

SURFACE OWNER PROTECTION ACTS AND OIL AND GAS DEVELOPMENT

This memorandum discusses North Dakota oil and gas production damage compensation legislation--the North Dakota Surface Owner Protection Act--and surface owner protection legislation enacted in other oil and gas-producing states.

THE DOMINANT MINERAL ESTATE AND THE ACCOMMODATION DOCTRINE

Minerals and the surface to lands may be separated or severed by several means, including by mineral deed or by reservation of minerals from a grant of surface. When the minerals in land are severed from the surface, the mineral estate becomes a separate property interest in the land. The severance of the mineral estate and surface estate requires that an easement in favor of the mineral estate be implied to assure access to the surface. Consequently, the mineral estate includes an implied easement to the surface, limited by reasonable necessity. In general, reasonableness of use has been determined by industry practices.

The accommodation doctrine was developed by the courts to temper the dominant rights of the mineral estate to reasonably accommodate the surface owner's existing use of the surface. Without the accommodation doctrine, if there were a conflict between the rights of the mineral owner and the rights of the surface owner, the mineral owner's rights prevailed over the interests of the surface owner. Under the accommodation doctrine, limits are placed on a mineral owner's right to use the surface by requiring the mineral owner, in exercising the mineral owner's rights to use the surface, to act with due regard for the interests of the surface owner. The accommodation doctrine requires the mineral owner to consider the rights of the surface owner and to accommodate the existing uses of the surface if those uses do not unreasonably interfere with the mineral owner's operations.

The common law generally provides that the mineral owner is only liable for damage to the surface if the surface owner can show negligence, unless there is a contractual arrangement providing for damages. Under the common law, the surface owner generally can recover the diminution in value to the surface for permanent damage and restoration costs for temporary damage not to exceed the value of the land.

OIL AND GAS PRODUCTION DAMAGE COMPENSATION IN NORTH DAKOTA

North Dakota Century Code Chapter 38-11.1 provides for compensation for surface damage caused by oil and gas production. Section 38-11.1-01 provides that among other things, the Legislative Assembly has found that owners of the surface estate

and other persons should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by oil and gas development. The purpose and interpretation of Chapter 38-11.1 is contained in Section 38-11.1-02. This section provides that it is the purpose of Chapter 38-11.1 to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of the development of minerals. Section 38-11.1-03.1 provides that upon request of the surface owner or adjacent landowner, the State Department of Health is to inspect and monitor the well site on the surface owner's land for the presence of hydrogen sulfide. If the presence of hydrogen sulfide is indicated, the State Department of Health is required to issue appropriate orders under Chapter 23-25 to protect the health and safety of the surface owner.

Section 38-11.1-04 provides for payments to the surface owner for damage and disruption caused by oil and gas development. This section requires the mineral developer--the person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes--to pay the surface owner a sum of money equal to the amount of damages sustained by the surface owner and the surface owner's tenant, if any, for loss of agricultural production and income, lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations.

Section 38-11.1-05 requires the mineral developer to give the surface owner written notice of drilling operations contemplated at least 20 days before commencement of operations, unless waived by mutual agreement of both parties. The notice must officially disclose the plan of work and operations to enable the surface owner to evaluate the effect of drilling operations on the surface owner's use of the property.

Section 38-11.1-06 concerns the protection of surface and ground water. This section provides that if the domestic, livestock, or irrigation water supply of a person who owns an interest in real property within one-half mile of where geophysical or seismograph activities are or have been conducted or within one mile of an oil or gas well site has been disrupted, or diminished in quality or quantity by drilling operations and a certified water quality and quantity test has been performed by the person who owns an interest in real property within one year preceding the commencement of drilling operations, the person who owns an interest in real property is entitled to recover the cost of making such repairs, alterations, or construction that will ensure the delivery to the surface owner of that quality and quantity of water available to

the surface owner before commencement of drilling operations. A person who owns an interest in real property who obtains all or a part of that person's water supply for domestic, agricultural, industrial, or other beneficial use from an underground source has a claim for relief against a mineral developer to recover damages for disruption or diminution in quality or quantity of that person's water supply proximately caused by drilling operations conducted by the mineral developer.

This section provides further that a tract of land is not bound to receive water contaminated by drilling operations on another tract of land, and the owner of a tract has a claim for relief against a mineral developer to recover the damages proximately resulting from natural drainage of waters contaminated by drilling operations. The mineral developer is also responsible for all damages to person or property resulting from a lack of ordinary care by the mineral developer or resulting from a nuisance caused by drilling operations. However, this section does not create a cause of action if an appropriator of water can reasonably acquire the water under the changed conditions and if the changed conditions are a result of the legal appropriation of water by the mineral developer.

Section 38-11.1-09 provides that if the person seeking compensation rejects the offer of the mineral developer, that person may bring an action for compensation in the court of proper jurisdiction. If the amount of compensation awarded by the court is greater than that which had been offered by the mineral developer, the court is required to award the person seeking compensation reasonable attorney's fees, any costs assessed by the court, and interest on the amount of the final compensation awarded by the court from the day drilling is commenced.

NORTH DAKOTA SURFACE OWNER PROTECTION ACT

The North Dakota Surface Owner Protection Act governs the surface mining of coal. Section 38-18-06 provides that before the Public Service Commission may issue a permit to surface mine land, the mineral developer must give the surface owner written notice of the type of land disturbance or mining operation contemplated by the mineral developer. The notice must include a map of proposed mining operations, and the notice and map must be submitted to the surface owner at least 30 days before the application for a permit to surface mine is to be submitted.

The Public Service Commission may not issue a permit to surface mine land unless the permit application is accompanied by statements of consent, executed by each surface owner whose land is included within the permit area, to have surface mining conducted upon the surface owner's land. If the mineral owner or the mineral developer is unable to obtain the surface owner's consent, the mineral owner or mineral developer may bring an action in

district court to establish the relative rights of the parties and measure of damages to the surface owner. At any time after the filing of any such action and either before or after the final decision of the district court, upon a showing to the satisfaction of the court that the surface owner will be adequately compensated for lost production, lost land value, and lost value of improvements due to mining activity, the court is required to issue an order that will authorize the commission to issue a permit to surface mine land without the consent that would otherwise be required.

Section 38-18-07 governs payments for surface damage and disruption caused by surface mining. This section provides that unless the mineral lease, surface lease, or consent statement executed by the surface owner provides for payments to the surface owner, the mineral developer must pay annually to the surface owner a sum of money equal to the amount of damages sustained by the surface owner for loss of agricultural production caused by mining activity, provided that it can be shown that the land disturbed or to be disturbed has regularly been used for agricultural production. Finally, Section 38-18-08 provides that it is the obligation of the mineral developer to pay the entire cost of surface reclamation necessitated by that developer's mining operation.

SURFACE USE STATUTES

Illinois, Kentucky, Montana, New Mexico, Oklahoma, South Dakota, Tennessee, West Virginia, and Wyoming also have enacted surface owner protection legislation. Generally, the purposes of surface owner protection statutes are to minimize damage suffered by surface owners, to prevent harm to the general public by potential loss of available surface for agricultural or other beneficial purposes, to promote settlement of disputes between surface owners and mineral owners, and not to prevent or delay exploration and development of minerals.

North Dakota was the first state to enact a surface owner compensation statute, and the Montana, Tennessee, and West Virginia statutes are modeled on North Dakota. Illinois and Kentucky have similar statutes that apply only when the surface owner has not consented to the mineral owner's operations. The Indiana statute is similar to the other statutes in that it imposes liability for surface damages, regardless of fault, but differs from the other statutes in that it does not require notice or bonding.

A summary of surface owner protection acts in several oil and gas-producing states is attached as an [appendix](#).

NEW MEXICO

New Mexico enacted a surface owner protection statute in 2007 which places additional obligations on operators as compared with the obligations imposed by surface owner protection statutes in other states.

The New Mexico statute requires the mineral developer to give notice 5 days before nonsurface

disturbance activities and not less than 30 days before planned oil and gas operations. For oil and gas operations, the notice must include an offer of compensation. If the owner does not accept the operator's compensation agreement within 20 days, the operator may proceed with bonding. The surface owner can negotiate or go to binding mediation or arbitration. If bonding is required, the statute requires a \$10,000 bond per well or a \$25,000 blanket bond, letter of credit, cash, or certificate of deposit with a New Mexico surety company or financial institution.

Concerning damages, the New Mexico statute requires damages for lost agricultural production and income, lost land value, lost use and access of land, and lost value of improvements. The New Mexico statute requires attorney's fees if the operator conducts operations without notice, conducts operations without agreement or bonding, or conducts operations outside the scope of the agreement. The New Mexico statute requires attorney's fees and treble damages if an operator willfully and knowingly does not give notice, enters the surface owner's property without agreement or bond, or violates the access and compensation agreement. A surface owner is subject to attorney's fees for not exercising good faith in complying with the New Mexico statute or agreement entered pursuant to the statute and treble damages for willfully and knowingly violating an access and compensation agreement. Damages are determined by agreement, arbitration, mediation, or litigation. In addition, the notice requires disclosure of the plan of operations, a copy of the Surface Owners Protection Act, proposed surface use agreement, and the name and contact information of the operator.

COLORADO

Colorado has statutorily codified the accommodation doctrine. The Colorado accommodation doctrine statute sets out a standard of conduct for the operator. The operator's standard of conduct is to conduct operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land. This is further defined to mean that the operator must use alternative well locations or alternative operations to minimize intrusion upon and damage to the land. The alternatives must be technically feasible, economically practicable, and reasonably available. The statute places parameters around the operator's standard of conduct so that the standard of conduct may not be construed as preventing an operator from entering upon and using that amount of the surface as is reasonable and necessary to explore for, develop, and produce oil and gas. The standard of conduct does not affect express provisions in surface use agreements on the conduct of operations. The

standard of conduct has no effect on releases of operator liability for surface use.

As with the common law, pursuant to the Colorado legislation, the surface owner bears the burden of establishing that the operator materially interfered with the surface owner's use of the surface. If the surface owner meets that burden of proof, the operator has the burden of proof to show it met the operator's standard of conduct. If the operator's burden is met, the burden shifts back to the surface owner for rebuttal evidence. An affirmative defense for the operator is if the damage was caused by compliance with the regulation, contract, or land use plan.

The Colorado statute does not require notice, a surface use agreement, or bonding. The Colorado statute does not mention damages and does not impose strict liability on operators for surface damages.

TEXAS

Texas has enacted legislation requiring the operator to notify surface owners of drilling permits for new wells or reentry of a plugged and abandoned well bore. However, the Texas statute specifically does not alter the status of any rule of law to the effect that the mineral estate in land is dominant over the surface estate.

Notice must be provided to the surface owner within 15 days after the permit is issued. A notice is not required if the surface owner has waived the requirement or if the operator and surface owner have entered an agreement that contains provisions regarding the operator's obligation to provide notice of operations. The failure to provide the required notice does not have any legal consequences for the operator.

The Texas statute affirms the common law dominance of the mineral estate without addressing the accommodation doctrine.

WYOMING

The Wyoming statute requires notice 5 days before entry for nonsurface disturbance activities and 30 days to 180 days before entry for surface disturbance activities. Before entry, the operator must attempt good-faith negotiations, obtain an agreement, or enter under bond. Wyoming requires a \$2,000 bond per well or a blanket bond approved by the state. The Wyoming statute provides for damages for loss of production and income, lost land value, and lost value of improvements. Damages are determined by a court unless otherwise agreed.

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Surface Statute Chart

STATE BLM (FED)	NOTICE	NOTICE CONTENT/ NEGOTIATION	BONDING	DAMAGE/ LIABILITY	DAMAGE DETERMINATION	OTHER
Colorado Colo.Rev.Stat. § 34-60-127	None	None	None	Compensatory damages or equitable relief to minimize intrusion but not prevent operator from entering.	By litigation if operator fails to meet statutory requirements	Legislative codification of Accommodation Doctrine
Indiana Ind.Code § 32-3-7	None	None	None	Actual damages from operations to: surface of the land; improvements to the land; or growing crops on the land.	Court	No punitive damages. Does not enlarge damages provided in lease, if lease specifies damages.
Illinois 765 Ill.Comp.Stat. 530	Prior to commencement of operations	In notice, Operator must offer to meet with owner, and if owner requests, to discuss operations	None	Crops, trees, shrubs, fences, roads, structures, improvements and livestock.	Operator tenders offer within 90 days after completion. Owner may accept offer or sue. Attorney fees for failure to offer or unreasonable offer.	
Kentucky KyRevStatAnn § 353.595	Prior to commencement of operations	In notice, Operator must offer to meet with owner, and if owner requests, to discuss operations	None	Crops, trees, shrubs, fences, roads, structures, improvements and livestock.	Operator tenders offer within 90 days after completion. Owner may accept offer or sue. Attorney fees if owner recovers more than offer, unless offer based on third party appraisal.	

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Surface Statute Chart

STATE BLM (FED)	NOTICE	NOTICE CONTENT/ NEGOTIATION	BONDING	DAMAGE/ LIABILITY	DAMAGE DETERMINATION	OTHER
<p>Montana</p> <p>Mont.CodeAnn § 82-10-501</p>	<p>Not more than 180 days nor less than 20 days prior to commencement of operations</p>	<p>Written offer of settlement within 60 days of receipt of demand from surface owner.</p>	<p>None</p>	<p>Lost agricultural production and income, lost land value, lost use of and access to land, lost value of improvements. Damage to real or personal property caused by mineral development.</p>	<p>Surface owner can agree to offer or litigate. If court award exceeds offer, surface owner may obtain attorney fees.</p>	
<p>New Mexico</p> <p>NMStatAnn § 70-12-1</p>	<p>A) 5 days prior to non-surface disturbance activities B) not less than 30 days prior to planned oil and gas operations.</p>	<p>Under B) Notice must include offer of compensation. If owner does not accept operator's comp agreement within 20 days, operator may proceed with bonding. Owner can negotiate, or go to binding mediation or arbitration.</p>	<p>\$10,000 bond/well or \$25,000 blanket bond, LOC, cash or CD with NM surety company or financial institution.</p> <p>No New Mexico surety companies or financial institutions issue bonds for surface compensation.</p>	<p>A) lost agricultural production and income, lost land value, lost use and access of land, lost value of improvements. B) Attorney fees if operator conducts operations without notice; conducts operations without agreement or bonding on; or outside of scope of agreement. C) Attorney Fees and Treble Damages for operator willfully and knowingly not giving notice, or entry without agreement or bond, or for violation of access and compensation agreement. Surface owner subject to attorney fees for not exercising good faith in comply with Act or agreement / treble damages for willfully and knowingly violating access and compensation agreement.</p>	<p>By agreement, arbitration, mediation, or litigation.</p>	<p>Notice requires disclosure of plan of operations; copy of Act; proposed surface use agreement; name and contact information for operator.</p> <p>Proposed agreement must contain minimum requirements specified by Act.</p>

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Surface Statute Chart

STATE	NOTICE	NOTICE CONTENT/ NEGOTIATION	BONDING	DAMAGE/ LIABILITY	DAMAGE DETERMINATION	OTHER
BLM (FED) North Dakota N.D.Cent.Code § 38-11.1-01	20 days prior to commencement of operations	Written offer for damages with the notice.	None	Lost agricultural production and income, lost land value, lost use of and access to land, lost value of improvements. Damage to water source or for run-off of contaminated water.	Surface owner can agree to offer or litigate. If court award exceeds offer, surface owner may obtain attorney fees.	
Oklahoma 52 Okla.Stat. § 318.2	Prior to commencement of operations	Parties to enter into negotiations within five days of notice. Either agreement prior to commencing operations or file request for appointment of appraisers.	\$25,000 blanket bond	Surface damage as determined by appraisal.	Appraisers appointed by court, or if appealed from appraisers by court or jury.	Treble damages for violation of statute.
South Dakota S.D.Codified Laws § 45-5A-1	30 days prior to commencement of operations	Written offer of settlement within 60 days of receipt of demand from surface owner.	None	Lost agricultural production and income, lost land value, lost use of and access to land, lost value of improvements. Damage to real or personal property caused by mineral development.	Surface owner can agree to offer or litigate.	
Tennessee Tenn.Code Ann § 60-1-601	None	Operator makes written offer within 60 days of demand from owner.	None	Loss of income from existing use, market value of crops destroyed, damage to water supply in use prior to operation, cost of repair or replacement of damaged personal property, and diminution of land value for actual prior use.	If offer rejected, arbitration or court.	
Texas Tx.NatResCode § 91.751 Common Courtesy Act	15 days after Railroad Commission issues permit for new well or to reenter P&A'd well	None	None	State expressly does not affect status of dominance of mineral estate over surface estate. Failure to give notice does not affect permit or otherwise restrict, limit or terminate right to develop.	N/A	Notice not required if A) agreement entered into regarding notice or B) surface owner has waived notice requirement.

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Surface Statute Chart

STATE	NOTICE	NOTICE CONTENT/ NEGOTIATION	BONDING	DAMAGE/ LIABILITY	DAMAGE DETERMINATION	OTHER
BLM (FED) West Virginia W.Va.Code § 22-7-1	None	Operator makes written offer within 60 days of demand from owner.	None	Loss of income from existing use, market value of crops destroyed, damage to water supply in use prior to operation, cost of repair or replacement of damaged personal property, and diminution of land value for actual prior use.	If offer rejected, arbitration or court at surface owner's election.	
Wyoming Wyo.Stat. § 30-5-401	A) 5 days prior to entry for non-surface disturbance activities; B) 30 to 180 days prior to entry for surface disturbance activities	Prior to entry Operator must attempt good faith negotiations, obtain an agreement or enter under bond. New negotiations if plans change. Good faith offer within 60 days of owner's claim.	\$2,000/ well or blanket bond approved by State commission	Loss of production and income, lost land value, lost value of improvements.	By court unless otherwise agreed.	
BLM Onshore Order No 1 Gold Book 43 CFR 3164.1 72 FR 10328	Good faith effort to notify surface owner prior to staking. Must certify that Surface Use Plan of Operations given to surface owner or good faith effort made if unable to provide to surface owner	Prior to approval of APD or Sundry Notice, the operator must certify as part of the application that there was a good faith effort to enter into a surface access agreement. If unable to enter into an agreement, the operator must file a bond.	If no surface access agreement, bond not less than \$1000 determined by BLM to cover compensation for reasonable and foreseeable damage to crops and damages to tangible improvements.	Private matter	Private matter	Each application for APD, NOS or SN must contain name, address and telephone number of private surface owner and email address if available. BLM will invite surface owner to inspection.

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Surface Statute Chart

STATE BLM (FED)	NOTICE	NOTICE CONTENT/ NEGOTIATION	BONDING	DAMAGE/ LIABILITY	DAMAGE DETERMINATION	OTHER
OTHER STATUTES						
STATE						
Colorado Colo.Rev.Stat § 24-65.5-101	Subdivision developer must provide mineral owner notice of impending surface development to facilitate negotiation of a surface use agreement for joint use of the surface. Statute requires agreement contain minimum oil and gas areas for surface developments for drilling windows, setbacks for existing wells and facilities, rights-of-ways or easements for existing and future pipelines and flowlines, and for non-exclusive road easements. The incremental costs to drill directional wells from drilling windows are to be deposited in an escrow account by the subdivision developer. Operator may draw up to \$87,500 from the escrow for each directional well to cover increased cost to drill. Local government involvement in the process.					
Texas Tx. Nat Res Code § 92.001 Mineral Use of Subdivided Land Act	Texas Railroad Commission to approve plats of subdivisions to ensure mineral resources are fully and effectively exploited and lands utilized to fullest and most efficient use. Railroad Commission to hold hearing after notice to applicant and mineral owners considering adequacy of number and location of operation sites, roads and pipeline easements. Owner of possessory mineral interest may use only surface in designated operating sites for exploration, development and production and the easements as necessary to adequately use the sites. Owner of possessory mineral interest may drill wells or extend well bores from operation sites in subdivision or from outside of subdivision under surface of subdivision if such does not unreasonably interfere with use of the surface. Restrictions on possessory mineral owner's surface uses cease to apply if within three years of the commission's order, the surface owner has not commenced actual construction of roads or utilities and a lot has not been sold to a third party.					
Louisiana Lou.Rev.Stat. Ann. § 30-29 Act 312	Louisiana passed Act 312 to address the problem that damage awards for remediation were not required to be expended on remediation. Under the Act, the Department of Natural Resources is involved in formulating a remediation plan and the funds are deposited in the registry of the court.					