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# THE SPLIT ESTATE: COMMUNICATION AND EDUCATION VERSUS LEGISLATION

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## I. INTRODUCTION

The conflict driving “split-estate” or “landowner accommodation” proposed legislation has its roots in a fundamental misunderstanding of the respective ownership rights of the surface and mineral owners. Surface owners who do not own the mineral rights often harbor the belief that they have the exclusive right to use and enjoy the land. Until mineral activity commences, they may not realize what separate ownership of the mineral rights means. Though surface owners work day after day to scratch out a meager existence from the land, royalty owners (many of whom live outside of Wyoming) and oil and gas companies reap the profits from mineral development. Because the surface owner must bear the daily inconveniences

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of mineral activity, they perceive they are not being compensated adequately for the use of the surface. Their anger is quickly directed to their legislator.

Reacting to the pressure of surface owners, the Wyoming Legislature in the 2003 and 2004 sessions considered "split-estate" or "surface owner accommodation" legislation aimed at this conflict. Though promoted as needed due to the increased surface disturbance and use resulting from large-scale coalbed natural gas production in the Powder River Basin, the 2004 proposed legislation hardly even explored ways of limiting surface impacts. Rather, surface owners sought to interject the Legislature into private negotiations over compensation and, with the aid of the Legislature, sought to strengthen their bargaining position.

The tension between surface and mineral owners is the inexorable consequence of the divided estate and this age-old conflict between surface and minerals cannot be resolved through legislation. These legal rights are interwoven, and both the mineral estate and surface estate are dependent upon each other for the protection of their interests. But like attempting to legislate morality, cooperation cannot be legislated. These problems must be managed by bringing the parties together to ensure that the surface owner's uses of the land are reasonably accommodated while mineral development occurs. Conflicts over the appropriate compensation to be paid to a surface owner can, and should, be worked out between the parties and the Legislature should not interpose itself into private contracts. The Legislature's foray into private contracts has obvious impairment of contract, takings, and in the case of federal minerals, Supremacy Clause implications.

The law in this area has been settled over the course of decades based upon rights in the Wyoming Constitution securing use of surface estates for mineral activity. By disturbing this historical and cohesive set of laws upon which purchase, exploration, development, and other investment backed expectations have been based, the Legislature is likely only to create uncertainty and new controversies to be litigated. In the end, while the lawyers will do well, the dissatisfaction of landowners will not be materially lessened, and uncertainty will dominate an area previously thought to be settled. As the root of the problem lies in the misunderstood nature of respective ownership rights, this is where we begin.

## II. RESERVATIONS, CONVEYANCES, AND THE WYOMING CONSTITUTION

For decades—even centuries—property owners who are aware of the documents in their chain of title have known that their quiet enjoyment of the surface is subject to the subsurface owner's right to enjoy the minerals lying underground. From feudal and colonial times, to now, the mineral estate holds the right to be the dominant estate over the surface estate. This paramount right finds its basis first in contract law, and is given a protected place in the Wyoming Constitution's Declaration of Rights.

At one time, every title was unified—one person (or country) owned the surface and mineral estates. At some distant point in time, the owner of the unified estate chose to sever that unity, either by deeding the mineral estate alone to another person, or by deeding the surface estate and retaining the mineral estate. So, by private agreement—the oldest form of law—the owner and his purchaser set the order and relations between the mineral and surface estates. They did so by publicly recorded deeds and agreements, meaning them to balance these discordant interests for all time, even should they or their successors later forget their predecessors' understandings.

A common discovery in Wyoming land titles is that the surface has been severed from the subsurface or mineral estate. Standard language in mineral estate deeds vests in the mineral owner the right:

to ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas, and other minerals, and storing, handling, transporting and marketing the same therefrom with the rights to remove from said land all of Grantee's property and improvements.<sup>1</sup>

The mineral and surface estates cannot be enjoyed fully without effect on the other. When the mineral estate and surface estates are separately owned, one owner takes his interests subject to the rights of the other. In Wyoming deeds, the surface owner subordinates his surface rights to those of the mineral owner, but only to the extent necessary for minerals exploration, production, and transportation. One holding a unified estate can lose absolute control over the surface in the same way. Though not technically creating a "split-estate," in granting a lease, the lessor grants to a lessee the right to do all things necessary to develop the mineral estate.<sup>2</sup> In *selling* the minerals or in selling the surface and reserving the minerals, the owner of the once unified estate elects for himself and all later owners for the mineral owner to have access over the surface to develop the mineral estate. A surface owner today could seek to gain control over the minerals by purchasing back the mineral rights, quite recently, for as little as \$1 per acre before mineral activity began.

The nature of land titles is that owners of discordant interests are bound by ancient agreements even when they are ignorant or forget their obligations. Moreover, the Wyoming Declaration of Rights recognizes which rights are paramount. Article 1, §32 of the Wyoming Constitution specifically extends the power of eminent domain to development of mineral

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1. Standard Form Mineral Deed, perhaps the most common of all kinds of mineral deeds found in title records in Wyoming, on file with the Wyoming Law Review.

2. For a discussion of the rights of mineral lessors and lessees, see Clarence A. Brimmer, *The Rancher's Subservient Surface Estate*, 5 LAND & WATER L. REV. 49, 52 (1970).

resources, in a state whose economy is grounded in minerals. As the Wyoming Supreme Court held in *Coronado Oil Company v. Grieves*,<sup>3</sup> “[w]e think it plain beyond any doubt that the intended purpose of the cited constitutional provision and statutes was to facilitate the development of our state’s resources.”<sup>4</sup> Pointedly referring to the effect of the constitutional provision and eminent domain statutes, the court in *Coronado Oil* added that “[i]t is only reasonable that the owner of valuable resources should not be shut in and deprived of the opportunity to exploit them for what is in a significant part a *compelling public purpose*.”<sup>5</sup>

Above all else, the common law considered the mineral estate to be the dominant estate.<sup>6</sup> Parties define their respective rights and obligations by deed, but if they fail to do so, the law resolves conflicts by holding that the mineral estate is dominant.<sup>7</sup> As commentators have observed, this rule finds logic in the recognition that the mineral estate’s value may only be realized through mineral production and the minerals constitute a value to society as a whole.<sup>8</sup> Predictably, the second rule is that surface owners are generally barred from interfering with the legitimate and proper use of the surface by the mineral owner.<sup>9</sup>

Producers have relied upon contracts, the Wyoming Constitution, and this body of law to give them the assurances they need to convince investors that Wyoming is a stable legal environment to explore for and develop oil, gas, and other minerals. One holding a unified fee estate made a choice to alienate the surface or the minerals, and in so doing, to grant the rights that made the subsurface valuable, i.e., to use so much of the surface as is necessary to develop the mineral estate. To sell the mineral rights without the right to the use of the surface to develop the minerals would be tantamount to fraud because the sale of minerals without right to use the surface would be equivalent to denying the very right granted, i.e., the right to produce the minerals.

Those seeking to alter the long-standing, agreed-upon balance of rights want the Legislature to resolve for them what they perceive now to be a poor agreement. Surface owners want legislation to restore “rights” their predecessors-in-interest gave up. Mineral owners want to enjoy the estate they bargained and paid for. Surface owners seek legislation to impose con-

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3. 603 P.2d 406, 411 (Wyo. 1979).

4. *Id.*

5. *Id.* (emphasis added).

6. Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 431 (1998).

7. *Id.*

8. *Id.*

9. *Id.*

ditions on surface use and restrict rights that all understood to be granted unconditionally.

### III. THE ORIGIN OF THE SEVERED MINERAL ESTATE

The severed mineral estate was among the King's prerogatives under early English law.<sup>10</sup> Incident to the King's exclusive power to coin money, he reserved to himself all deposits of gold and silver when granting estates and the right to extract those minerals.<sup>11</sup> Similarly, his duty to defend the realm accorded him the right to enter private lands to excavate saltpeter to make gunpowder.<sup>12</sup> So from the earliest days of our jurisprudence, the King's "mineral estate" was paramount over the interests of the surface owner.<sup>13</sup>

The concept of the dominance of the mineral estate over the surface estate was adopted early in America.<sup>14</sup> Many charters to settle the eastern United States reserved one-fifth of all gold and silver to the crown.<sup>15</sup> After

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10. See *The Case of Mines*, 75 Eng. Rep. 472, 477 (Ex. 1567) (examining a dispute between the Queen of England and the Earl of Northumberland over precious metals, stating that "[a]ll mines of gold or silver throughout the realm, or of base metal, wherein there is any ore of gold or silver of however small value, belong to the King by prerogative, with liberty to dig . . . and carry it away from thence . . ."). See also Michelle A. Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607, 614 (1993).

11. 2 WILLIAM BLACKSTONE, COMMENTARIES 18-19 n.20 (William D. Lewis ed., 1922) ("Mines of gold and silver, by royal prerogative from time immemorial, have belonged to the crown.") (citations omitted). See also Wenzel, *supra* note 10, at 614.

12. See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562 (1972); see also Wenzel, *supra* note 10, at 614-15. The King's right to use private lands for this purpose was contested through the courts in 1606, and given the historic English protection of private property ownership, one might have predicted a successful challenge. Yet the King won. See *The Case of The King's Prerogative In Saltpetre*, 77 Eng. Rep. 1294, 1295 (K.B. 1606). The court found:

[A]lthough the invention of gunpowder was devised within time of memory . . . yet inasmuch as this concerns the necessary defence of the realm, [the King] shall not be driven to buy [saltpetre] in foreign parts; and foreign princes may restrain it at their pleasure, in their own dominion: and so the realm shall not have sufficient [saltpetre] for the defence of it, to the peril and hazard of it: and therefore insomuch as saltpetre is within the realm, the King may take it . . . for the necessary defence of the kingdom.

The same argument could be made today in reference to America's dependence on foreign sources of oil. Oil is as much a part of our national defense as were the constituents of gunpowder to England. Given interests of national security and economic stability, one can easily see why the production of minerals in the United States has been given protected status.

13. Wenzel, *supra* note 10, at 614.

14. Owen M. Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners*, 26 ROCKY MTN. MIN. L. INST. 995, 996 (1980). See also Wenzel, *supra* note 10, at 615.

15. Wenzel, *supra* note 10, at 615.

independence, some states asserted sovereign rights over precious metals<sup>16</sup> leading Congress to pass legislation reserving one-third of such metals to the Federal Government.<sup>17</sup> Although not long lived, these laws demonstrate colonial acceptance of the dominance of the mineral estate.<sup>18</sup>

The split estate grew most quickly from lands held by the federal government. During the second half of the nineteenth century, Congress sought to encourage the settlement of the West by granting land in fee simple to homesteaders who entered and cultivated designated tracts.<sup>19</sup> These land grants, however, were subject to mineral reservations by the Federal Government.<sup>20</sup> Many land grants that permitted the private leasing of coal-bed natural gas lands in Wyoming derived from these reservations. Land patents issued pursuant to the Coal Lands Acts of 1909 and 1910 conveyed to the patentee the land and everything in it, except "coal," which was reserved to the United States.<sup>21</sup> In *Amoco Production Company v. Southern Ute Indian Tribe* the United States Supreme Court held that the reservation of "coal" by itself did not include gaseous substances residing in the bed of coal.<sup>22</sup>

For private lands, the industrial revolution gave rise to the need for discrete mineral ownership to apply to fee interests as well as to the government.<sup>23</sup> Neither the federal government nor landowners could extract the volume of minerals required by American industry.<sup>24</sup> Mining entrepreneurs relied upon the precedent of the severed mineral estate owned by the federal government to establish private rights over severed minerals, either by lease or by outright purchase of the mineral rights.<sup>25</sup> Developers gained opportunities for large-scale production, and surface owners had the financial incentive to lease or sell the mineral estate.<sup>26</sup>

By 1900, estate severance had become well established.<sup>27</sup> Today, in all jurisdictions, the owner of a fee simple estate may create as many separate estates as there are different minerals and strata of minerals beneath the

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16. See 2 Blackstone, *supra* note 11, at 18-19 n.20.

17. See 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 378 (John C. Fitzpatrick ed. 1933) (Act of May 20, 1785, for determining a way of disposing of lands in West, providing for reservation to the United States of "one third part of all gold, silver, lead and copper mines"). See also Wenzel, *supra* note 10, at 615-16.

18. See Lopez, *supra* note 14, at 997 n.8.

19. *Amoco Production Company v. Southern Ute Indian Tribe*, 526 U.S. 865, 868 (1999).

20. *Id.* at 870.

21. *Id.*

22. *Id.* at 868.

23. Wenzel, *supra* note 10, at 616.

24. *Id.*

25. *Id.*

26. *Id.* at 616-17.

27. *Id.* at 618.

surface.<sup>28</sup> Upon transfer, each severed estate is held under separate and distinct title, each of which is entitled to the full protection of the law, including the laws of descent, devise, conveyance, and contract, and each is independently taxable.<sup>29</sup>

#### IV. THE DOMINANCE OF THE MINERAL ESTATE AND PUBLIC POLICY

The doctrine of mineral estate dominance, at its most practical level, seeks to balance mineral and surface interests. It reflects the broad policy considerations of assuring a usable mineral interest and assuring a supply of energy while making provision for the surface owner's use of his property. Exploration for America's mineral wealth has historically been the goal taking priority over ownership interests in the surface. In 1882, the United States Supreme Court allowed mining to proceed in the middle of Leadville, Colorado, an established town, affirming the national policy favoring mineral development.<sup>30</sup> The Pennsylvania Supreme Court articulated the policy rationale of the rule by stating that "[t]o encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."<sup>31</sup> The Pennsylvania court later spoke to the consequences of curtailing access to minerals:

[T]he public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for man's use in the bowels of the earth. Some of them, at least, are necessary to his comfort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. . . . [T]he question we are considering becomes of a quasi public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth.<sup>32</sup>

In the early days of mineral development, this was the perception of the burdens borne by surface owners. Surface damages caused by picks, shovels, and mule-drawn scrapers were truly minor inconveniences as nineteenth-century know-how had not advanced to such a stage that mineral activity posed a real threat to land values, nor had farming technology ad-

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28. *Id.*

29. *Id.*

30. *See Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. 447, 449 (1882) (finding that "[t]o such [mining] claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in the wilderness . . .").

31. *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453, 459 (Pa. 1886), *overruled by Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871 (Pa. 1974).

32. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893).

vanced to such a stage that a larger portion of the surface acreage was put to agrarian use.<sup>33</sup>

Times changed. Mineral developers now utilize, for example, large scrapers that allow mining companies to extract tons of coal never before thought possible. The increased demand for energy means that energy sources previously thought to be a waste product (like coalbed natural gas)<sup>34</sup> are now fully exploited. These changes, and economies of scale that make mineral production more cost effective and cheaper to the consumer, put requirements on the surface owner that the nineteenth-century farmer or rancher did not face. Even so, unless America is willing to stop its dependence on conventional energy sources cold turkey, surface owners cannot escape the realities of mineral production. The Wyoming split estate surface owners' demands for ever increasing sums of money, even beyond the fair market value for use of the surface, in the long run, can only have an impact on energy costs to the consumer. Watching as the trucks crisscross his land, however, the farmer or rancher finds it difficult to view himself as an integral part of the national energy picture.

#### V. THE ACCOMMODATION DOCTRINE

##### *Limitations On Mineral Estate Dominance*

The doctrine of mineral estate dominance has adapted to the increasing demands on surface owners. Even from the beginning, two primary canons that ameliorated the potentially harsh effects of the dominance doctrine were part of the jurisprudence. It was always true that a mineral owner's use of the surface could not exceed what was 'reasonable and necessary' for exploration and development of the minerals.<sup>35</sup> This rule was expressly adopted in Wyoming in *Sanford v. Arjay Oil Co.*<sup>36</sup> In that case, the Wyoming Supreme Court held that "[u]nder the rule of reasonable necessity, a mineral lessee is entitled to possess that portion of the surface estate 'reasonably necessary' to the production and storage of the mineral."<sup>37</sup> This rule forms the underpinnings of what is known as the "accommodation doctrine" as applied to the mineral owner's use of the surface for mineral exploration, development, and transportation. And, the rule makes sense. In pragmatic terms, as one commentator has observed, it preserves the original intent of

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33. Wenzel, *supra* note 10, at 623-24.

34. *Amoco Production Company v. Southern Ute Indian Tribe*, 526 U.S. 865, 868 (1999).

35. See Marvin D. Truhe, *Surface Owner vs. Mineral Owner or "They Can't Do That, Can They?"*, 27 S.D. L. Rev. 376, 385-388 (1982) (surveying the reasonable and necessary standard in the majority of jurisdictions). See also RESTATEMENT (THIRD) OF PROPERTY, § 2.15 (1989) (noting that servitudes reasonably necessary to the use and enjoyment of the minerals will be implied from conveyances unless clearly contrary to language in the conveyance documents).

36. 686 P.2d 566, 572 (Wyo. 1984).

37. *Id.*



the parties to the severance by balancing the interests: while the only access to the mineral estate comes over the surface, separate ownership of the surface has no meaning if mineral producers are able to completely destroy the surface.<sup>38</sup>

The second canon is that the surface owners have the right to subjacent support. This rule holds that mineral developers must provide subsurface support for the land surface and for improvements anticipated to be constructed on the surface.<sup>39</sup> This rule has application mostly in underground mining operations and has only rare application in Wyoming.

In theory, these two rules work as limitations on the general rule that the mineral estate is dominant. The perception of surface owners, however, is that the dominance of the mineral estate, in practice, means that "what is good for the company is good for the surface owner."

#### *The Rise of the Accommodation Doctrine*

Partly through the stigma surrounding mineral estate dominance, as legally unfounded as that stigma was, and as result of the conservation movement in America, the law has continued to evolve to be responsive to surface owner concerns. In this context, a growing number of states have applied the common law principle known as the "accommodation doctrine" to land use conflicts between surface and mineral owners.<sup>40</sup> The "reasonable and necessary" paradigm focuses courts on the requirements of the mineral owner. As the counter-weight, the accommodation doctrine requires courts to examine the surface owner's needs and concerns.<sup>41</sup>

#### *Texas*

Texas led the way with the adoption of the accommodation doctrine. In *Getty Oil Co. v. Jones*,<sup>42</sup> the surface owner (Jones) used a self-propelled irrigation system needing seven feet of surface clearance to water his fields.

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38. Wenzel, *supra* note 10, at 630.

39. See RESTATEMENT (SECOND) OF TORTS § 820 (1979). This section provides:

(1) One who withdraws the naturally necessary subjacent support of land in another's possession or the support that has been substituted for the naturally necessary support is subject to liability for a subsidence of the land of the other that was naturally dependent upon the support withdrawn.

(2) One who is liable under the rule stated in Subsection (1) is also liable to artificial additions that result from the subsidence.

40. See Wenzel, *supra* note 10, at 629. For a discussion of the accommodation doctrine applied in Texas and Utah, see *infra* notes 42-54 and accompanying text.

41. *Id.*

42. 470 S.W.2d 618 (Tex. 1971).

Getty Oil installed two oil pumps that prevented operation of the irrigation system. Two other producers used equipment that did not interfere with the irrigation system. One of those producers used hydraulic pumping units, while the other producer, Adobe Oil, used units like Getty's, but sank their units to provide clearance. The Getty leases did not specify the type of oil pumps that could be installed on the land, but did contain a clause requiring the mineral owner to bury any pipelines below ordinary plow depth, evidencing intent to accommodate farming in conjunction with oil production.<sup>43</sup>

Jones asked the court to enjoin use of Getty's pumps and sought damages.<sup>44</sup> Getty said that it had met the "reasonable and necessary" limitation on the doctrine of mineral dominance.<sup>45</sup> The Court disagreed with Getty, and held that,

[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available . . . whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative [by the mineral owner].<sup>46</sup>

The accommodation doctrine does not represent a rejection of the mineral estate dominance. To be precise, it represents an addition to the rule that the dominant owner is required to use only that much of the surface as is "reasonable and necessary" to include consideration of *how* the surface is used, and perhaps *when*. As the court made clear in *Getty*, the accommodation of the surface owner's interests does not envision a balancing of surface owner harm or inconvenience against mineral owner rights, but rather, the surface owner must prove that the mineral owner's use of the surface is not reasonably necessary as shown by reasonably available alternatives.<sup>47</sup> If the surface owner cannot carry his burden of proof, then the mineral owner may proceed.<sup>48</sup> Getty had two other reasonable alternatives available to it that permitted mineral development.

### *Utah*

In *Flying Diamond Corp. v. Rust*,<sup>49</sup> Utah adopted the accommoda-

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43. *Id.* at 621.

44. *Id.* at 619.

45. *Id.* at 621.

46. *Id.* at 622.

47. *Id.* at 622-23. (clarifying that the initial issue is not one of whether the surface owner has been inconvenienced, but is an evidentiary question of whether the surface owner is able to carry his burden of proof that the mineral owner's surface use is unreasonable and that a reasonable alternative is available).

48. *Id.*

49. 551 P.2d 509 (Utah 1976).

tion doctrine. Flying Diamond, the producer, decided that it needed to build a road across Rust's clover and alfalfa field. Rust asked that the road enter from the north to minimize surface damage and to prevent interference with irrigation functions.<sup>50</sup> By not honoring Rust's request, Flying Diamond used six acres of farmland and prevented the irrigation of another fifteen acres.<sup>51</sup> The court found Flying Diamond liable for the use of twenty-one acres that had been rendered unusable for farming and for the value of crops because a less invasive and less damaging alternative for the route was available.<sup>52</sup>

In reaching this result, the Utah Supreme Court found that each estate holder "should have the right to the use and enjoyment of his interest in the property to the highest degree possible not inconsistent with the rights of the other."<sup>53</sup> Although purportedly relying on *Getty Oil Co. v. Jones*,<sup>54</sup> the court did not seem to place the restrictions on the accommodation doctrine adopted by the Texas court. The court did not make clear, as had the Texas court, that the accommodation doctrine is not a balancing test in which surface owner harm is measured against mineral producer options, but rather, that the surface owner must prove that the mineral owner's use is not reasonably necessary by showing that reasonable alternatives exist. The Utah Supreme Court may have felt that this requirement had been satisfied since, at trial, Rust established the feasibility and diminished impact of the alternate route.

The Texas and Utah cases represent easy cases for applying the accommodation doctrine to help sort out conflicts between surface and mineral owners. More difficult issues include, among others, accommodations that are cost prohibitive, or the required use of unproven technologies. Obviously these are factually intensive questions that must be addressed on a case-by-case basis.

Wyoming has not adopted the accommodation doctrine as applied to the rights and obligations of mineral developers and surface owners. In *Mingo Oil Producers v. Kamp Cattle Company*,<sup>55</sup> the Wyoming Supreme Court did adopt the usual "reasonable necessity" limitation on the dominant estate doctrine holding that only so much of the surface may be used as is reasonably necessary, and while citing the *Getty* case for this proposition, the Court did not go on to adopt the accommodation doctrine.<sup>56</sup> Given the short distance between the reasonable necessity limitation on the dominant estate doctrine and the accommodation doctrine, in the current climate, it is

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50. *Id.* at 511.

51. *Id.*

52. *Id.* at 512.

53. *Id.* at 511.

54. 470 S.W.2d 618 (Tex. 1971).

55. 776 P.2d 736 (Wyo. 1989).

56. *Id.* at 742.

difficult to imagine that Wyoming would not also adopt the accommodation doctrine. Given its strong commitment to the dominance of the mineral estate, it is likely that the Wyoming court would find the Texas approach more fitting with Wyoming law.

#### VI. LEGAL SYSTEMS RESOLVING CONFLICTS BETWEEN SURFACE ESTATES AND FEDERAL, STATE, AND PRIVATE MINERALS

Split estate conflict resolution always involves negotiation and often becomes a very difficult process. However, the degree of difficulty is largely dependent upon whether a system is in place to ultimately resolve the conflict. That depends upon how the split estate is owned. Mineral estates are held independently from the surface estate in one of three common title occurrences: (1) where fee minerals are owned separately from fee surface; (2) where the state owns the surface or minerals, but not both, or (3) where the federal government owns the minerals but not the surface.

##### *The Fee Approach*

For fee minerals in Wyoming, the lease grants access and usually defines what kind of damages the lessee will pay.<sup>57</sup> In *Mingo Oil*, on the way to finding that the mineral estate is dominant, the Wyoming Supreme Court enforced the standard form lease at issue granting access to that much of the surface needed for exploration, development, and production of covered minerals and allowed only the damages defined in the lease.<sup>58</sup> In instances in which the conveyance or reservation of mineral rights granted access for mineral activity, that instrument would be given effect according to its terms.<sup>59</sup>

Thus, in the typical fee split estate, the mineral lessee has the legal right to go on to the surface whether the surface owner likes it or not. Mineral lessees have often had to resort to entering onto a lease by cutting locks off of gates under threat of having their tires shot out. In practice, however, negotiations have evolved between surface owners and mineral owners such that the parties typically enter into a surface use agreement to order their respective rights and responsibilities.

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57. See *Mingo Oil Producers v. Kamp Cattle Company*, 776 P.2d 736 (Wyo. 1989).

58. *Id.* at 740.

59. *Caballo Coal Co. v. Fidelity Exploration & Production*, 2004 WY 6, 84 P.3d 311, 314 (Wyo. 2004) (stating mineral conveyances construed under rules of contract interpretation along with the surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract). See also *Double Eagle Petroleum & Mining Corp. v. Questar Exploration & Prod. Co.*, 2003 WY 139, 78 P.3d 679, 681 (Wyo. 2003).

For situations in which access was not granted by agreement, the right of condemnation is made available to mineral developers under the Wyoming Constitution. Article 1, Section 32 of the Wyoming Constitution's declaration of rights provides for the right of eminent domain to develop mineral resources. As to the public interest and necessity requirement found under the condemnation statutes,<sup>60</sup> the Wyoming court has made clear that the development of the state's mineral resources is a "compelling public purpose."<sup>61</sup> At the same time, a mineral producer condemning an interest must plan the project in the manner that will be most compatible with the greatest public good (i.e., producing the mineral resources of the state), and the least private injury.<sup>62</sup>

### *The Federal System*

The federal approach to split estate issues is well settled in the law and in practice. The intent of acts such as the Stock Raising Homestead Act of 1916<sup>63</sup> and the Minerals Leasing Act of 1920<sup>64</sup> was "[s]eparation of the surface and the subsurface resources. This objective opened the surface for immediate agricultural use while preserving whatever mineral potential lay buried in the subsurface for later development,"<sup>65</sup> and

to divide oil and gas lands into two estates for the purposes of disposal -- one including the underlying oil and gas deposits and the other the surface -- and to make the latter servient to the former, which naturally would be suggested by their physical relation and relative values.<sup>66</sup>

Thus, the Federal Government, with those objectives in mind, codified a procedure so that lessees of Federal minerals could effectively and efficiently develop their minerals, regardless of the surface ownership. The best example of the Federal approach can be found in the Stock Raising Homestead Act (SRHA).<sup>67</sup>

The SRHA provided that a person could make entry onto U.S. lands pursuant to the Homestead Acts of the United States for the purpose of stock raising on up to 640 acres of unreserved, unappropriated "reasonably compact" lands.<sup>68</sup> In addition, if any of the lands were found in an oil and gas producing field, then any patent of those lands contained a "reservation to

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60. WYO. STAT. ANN. § 1-26-504(a)(i) (LexisNexis 2003).  
61. *Coronado Oil Company v. Grieves*, 603 P.2d 406, 411 (Wyo. 1979).  
62. WYO. STAT. ANN. § 1-26-504(a)(ii) (LexisNexis 2003).  
63. 43 U.S.C. § 291 (repealed 1976).  
64. 30 U.S.C. § 181 (1995).  
65. *Rosette v. U.S.*, 64 F. Supp. 2d 1116, 1120 (D.N.M. 1999).  
66. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1928).  
67. 43 U.S.C. § 291 (repealed 1976).  
68. *Id.*

the United States of all minerals in said lands *and* the right to prospect for, mine and remove the same."<sup>69</sup>

The SRHA's reservation of minerals to the United States is further defined in the Act at 43 U.S.C. § 299. Section 299 provides in part:

All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. . . . Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner . . . .<sup>70</sup>

In 1993, several additional sections were added to the SRHA, however those provisions deal with entry and bonding for mining operations.<sup>71</sup>

Contrary to the lack of direction found when a split estate contains fee minerals, the federal government sets out the procedure for resolving surface damages under SRHA patented lands in the United States Code. Further, the Code of Federal Regulations spells out the details of the proce-

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69. *Id.* (emphasis added).

70. 43 U.S.C. § 299 (1995).

71. Laura Lindley, *Bonds*, in ROCKY MOUNTAIN MINERAL LAW FOUNDATION FEDERAL OIL AND GAS LEASING SHORT COURSE 18-1 to 18-12 (1999).

cedure a federal mineral lessee must follow in using the surface estate. Following the codified procedures, as a practical matter, tends to be the last resort for mineral lessees. In fact, the practice is that mineral lessees enter into voluntary surface and damage agreements similar to those described in other sections of this article. However, if the parties reach an impasse, the so-called "bond-on" process is available.

Section 3814 of the Code of Federal Regulations (CFR) sets forth the "bond on" procedure. First the mineral lessee must attempt to gain access to the lease through their negotiations with the surface owner, as mentioned above.<sup>72</sup> A detailed discussion of access to the lease line could be the subject of a separate article, and will not be discussed here. The bond on process presupposes that negotiations with the owner of the surface estate have failed and the mineral interest owner has legal access to the lease line. As the Code of Federal Regulations describes it, there are three ways to gain access onto the surface to develop the mineral interests. One is by written consent of the surface interest owner, the second is by payment of damages to crops and tangible improvements to the surface owner upon written agreement, and the third is to execute a "good and sufficient bond" to secure payment of damages to the surface owner.<sup>73</sup>

Once negotiations with the surface owner have failed, the mineral owner should write a letter containing a formal offer of payment of surface damages and send the letter by certified mail.<sup>74</sup> When it is clear that the offer is rejected, and access to the surface denied, the mineral owner contacts the appropriate office of the Bureau of Land Management (BLM), also in writing, to let them know that surface access has been denied, that the mineral owner is bonding on to the lease, and third, that the mineral owner has a "good and sufficient bond" in place, that being its operating bond on file in the state BLM office.<sup>75</sup> The BLM certainly can require additional bonding, and many mineral owners do post additional bonding supported by an appraisal of the value of the damages to crops and tangible improvements. As a practical matter, it may be wise to post an additional form of bonding that is readily available for the benefit of the surface interest owner rather than for the mineral interest owner to rely on its operational bond. Mineral owners do not want their operational bonds to be in jeopardy of being called due to surface damages.

The bond on form, Form 3814, must be completed and signed by the person who is the mineral owner, as the principal, with either two "competent individual sureties" or a bonding company that has complied with all the

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72. Robert M. Anderson, *Permitting Oil and Gas Well Location*, in *ROCKY MOUNTAIN MINERAL LAW FOUNDATION LAND AND PERMITTING II* 18-15 (1996).

73. 43 C.F.R. § 3814.1(c) (2004).

74. Anderson, *supra* note 72, at 18-15.

75. *Id.* at 18-16.

applicable federal rules and regulations. The bond must be for an amount not less than \$1,000.00. A qualified corporate surety may be accepted as the only surety and they are preferred.<sup>76</sup> If the bond is not obtained through a qualified corporate surety, there are additional measures the mineral owner must take to justify the surety used. The properly completed bond and any accompanying papers must be filed with the appropriate officer of the BLM. The mineral owner must file evidence that a copy of the bond has been served on the mineral owner.<sup>77</sup>

The surface owner has thirty days from the date of receipt of the bond copy to object. If the surface owner does not object, assuming the form and bond are in order, the appropriate officer of the BLM may approve the bond.<sup>78</sup> If the surface owner timely objects to the bond the authorized BLM officer shall give consideration to the objection, the bond, and any accompanying papers. The authorized officer can either approve or disapprove the bond. If he disapproves the bond, he is to give notice to the mineral owner and advise the mineral owner of its appeal rights. If the mineral owner does not appeal timely, the authorized officer endorses the bond "disapproved" and closes the case.<sup>79</sup>

If the authorized officer, after consideration, approves the bond, and believes that the objections do not offer "sufficient reasons to justify him in refusing to approve the proffered bond" then he will notify the surface owner in writing, and allow the surface owner thirty days in which to appeal the decision to the State Director of the BLM.<sup>80</sup> If the surface owner does not appeal, the authorized officer may approve the bond. If the surface owner appeals, that sends the matter to the State Director for review.<sup>81</sup>

### *The State Approach*

The State of Wyoming owns approximately 897,113 acres of minerals under federal and fee surface ownership. It also owns approximately 369,511 acres of surface over federal and fee mineral ownership. The State owns 2,930,000 acres as the owner of the surface and the minerals.<sup>82</sup> When the State owns both the minerals and the surface, and the surface is leased to a grazing lessee and the oil and gas is leased to an oil company, the procedures for compensating the State and the grazing lessee are clear. The State oil & gas lease form requires compliance with the Rules and Regulations of

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76. 43 C.F.R. § 3814.1(c) (2004).

77. *Id.*

78. 43 C.F.R. § 3814.1(d) (2004).

79. *Id.*

80. *Id.*

81. *Id.*

82. Interview with Harold Kemp, Assistant Director, Mineral Leasing and Royalty Compliance Division, Office of State Lands and Investments (April 5, 2004).



the Board of Land Commissioners. However, this is not a “split estate” situation since the State owns both the surface and the minerals.

In the case of the State’s 897,113 mineral acres under surface owned by federal and fee owners, the mineral estate is still the dominant estate and is subject to the typical split estate issues and negotiations described throughout this article. In the case of the State’s 369,511 surface acres over minerals owned by the federal government or fee owners, the analysis is less clear.<sup>83</sup> Arguably, the mineral owner in this split estate situation is subject to the Rules and Regulations of the Board of Land Commissioners of the State of Wyoming. Chapter 4 Section 2 of the Grazing and Agricultural Leasing Rules defines “Surface Impact Payments” as “money paid by a user of state lands in compensation for potential negative impacts to the fee simple or leasehold estate, including, but not limited to, destruction of forage, disruption of grazing, agricultural, or commercial operations, nuisance, inconvenience and for incidental use of the land surface.”<sup>84</sup> Further, prior to entering onto surface owned by the State, which is under lease, “anyone” (with exceptions set out later) must contact the lessee before entering.<sup>85</sup> The lessee then is authorized to negotiate a surface impact payment, consistent with payments made for adjacent lands. The party paying the surface impact payments makes the payments directly to the Lessee and the State in accordance with a schedule set forth in the rule providing for differing shares between the lessee and the State, depending upon the amount of the payment as it increases incrementally.<sup>86</sup> Parties exempt from surface impact payments are:

- (i) The Board and its representatives when entering for purposes of management or administration of state lands.
- (ii) Members of the public when entering for purposes of hunting and fishing and casual recreational use pursuant to the provisions of Chapter 13 of these rules.
- (iii) Applicants for, or holders of, an easement issued under Chapter 3 of the Board’s rules.
- (iv) Applicants for, or holders of, a temporary use permit issued under Chapter 14 of the Board’s rules.<sup>87</sup>

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83. Interview with Lynne Boomgaarden, Director, Office of State Lands and Investments (Apr. 5, 2004).

84. Weil’s Code of Wyoming Rules 06 060 004 § 2(f) (Aug. 2003).

85. *Id.* at § 13.

86. *Id.* at § 13(b).

87. *Id.* at § 13(c)(i-iv).

It would appear that fee or federal mineral owners are not exempt from these rules and therefore must make surface impact payments to the State and its surface lessee. As a practical matter, the acreage where the state owns only the surface is relatively small. Circumstances have not yet required the Office of State Lands and Investments to resolve the issue of whether it can enforce the Chapter 4 rules against non-state mineral lessees.<sup>88</sup>

If a party who wants to enter upon state lands cannot reach an agreement with the grazing lessee, they can engage in a procedure similar to that described for the federal bond on process. In this case, the party attempting access to the surface must negotiate in "good faith" with the lessee for a period of at least 90 days. If the negotiation fails, the party attempting access can submit evidence of the negotiation to the Office of State Lands and Investments to establish the amount of the surface impact payment.<sup>89</sup> The evidence is analyzed by the Director of State Lands who then enters an order regarding the amount that should be required for the surface impact payment and recommending the payment to the Board of Land Commissioners,<sup>90</sup> which must give final approval.<sup>91</sup>

Either party is allowed to appeal the Director's decision. Upon appeal, the case is treated as a contested case hearing under the Wyoming Administrative Procedures Act. W.S. 16-3-107 *et seq.* The costs of the contested case hearing are shared equally by the parties.<sup>92</sup>

Interestingly enough, and contrary to the federal bond on procedure, the State allows parties to enter State lands even while negotiations are proceeding with the lessee if the party deposits a surface impact payment with the Office of State Lands in an amount determined by the Office if the "good faith negotiations" with the lessee are proceeding.<sup>93</sup> Thus, the State has a procedure in place that allows quick access, which should be an acceptable methodology for most mineral owners. However as mentioned above, the foregoing procedure is only *arguably* the procedure in the case where the State owns the surface only. One could make an argument that in split estates in which the State owns only the surface, with the mineral estate again (and still) being the dominant estate, the mineral owner is not bound at all by the State's surface access rules. Instead, the argument would follow that a challenge to the State's rules may result in a judicial decision holding that

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88. Interview with Lynne Boomgaarden, *supra* note 83.

89. Weil's Code of Wyoming Rules 06 060 004 at § 13(d).

90. The Board of Land Commissioners of the State of Wyoming is made up of the five top elected officials in the State. The current members are Dave Freudenthal, Governor, Cynthia Lummis, Treasurer, Joe Meyer, Secretary of State, Max Maxfield, Auditor, and Trent Blankenship, Superintendent of Public Instruction.

91. Weil's Code of Wyoming Rules 06 060 004 § 13(d)(i).

92. *Id.* at § 13(d)(iv).

93. *Id.* at § 13(d)(iii).

the mineral owner, as the owner of the dominant estate at common law, has no obligation to the State as owner of the surface. If such a challenge by a mineral owner were successful, the State would be in the same position as any other surface owner of a split estate.<sup>94</sup>

## VII. THE PRIVATE INITIATIVE

The Wyoming Split Estate Initiative (WYSEI or Initiative)<sup>95</sup> is a coalition comprised of the Petroleum Association of Wyoming,<sup>96</sup> the Wyoming Stock Growers Association,<sup>97</sup> the Wyoming Farm Bureau Federation<sup>98</sup> and the Wyoming Wool Growers Association.<sup>99</sup> The goal of the Initiative is to "provide resources and tools that their constituents can utilize to help remove uncertainty as they work through the Surface Use Agreement process."<sup>100</sup> The Initiative, in addition to the four organizers, received input in developing their protocol from the United States Department of Agriculture Natural Resources Conservation Service, Wyoming Association of Conservation Districts, Wyoming Oil and Gas Conservation Commission, and the Wyoming Department of Agriculture and Natural Resource Mediation Program. The listed goals of the Initiative are to:

Minimize or prevent conflict between landowners and operators while maximizing cooperation where oil and gas development occurs in the areas of split ownership;

Enhance and encourage responsible development of minerals and continued surface resource values while maintaining and promoting land, water, air and wildlife resources; and

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94. Interview with Lynne Boomgaarden, *supra* note 83.

95. The web site for the WYSEI is [www.wysei.com](http://www.wysei.com).

96. The contact person at the Petroleum Association of Wyoming (PAW) for the WYSEI is Dru Bower, Vice President, whose address is 951 Werner Court, Casper, WY 82601, (307) 234-5333 (telephone) and (307) 266-2189 (telecopy). The website for PAW is [www.pawyo.org](http://www.pawyo.org).

97. The contact person at the Wyoming Stock Grower's Association for the WYSEI is Jim Magagna, Executive Vice President, whose address is P.O. Box 206, Cheyenne, WY 82003-0206, (307)-638-3942 (telephone) and (307) 634-1210 (telecopy).

98. The contact person at the Wyoming Farm Bureau Federation for the WYSEI is Marvin Applequist, Executive Vice President, whose address is 406 South 21<sup>st</sup> Street, Laramie, WY 82070, (307) 721-7711 (telephone) and (307) 721-7790 (telecopy).

99. The contact person at the Wyoming Wool Grower's Association for WYSEI is Bryce Reece, Executive Director, whose address is 811 North Glenn Road, Casper, WY 82601, (307) 265-5250 (telephone) and (307) 234-9701 (telecopy).

100. Wyoming Split Estate Initiative, *What is WYSEI?*, at <http://www.wysei.com/split%20estate.htm>.

Provide a forum for conflict resolution.<sup>101</sup>

The Initiative's objectives are to foster and improve communications between operators, landowners, and regulators, and to provide the parties with certain guidelines to achieve these objectives. If communication does not result in the parties reaching an agreement, then the Initiative first offers an advisory team to assist the parties and to make recommendations, and if that is still unsuccessful, or at the parties' choice in lieu of an advisory team, the Initiative offers mediation and arbitration services.<sup>102</sup>

The Initiative sets out lists of recommendations to meet every stated objective, including a list of seventeen "Recommended Practices." For the operator, the Initiative recommends that, when possible, "avoid waiting until the final days of lease expiration to approach the landowner in a state of urgency to begin activity," and for the landowner, "The landowner is encouraged to provide a range of alternatives (perspectives and limitations) to the operator up front."<sup>103</sup> While these are only a couple of examples of the recommended practices, and may sound basic, the purpose is to get the parties thinking about the issues and communicating at an early stage so that they can avoid conflicts, and more importantly, impasses.

If the parties cannot reach a negotiated surface use agreement, the Initiative provides follow-up services all the way through the mediation phase. The WYSEI has a board to "design, implement, and maintain the mediation/arbitration programs."<sup>104</sup> The Initiative sets out a timetable for conducting mediation and has a very well thought-out and developed protocol covering issues such as standing, selection and qualifications of mediators, arbitrators and facilitators, initiation procedures, preparation of agreements, a code of ethics, and compensation.

The WYSEI is a great tool that can be likened to the rational and reasonable approaches set out by the Federal Government and the State to resolve surface use issues. In fact, the WYSEI calls for much more surface owner involvement and input than the federal and state approaches. This Initiative offers a real chance for true accommodation among surface and mineral interest owners, and even more importantly, an opportunity for communication, neighbor to neighbor, citizen to citizen, to resolve problems that are key to the future economic health of Wyoming. Legislation is not the magic bullet and will not foster a meeting of the minds.

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101. Wyoming Split Estate Initiative, *How Does WYSEI Work?*, at <http://www.wysei.com/how%20does%20WYSEI%20work.htm>.

102. *Id.*

103. *Id.*

104. *Id.*

### VIII. CONCLUSION

Split estate surface owners have gained a powerful legal voice since the early days of the common law. Through accommodation and private initiatives they now have real bargaining power, and the means to assert it. Yet anyone who lives in the United States in these times realizes just how important our mineral resources are and that they should (no, that they *must*) be developed to see America through the twenty-first century. The answer, then, lies not in legislation, which we have learned by experience will not solve these kinds of problems. The answer lies in respect, communication, and education. Education must center on legal rights and the background that led to those rights, and education must focus on the processes and procedures available to resolve split estate conflicts. Wyoming is uniquely poised to lead the country and help to provide for its vast energy requirements well into the future. Under the existing structure of the law and through private initiative, Wyoming can lead the way in both mineral development and working cooperatively with surface owners.