conjunction with pooling, in which operators obtain a drilling permit that allows drill bores to cross (and drain from) multiple pooled groupings. Like pooling agreements, PSAs are used to allocate production among all the parties with an interest in that production. However, while pooling agreements apportion production by the amount of acreage contributed to the pool, PSAs typically apportion production by other mechanisms, such as by the length of the specified well’s drainhole that is under that tract. Significantly, the RRC does not regulate how the allocation of profits are to be made; that is left solely to the PSA itself. There are as yet no court cases addressing the use of PSAs in Texas, but the RRC reports that it will issue a drilling permit for such a well if at least some percentage of interests in each pool consents. The percentage of agreement required has varied in recent years from 100% to 65% and there are current arguments at the RRC that the percentage should be lower or that the operator’s interest in the multiple pools is sufficient. Indeed, the RRC itself reports that its predisposition is to grant a well permit so long as the land collectively involved in the PSA meets the minimum requirements for acreage to drill a well.

II. Voluntary Formation of Pools

Unlike other states where forced pooling is common, pooling in Texas is almost always established by voluntary action. The methods and requirements for voluntary formation of pools are explored below.

A. Pooling Mechanisms

Pooling is generally regarded as a transfer of interest in property from a property owner (lessor) to the operator of the well (lessee). While voluntary pooling does not always

occur intentionally, it cannot be achieved without some sort of express permission. Generally, a given piece of property or mineral interest may become part of a pool through one of four different mechanisms: (1) pooling clauses in lease agreements; (2) separate pooling agreements; (3) community leases; and (4) ratification. Express authorization to pool is most commonly granted by a pooling clause contained in a mineral lease. The terms of such clauses vary, but will often be anticipatory or general in nature, as future circumstances and regulations can be unforeseeable to operators at the time the agreement is drafted. Because of this, Texas courts may uphold a pooling authorization even when the pooling clause itself is defective in some way, so long as the intent to authorize pooling is clear. Although the language of pooling clauses tends to be general, it will nonetheless be critical to the rights of both the lessee and lessor due to the mathematical effects of pooling. As an example, a 20% royalty owner with a well on his unpooled 40 acres will receive 20% of the profits from production. If that same 40 acres becomes part of a 640 acre pool, that royalty owner will get only 1.25% of profits ($40 \div 640 \times 20\% = .0125$). This mathematical calculation is the same regardless of whether or not the well is physically located on the royalty owner's tract or elsewhere in the pool. However, it is important to keep in mind that this royalty owner would have been entitled to no share if he did not permit pooling and the well was drilled on another tract instead of his. Another aspect of the pooling clause that can have significant impact on the lessor is whether the lessee must include all of the lessor's land in the pool. In our hypothetical above, if only one of the lessor's 40 acres was included in that 640-acre pool, his royalty share would be reduced to .03125%. To combat that possibility, some lessors include "anti-dilution" restrictions that allow pooling only if the leased land comprises a certain minimum percentage of the entire pool if a well is drilled on that land, or allow the land to be pooled only if all of it is included in the pool. On the other hand, unduly restrictive pooling provisions may drastically increase the burdens on an operator, give the operator the incentive to exclude that particular tract from a pool, or even function to divest the operator of the lease itself if the operator fails to comply with the provisions. Separate pooling agreements not contained in mineral leases are not common, but they may be necessary when (a) a previous lease does not contain a pooling clause, (b) a certain type of pooling is not authorized by a prior pooling provision, or (c) a non-participating royalty interest (NPRI) (or otherwise unpooled interest). Arranging separate pooling agreements may be a difficult task for a lessee. This is at least partially due to "the possibility of many changes in ownership of the lessor's interest as time goes on," as well as the simple realities that re-negotiation of provisions always increase the chances of holdouts. Community leases may authorize pooling when two or more property owners jointly execute a general form lease to transfer property interests to a single lessee. In Texas, it has become well established that "the execution of a single lease by several owners of adjoining tracts, without expression of a contrary intention, has the effect of pooling the land covered by the lease, as a matter of law." Consequently, since intent to pool in such joint leases is legally immaterial, it would be relatively easy for this kind of pooling to occur accidentally. Ratification may also be used to create pooling even when there was arguably no original pooling agreement from that owner. Ratification functions differently than separate pooling agreements in that it may actually take the form of an affirmative defense. "The elements of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act. In some cases, it may be difficult to determine whether the interest owner did indeed "ratify" the pooling agreement. Intent (a critical element for ratification) may be especially difficult to discern, although course of conduct may be used as evidence of intent.

B. Participation Requirement

There is some dispute in Texas case law concerning whether participation of all interest holders is necessary to execute a valid pooling agreement. In many modern leases, this ambiguity is expressly addressed by lease provisions that bind pooled interests even when less than 100% participation is achieved. Absent such a provision, it appears that whether 100% participation is required depends upon the legal relationship of the non-participating parties to the other interest holders. In *Whelan v. Placid Oil*, a Texas appellate court held that tenants in common did not need to join their co-tenant in order to execute a valid lease agreement.²⁶ In contrast, the court in *Guaranty National Bank & Trust Co. v. May* held that, because the participation of unrelated royalty owners was lacking, the “royalty interests [can] not be unitized or communitized without the joinder or ratification of *all* of the royalty owners.” Neither of these cases has been explicitly overturned, so a lessee is best served by negotiating for a pooling provision explicitly authorizing pooling with less than 100% participation of all mineral interest owners.

III. Abilities and Duties of Lessees

The abilities and duties of lessees (operators) with respect to pooling are primarily governed by the terms of the agreement authorizing the pool, which are in turn affected by operators’ implied duties. Texas courts have made it clear that lessees must strictly comply with all of the expressed terms of the pooling authority, including stipulations concerning the creation of a pool, in order for that pool to be valid. On the other hand, a lessee’s abilities under an express pooling agreement tend to be broadly construed. For example, one Texas appellate court has held that an agreement silent on whether multiple pools may be created will be read in favor of a lessee’s ability to create them. Another court held in favor of a lessee seeking to enlarge a previously created pool after the primary term of the lease had expired. The primary implied duty owed by lessees is the duty to act and deal in good faith. Courts see this as a critical requirement, since a lessee’s interests “are frequently in conflict with those of its lessor.” This conflict probably stems from the lessee’s broad authority in determining when, how, and whether to pool. The good faith requirement does not mean that a lessee must act as a fiduciary to, or even subordinate its own interests for, those of the lessor; rather, the lessee must simply take *both* interests into account in order to make a good faith decision. The presence or absence of good faith is generally a fact question that will necessarily depend on individual circumstances. Evidence that a lessee truly believed it was acting in good faith is not dispositive on the issue. Instead the factfinder must determine whether the lessee acted “as a reasonably prudent operator would...under the same or similar circumstances....” As the reasonably prudent language implies, this is an objective standard. *Amoco Production Co. v. Underwood* provides an example of circumstances in which bad faith was found. In that case, the lessee “gerrymandered” a pool to keep lessors from leasing to other operators. Because the lessee was found to have acted in bad faith, the pool was cancelled and the leases were thus lost. Such results make a finding of bad-faith pooling can be quite expensive for an operator. In addition to the good faith requirement, courts can impose on the operator a “duty to pool” as part of the duty to prevent drainage. This is a somewhat recent concept; early cases spoke only of the operator’s duty to drill an offset well to prevent drainage. The Texas Supreme Court, in articulating the duty to pool, stated that it may be considered a part of the “reasonably prudent operator” standard when pooling would help mitigate drainage to the leased land.

IV. Modifying a Pool

As development of a field progresses, an operator may wish to expand or contract the size of the pool. Many modern leases contain express provisions permitting a lessee's ability to enlarge a pool "from time to time" or whenever the lessee sees fit. Absent such a provision, a court may nonetheless grant this authority to a lessee who invokes it in good faith. In *Expando Production Co. v. Marshall*, the court upheld a lessee's implicit power to enlarge a pool when it appeared that doing so would be in the best interests of both the lessor and lessee. When it comes to reduction, however, Texas courts appear less inclined to grant broad powers to lessees. This is likely because reduction will result in the "termination" of at least a part of one lessor's interest (since the lease is probably beyond its primary term and is being held only by production at that point). As a result, if the goal is to reduce the size of the pool, any ambiguity in the pooling language will be read restrictively. For example, the clause "enlarge or change" has been interpreted to *only* grant authority to enlarge an existing pool. This is not to say that courts refuse to recognize clauses authorizing reduction, but rather that such clauses should be drafted carefully, accounting for the courts' restrictive interpretations. Absent an express authorization of reduction within all of the pooled leases, the lessee will likely need to obtain the consent of all the lessors.

V. Terminating a Pool

Obviously, termination is least controversial when there is express agreement among all of the lessors; indeed, some cases have precluded termination without such specific authority, either through the original pooling agreement or a subsequent writing. For that reason, many lease forms grant the lessee authority to dissolve the pool at its discretion. In addition, several other circumstances have been found to terminate the pool, such as the bad-faith pooling discussed above, or if the lessee fails to drill or pay rent. Texas courts have also recognized that the termination of all but one lease in a pool will not necessarily terminate the pool because a pool is, by definition, "made up of two or more leases which are in full force and effect." While this seems obvious in theory, it is not straightforward in practice. For example, in *Wagner & Brown, Ltd. v. Sheppard*, the Supreme Court of Texas held that there is a material difference between pooling of "lands" and pooling of "leases." Hence, in the case where *lands* are pooled, the termination of all but one *lease* may not be enough to terminate the actual pool itself.

VI. Pooling Sizes

A. Acreage

Pooling sizes can be relevant for a number of reasons. Of course, the underlying reasons for pooling are often based on meeting certain statutory size or boundary provisions put in place by the RRC, maximizing production allowables, or holding the maximum amount of leases. Additionally, different lessors will have their own preferences concerning the size of a pool. For example, an expansive pool is likely to be disfavored by a lessor whose property is being drilled, while a restrictive pool is likely to be disfavored by the lessor whose property is hardly used. Maximum acreage provisions are most often included in pooling authorization agreements. Fairly standard pooling clauses will contain language limiting the acreage pooled for oil to 40 acres and the amount pooled for gas to 640 acres, with the potential for larger pools depending on governmental authority. The "governmental authority" clause has been a frequent point of contention in such pooling agreements. In *Jones v. Killingsworth*, the Texas Supreme Court was charged with interpreting a pooling clause that established a 40-acre oil

pooling restriction but then provided, “[S]hould governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations.” The Court, focusing heavily on the phrase “prescribed by governmental regulation,” held that the lessor intended the initial size restriction (40 acres) could be increased only to the extent *required* by the governmental authority. Since the applicable governmental regulation set only a minimum acreage, the Court held that the lessee violated the terms of the lease when it created a pool substantially larger than 80 acres because any amount more than 40 acres was not *required* by governmental regulations. Similar clauses may require certain conditions be met before acreage increases may occur. For example, the pooling agreement may authorize an acreage increase permitted under government authority *only* when such increase is necessary in order to obtain a “regular location” (a well location that meets relevant RRC distance and spacing requirements), or when it increases the well’s production allowable.

B. Depth

In addition to limitations concerning the surface area size of pools, some lessors may wish to include depth restrictions in the lease agreement. Although depth restrictions are often invoked by Pugh clauses (discussed below), it is not necessary that they are. For example, *EOG Resources v. Wagner & Brown* involved a lease which stipulated that the lessee could not drill more than 100 feet below “the deepest producing interval obtained in a test well.” While many pools encompass all depths, there are several circumstances where limiting the pooling depth may be desirable. For example, depth restrictions may be included to maximize the lessor or lessee’s future flexibility, allowing for optimal future development.

VII. Pugh Clauses

A Pugh clause can be a lessor’s solution to a few of the common problems that result from the broad pooling authority generally granted to the lessee. Pugh clauses (named for the attorney reputed to have first devised the clause) “provides that drilling operations on, or production from, pooled units shall maintain the lease only as to the lands that are included in such producing unit(s).” Hence, it functions by severing the pooled land from unpooled land, effectually making it so that, over time, the leased land and pooled land are one and the same. Pugh clauses may be drafted to apply to either vertical severance (severance of unpooled depths) or horizontal severance (severance of un-pooled acreage). And while Texas courts appear willing to enforce Pugh clauses, many have narrowly interpreted these provisions. The general rule in Texas is still that an oil, gas, and mineral lease is indivisible by nature. As a result, Pugh clauses must be carefully drafted in order to be effective. For example, in *Friedrich v. Amoco Production Company*, a Texas appellate court held that, absent an express provision to the contrary, a Pugh clause applying to “land” would only be interpreted in the context of horizontal (rather than both vertical and horizontal) severance.

VIII. Forced Pooling – The Mineral Interests Pooling Act (MIPA)

A. Purpose

Before the Mineral Interests Pooling Act was enacted by the Texas legislature, each tract of land, no matter how small, was allowed to drill its own well. When that method of apportioning drilling rights was invalidated and a certain minimum amount of land was required for a drilling permit, MIPA was enacted to allow those small-tract owners to

force their way into a pre-existing pool to obtain value for their minerals and prevent their minerals from being drained by wells on nearby larger tracts. But while the legislative intent was originally to benefit small mineral interest owners, its use has now been expanded. In fact, because of the costs and other circumstances associated with a MIPA proceeding, larger operators may be in a better position to utilize MIPA than the smaller interest owners for whom it was created.

B. Conditions

MIPA provides numerous conditions that must be met before the RRC will grant an application for forced pooling. Foremost among these conditions is that the RRC must find that the applicant had first made a “fair and reasonable offer” in a sincere attempt to pool voluntarily. The “fair and reasonable” standard requires both a subjective and objective determination. It is subjective in the sense that the offer “must be fair and reasonable from the standpoint of the party being forced pooled.” It is objective in the sense that the offer must “take into consideration those relevant facts, existing at the time of the offer, which would be considered important by a *reasonable person* in entering into a voluntary agreement concerning oil and gas properties.” Additional conditions include the following:

- the application must be in reference to a field discovered after March 8, 1961;
- the application must be in relation to an existing RRC designated common reservoir;
- all acreage sought to be pooled must be within the productive limits of the reservoir;
- the RRC must have already adopted special field rules (i.e., exceptions to general rules and regulations that vary due to specific field conditions), on either a temporary or permanent basis;
- the application must not concern land owned by the State of Texas or land in which the State has a direct or indirect interest;
- the common reservoir must contain two or more separately owned tracts;
- at least one owner with a right to drill must have already done (or proposed to do) so;
- the application must contain “approximate acreage” of the standard proration unit established by special field rules; and
- the application must be for the purposes of avoiding drilling of unnecessary wells, protecting correlative rights, or preventing waste.

MIPA also provides that a force-pooled lease will automatically terminate if: (1) one year after the effective date of the pool, there has been no drilling operations or production; (2) more than six months have passed from the date a dry hole is completed on the pooled acreage; or (3) more than six months have passed after cessation of production from the pool. Termination may also occur upon consent of all the mineral owners affected.

C. MIPA as a Resource for Small Interest Owners and Large Operators

There is little debate that the legislature intended MIPA to be a resource for smaller interest owners. However, MIPA historically has been remarkably ineffective at protecting their interests. Whether this is the fault of the legislature, the RRC, the owners themselves or the simple burdens of cost and delay, two facts are beyond dispute: (1) MIPA has rarely been invoked by small interest owners to force themselves into a pool; and (2) *when* invoked, the applicant has obtained an order granting forced pooling even more rarely. Better equipped to deal with the temporal and monetary setbacks, large operators appear to be in a better position to utilize MIPA to their advantage. And while “reverse MIPA” pooling can hardly be considered a trend at this point, there is growing

evidence that large operators can force smaller interest owners into pooling through MIPA. The seminal application of *Finley Resources, Inc.* is often cited in support of this principle, and it was followed by at least one other successful application by *XTO Resources*.

IX. Unpooled Interests

Operators are best served if they can minimize unpooled interests concerning the land in question. Although the owners of these interests may not have the authority to pool independently, their consent is required to create a valid pool. There are numerous types of unpooled interests; a few common ones are discussed below.

One of the most discussed unpooled interests is the Non-Participating Royalty Interest (NPRI). An NPRI is defined as “an interest in the gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty...[while] [t]he exclusive leasing privilege remain[s] in the mineral fee owner.” The Texas Supreme Court has made it clear that the owner of executive rights in land cannot pool an NPRI owner’s interest without his or her consent. Some leases, however, may purport to do exactly that. In those cases, courts will construe the lease as “an offer by the lessor to the other royalty interest owners to create a community lease by ratifying the lease[.]” Another commonly articulated interest is the overriding royalty. One court has defined this as “a certain percentage of the working interest which as between the lessee and the assignee is not charged with the cost of development or production.” By this definition, an overriding royalty will likely often be treated similarly to an NPRI. Lessees may also encounter pooling issues in the case of undivided interest owners (i.e., tenants in common). The general rule is that one tenant in common can execute a lease of his undivided interest, regardless of whether his co-tenant is a party to that lease. It follows, then, that one co-tenant may unilaterally authorize the pooling of his undivided interest in the land. Local property laws govern how resources and rent are shared in tenancy in common situations (and which property laws apply may depend on where the drillsite is located). If an unpooled landowner’s minerals are being drained due to nearby drilling, there is little recourse due to Texas’ enforcement of the “rule of capture,” which explicitly provides that a mineral rights owner gains title to all oil and gas produced from a lawful well even when such minerals have migrated from another’s nearby property. While there exist some safeguards for a property owner in such a situation (including MIPA and an operator’s possible “duty to pool”), he or she may have to resort to pooling voluntarily on terms that may seem relatively unfavorable, but are better than being denied all proceeds from minerals.

X. Conclusion

Pooling can be a great boon to all involved in gas production: pools permit mineral owners to participate in wells that might otherwise not be drilled on their lands, and they encourage efficient drilling which in turn allows operators and gas pipelines to maximize long-term value for themselves and for the royalty owners. However, the use, applications, and definitions of pooling provisions should be carefully considered at the time the pooling clause is negotiated, and then again in light of actual circumstances at the time of the pool and any time it is changed, in order to ensure that all concerned can reliably and profitably employ these provisions.

SAMPLE SURFACE USE AND DAMAGE AGREEMENT:

Introduction: This is a sample agreement and does not include many of the payments suggested in the “Payment Guidelines for Surface Use Agreements” or provisions listed in the “Surface Use Agreement Provisions to Consider” sections. However, this sample agreement provides an excellent starting point from which you can incorporate a variety of payments and terms listed in previous sections. This Sample Agreement provides an excellent base document upon which to develop an agreement that meets your individual needs and fits your specific operation. It is also common for the surface owner to negotiate separate agreements for **conducting seismic operations** and providing **easements for compressor stations** due to the unique nature of these specialized operations and the fact that surface owners may be dealing with a myriad of different companies. This may require more time but provides the surface owner with specific agreements that will hold these companies accountable when conducting operations. Please refer to the “Sample Seismic Agreement” section to obtain more information.

This Agreement is made and entered into effective this 23rd day of December, 2009, by and between _____, as the owners of the surface of the lands described hereafter and _____, as the grazing lessee of the lands described hereafter whose addresses are _____ (hereinafter collectively referred to as "Owner") and _____ whose address is _____ (hereinafter referred to as "Operator").

WITNESSETH:

WHEREAS, Owner owns or is a grazing lessee of the surface estate described on Exhibit “A” attached hereto (the "Lands"); and

WHEREAS, Operator holds one or more valid oil and gas leases from Owner or from third parties covering all or portions of the Lands; and

WHEREAS, the parties wish to enter into an agreement respecting the use by Operator of portions of the Lands for the purposes of drilling, completing, and operating one or more oil and gas wells on the Lands.

NOW, THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1.Right of Use. Owner hereby gives and grant to Operator, its agents, employees, drilling contractors, and related service companies, subject to the terms of this Agreement, the non-exclusive right to enter upon and use the Lands for the purpose of drilling, completing, and producing one or more oil and gas wells at legal locations or at such exception locations as are approved by the Wyoming Oil & Gas Conservation Commission, together with rights-of-way across the Lands owned by Owner necessary to construct and maintain one or more access roads, well sites, tank batteries, and pipelines in connection with the oil or gas wells to be drilled by Operator upon the Lands.

2.Mutual Accommodations Doctrine. In order to permit the use of the property for mineral development while also allowing the Owner to develop wind, solar, and/or other energy resources in such a manner as to permit both activities to be pursued simultaneously, Operator and Owner agree that this surface use Agreement will reasonably accommodate the enjoyment of, and avoid impairment of, any other improvements on the parcel, lease, property placed there in connection with other Surface Use Agreements.

3.Notification and Consultation

(a) Prior to initiating the drilling of any well or initiating the conduct of seismic activities on said lands, Operator shall notify Owner prior to entry upon the Lands and shall consult with Owner as to the location of each well, road, pipeline, power line, tank battery, or other facility to be placed upon the Lands.

(b) Owner and Operator recognize and agree that the Lands include irrigated lands served by center pivot, side roll irrigation and flood irrigation systems, and that Owner and Operator will meet and mutually agree on the location of well sites, roads, pipelines, tank batteries, and other surface facilities in order to avoid interference with Owner's existing and planned future irrigated lands and irrigation systems. No well will be located where it will interfere with any existing irrigation system on the lands, or any irrigation system which is planned by Owner at the time an Application for Permit to Drill ("APD") is submitted to the Wyoming Oil and Gas Conservation Commission. Operator agrees it will take all reasonable steps to locate wells to allow for expansions of Owner's irrigation systems. Prior to Operator filing an APD, Owner will upon request, provide Operator with a map showing all irrigation systems which are planned by Owner at that time.

(c) If Owner requests that the proposed well locations be moved in order to avoid irrigated or cultivated lands, Operator agrees to seek exception locations from the Wyoming Oil and Gas Conservation Commission, if necessary.

(d) Owner and Operator acknowledge that a portion of the Lands are operated by Owner under a Conservation Easement (hereafter referred to as the "Conservation Easement") administered by the Wyoming Stockgrowers Agriculture Land Trust (hereafter referred to as the "Trust"). Operator shall conduct its operations in a reasonable manner on the Lands subject to the Conservation Easement in order to protect the purposes of the Trust which are perpetual agricultural operations to protect the wildlife, cultural and esthetic values of the Lands subject to the Conservation Easement important to the Owner and to the State of Wyoming.

4. **Compensation.** As compensation for surface damages and as rental for use of Owner's surface estate, Operator shall pay to Owner the following:

(a) The sum of _____ Dollars (\$_____) for the drilling of any well upon the Lands and the sum of _____ Dollars (\$_____) per rod for the access road across the Lands to the well location, payable prior to commencement of surface disturbing activities for the drilling of the well. In the event that any well drilled upon the Lands is completed as a commercial producer of oil and/or gas, Operator shall pay Owner the sum of _____ Dollars (\$_____) per year for the well location and tank battery. The annual payments described herein shall commence one year from the date of the initial well payment, and shall allow Operator a right-of-way and easement to be used by Operator, its agents, employees, service contractors, and successors in interest as long as the annual payments are made and the well is capable of producing oil and/or gas in paying quantities.

(b) In the event that Operator desires to construct buried oil or gas pipelines, Operator shall pay Owner a one-time payment of _____ Dollars (\$_____) per rod for such pipelines.

(c) In the event Operator desires to use Owner's water for drilling purposes and Owner has such water available, Operator shall pay Owner _____ Dollars (\$_____) per barrel plus Owner's pumping costs for drilling water. Operator shall not cause any water well or spring to be lost or materially diminished in productivity, as a result of production of oil, gas, or water by Operator.

(d) For buried power lines and telecommunication lines, Operator shall pay Owner a one-time payment of _____ (\$_____) per rod, unless such power lines or

telecommunication lines are installed at the same time and in the same ditch as the pipelines described herein, in which case there shall be no duplication of payment.

(e) For ease of administration, with Owner's approval, Operator may prorate annual payments so that all rental payments for various facilities located on the Lands fall on the same date.

(f) On the fifth anniversary of this Agreement, and every five years thereafter, payments provided for in this Agreement shall be increased or decreased (but never below the amounts stated herein) by a percentage equal to the increase or decrease in the Consumer Price Index as published by the United States Department of Commerce for the preceding five-year period.

(g) The fees and compensation payable by Operator to Owner for the installation and operation of any compressor on the Lands shall be negotiated in good faith by Owner and Operator under a separate agreement.

5. **Road Construction and Use.** Any roads constructed or used by Operator on the Lands shall be constructed or used to the following specifications:

(a) To the maximum extent possible, Operator will use existing roads designated by Owner for its operations, and if construction of a new road is required, Operator will consult with Owner and obtain Owner's consent to the location of the new road, which shall be located in a manner so as to cause the least interference with Owner's current or proposed future agricultural uses of the Lands.

(b) The surface of all roadways shall not exceed 16 feet in width for traveled surface.

(c) If requested by Owner, access to the Lands of Owner from any public road shall be controlled by a swinging metal gate in addition to a cattle guard, which gate and cattle guard Operator shall construct in accord with Owner's reasonable specifications. Owner may require Operator to place swinging metal gates and/or cattle guards on roads that access wells in Owners adjoining pastures.

(d) Culverts shall be placed in low areas for proper drainage.

(e) No off-road travel is permitted.

(f) Operator agrees to keep roads used by it free of weeds, debris, and litter, and to conduct periodic trash pickup if requested by Owner.

(g) The use and construction of roads by Operator on the Lands is a non-exclusive use, and Owner may allow other parties to use said roads and make a charge therefor. However, Operator shall have the right to assess other non-agricultural users of the roads for their share of maintenance work performed by Operator. Owner shall have no responsibility for road maintenance, but may assist in maintenance operations.

(h) Operator agrees, if requested by Owner, to place an appropriate sign or signs on any road designating them as "private roads" and to assist Owner in the control of the use of such roads by unauthorized users. The size and color of such signs shall be subject to Owner's approval.

(i) Owner may lock gates across its private roads, provided that Operator shall have the right to place its own locks on such gates.

(j) Operator shall maintain existing and newly constructed roads used by Operator to the reasonable satisfaction of Owner, which maintenance may include shaling, ditching, graveling, blading, mowing grass to avoid fire danger, installing and

cleaning cattle guards, and spraying for noxious weeds. This work shall be done at such reasonable times as Owner shall request.

(k) No roads on the Lands shall be constructed or used by Operator for access to lands not subject to this agreement without a separately negotiated agreement.

6. **Well Sites.** Well sites located on the Lands shall be limited to no more than ____ (___) acres in size during drilling, completion, and reworking activities, and no more than ____ (___) acres in size for producing well sites, including any tank batteries constructed by Operator. Operator agrees to fence the pits and other dangerous areas and at all times keep its well sites in good order and free of litter, debris, trash, or spilled hydrocarbons. In the event that Operator does not encounter commercial quantities of oil, gas, or other hydrocarbons at any well location and determines the location to be a "dry hole," Operator shall fill in, smooth over, and clean up the well site and rights-of-way and shall restore and reseed the area with a seed mix reasonably approved by Owner after replacing topsoil. All cleanup and restoration activities shall be completed by Operator as soon as the reserve pit has been allowed to dry so that proper backfilling can be accomplished. If the reserve pit is not dry within six months of completion of drilling operations, it shall be pumped dry by Operator and the contents properly disposed of off the Land pursuant to applicable law. In the event that any well drilled upon the Lands is completed as a commercial producer of oil and/or gas, Operator shall clean up the well site location and use only so much of the area as is reasonably necessary for its operations, and Operator shall restore such well location, reseeding the same with a seed mix specified by Owner, and Operator shall keep all well site locations neat, orderly, and clean at all times.

7. **Pipelines.** Any pipelines constructed by Operator on the Lands shall be constructed and maintained to the following specifications:

(a) Owner shall approve all pipeline locations so as to avoid interference with Owner's agricultural operations.

(b) The top of each pipeline shall be buried at least 48 inches below the surface of the ground.

(c) Operator shall be responsible for backfilling, repacking, reseeding, and recontouring the surface so as not to interfere with Owner's agricultural operations. If pipeline trenches settle so as to interfere with Owner's irrigation or ranching activities, upon request by Owner, Operator shall fill in, repack, and level such trenches.

(d) Operator shall provide Owner with a plat showing the "as built" length and location of all pipelines promptly after their installation.

(e) Owner reserves the right to occupy, use and cultivate the lands affected by such pipelines, and to grant such rights to others, so long as such use does not interfere with Operator's operations.

(f) The pipelines referred to in this Agreement are only those gathering system pipelines used in connection with wells drilled on the Lands. Surface damages for pipelines serving lands other than those owned by Owner shall be by separate agreement to be negotiated by Owner and Operator.

(g) If Operator fails to use any pipeline for a period in excess of twenty-four (24) consecutive months, the pipeline shall be deemed abandoned and Operator shall promptly take all actions necessary or desirable to clean up and remove the pipeline, or render the pipeline environmentally safe and fit for abandonment in place. All such cleanup and mitigation shall be performed in compliance with all applicable federal, state, and local laws and regulations.

8. **Power Lines.** Any buried or overhead power lines constructed on the Lands shall be constructed and maintained to the following specifications:

(a) Operator will consult with Owner and with the independent power company supplying power to Operator with respect to the location of overhead power lines prior to construction. Overhead power lines will be constructed so as to cause the least possible interference with Owner's visual landscape and Owner's existing and future ranching operations, and, to the maximum extent possible, overhead power lines will be constructed along fence lines or property lines. All overhead power lines will be located in a manner to minimize or avoid interference with Owner's agricultural operation. No overhead power line will be located where it will interfere with Owner's existing irrigation systems or any future irrigation systems which are planned by Owner at the time of construction of overhead power lines. Owner shall be entitled to receive payment from Operator's electricity provider for overhead power lines.

(b) Within two months after a well has been placed on production, all power lines constructed by or for Operator downstream of the independent power company's meters shall be buried, and all power line trenches shall be fully reclaimed and reseeded to the reasonable satisfaction of Owner. Buried power lines shall be installed at least 48 inches below the surface of the ground.

(c) Operator agrees that it will not construct overhead power lines in those portions of the Lands which are being irrigated or cultivated or which may, in the future, be irrigated or cultivated or which are fallow as part of a crop rotation or management program.

(d) Any power lines constructed by Operator on Lands subject to the Conservation Easement shall be constructed and maintained in accordance with all of the terms and provisions of the Conservation Easement.

9. **Operations.** Operator's operations on the Lands shall be conducted according to the following specifications:

(a) Operator shall at all times keep its well sites and road rights-of-way safe and in good order, free of noxious weeds, litter and debris, and shall spray for noxious weeds upon reasonable demand by Owner as required by the Wyoming Weed and Pest Control Act, W.S. 11-5-101 through 119.

(b) Operator shall rehabilitate, restore, reclaim, and reseed all disturbed areas caused by Operator's operations within six (6) months after termination of construction activities on such sites, unless inclement weather prevents such rehabilitation and restoration within that time period.

(c) All cattle guards and fences installed by Operator shall be kept clean and in good repair and will become the property of Owner when Operator ceases ownership of its oil and gas lease covering that portion of the Lands.

(d) Operator shall not permit the release or discharge of any toxic or hazardous chemicals or wastes on the Lands. Any spill of oil, grease, solvents, chemicals, or hazardous substances on the Lands which are reportable to regulatory authorities under applicable law or regulations shall be immediately (within 24 hours) reported to Owner by telephone, fax, or e-mail, to be followed by copies of written notices which Operator has filed with regulatory authorities within five (5) business days after such filing.

(e) Operator shall remove only the minimum amount of vegetation necessary for the construction of roads, well locations, and other facilities. Topsoil shall be conserved during excavation, stockpiled and reused as cover on disturbed areas to facilitate regrowth of vegetation.

(f) No construction or routine maintenance activities will be performed during periods when the soil is too wet to adequately support construction equipment. If

such equipment creates ruts in excess of three inches deep, the soil shall be deemed too wet to adequately support equipment.

(g) All surface facilities not subject to safety requirements shall be painted to blend with the natural color of the landscape.

(h) No living quarters shall be constructed upon the Lands, except that drilling crews and geologists or service personnel may use temporary "dog houses" during drilling, completion, or reworking activities.

(i) Operator shall not fence any access roads without the prior consent of Owner.

(j) Operator shall construct and maintain stock-tight fences for both sheep and cattle around any dangerous areas, including any pits where Operator drills wells.

(k) Operator and its employees, agents, and contractors shall leave all gates located on the Lands as they found them; gates found closed are to be closed; gates found open are to be left open.

(l) None of Operator's employees, agents, or contractors, or any other person under the direction or control of Operator shall be permitted to carry firearms or any other weapon the Lands, and such persons shall not hunt, fish, or engage in recreational activities on the Lands. No dogs will be permitted on the Lands at any time. Operator will notify all of its contractors, agents, and employees that no dogs, firearms, weapons, hunting, fishing, or recreational activities will be allowed on the Lands. None of Operator's employees, agents, or contractors, or any other persons under the direction or control of Operator, shall possess or be under the influence of alcohol or illegal drugs while on the Lands.

(m) Operator shall conduct operations and activities on the Lands in accordance with all existing local, state, and federal laws, rules, and regulations.

(n) No open fires shall be permitted on the Lands. Operator shall take all reasonable steps to prevent fire and to promptly extinguish fire, including, but not limited to, maintaining a fire extinguisher, shovel, and bucket in each service vehicle entering upon the Lands. Operator shall fully and promptly compensate Owner for all damages caused by fire arising out of Operator's operations, including, without limitation, any charges incurred by Owner for fire suppression and the replacement of fences and other property damaged or destroyed by fire.

(o) Operator shall conduct dust suppression in such areas and at such times as Owner shall reasonably request.

10. Limitation on Rights. The Lands may not be used in connection with operations on other premises not owned by Owner without Owner's written consent.

11. Surface Owner's Water. Before conducting any drilling operations, Operator, at its sole cost and expense, will measure or cause to be measured the static water level and productive capacity of all water wells and springs located on Owner's land within one mile of Operator's wells. The Operator shall also provide the Owner with a laboratory analyses for mineral, metal and chemical water quality "indicators" for monitoring the potential effects from oil and gas development as outlined in the Wyoming Department of Environmental Quality's "Guidelines for Sampling and Testing Well Water Quality" of all wells and springs within one mile of Operator's wells (See DEQ Water Well Testing Guidelines section). Owner shall be notified prior to such testing and measuring and Owner or its agents or representatives shall have the right to be present during such testing and measuring. The results of these tests and measurements will be immediately provided to Owner. Operator shall establish a continuing water well monitoring program to identify changes in the capacity of any water wells located on Owner's land and in the chemical content of the wells, and Operator shall immediately provide that monitoring data to Owner.

12. Loss or Impairment of Water Wells or Springs. In the event that any water well or spring located on Owner's land is lost or materially diminished in productivity, or the quality of water produced by such well or spring is reduced so that the water is unusable by livestock or humans (as the case may be), as a result of production of oil, gas, or water by Operator, Operator shall, at its expense, immediately repair or replace any water well or spring which is lost or diminished in productivity with a new water well or spring at least equal in productivity and quality of water to the lost or diminished well or spring, using a water well drilling contractor acceptable to Owner. If Operator is unable to repair or replace the water well or spring as herein contemplated, Operator shall compensate Owner for the resulting diminution in value to Owner's property.

13. Produced Water. With respect to any water produced from wells drilled on the Lands in connection with the production of oil, gas, or other hydrocarbons, Operator agrees to reinject produced water or haul the same away from the Lands and properly dispose of such produced water off the Lands. Operator shall not construct evaporation pits for produced water, but may have a small "emergency pit" during drilling, completion, or reworking operations for produced water purposes.

14. Dry Hole / Water. In the event that Operator discovers water during its drilling operations, Operator shall advise Owner of the location and quantity thereof. In the event Operator elects to abandon a well (either a "dry hole" or upon cessation of production from a producing well), Operator will give Owner thirty (30) days written notice of the opportunity to take over any abandoned well and convert the well to a water well. If Owner elects in writing to take over the abandoned well and convert the well to a water well, then Owner will assume all liability and costs associated with the well thereafter, and both parties shall execute any and all documents necessary to provide that the water in the well shall become the property and the responsibility of Owner. If Owner does not elect to take over an abandoned well within such 30-day period, Operator shall plug and abandon the well as required by applicable law and regulations and reclaim the well site as provided herein.

15. Seismic Operations. Seismic operations on the Lands and the compensation payable to Owner therefor, shall be subject to a separate agreement between Owner and Operator.

16. Extraordinary Damages. The compensation provided for herein is acknowledged by Owner as sufficient and in full satisfaction for damages and use of the Lands caused or created by the reasonable and customary entry, rights-of-way, and operation and use of roads and well sites, but do not include damage to livestock, buildings, or improvements, or injuries to persons. This Agreement does not relieve Operator from liability due to Operator's negligence or due to spills or discharges of any hydrocarbon or toxic substance or hazardous chemicals or wastes, or from leaks or breaks in Operator's pipelines. Damage to or loss of livestock shall be paid for by Operator at the higher of market value or replacement cost.

17. Reclamation and Reseeding.

(a) Unless Owner otherwise agrees in writing, within six (6) months after termination of any of Operator's operations on the Lands, Operator shall fully restore and level the surface of the lands affected by such terminated operations as near as possible to the contours which existed prior to such operations. Operator shall use water bars and other measures as appropriate to prevent erosion and non-source pollution.

(b) Unless otherwise agreed by Owner, all areas disturbed by Operator's activities will be reseeded with suitable grasses or crops selected by Owner, at a reseeded rate determined by Owner, and during a planting period selected by Owner. In the absence of direction from Owner, no reseeded (except for borrow pits) will be required on any access roads existing as of the date of this Agreement. It shall be the duty of Operator to ensure that a growing ground cover is established upon disturbed soils and Operator shall reseed as necessary to accomplish that duty.

(c) It shall further be the duty of Operator to inspect and control all noxious weeds as may become established within areas used or disturbed by Operator. Operator shall inspect disturbed areas from time to time and as Owner shall reasonably request in order to determine the growth of ground cover and/or noxious weeds. Operator shall reseed ground cover and control noxious weeds from time to time to the

extent necessary to accomplish its obligations hereunder. Operator recognizes that this shall be a continuing obligation and Operator shall reseed ground cover and/or control noxious weeds until areas disturbed by Operator are returned to as good condition as existed prior to construction. If Owner so requests, Operator shall construct and remove fences for the purpose of temporarily excluding livestock from newly seeded areas.

18. Indemnification. To the maximum extent permitted by law, Operator will indemnify, defend, and hold Owner and, if applicable, Owner's members, officers, directors, employees, agents, successors, and assigns, harmless from any and all claims, liabilities, demands, suits, losses, damages, and costs, including, without limitation, any attorneys' fees which may arise out of or be related to Operator's activities on the Lands.

19. Release. To the maximum extent permitted by law, Operator releases and waives and discharges Owner and, if applicable, Owner's officers, directors, employees, agents, successors, and assigns from any and all liability for personal injury, death, property damage, or otherwise arising out of Operator's operations under this Agreement or Operator's use of Owner's property, unless such injury, death, or property damage is the result of Owner's intentional act or willful misconduct,

20. Designated Contact Person. Operator and Owner will each from time to time designate an individual, with appropriate 24-hour telephone and fax numbers, who is to be the primary contact person for discussions and decisions concerning matters related to this Agreement. Current contact information is as follows:

Operator:	Attn: _____ Phone: _____ Fax: _____ E-Mail: _____
Owner:	Attn: _____ Phone: _____ Fax: _____ E-Mail: _____

21. Assignment. This Agreement shall be assigned by Operator in connection with an assignment of Operator's oil and as leasehold rights under all or a portion of the lands described on Exhibit "A".

22. Enforcement Costs. If either party defaults under this Agreement, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, incurred by the non-defaulting party in enforcing this Agreement, with or without litigation.

23. Binding Effect. This Agreement is binding upon and shall inure to the benefit of the successors and assigns of the parties.

24. Applicable Law. This Agreement shall be construed under the laws of the State of Wyoming.

25. _____ Area. Notwithstanding anything to the contrary contained in this Surface Use and Damage Agreement, Operator shall not conduct any surface disturbing activities in the _____ Area being that area identified as those parts of Sections _____ and those parts of Sections _____ surrounded by the green outline as depicted on Exhibit "B" attached hereto and made a part hereof, unless and until Owner approves in writing a specific surface use plan for those lands located within the _____ Area. Nothing contained herein, however, shall prohibit Operator from accessing the hydrocarbons underlying the _____ Area utilizing horizontal drilling so long as Operator does not disturb any of the surface area contained within the _____ Area.

DATED as of the year and date first above written.

OWNER:

OPERATOR:

Sample Seismic Surface Use

Agreement (Obtained from Steve Sherard, Attorney At Law)

THIS AGREEMENT is made and entered into this _____ day of _____
20_____, by and between _____, whose address is
_____, (“Grantor”), and
_____, whose address is
_____ (“Grantee”).

WITNESSETH:

- A. Grantor owns the surface estate in the following described lands located in _____, County, Wyoming:
- B. Grantee desires to conduct seismic operations on and across the Lands along the routes shown on the plat attached hereto which describes the proposed seismic lines (“Seismic Lines”);
- C. Grantor is willing to allow Grantee to enter upon the lands to conduct seismic operations under the terms hereinafter set forth;

NOW THEREFORE, in consideration of the premises, the payments to be made hereunder, and the additional covenants hereinafter set forth, the parties agree as follows:

1. **Permission to Conduct Seismic Operations.** Grantor grants to Grantee, its employees, representatives, agents and contractors the temporary right to enter upon the lands for the sole purpose of conducting seismic operations with a digipulse seismic truck and related equipment along the proposed Seismic Lines.
2. **Notice to Enter Lands.** Grantee shall notify Grantor at least twenty-four (24) hours prior to entry upon the Lands to conduct its seismic operations.
3. **Term of Agreement.** The rights granted hereunder shall automatically terminate upon completion of the proposed seismic operations.
4. **Indemnification.** To the maximum extent permitted by law, Grantee hereby agrees to and shall indemnify, save, protect and hold harmless Grantor, and Grantor’s partners, officers, employees, agents, representatives, successors and assigns, from and against any and all claims, liabilities, demands, suits, losses, damages, cost and expenses) including attorney’s fees and costs of litigation) which may in any manner arise out of or be related or connected, in any way, to Grantee’s operations on the Lands or on adjacent lands, including without limitation, claims, liabilities, demands, suits, losses, damages, costs and expenses (including attorney’s fees and cost of litigation) for personal injury or death of any person and property damage or property destruction, for operations that are illegal, unauthorized or constitute an improper interference with any party’s rights, or that have damaged the lands or operations of landowners, and for the violation or

failure to comply with all federal, state, or local statutes, laws, rules, regulations and orders, including without limitation, Environmental laws, including any claims based on the alleged concurrent or joint negligence of the Lessor. For purposes of this indemnity, the term "Environmental Laws" means any and all regulations, relating to or imposing liability or standards of conduct concerning protection of human health, safety or the environment or to emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals, or industrial, toxic or hazardous substances or wastes into the environment including ambient air, surface water, ground water, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of pollutants, contaminants, chemicals, or industrial, toxic or hazardous substances or wastes, as now or may at any time hereafter be in effect.

5. **Compensation.** Grantee agrees to pay Grantor the sum of _____ Dollars (\$_____) per mile for that portion of the Seismic Lines traversing Sections _____ and _____ of the Lands, and _____ Dollars (\$_____) per mile for that portion of the Seismic Lines traversing any of the remaining Lands. No seismic energy source shall be located closer than 1,320 feet from any water well, spring, or stock water pipeline on Grantor's property. Grantee agrees to consult with Grantor prior to entry regarding the location of water wells, springs and stock water pipelines.
6. **Fences and Gates.** Grantee agrees that no fence shall be cut or altered without the prior consent of Grantor. All gates shall left as found. Grantee agrees to pay Grantor at the rate of _____ Dollars (\$_____) per hour, plus cost of repairs and material for repairing any damaged fences, and the same sum per hour for time spent by Grantor or his employees for gathering livestock occasioned by Grantee's negligence in damaging fences and in failing to keep gates closed where required.
7. **Damages.** The cash payments required to be made hereunder for the right to enter upon the Lands to conduct seismic operations are acknowledged by Grantor as payment in full for such rights and all ordinary and usual damages resulting from the proposed operations, but do not include payment for any and all other damages suffered by Grantor as the result of Grantee's operations, including with limitation damage to livestock, buildings, or improvements, injuries to persons, damage or impairment to Grantor's water wells and springs, damage caused by the negligence of Grantee and its employees, agents, and contractors, and damaged caused by fires, spills, discharges, or releases.
8. **Advance Payments Required.** It is agreed that the payments required hereunder are due and payable prior to the commencement of the proposed seismic operations on the Lands.
9. **Notices.** Any notice or communications permitted or required hereunder shall be given promptly, orally if possible, and then confirmed in writing. Notices shall be deemed given three days after mailing, or on the same day if delivered personally or by telefacsimile transmission, when addressed as follows:

GRANTOR:

Phone:

FAX:

Email:

GRANTEE:

Phone:

FAX:

Email:

Any party may amend the foregoing address and information by written notice to the other party.

10. **Alcohol, Guns, Dogs and Hunting Prohibited.** Grantee shall not permit its employees, agents or representatives to possess or be under the influence of alcohol or controlled substances, or to possess firearms, or other weapons while on the Lands. No recreational use, including but not limited to, camping, hunting, fishing, or similar activities are allowed at any time by Grantee or Grantee's representatives while on the Lands. No dogs shall be allowed on the Lands. The failure of any employee, agent, or representative of Grantee to comply with the foregoing shall entitle Surface owner to treat the person as a trespasser.
11. **Suspension of Operations Under Wet Conditions.** Grantee agrees to suspend operations when conditions are wet and as a result thereof, excessive damage to the surface will occur.
12. **Construction.** This agreement shall be construed in accordance with the laws of the State of Wyoming. In the event of a dispute hereunder, the parties agree that sole venue will lie in the federal or state courts in Wyoming.
13. **Entire Agreement; Amendment.** This agreement constitutes the entire Agreement between the parties and any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding on either party except to the extent incorporated in this Agreement. Any modification or amendment of this Agreement shall be binding only if evidenced in writing signed by each party.
14. **Severability.** Should any provision of this Agreement be held to be invalid, the remainder of this Agreement shall not be affected thereby.
15. **Captions.** The captions used in this Agreement are for convenience only and shall in no way define, limit, or describe the scope or intent of this Agreement or any part thereof.
16. **Counterpart Execution.** This Agreement may be executed in any number of counterparts, which when taken together shall constitute one (1) original valid and binding Agreement.
17. **Attorney's Fees.** In the event of a dispute hereunder, or if any party seeks to enforce, interpret or terminate this Agreement, with or without litigation, the prevailing party shall be entitled to attorney's fees and costs.
18. **Binding On Successor and Assigns.** The terms and provisions hereof shall inure to the benefit of and be binding upon Grantor and Grantee, and their respective legal representatives, successors and permitted assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

GRANTOR:

By:

By:

GRANTEE:

By:

By:

STATE OF WYOMING)
 ss:
COUNTY OF _____)

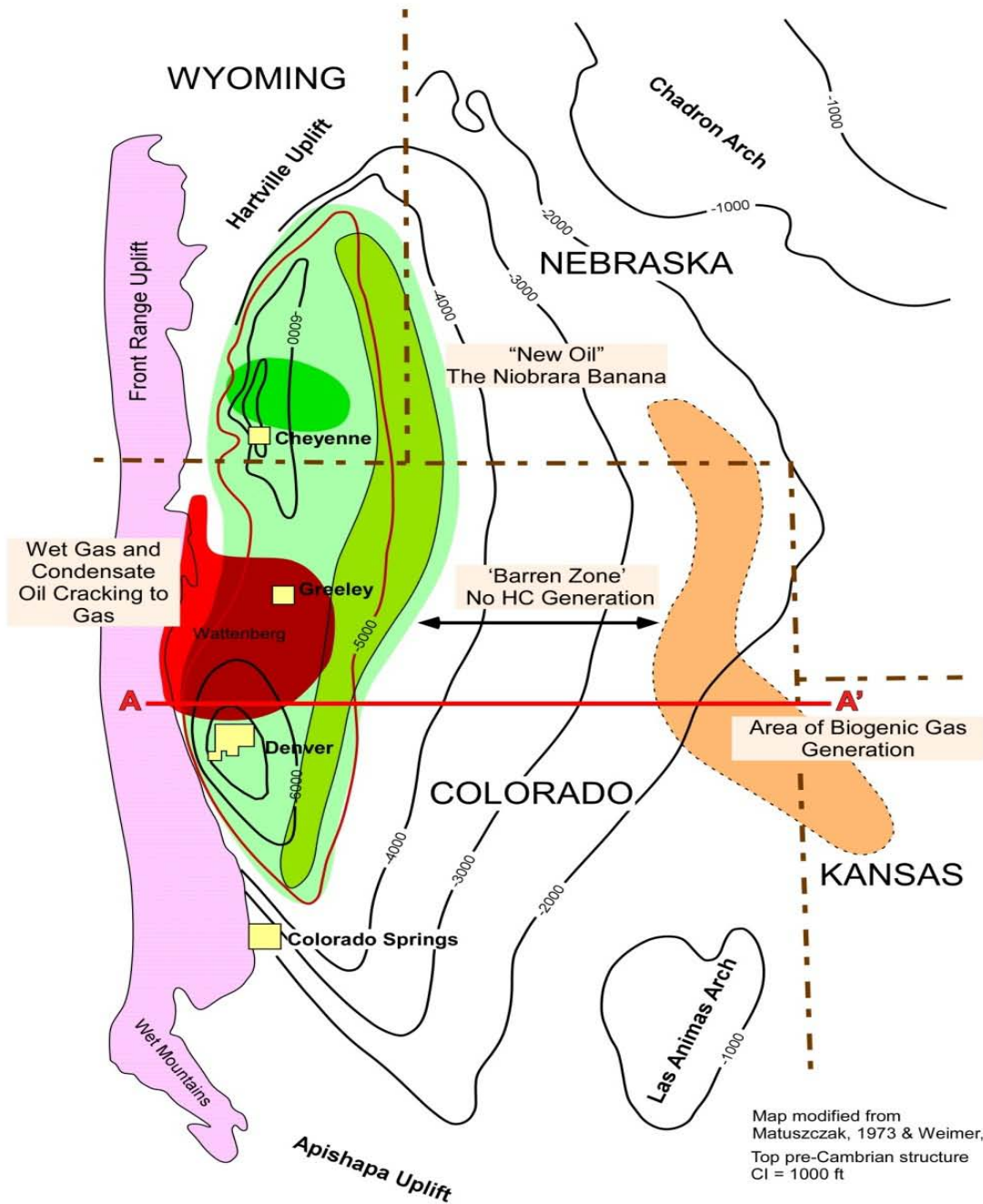
The foregoing instrument was acknowledged before me this _____ day of _____, 20_____, by _____.

Witness my hand and official seal.

Notary Public

My Commission Expires:

MAP OF THE NIOBRARA OIL FORMATION



NOTES

NOTES

NOTES