



# Chapter II

## Legal and Regulatory Issues

# Oil and Gas at Your Door?

**A Landowner's Guide to Oil and Gas Development**  
Second Edition



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# II

## Chapter II

### Legal and Regulatory Issues

#### WHO OWNS THE MINERALS BENEATH YOUR LAND?

In some cases the surface and minerals (including oil and gas) are owned by the same person, but often the minerals are owned separately from the surface property.

#### MINERAL VERSUS SURFACE RIGHTS

Mineral owners have different rights than owners of the surface lands. This section outlines some of the unique rights granted to mineral owners, as well as information on surface owner rights and protections.

#### REGULATIONS AND SURFACE OWNER PROTECTIONS

This section provides examples of state, county and federal statutes (i.e., laws) and regulations that provide some protection to surface owners, e.g., consultation requirements, compensation for surface damage, reclamation of disturbed lands, and more.

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In many regions of the United States landowners are being approached by companies who want to search for oil and gas beneath their land. This can be an extremely stressful, confusing time for landowners. The companies have done this many times before, and understand what their legal rights are. But most landowners are not aware of what they can demand of companies in return.

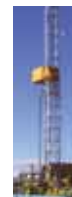
Too many landowners have signed away certain rights to companies, only later to find out that they didn't have to do so. Or they have agreed to offers, only to find that their neighbors have received a better deal.

#### What are the first steps a landowner should take?

1. Most importantly, don't panic, and don't rush into any agreements.
2. Educate yourself. Understand your rights, and your options. You may want to consult an attorney.
3. Find allies. You may need support, and be able to learn from others' experiences.
4. Find out who owns the minerals beneath your land. In some cases, the surface and the minerals are owned by the same person, but often the minerals are owned separately from the surface property. Landowners will have different rights and different negotiation strategies depending upon whether the mineral rights belong to them; to federal, state or tribal governments; or to other private parties (e.g., citizens or companies).

This chapter is designed to provide a general introduction to the legal and regulatory issues related to oil and gas development. It is important to have some understanding of government regulations and laws pertaining to oil and gas. These may provide you with important tools for ensuring that oil and gas development will have as minimal an impact as possible on your property and lives. The following pages discuss various legal and regulatory options; and provide some strategies for dealing with oil and gas development whether or not you own the minerals beneath your land.

Bear in mind that the laws and regulations that govern oil and gas development vary from state-to-state. So you will likely need to do some additional research, or contact local organizations,



other landowners or attorneys who may be more familiar with your state's oil and gas laws. And please note that while some recommendations and suggestions are made in the following text, this does not constitute legal advice. Competent legal advice can only be provided when the lawyer has heard all of the factual information pertaining to your particular situation.

## **The Legal Steps in Oil and Gas Development**

In the first chapter, you learned about the technical aspects of oil and gas development. But before any of that can take place, a company must ensure that they have the legal right to develop the oil and gas. The following provides you with an understanding of the legal steps taken by companies to secure those rights.

### **1. Mineral ownership is determined.**

Oil and gas companies usually hire people to research mineral titles, in order to determine who owns the minerals that they want to develop. In some cases, this work involves researching land and mineral deeds that date back to the 1800s.

### **2. Mineral owners are contacted by the company.**

Once mineral ownership is determined, the mineral owners will be approached by the company. The initial contact may be made by a phone call, a letter, or a home visit from an oil or gas company employee or representative (could be a leasing agent or a land man). At this time, the company will explain its desire to explore for and possibly develop the mineral estate for oil and gas. (Unless the surface owner also owns the minerals, he or she will not be contacted at this stage.)

### **3. Negotiations begin on the purchase or leasing of mineral rights.**

The company will attempt to negotiate an agreement to lease or buy the mineral rights. Negotiations may include issues such as: royalties; water use; compensation for damages to property; and other considerations. If successfully negotiated, leases can be used to protect the surface property. The company requires the lease in order to proceed with their development plans, as the lease transfers the right to explore for and develop minerals from the mineral owner to the company. (See Chapter III for Tips on Leasing Your Minerals.)

### **4. Company may contact the surface owner (if different from mineral owner).**

In many cases, when companies are ready to explore, they are legally required to inform surface owners that they have leased the mineral rights and intend to search for and possibly develop the oil and gas under the surface owner's property. Surface Use Agreements (contracts) or less formal agreements may be negotiated with the surface owners at this stage. (See Chapter III Tips on Surface Use Agreements.)

## Who Owns the Minerals Beneath Your Land?

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It is important for landowners to have an understanding of some key legal terms and concepts related to oil and gas development, such as the difference between surface and subsurface rights.

Oil, gas and minerals, like land, are considered forms of property. The mineral resources that are beneath a tract of land (i.e., the mineral estate or subsurface estate) can be owned, and ownership provides you with the **mineral rights** or subsurface rights. **Surface rights**, on the other hand, refer to ownership of land (i.e., the surface estate) and the right to use the surface, e.g., for dwellings, agriculture, or urban development.

### SPLIT OR SEVERED ESTATE PROPERTY

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In many states, the owners of the land are not necessarily the owners of the minerals. When the surface and subsurface estates are owned by different parties, they are referred to as split estate or severed estate lands.

When you buy a piece of land, it is not always evident whether or not you own the minerals, because mineral estate owners do not have to inform a new surface owner that the mineral rights have been severed. There are ways of finding out whether or not the minerals and land are split estates. These are discussed later in the chapter.

All western states and most other states allow for the separate ownership of land and mineral resources. Some states have more split estate lands than others. It has been estimated that:

- In Texas, for 90% of the property owned, the surface landowner is not the owner of the land's mineral rights.<sup>363</sup>
- If you're buying land in Colorado, 85% of the time the land purchase will not include the mineral rights beneath that land.<sup>364</sup>
- In Kansas, the landowner usually owns the subsurface rights, too.<sup>365</sup>

In Louisiana, the owner of the land does not “own” the oil and gas, but “has the exclusive right to explore and develop his property for the production of such minerals.”<sup>366</sup> Louisiana landowners may convey, reserve, or lease their right to explore and develop their land for production of minerals. This right to explore and develop reverts back to the landowner if no exploration or production occurs within ten years (or within a timeframe prescribed in the lease or contract).<sup>367</sup>

#### How are Mineral Rights Severed from Surface Rights?

The separation of surface and subsurface rights occurs through: 1) a mineral deed, or 2) mineral reservation.

1. Severance by mineral deed occurs when someone who owns both the surface and mineral rights chooses to sell all or a portion of the mineral rights to another party. Another scenario is when the owner of both the surface and mineral rights sells the land to one party and the minerals to a different party.<sup>368</sup> In either case, the proof of the sale is known as a mineral deed, which is recorded in government land title offices (most often with the county governments).
2. Severance by mineral reservation may occur if a party owning both surface and mineral rights sells the land, but retains (or reserves) all or a portion of the mineral rights. All the mineral owner has to do to preserve title to the subsurface estate is record his or her mineral reservation with the county clerk and recorder's office or other government land title office.<sup>369</sup>

**In many states the owners of the land are not the owners of the minerals.**

Mineral reservation has been widely practiced by individuals, land-grant railroads, lending institutions, and federal and state governments. For example, one of the largest private mineral owners in Montana is Ag America. That company acquired its minerals through mortgage foreclosures on ranches during the 1930s and 1940s. When the company sold the land, it would reserve half of the minerals.<sup>370</sup> Mineral reservations also often occurred when lands were originally patented (i.e., the federal government sold the land but held on to the mineral rights).

### Other Split Estate Considerations

- The mineral estate, like the surface property, can be subdivided. The mineral rights can be split so that there may be numerous parties who own a portion of the minerals beneath your land.
- Mineral rights can be divided by specific mineral commodities. For example, one company can own the mineral rights to coal, while another company owns the oil and gas rights.<sup>371</sup> Consequently, it is important to know which minerals are included in a mineral deed. Some deeds specify that “all minerals” are included. Others use the phrase “oil and gas,” which means that only the rights to develop oil and gas are included in that deed. The general rule is that unless specifically defined, the term “mineral” refers to oil, gas, coal, metals and precious or semi-precious stones.<sup>372</sup>
- In some states, there is a third estate that can be severed. In Pennsylvania, a state rich in coal resources, there are three separate estates: the surface estate, the mineral estate and the support estate. If the surface owner also owns the support estate, the mineral owner may mine the coal but must leave enough of it there to support the surface estate, i.e., if the mineral owner mines too much coal, and the surface owner’s house falls into the mine, the surface owner’s rights have been violated. If, on the other hand, the mineral owner also owns the support estate, the surface owner has no legal right to have his or her property supported by anything.<sup>373</sup>
- Who owns coalbed methane? For the past 50 years, when the mineral rights to the gas and coal beneath a tract of land have been owned by different parties, disagreements have occurred over who owns the coalbed methane.<sup>374</sup> In some states, such as Pennsylvania, Alabama, and Montana, courts have ruled that coalbed methane is part of the coal formation in which it is found.<sup>375</sup> In 1999, however, the U.S. Supreme Court ruled that coal, as defined in the 1909 and 1910 *Coal Lands Acts*, does not include the methane gas found within the formation, and therefore, a coal owner has no right to extract coalbed methane for profit.<sup>376</sup>
- Who owns the groundwater rights? Water quality and quantity issues could become important depending on who owns the rights to the groundwater, there may be an opportunity for landowners to influence the development of oil or gas on their property. In some states, the groundwater belongs to the state (i.e., it’s a public resource), and so companies must apply for permits to extract and remove the groundwater that accompanies oil and gas development. In other states, however, the groundwater rights belong to the surface owner.



## RECONNECTING THE SURFACE AND MINERAL ESTATES

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In some states, mineral rights revert to the surface owner under certain conditions such as death, failure to obtain production, or passage of a specified period of time. It is important to be aware that these types of laws may exist in your state, and they may provide surface owners with the opportunity to take possession of the mineral rights beneath their land. Several states have laws to this effect.

- In Louisiana, if the minerals are not used (e.g., no exploration or production has occurred) within 10 years, the surface owner becomes the owner of the minerals.<sup>377</sup>
- In North Dakota and Ohio, if minerals have lain dormant for 20 years the surface owner can claim them.<sup>378</sup>
- In Michigan, a law that passed in 1998 provides landowners with the opportunity to petition the state to purchase the state-owned minerals beneath their land. They can do this only if there is no pending lease or development. Upon request from surface owners, the state must sell the minerals to them at fair market value, unless the state wants to reserve minerals to prevent damage in environmentally sensitive areas, or there is some other legitimate reason to keep the minerals in state ownership. A deed restriction then will be added to the property that prohibits the minerals from being severed in the future.<sup>379</sup>
- Recent attempts to pass similar laws in Colorado and Montana have failed.

## HOW TO DETERMINE OWNERSHIP

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If a landowner is unsure of whether or not he or she owns the mineral estate, it is a question that should be answered, especially if the land is owned or leased in a region with oil and gas development.

- If you own the minerals beneath your land, you have considerable opportunity to benefit from and influence the course of oil and gas development.
- If you do not own the minerals beneath your land, that means that other people or entities possess certain rights that may hinder your ability to shape oil and gas development on your property.

There are a number of methods for determining who owns the oil and gas beneath your land.

### **1. Read your property deed and research the land title records.**

If you want to find out who owns the minerals beneath your land the first step is to find the deed to your property. The deed may state that ownership of your property is fee simple absolute. This may mean that you own both the surface property and the underground mineral resources.

If you can't find your copy of your deed, contact your county government. Surface deeds are almost always recorded in the county government's Recorder of Deeds (or some equivalent) office in the county where the property is located.

It may be necessary to search the property's historical deeds all the way back to the 1800s. (Be aware that older mineral deeds may not be recorded in any government office.) A phrase in an old deed such as "oil and gas excepted and reserved" means that the surface was sold separately from the oil and gas estate at that time. If you find such a statement in an old deed, the oil and gas is probably not yours to lease or develop.<sup>380</sup>



## **2. Research mineral deeds, grants and reservations.**

Go to the county and federal government offices to find out if there are mineral deeds, grants or reservations related to your property. You will need a legal description of your land (this can be found in your deed or in the title document for your land).

The federal Bureau of Land Management maintains Surface and Mineral Land Status maps, which can be purchased for a nominal fee. These maps are color-coded to show ownership status (i.e., federal, state or private ownership), but the maps do not show private land owner names.

Depending upon where you live, there will be different county officials (e.g., county recorders, register of deeds, county clerk) charged with recording mineral, oil and gas transaction documents such as mineral deeds. To obtain addresses and phone numbers for the appropriate office, contact your county government, or visit the web site: <http://royalty-deeds.com/courthouses/>.

Some county assessor offices track minerals because they are taxed at the county level if they are producing (or they are taxed if non-producing but severed from the surface). You should contact your assessor's office to determine if they track mineral ownership.

## **3. Have a title search conducted by a land title/abstract or title insurance company.**

There are two main types of companies that provide information on property ownership: one that will create an abstract of title, and a second that provides title insurance. In both cases, these companies can research the legal history of property and perform extensive searches of public records including deeds, mortgages, contracts, civil court records, probate court records, federal court records, and tax records. They may be able to assist you, if your own search attempts have not provided you with adequate information.

When you purchased your property, you may have hired a company to provide you with title insurance to prove that you had clear title to the land. In Colorado, title insurance companies are now required by law to inform the title insurance purchaser if the mineral estate has been either leased or severed from the surface estate. The title companies must also inform the purchaser that there is a substantial likelihood that a third party holds some or all interest in oil, gas, other minerals, or geothermal energy in the property; and that such mineral estate may include the right to enter and use the property without the surface owner's permission.<sup>381</sup>

For residents of other states, be aware that title searches may not include information on whether or not you own the minerals. In many states, it is common for title companies to exclude research on mineral rights, mining claims, water rights, and other issues of concern. If you have already done a title search for your property, refer to the exclusion section of the title policy. If mineral rights are mentioned as exclusions, then it is unlikely that this document will provide you with the information you need.

Make sure you find a company that will (and knows how to) include mineral rights in a title search. Not all title companies have personnel trained in examining mineral ownership, so it is important to ask if they are qualified to examine this type of property. The companies should also be willing to "stand behind" their findings. Having a title company insure a mineral title examination may be difficult, however, so find out in advance whether or not the company is willing to provide insurance. Alternatively, you can ask for a mineral guarantee, which will disclose any mineral reservations found in the "chain of title" (i.e., the list of all people/entities who have held title to the property) since the land was first patented. As mentioned above, a mineral reservation indicates that the ownership of the minerals has been severed from ownership of the land. The interpretation of the mineral report, howev-

er, can be complicated. Usually, if you order a mineral guarantee report from a title/abstract company, you will need to take that information to an attorney who can provide you with an opinion based on the findings in the report. If you get mineral title insurance, you do not normally need to get the legal opinion.

Be aware that title searches can be expensive. One Montana titles searcher quoted his hourly fee for producing a mineral report at \$126.<sup>382</sup> And there may be attorney fees on top of that.

#### 4. You may want to consider hiring a landman.

While landmen typically work for oil and gas companies, determining mineral ownership is a large component of their work, and experienced landmen should have significant expertise in determining mineral ownership. Also, landmen may be more affordable than title companies, but unlike title companies they may not be able to guarantee their findings.

#### 5. Find out if the minerals have been dormant, and for how long.

As mentioned above, several states have laws that allow surface owners to claim minerals beneath their lands if those minerals have been dormant for a certain period of time. There may be other states that also have similar laws. Again, you will want to consult an attorney to determine whether the dormant minerals now belong to you, or what steps you need to take to re-claim these rights.

## Mineral Versus Surface Rights

If someone owns or leases the mineral rights to oil and gas beneath your land, he or she has the right to enter your property and search for minerals; and, if minerals are discovered, the owner then has the right to remove those minerals.

Depending upon the state that you live in, some or all of the following “rights” may be included in the search for and removal of minerals:

- the right to enter upon the surface for exploration and production of oil and gas
- the right to conduct geophysical exploration and seismic tests on the surface
- the right to mine caliche (dirt, gravel, etc.) for constructing roads, drill pads, etc. from the premises

### The Rights

“In Manistee County, the Michigan Department of Environmental Quality (DEQ) has allowed drilling in residential areas of natural gas wells that contain high concentrations of hydrogen sulfide, a poisonous chemical. DEQ officials defend their action on the basis that the rights of mineral and lease holders “must be respected.” In effect, they appear to be determining that the drillers’ rights are more important than the rights of residents.”

— Schneider, Keith.<sup>383</sup>





- the right to construct roads to drill sites (including cutting and removing timber); and to construct, maintain and use roads, bridges, canals and other passageways necessary to transport materials, workers and equipment to and from well sites and associated facilities
- the right to take a reasonable amount of water (fresh or saline, found above or below the surface) for development and production of oil and gas
- the right to dispose of fresh or salt water, which is produced with oil and gas, on premises
- the right to house employees on the premises
- the right to construct or install production and storage facilities, storage tanks, pits, structures, machinery and other appliances
- the right to select drilling sites
- the right to select timing of drilling operations
- the right to install and use pipelines to transport hydrocarbons and waste products to points within or off the leased premises
- the right to enter premises despite the existence of growing crops

It is common to hear of the mineral estate as being “dominant” to the surface estate, because the owner of the mineral estate has the right to access and develop his or her minerals, even if those actions infringe upon the surface owner’s property and life. And in many instances, mineral owners do not have to compensate the surface owners for use of their property.

To many people, the dominance of the mineral estate seems unfair. In the United States, the U.S. Constitution guarantees that private property cannot be taken for public purposes without just compensation.<sup>384</sup> For example, if private property is acquired by the U.S. government (e.g., to create a national park), the surface and mineral owners are compensated. Yet private property can be used and damaged by oil and gas development without just compensation for the surface owner - meanwhile, there are huge profits being generated by the oil and gas industry.

## SURFACE OWNER RIGHTS AND PROTECTIONS

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Surface owners are not without rights. There are rights and protections stemming from legal decisions and government laws and regulations. Also, surface owners have access to the court system if laws and regulations are not enforced, or if negligence on the part of the oil and gas company has damaged their property. In addition, some oil and gas companies will negotiate surface use and/or surface damage agreements with surface owners, including offers for compensation, although they may not be required by law to do so.

### Legal Decisions

Over time, the courts in a number of states have recognized that surface owners do have some rights when it comes to mineral development. The following rules related to surface owner protections have become commonly accepted:<sup>385</sup>

- 1. Mineral owners may be held responsible for creating a nuisance, depending upon the definition of nuisance in the state where the land is located.**
- 2. Mineral owners may be liable for damages if they fail to reasonably accommodate the surface uses.**
  - In *Gerrity Oil and Gas Corp. v. Magness*, the Colorado Supreme Court decided that there is a ‘due regard’ responsibility, which “requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate.”<sup>386</sup> The practical application of this ruling is still being worked out.



- In the case of *Getty Oil Company v. Jones*, the Supreme Court of Texas required that Getty Oil bury its oil pumping units in cellars so that Jones, a farmer, could operate his automatic mobile irrigation system unimpeded (the height of the pump prevented full rotation of the irrigation system). This case demonstrates that even though the mineral owner may use the surface to the extent that is reasonably necessary, he or she may not interfere with the surface owner's use of the surface if there are reasonable alternatives available to the mineral owner (e.g., in the case of Getty Oil, the company had the alternative of burying the pumping units).<sup>387</sup>

**3. Mineral owners may be liable for damages to the surface if unreasonable or negligent use occurs, or if the mineral owner violates a contractual obligation.** It is, however, the landowner's responsibility to prove damages in a court of law.

There have been a variety of court cases that have found unreasonable surface use by an oil and gas operator in a variety of circumstances.<sup>388</sup>

- Use of an excessive amount of surface. In Texas, an oil and gas operator used six acres more than was reasonably necessary, and had to pay the surface owner for the value of the use of those six acres;<sup>389</sup> in Alaska a mineral lessee was liable for excessive use for clearing a helicopter landing field 50-feet wider, and using 50% more trees, than was reasonably necessary;<sup>390</sup> in Utah, the construction of a road interfered with the landowner's irrigation system and disturbed more than six acres of the surface owner's land. The court held that this was not reasonably necessary, especially since the mineral lessee ignored the surface owner's request to build the access road from a different direction so that damage to the surface owner's property would be minimized.<sup>391</sup>
- Use of surface for an excessive length of time.<sup>392</sup>
- Use of fresh water for secondary recovery operations when other solid, liquid or gaseous substances are available that are technically and economically feasible for use; or excessive use of water.
- Use of obstructing equipment (see *Getty Oil Co. vs. Jones*, above).



**FIGURE II-1.** LOW PROFILE WELL HEAD

This allows irrigation machinery to operate unimpeded.

## Surface Use Agreements

Some states have laws requiring companies to attempt to negotiate surface use or surface damage agreements with the surface owner. These laws are discussed below. In states where such agreements are not required by law, many companies still attempt to negotiate with split estate surface owners on issues such as access and compensation for damages.

These agreements are not reviewed by a government agency. They are contractual agreements between the company and the surface owner.

Negotiations with surface owners may include a discussion of:

- what compensation will be paid, and the timing and method of that compensation;
- the extent or nature of the property interest needed for oil or gas development;
- the quality, location or size of property needed for development;
- management of improvements and personal property during development;
- the date of proposed entry and issues related to use of the property; and
- any other terms and conditions deemed appropriate by either party.

See Chapter III for more information on Surface Use Agreements.

## Regulations and Surface Owner Protections

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Depending on whether or not minerals are privately owned, or owned by state or federal governments, different regulations apply.

If the minerals are privately owned, e.g., you own the minerals and lease them to a mining company, that company will be subject to state laws, and possibly county or municipal laws. Also, the company will be required to honor any contractual agreements made with you, the mineral owner. The most common of these agreements is a mineral lease. If you own the mineral and the surface rights, the mineral lease can be negotiated to protect your surface. See Chapter III for more information on leasing your minerals.

The oil and gas industry is regulated primarily at the state level. Generally, no matter whether the state, the federal government or a private party owns the minerals, operators must adhere to state laws and regulations governing oil and gas development.<sup>393</sup> Depending upon the state, the laws may be more or less protective of surface rights than federal, county or municipal laws and regulations.

The authority of government agencies to oversee oil and gas development is established in **statutes**, which are laws established when an act is passed by a state or federal legislature or municipal council. Some state legislatures have passed statutes solely devoted to oil and gas, while others have passed statutes, e.g., environmental or natural resources statutes, which contain small sections that pertain to oil and gas. At the local or municipal level, statutes are usually called “ordinances.”

**Regulations** are rules and administrative codes issued by governmental agencies at all levels (municipal, county, state and federal). Although they are not laws, regulations are adopted under authority granted by statutes, and therefore they have the force of law. Regulations tend to provide much more detail on a particular subject than do their corresponding statutes, and often include penalties for violations.

To find out which statutes and regulations apply to oil and gas in your state, contact the government agencies listed in Chapter V. For a list of federal statutes that apply to oil and gas, see the publication *Preserving Our Public Lands* (to obtain a copy, see Chapter V).

The following sections provide examples of various state, federal and county or municipal statutes and regulations that provide some protections for surface owners.

Before reading about the potential regulatory protections for surface owners, it is important to note that even though there are statutes and regulations on the books, it does not guarantee that these protections will occur. Companies may fail to follow the laws, and their infractions may go unnoticed by the government enforcement agencies. Or governments may turn a blind eye when companies break the law — either for political reasons, or because the agencies do not have the staff to properly enforce the laws. Therefore, it is important for landowners to learn as much as they can about the laws and regulations governing oil and gas in their region. If landowners see that laws are being broken, they can pressure government agencies to enforce the laws.

## STATE REGULATIONS

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The oil and gas industry is regulated primarily at the state level. Whether the state, the federal government or a private party owns the minerals, generally the mineral operator must adhere to state laws and regulations governing oil and gas development.<sup>394</sup>

Most states have agencies with the specific mandate to oversee oil and gas development. For example, many states have oil and gas commissions, which are empowered by the state government to regulate the industry. Also, natural resources or environmental quality departments may have the ability to regulate certain aspects of the oil and gas industry, such as discharge of wastes. (A table of state regulatory agencies and contact information can be found in Chapter V.)

The following section provides information on how various states treat some issues that are of concern to surface owners. Selected examples are given of state regulations and requirements. It is not possible to include all regulations for all states in this guide. The purpose of the examples is to provide the reader with an idea of the way in which different states regulate oil and gas development.

### Leasing

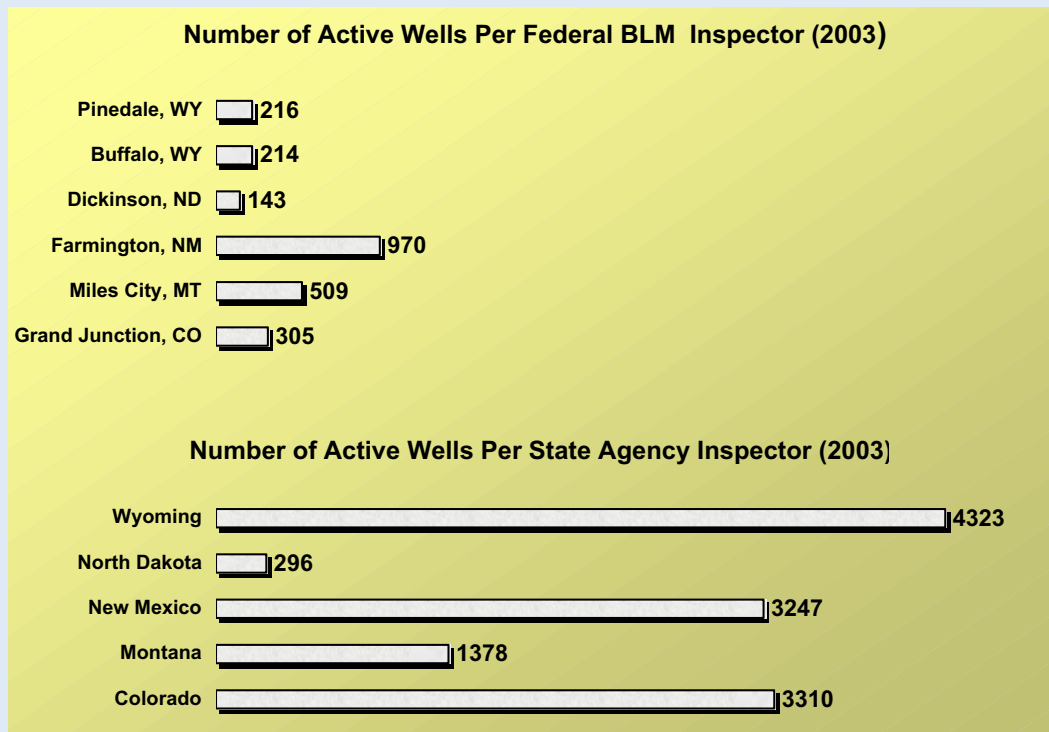
The direct notification of individual surface owners typically does not occur when leasing of state or federal minerals occurs. Consequently, surface owners often do not realize that the mineral rights have been leased to a company that may develop oil and gas on their land. Some states do have processes for posting notices about lease sales on state lands. For example, the state agency in Montana will post notices on its web site, in local newspapers and they will send information about leases to a mailing list.<sup>395</sup>

The Interstate Oil and Gas Compact Commission has produced a table that summarizes state oil and gas leasing information, including how the state agencies notify the public about lease sales. This table is available at: <http://www.iogcc.state.ok.us/STATELANDLEASINGINFO.htm>

**Even though there are laws or regulations on the books, it does not guarantee that these protections will occur.**

## Shortage of State and Federal Oil and Gas Inspectors

A 2004 review of inspection and enforcement programs in five western states found that although the number of active oil and gas wells in those states increased by 14% between 2000 and 2004, the number of state oil and gas inspectors generally did not increase. On the federal level, Bureau of Land Management (BLM) field office inspectors conducted 33% fewer inspections in 2003 than they did in 1999. The chart below shows the average number of active wells per state and federal inspectors for the year 2003. From the chart, it is clear that in most jurisdictions inspectors cannot possibly have time to inspect all active wells every year – given the fact that each inspection involves driving to the well site, conducting the inspection, and performing any necessary paperwork and follow-up. Although state agencies have fewer inspectors relative to the number of active wells than the BLM, state inspectors conduct significantly more field inspections than their federal counterparts. State agencies inspect active wells once every 1-3 years, while BLM field office staff inspect active wells every 2-10 years (and inspect active wells for environmental compliance once every 4-5 years).



The above information comes from a report entitled *Law and Order in the Oil and Gas Fields – A Review of Inspection and Enforcement in Five Western States*. It was produced by the Western Organization of Resource Councils in November, 2004.<sup>396</sup>



## Exploration

Before a company can enter a surface owner's property for exploration purposes, it may be required to obtain an exploration permit from the state and notify surface owners that exploration is going to take place on their property. Permission, however, is not usually required from the surface owner.

<b>Alaska</b>	A geophysical exploration permit is required to explore on state land. This permit is supposed to provide some controls over activities and minimize negative impacts. Also, exploration may not be conducted on state land until good-faith attempts have been made with surface owners to come to an agreement on a surface damage settlement. If no agreement is achieved within a "reasonable time," exploration may only begin if the company has approval from the government and adequate provisions have been made for full payment of any damages to the surface owner.
<b>Montana</b>	Exploration permits are required; bonds must be posted by the company as a means of ensuring reclamation of exploration sites; and before exploration begins the company must notify the surface owner of the approximate time of the planned activities.
<b>Ohio</b>	No exploration permit is required, as seismic exploration is not regulated by that state. According to the Ohio Department of Natural Resources, the ability of a company to perform seismic exploration rests solely on an agreement between the company and the landowner.
<b>Oklahoma</b>	Companies applying for an exploration permit are required to notify all surface owners of the intention to perform seismic exploration. Notification must occur at least 15 days prior to the initiation of seismic exploration. Additionally, prior to any seismic or stratigraphic test hole drilling companies must post a performance bond in the amount of \$50,000.

**FIGURE II-2.** SELECTED STATES' EXPLORATION REQUIREMENTS<sup>397</sup>

## Drilling and Production

### Surface Owner Permission and Notification

In most states, surface owner permission to conduct oil and gas operations is not required. Louisiana and West Virginia, however, do require landowner permission before oil and gas development may occur.<sup>398</sup>

Even though permission from the surface owner to develop oil and gas is not required in most states, companies typically do have to notify surface owners about a proposed development or application for a permit to drill.

Once notified of a company's intention to drill, it is important to realize that surface owners generally have a time frame during which they may object to the company's application to drill. Also, if a landowner fails to receive notice during the time frame specified by the government, then the operator has no right to begin drilling operations. In the event that drilling begins without notification, landowners are encouraged to contact the appropriate government agency. If you do not know which agency is responsible for hearing complaints, simply contact any department that deals with oil and gas issues. They should be able to direct you to the appropriate state office.

### Consultation and "Good Faith" Negotiations

In some states, there are regulations that require companies to consult with surface owners regarding the location of wells, roads and other items that will affect the surface owner's ability to use his or her property.

In Colorado, for example, an operator is required to make a good-faith consultation with surface owners regarding well locations and access roads. The operator must ask the surface owner if he or she wants to be consulted about the timing of the operations and the location of the well site and access road, as well as final reclamation activities. The operator is required to provide the surface owner with a description or diagram of the proposed drilling location, dimensions of the well site, and if known, the location of associated production or injection facilities, pipelines, roads, and any other areas to be used for oil and gas operations. If there is a surface



<b>Colorado</b>	Companies must notify surface owners before drilling a well. The notice must be mailed or delivered to the surface owner, and posted at the drill site, 30 days in advance of drilling operations (44 days in advance if surface use is irrigated crop land). Operators must also notify surface owners if future operations are planned at an existing well that will cause significant surface disturbances (seven days notice) and before final reclamation of the well site and access roads (30 days notice).
<b>Montana</b>	Before drilling, companies must provide written notice of the intended drilling operations, including a plan of work. This notice must be given within a very specific time frame – no more than 90 days and no fewer than 10 days before activity on the land begins.
<b>Michigan</b>	<p>Within 7 days of submitting a new oil and gas or injection well permit application, companies must send a notice by first class mail to the surface owner(s) of the well site. The notice should include a copy of the first page of the permit application and should identify the expected date when construction of the well site is to begin. If the surface owner is not the mineral owner, the following statement must be included: <i>"Michigan law provides certain rights to surface owners of lands where the mineral rights have been severed. If you have questions regarding these rights, you may wish to consult an attorney."</i></p> <p>Once the permit is received, and before any construction or earth moving activity at the well site, the company must inform (either in writing or verbally) both the surface owner and the appropriate District Geologist of its intended activities: 1) at least five days prior to preparing the well site location; and 2) at least 48 hours prior to commencement of drilling.</p>
<b>Oklahoma</b>	Operators are required to provide surface owners with a written notice (sent by certified mail) of their intent to drill. This notice must contain a designation of the proposed location and the approximate date that the operator proposes to commence drilling. Within five days of the date of delivery or service of the notice of intent to drill, it is the duty of the operator and the surface owner to enter into good faith negotiations to determine the surface damages.
<b>Pennsylvania</b>	In Pennsylvania, companies applying for a permit to drill a well must notify (by certified mail) surface owners, water supply owners and parties with coal interests within 1,000 feet of the proposed well location. Surface owners have 15 days to object to the permit application. Surface owners may be able to file an objection to the proposed location of the drill site with the state's Department of Environmental Protection (based on the assertion that the well location violates section 205 of the Pennsylvania <i>Oil and Gas Act</i> ). If a surface owner files an objection, however, he or she should be prepared to present facts and reasons as to why the location does not adhere to the <i>Oil and Gas Act</i> (e.g., it is too close to your house, etc.).

**FIGURE II-3.** SELECTED STATES' NOTIFICATION REQUIREMENTS<sup>399</sup>

tenant, however, the operator has no obligation to consult with them unless the surface owner appoints the tenant for consultation.<sup>400</sup>

Similarly, in Illinois, operators must make an offer to discuss access, placements of roads, construction and placement of pits, restoration of fences, use of surface waters, removal of trees and surface water drainage changes caused by drilling operations.<sup>401</sup> Once discussions are conducted, there is nothing that obligates a company to accommodate the surface owner's concerns. There is, however, a provision for surface owner compensation that acts as an incentive for companies to limit the damages done to the surface estate. Otherwise, the company may be taken to court by the surface owner (and if the surface owner's case is successful, the company pays for attorney fees).<sup>402</sup>

In Wyoming, if the negotiations with surface owners are unsuccessful, a company wanting to develop coalbed methane (CBM) may go to state court to try to get "right of access" to the surface owner's property—this could include access to the wells, roads, reservoirs, pumping stations and other facilities. In order for a company to obtain court-ordered access over the surface to develop the CBM, the operator must prove that it made "reasonable and diligent efforts"

to acquire access through good-faith negotiations. At a later time, the court will hold a trial to determine the appropriate damages to be paid to the surface owner. Many of the disputes are settled before the cases go to court.<sup>403</sup>

Conversely, in Montana, there is no requirement for companies who hold valid mineral leases to consult with surface owners about the placement of roads, drill sites, power lines, containment ponds, or other activities that will affect their land.<sup>404</sup>

In states that have a requirement to consult and negotiate “in good faith,” it is often unclear what is meant by “good faith.” A company’s definition may differ significantly from that of the surface owner. In Chapter IV, the landowner story “Company’s threat to bond-and-drill is not negotiating in good faith” addresses this issue.

### Compensation for Surface Damages

At least nine states have adopted surface damage compensation provisions as part of their state laws.<sup>405</sup> In these statutes, oil and gas companies typically are required to attempt to negotiate damage settlements with surface owners before beginning operations. In most of the states, if the developer and surface owner cannot reach an agreement, the company has the right to proceed with development. The surface owner then has the opportunity to pursue compensation for damages through the court system. One notable exception is in Oklahoma, where no drilling may occur until a surface use agreement is reached or a petition is made to the court to appoint appraisers to assess surface damages. Any operator who willfully and knowingly fails to notify the surface owner prior to entering his or her land, or fails to come to an agreement and does not ask the court for appraisers, shall pay, at the direction of the court, treble damages to the surface owner.<sup>406</sup>

Most surface damage statutes truly give oil and gas operators an incentive to minimize surface damages, since the operators will bear the costs of any damage, not simply “unreasonable” damages (which are often difficult for surface owners to prove). In many of the state statutes listed on the following page, there is a provision for “loss of land value.” For surface owners, this is preferable to the federal damage provisions, which only apply to damages to crops and tangible improvements.

In 2005, Surface Owner Protection bills were proposed in four western states: Colorado, Montana, New Mexico and Wyoming. Only Wyoming’s bill passed. For more information on Surface Owner Protection bills and legislation, contact OGAP.

### Site Reclamation

Site reclamation of abandoned oil and gas wells is required by all states, although there are some differences in regulations. All states have specific requirements for the plugging of wells to protect groundwater, coal, gas, oil, or other natural resources. The definition of acceptable surface reclamation varies from “as near as practical to pre-operation conditions” to detailed requirements for land restoration, including the replacement of site topsoil.

By and large, states do not simply assume that companies are going to plug wells and reclaim well sites. Most states require companies to provide financial assurance (e.g., post a bond) before a well is drilled. This ensures that at the end of the well’s life, if companies do not have the financial ability to plug and reclaim well sites, some funds are available to enable the state to do the work.



**FIGURE II-4. THIS IS RECLAMATION?**  
Jonah Natural Gas Field, Wyoming, 2003. Photo by Linda Baker.



<b>Alaska</b>	<p>Before undertaking operations an oil or gas company must provide for full payment to the surface owner for all damages resulting from entering the surface estate.</p> <p>If an agreement can not be made, the company may post a surety bond in an amount determined by the Director of the Department of Natural Resources' Division of Lands. The surface owner may institute legal proceedings to determine damages that the surface owner may suffer.</p>
<b>Illinois</b>	<p>The surface owner is entitled to reasonable compensation from the company for damages to growing crops, trees, shrubs, fences, roads, structures, improvements and livestock caused by the drilling of a new well, as well as subsequent production operations. The surface owner is entitled to reasonable compensation for all negligent acts of an operator that cause measurable damage to the productive capacity of the soil.</p> <p>Award of damages: The compensation required above is paid in any manner mutually agreed upon by the company and the surface owner. Failure to agree upon, or make the compensation required, does not prevent the company from beginning its drilling operation.</p> <p>If an agreement cannot be reached, the surface owner may undertake an action for compensation in the circuit court. If the court finds that the company's offer was not reasonable, the surface owner is entitled to reasonable compensation as well as attorney's fees.</p>
<b>Montana</b>	<p>Mineral developers are required to pay the surface owner a sum of money equal to the damages for loss of agricultural production and income, lost land value, and lost value of improvements caused by drilling operations.</p> <p>The amount of damages may be determined by any formula mutually agreeable between the developer and surface owner, and consideration shall be given to the period of time during which the loss occurs. Payments only cover land directly affected by drilling operations and production.</p>
<b>North Dakota</b>	<p>Companies developing oil and gas must pay a surface owner a sum of money equal to the damages for loss of agricultural production and income, lost land value, lost use of and access to land, and lost value of improvements caused by drilling operations. The companies are also responsible for damages to the domestic livestock or irrigation water supply of any person who owns an interest in real property within one-half mile of drilling operations.</p> <p>The amount of damages may be determined by any formula mutually agreeable between the developer and surface owner. If the surface owner rejects a company's offer, the surface owner can take the company to court. Attorney fees, costs and interest will be awarded to the surface owner if the amount awarded by the court is more than the amount offered by the company.</p>
<b>Oklahoma</b>	<p>Mineral owners must negotiate a written contract with the surface owner for the payment of any damages that may be caused by a drilling operation. This agreement must be negotiated prior to entering the site with heavy equipment.</p> <p>If agreement is not reached or all parties are not contacted, the district court will appoint appraisers to make recommendations to the parties and to the district court concerning the amount of damages. The mineral and surface owners are each allowed to select one appraiser, and the two selected appraisers then select a third appraiser for appointment by the court. The mineral owner and the surface owner share equally in the payment of the appraisers' fees and court costs. No drilling may occur until an agreement is reached or a petition is made to the court to appoint appraisers.</p> <p>The courts may award triple damages where: (1) the mineral owner willfully and knowingly began to drill without giving notice of entry or without the agreement of the surface owner; or (2) the operator willfully and knowingly failed to keep posted the required bond.</p>
<b>Pennsylvania</b>	<p>If gas companies seek to appropriate land for the purposes of natural gas storage, the companies must attempt to reach an agreement with the surface owner about payment for damages to the surface property prior to any appropriation.</p> <p>If no agreement is reached, the company must post a surety bond. If the surface owner does not believe that the bond will cover the cost of the damages, the surface owner may petition the court, who may then appoint three disinterested freeholders of the county to serve as viewers to assess the damages. After their viewers have filed their report with the court, the court will fix reasonable compensation for the service of said viewers. Upon the approval of the bond, the right of the company to store gas and to enter on the property for the purpose of locating, reconditioning, maintaining, plugging or replugging any active or abandoned wells or operating any wells within the storage reservoir boundary or within the reservoir protective area shall be complete.</p>
<b>South Dakota</b>	<p>Mineral developers are required to pay the surface owner a sum of money equal to the damages for loss of agricultural production, lost land value, and lost value of improvements caused by drilling operations. Mineral developers are responsible for all damages to property resulting from the lack of ordinary care by the mineral developer.</p> <p>The amount of damages may be determined by any formula mutually agreeable between the developer and surface owner. To receive compensation under the surface damage statutes, the surface owner must notify the mineral developer of damages within two years after the injury becomes apparent or should have become apparent to a reasonable person.</p>
<b>Tennessee</b>	<p>Oil and gas developers are obligated to pay surface owners for: (1) lost income or expenses incurred as a result of being unable to dedicate land or for drilling operations which prohibit access to the land for a preexisting dedicated use; (2) the market value of crops destroyed, damaged, or prevented from reaching market; (3) damage to water supply; (4) cost of repair of personal property; and (5) the diminution of value after completion of the surface disturbance.</p> <p>To receive compensation under the surface damage statutes, the surface owner must notify the oil and gas developer of the damages within three years after the injury occurs. The person seeking compensation may bring an action in court or can request that compensation be determined by binding arbitration.</p>
<b>Texas</b>	<p>Leases issued for unsold school land must include a provision requiring the compensation for damages from the use of the surface in prospecting for, exploring, developing, or producing the leased minerals.</p>

**FIGURE II-5.**  
SELECTED STATES  
WITH SURFACE  
DAMAGE  
COMPENSATION  
REQUIREMENTS  
OR LAWS.<sup>407</sup>

### Financial Assurance (Bonds)

Typically, if oil and gas operators walk away from their operations (e.g., by declaring bankruptcy), the management of these orphan sites falls to the state or federal governments. Nearly all states require that companies post a bond or another form of financial assurance with the state to cover the costs related to plugging and abandonment of wells. These funds are collected to provide the state with some “insurance,” in the event that a company is no longer willing or able to perform the plugging and restoration. The funds are released back to a company if it properly plugs and abandons its well. Proper abandonment typically includes the restoration of surface lands.<sup>408</sup>



State	Financial Assurance Per Well	State-wide Blanket Bond
Alaska	\$100,000	\$200,000
California	\$15,000 (wells < 5,000' deep) \$20,000 (wells 5,000 – 10,000') \$30,000 (wells > 10,000')	\$100,000 (50 or fewer onshore wells) \$250,000 (more than 50 onshore wells) \$1 million (all onshore and offshore wells)
Colorado	\$5,000	\$30,000 (less than 100 wells) \$100,000 (more than 100 wells)
Illinois	\$1,500 (well < 2,000' deep) \$3,000 (well = or > 2,000' deep)	\$25,000 for up to 25 wells \$50,000 for up to 50 wells \$100,000 for all wells in state
Kansas	\$50 refundable fee (if operator has an acceptable record of compliance) \$0.75 per foot drilled (for all the operator's wells)	\$5,000 (1-5 wells that are <2,000' deep ; this increases to \$20,000 for 25 or more wells at this depth) \$10,000 (1-5 wells that are >2,000'; this increases to \$30,000 for 25 or more wells)
Kentucky	\$500 (wells = or < 500' deep) \$5,000 (wells > 4,000' deep)	\$10,000
Montana	\$1,500 (well < 2,000' deep) \$5,000 (2,000' – 3,500' deep) \$10,000 (3,501' or deeper)	\$50,000
New Mexico	\$5,000 - \$7,500 (well < 5,000' deep) \$7,500 - \$10,000 (5,000' – 10,000' deep) \$10,000 – \$12,500 (well > 10,000' deep)	\$50,000
Ohio	\$5,000	\$15,000
Oklahoma	None.	\$25,000 <u>OR</u> financial statement showing operator net worth of at least \$50,000
Pennsylvania	\$2,500 (this amount may be adjusted every two years; different rules apply for wells drilled prior to 1985)	\$25,000 (this amount may be adjusted every two years; different rules apply for wells drilled prior to 1985)
Wyoming	\$10,000 (wells < 2,000' deep) \$20,000 (wells > 2,000' deep)	\$75,000 for all wells < 2,000' deep

**FIGURE II-6.** VARIATIONS IN FINANCIAL ASSURANCE REQUIREMENTS FOR PLUGGING AND SITE RESTORATION.<sup>409</sup>

Well depth and geographic location are two factors that play into the amount of financial assurance that state agencies require for plugging and restoration of individual wells. The amount varies with well depth in fourteen states (Alabama, Arizona, California, Illinois, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, Utah and Wyoming).<sup>410</sup> Geographical differences in financial assurance are evident by comparing bond amounts in Kentucky and Alaska. In Kentucky a single bond for a well 500 feet deep or less is \$500, while the minimum per well amount in Alaska is \$100,000. This may reflect the higher costs of reclaiming Alaskan well sites.

In most states, companies are allowed to post state-wide or blanket financial assurances with the state government. These blanket bonds are supposed to demonstrate a company's financial capability of plugging and restoring all of its wells in that state. The states vary greatly on the amount of financial assurance required in a blanket bond. The amounts range from as low

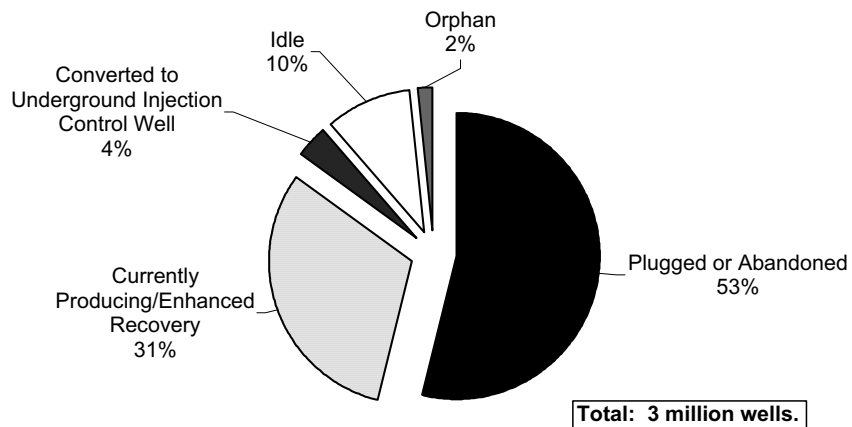
**The cost of plugging and reclaiming a single orphaned well site in the western states can range from \$19,000 to \$75,000.**

as \$5,000 in Kansas to as high as \$1 million in California.

A recent study indicates that the costs of plugging and reclaiming a single orphaned well site in the western states can range from \$19,000 to \$75,000.<sup>411</sup> Based on these numbers, it appears that in most states financial assurance bonds are inadequate to cover the costs of properly plugging and restoring well sites.

A striking example of the inadequacy of bond amounts comes from Wyoming. In 2001, the state of Wyoming and the federal Bureau of Land Management (BLM) were left with an estimated \$4 million in liability to plug and reclaim 120 wells abandoned by Emerald Restoration & Production. The government collected \$125,000 in bonds from the company, which went toward plugging 56 wells on private land. The state Oil and Gas Commission used \$2 million from the state's Conservation Fund to meet plugging costs that the bond did not cover. There are still more than 60 of Emerald's wells on federal and state lands yet to be plugged.<sup>412</sup>

### Status of wells drilled in the U.S. since states began regulating oil and gas



**FIGURE II-7.** STATUS OF THE THREE MILLION WELLS drilled in the U.S. since states began regulating oil and gas. Source: *Produce or Plug: A Summary of Idle and Orphan Well Statistics and Regulatory Approaches.* <sup>413</sup>

According to industry statistics, approximately 2 % of the three million wells (i.e., 60,000 wells) that have been drilled in the United States are considered orphaned.<sup>414</sup> As already mentioned, it can cost between \$19,000 and \$75,000 to properly plug and abandon a single orphan well. That means that at the present time \$1.1 billion to \$4.5 billion of taxpayers' money will have to be spent to properly plug and abandon all of the orphan wells in the U.S.<sup>415</sup>

In some situations it can cost far more than \$75,000 to properly plug and abandon a single orphan well. To date, the Colorado Oil and Gas Conservation Commission (COGCC) has spent more than \$400,000 trying to plug an orphan gas well in La Plata County, Colorado. Unfortunately, COGCC's efforts have not been successful, and the failure to plug the well has had near tragic consequences.

*On February 12, 2005, Charles Yoakum turned on his stove. All four walls of his trailer blew apart and the roof blew into the air. An orphan gas well, located about 250 feet from Yoakum's trailer, is the likely source of methane that fueled the --.*<sup>416</sup> *The orphan well has a long history of leaking methane and fouling the groundwater in the Bondad area of La Plata County. In 1994, the Colorado Oil and Gas Conservation Commission (COGCC) spent*



\$200,000 trying to plug the well. After the explosion, the COGCC pledged to spend \$200,000 more to identify the exact location of the well and of another orphan well in the area, and identify any abandoned pipelines, utility corridors, or other potential conduits for gas migration.<sup>417</sup>



**FIGURE II-8.** REMAINS OF A TRAILER IN LA PLATA COUNTY, CO. The trailer exploded due to methane that most likely came from an inadequately plugged orphan well. Photo Credit: Yodit Gidey, Durango Herald.

Clearly, if states do not have enough money to put toward plugging all orphan wells, the wells can become environmental problems and present health hazards to nearby residents. (See box entitled “Bankrupt Companies Walk Away from Oil Wells in Texas.”) It is important, therefore, for surface owners to: 1) encourage governments to require adequate bonds, and/or 2) include a financial security provisions in Surface Use Agreements. With these measures in place, there will be some assurance that companies—not the surface owners or the public— will bear the cost of adequately plugging and cleaning up well sites.



## Bankrupt Companies Walk Away from Oil Wells in Texas

In 1996, the Genco Operating Company walked away from more than 500 wells in Texas, when the company filed for bankruptcy. At that time, the state held less than four thousand dollars in financial assurance from the company. The maximum the state could have required was a \$250,000 blanket bond. By 1999, the agency responsible for the orphan sites, the Texas Railroad Commission (TRC), had spent more than \$500,000 plugging and reclaiming some of Genco's wells, with hundreds more yet to be plugged.

The Genco case was by no means an isolated one. As of 2002, the state has 17,000 orphan wells to plug, at a cost that the state estimates at \$4,500 per well.<sup>418</sup> The reality is that the state does not collect enough money in bonds and other forms of financial security to cover the cost of plugging wells if companies walk away. In 1997 alone, the TRC Oil Field Cleanup Program spent \$12.7 million to plug and reclaim wells, and was reimbursed only \$82,691 by operators - about 65 cents for every \$100 spent, according to state records.<sup>419</sup>

An article in the San Antonio Express newspaper relates the story of a landowner affected by the Genco bankruptcy.<sup>420</sup> By the time Genco bought the wells on Milton Brehm's property, most of the oil had been removed. According to Brehm, the wells "just weren't producing that much no more and they didn't take care of them. . . They let them run down."

Before Genco declared bankruptcy, its workers removed the pump jacks and ripped out hundreds of feet of tubing. Eventually, a slow trickle of oil began flowing out of the well and onto the ground. According to Brehm, the oil "would run into the creeks and that would worry the Railroad Commission." The Texas Railroad Commission, the state agency responsible for the wells, plugged the wells in 1996.

Even though the wells are plugged, Brehm is left with areas in his wheat fields where nothing will grow. These areas are often referred to as "kill zones," and are found around many leaking wells. As well, a tank battery, a number of 55-gallon drums and a large 200-barrel storage tank remain on his property.

"Why is the landowner responsible for all this stuff after they run off and leave it?" Brehm asked.

Note: As of 1999, the TRC has been taking steps toward changing the bonding requirements for the oil and gas industry. A backgrounder on the rationale for the changes that have been made can be found on the Texas Railroad Commission web site. <http://www.rrc.state.tx.us/divisions/og/p5overview.html>

**In Texas, as of 2002,  
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at cost of \$4,500  
per well.**

**The state does not  
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cover the cost of  
plugging the wells  
if the companies  
walk away.**

## Other Protections

Statutes and regulations provide other stipulations that may serve to protect a surface owner's interests. Below are just a few examples of other surface owner protection provisions. Again, to find out what other provisions might be available in your state, consult with individuals, organizations or attorney's who are familiar with your state's laws.

Issue Addressed	How
Protection of water supplies	<p>If an area is designated principally for permanent or recreational residences, regulations prohibit in-ground pits. (Michigan)</p> <p>Any well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply.</p> <p>Any landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may notify the department and request that an investigation be conducted.</p> <p>It shall be presumed that a well operator is responsible for the pollution of a water supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well. (Pennsylvania)</p> <p>Operators shall obtain written approval from the surface owner prior to land application of water-based bentonitic drilling fluids. (Colorado)</p>
Use of alternative technologies or approaches	<p>In Colorado, a surface owner may file an application for a Colorado Oil and Gas Conservation Commission (COGCC) hearing to argue that directional drilling or pitless drilling is necessary to protect public health, safety and welfare, while taking into consideration cost-effectiveness and technical feasibility. Generally, the COGCC has not imposed these requirements on companies because of the Commission's view that there has been no demonstration that the requested method is cost-effective, technically feasible, and necessary to protect the public health, safety and welfare.</p>

**FIGURE II-9.** PROVISIONS THAT PROVIDE ADDITIONAL PROTECTIONS<sup>421</sup>

## Filing Grievances and Complaints

There are a few options for surface owners who believe their surface rights have been ignored. If a specific law has been broken (e.g., a company fails to notify you of their drilling activities, even though there is a law that requires them to do so), the surface owner may file a complaint with the appropriate government agency.

It is not always clear which state agency deals with complaints. A good place to start is with the state's Oil and Gas Commission (if the state has one). Also, consult the list in Chapter V for some of the state agencies involved in oil and gas regulation. If you don't have the right agency or department, a staff person with one of the agencies should be able to direct you to the proper official.

- In Colorado, complaints may be filed with the Colorado Oil and Gas Conservation Commission (COGCC). They have a toll-free complaint line: 1-888-235-1101. If the COGCC enforcement process does not adequately address a surface owner or tenant complaint, an application can be filed for a Commission hearing.
- In the case of Montana, the Board of Oil and Gas and the Department of Environmental Quality are the state agencies responsible for permitting, defining reclamation terms, and enforcement in the case of non-compliance. These agencies should be contacted when companies are not living up to their responsibilities.
- The U.S. Bureau of Land Management and U.S. Environmental Protection Agency are the federal agencies most involved with oil and gas regulations and enforcement for federal minerals.

If a surface owner believes that his or her complaint has not been adequately dealt with by the government agency, or if there has been negligence on the part of the government agency that has led to damage of the surface owner’s property (e.g., failure of the agency to enforce laws), the surface owner has the option of filing a lawsuit against the agency and/or company. Or the surface owner can attempt to initiate a dispute resolution process, to settle out of court.

**Dispute Resolution**

Many states have a procedure in place to allow a hearing of a dispute before a public commission (usually the Oil and Gas Commission). These commissions generally attempt to resolve disputes in meetings that are open to the public. If parties go through the state dispute resolution process and are dissatisfied with the outcome, they may still use the court system to settle a dispute.<sup>422</sup>

**COUNTY AND MUNICIPAL REGULATIONS**

If a private party or parties own the minerals beneath your land, and your property is within city or county limits, then the oil and gas companies must adhere to both state laws and any county or municipal ordinances or regulations that apply to oil and gas. In many instances, the municipal and county regulations are more stringent than those of the federal or state governments; and quite possibly, they address different aspects of the development than the state and federal regulations. Consequently, it is worth spending the time to contact the county and municipality to obtain copies of these regulations, as they may offer the most protection to landowners.

	State of Colorado	La Plata County, Colorado
<b>Setbacks</b>	A well must be at least 150 feet from homes and property lines. In high density areas (where 36 or more buildings are within a 72-acre area), the wellhead location must be at least 350 feet from any building.	A setback of at least 400 feet shall be required between the well site perimeter and the closest existing residential structure, unless verified written consent is obtained from the affected surface property owner to a waiver of this standard.
<b>Financial Assurance</b>	The financial assurance required by this section shall be in the amount of \$2,000 per well for non-irrigated land, or \$5,000 per well for irrigated land. In lieu of such individual amounts, operators may submit statewide, blanket financial assurance in the amount of \$25,000.	The applicant shall provide one form of the following security to ensure compliance with mitigation requirements set forth in this article and specific conditions of approval for minor and major facilities: \$5,000.00 performance bond for each minor or major facility; \$50,000.00 countywide blanket bond for all facilities operated by the applicant within the county.

**FIGURE II-10.** COMPARISON OF COLORADO STATE AND COUNTY REGULATIONS<sup>423</sup>

Under federal and Ohio state laws, permission from surface owners is not required in order to drill an oil or gas well. In the City of Norton, Ohio, however, there is a city ordinance that states that, “No permit may be issued until 51% of the owners of the real estate units within 1,000 feet of the wellhead approve (in writing) the drilling of the oil or gas well.”<sup>424</sup>

Other requirements in Norton that favor the surface owner include:

- when permit applications are submitted, the City Council holds a public hearing before granting a drilling authorization; and all property owners and residents within 1,000 feet of the wellhead are notified of the hearing.
- the company has liability insurance of not less than \$500,000 for property damage, and not less than \$1,000,000 for personal injury before a permit to drill is issued.<sup>425</sup>

- all pumps be operated using explosion proof, electric motors
- all fresh water wells within 1,000 feet of the wellhead are tested by the company

Another example of a protective municipal ordinance comes from the City of Lovington, New Mexico. In December of 2003, the city adopted an ordinance to protect the city's water from contamination due to leaks and spills resulting from oil and gas activities in their water field. According to an article in a Hobbs, New Mexico newspaper, "After becoming frustrated with the [New Mexico] Oil Conservation Division's slow response time to oil spills near the city's water supply, city manager Pat Wise and the commission felt it was necessary to draft its own regulations."<sup>426</sup>

The ordinance contains a number of very stringent requirements for oil and gas companies that want to operate on lands within the city's water field. Examples include:

- The use of closed-loop drilling systems, which prevents on-site storage and disposal of often toxic drilling fluids. Companies in Lovington are required to remove from the site, and properly dispose of, all drill cuttings and fluids. This is much more strict than New Mexico state law, which allows for storage and burial of drilling fluids on-site, in unlined pits. (For more information on closed-loop drilling systems, see Chapter I, Alternatives Used During the Drilling Phase.)
- A ban on the drilling of new disposal wells, and a ban on the conversion of existing wells into disposal wells.
- Leaks or spills must be reported to the city engineer within 15 days.
- The submission of a leakage survey at least once a year. Failure to file the survey with the city engineer within a specific timeframe results in penalties up to \$500 per day for every day that the report remains unfiled.
- Before drilling begins, companies must receive a permit from the city.

For more examples of local ordinances, see Chapter III.

## Protections for Surface Owners Who Also Own the Minerals

If you own the minerals and lease them to an oil or gas company, that company will be subject to state laws, as well as county and municipal laws (if the land is within county or city limits). Also, the company will be required to honor any contractual agreements made with you, the mineral owner. The most common of these agreements is a mineral lease. If you own the mineral and the surface rights, the mineral lease can be negotiated to protect your surface. See Chapter III for more information on leasing.

## FEDERAL REGULATIONS

**Many surface owners are unaware that federal minerals have been leased under their land, since there is no requirement to notify surface owners that federal lands have or are going to be leased.**

The federal government owns more than 30% of the subsurface of the United States, which is approximately 700 million acres of mineral rights.<sup>427</sup> In 2001, approximately 57 million acres of federally-owned minerals were located beneath privately owned land.<sup>428</sup> The majority of federal split estate lands are located in the western states — in the eastern states only 300,000 acres of land are split between federal ownership of minerals and private ownership of the above-lying lands.<sup>429</sup>

Between 35 and 40 million acres of federal land (onshore) in the U.S. are currently under lease for oil and gas development. When the minerals are federally owned, the federal government retains the right to lease the mineral rights to an oil and gas developer.<sup>430</sup>

If a company leases the oil and gas from the federal government, the company (known as the mineral lessee or operator) usually must adhere to both federal and state laws that govern oil and gas development.<sup>431</sup> The federal Bureau of Land Management is responsible for permitting, bonding, and overseeing the reclamation of federally leased mineral rights.<sup>432</sup>

The following paragraphs provide information on some of the responsibilities of the companies that lease federal minerals where the land above the minerals is privately owned.

### Exploration

The mineral operator may enter land to explore for oil and gas by filing a notice of intention with the BLM. A copy of this MUST be provided to the surface owner, but surface owner permission is not required prior to entry. The exploration period begins 30 days after the notice of intention is submitted, and lasts for 60 days. During exploration, the “entry” onto the surface owner’s land does not allow for use of mechanized equipment, explosives, the construction of roads, drill pads, or the use of toxic and hazardous materials, and may not cause more than “a minimal disturbance of surface resources.”<sup>433</sup>

### Drilling

#### Access

Mineral lessees (i.e., oil and gas operators) are supposed to make access arrangements with surface owners prior to entering a surface owner’s land for the purpose of surveying and staking; but they do not need approval from the federal government to conduct these operations.<sup>434</sup>

#### Commenting on Applications for Permits to Drill

Before mineral operators can begin an oil or gas operation, they must submit an application for permit to drill (APD). Upon initiation of the APD process, the authorized officer of BLM must consult with other federal agencies and with other appropriate interested parties. There is a 30-day window of opportunity for surface owners to comment before the BLM takes its next steps:

1. approves the application;
2. returns the application, with an explanation as to why it was not approved; or
3. notifies and explains to the operator why a decision on the application will be delayed.

#### On-site Visits and Inspections

The BLM is required to conduct an on-site inspection of the proposed drilling operation within 15 days of the submission of either the Notice of Staking or APD. The BLM must invite the sur-



**FIGURE II-9.** THE HD MOUNTAINS, NEAR BAYFIELD, COLORADO

The federal government has leased oil and gas rights in this old-growth roadless area and many other important wilderness and cultural areas across the country.



face owner to participate in this on-site visit (along with the mineral lessee), and the BLM is supposed to make an effort to schedule a time that is convenient to all parties.<sup>435</sup> During the on-site visit, the BLM officers will develop surface use and reclamation stipulations, which will be given to the mineral operator to incorporate into their APD. The surface owner may request that specific items be made part of the Surface Use Program (SUP), which is part of the APD.<sup>436</sup> This program contains information such as: descriptions of road and drill pad locations; methods to be used for containment and disposal of waste material; and descriptions of measures that will be taken to reclaim disturbed lands.<sup>437</sup> It is up to the authorized federal official whether or not the surface owner's suggestions are incorporated into the SUP.

### Surface Owner Agreements and Bonds

Before entering a surface owner's property to drill a well, a mineral operator is required to enter into good-faith negotiations with the private surface owner to reach an agreement for the protection of surface resources and reclamation of disturbed areas, or compensate the surface owner for loss of crops and damages to tangible improvements.<sup>438</sup> Note that crops only include those used for feeding domestic animals, e.g., grasses, hay and corn, and NOT plants unrelated to stock raising. Also, tangible improvements include those relating to domestic, agricultural and stock raising uses, e.g., barns, fences, ponds or other works to improve water utilization, but NOT nonagricultural improvements.<sup>439</sup>

As proof of these good faith negotiations, the mineral owner is supposed to secure one of the following: a surface owner agreement for access to enter the leased lands; a waiver from the landowner for access to the leased lands; or an agreement regarding compensation to the surface owner for damages for crop losses and tangible improvements.<sup>440</sup>

In reality, the company does not have to negotiate in good faith with the landowner, because if an agreement cannot be reached, the company may simply post a bond to "indemnify the surface owner against the reasonable and foreseeable damages for loss of crops and tangible improvements caused by the proposed operation."<sup>441</sup> The bond must be at least \$1,000, which is supposed to cover damages to crops and improvements, as well as any loss of income from using the land. It is highly questionable as to whether this amount will cover the costs necessary to compensate for damages to crops or tangible improvements, especially since drilling a well can disturb anywhere from one to forty acres of land.<sup>442</sup> This bond is sometimes referred to as the 3814 bond, because it is a requirement under BLM department regulations at 43 Code of Federal Regulations 3814. The bond is not intended to cover the costs associated with compliance with lease terms, plugging the well, abandonment, or reclamation. Plugging, abandonment and reclamation are supposed to be covered by a 3104 bond, which is discussed below.

The BLM is required to send surface owners a copy of the 3814 bond proposal submitted by the company. The Northern Plains Resource Council has some suggestions on what to do if you receive a bond notice:<sup>443</sup>

- Carefully review the bond amount. If it is inadequate, challenge it by filing an objection (discussed below)
- Based on calculations that you have made for replacement costs for your crops, your grazing land, your water and any improvements you may have made, develop what you would consider an appropriate bond amount.
- The BLM officer is required to consider these factors, so push hard to make sure they are accounted for in the bond amount.

Surface owners have the opportunity to object to the 3814 bond amount.<sup>444</sup> There is a 30-day period of time during which the landowner may file an objection with the federal office that

**Companies can post a state-wide bond of \$25,000 for all the company's wells on federal leases within a single state, and a blanket bond of \$150,000 for all wells across the country.**





issued the bond approval. The protest period begins when the surface owner receives a copy of the bond, which should be sent by certified mail. The bond will not be approved or accepted by the BLM during the protest period. If objections are received during the 30-day period the authorized officer will consider the objections and will determine whether or not the bond amount is sufficient. If it is determined to be sufficient, the surface owner will be sent another certified notice explaining that the objections have been overturned, and that the surface owner can appeal the decision. The surface owner may then file an appeal with the state office that issued the decision. Oil and gas operations may proceed during the appeal process.

### Reclamation and Abandonment: the 3104 Bond

Companies are supposed to reclaim the land to pre-development conditions. To provide some insurance that sites will be reclaimed, companies leasing minerals from the federal government must also post a 3104 bond for reclamation and abandonment (in addition to the 3814 bond mentioned above).

The 3104 bond must be provided by the operator prior to the APD approval. The bond is supposed to ensure that the company complies with the federal requirements to plug wells, reclaim the leased area, and restore any of the lands and surfaces affected by the drilling operations.

The minimum bond amount is \$10,000 per lease, *not* per well. BLM officials have the power to set the bond amount much higher than \$10,000, if a case can be made that the reclamation costs will exceed the minimum bond amount. Surface owners should be aware that reclamation of a single well can easily exceed the \$10,000 minimum (which is supposed to cover all wells drilled under one federal lease).

- A recent study by the BLM revealed that orphaned wells in the western states will cost an average of \$19,000 per well to reclaim, with some sites costing \$75,000.<sup>445</sup>
- Another BLM web site reported that, “As the U.S. oil and gas industry continues to decline and as producing oil and gas fields end their production cycle, many small operators face bankruptcy. Although these operators are required to be bonded, the bonds are insufficient to plug and reclaim the well sites.”<sup>446</sup>

Another thing to know is that companies can post a **state-wide** bond of \$25,000, for all of that company’s wells on federal leases within a single state, and a **blanket bond** of \$150,000 for all wells across the country.<sup>447</sup> It is not unusual for companies to own hundreds of wells, and in these situations, if a company were to declare bankruptcy there is no way that the federal government would be holding enough money to pay for the plugging and reclamation of the wells.

### Special Situation: If You Lease Land from the Federal Government

If you do not own but are leasing land from the federal government (e.g., for grazing), there is the possibility that oil and gas development may interfere with your use of the land, since most federal lands are open to oil and gas leasing and development. In 2003, the Department of Interior released a report stating that 85% of natural gas on federal lands is accessible and open for oil and gas leasing and development.<sup>448</sup>

As mentioned above, there is no requirement for federal agencies to notify surface owners that federal lands have or are going to be leased. This also applies to those who lease federal lands that lie above federal minerals. Consequently, citizens who lease federal lands may want to stay in close contact with federal agencies to find out if the minerals beneath the land have been leased or have the possibility of being leased.

For one landowner’s experience with the leasing of federal minerals, see the story “Rancher Not Informed about Mineral Leasing” in Chapter IV. And for a list of additional resources on oil and gas development on public lands, see Chapter V.