Why Split-Estate Energy Development Should Concern Utah’s Policymakers

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Traditional multiple-use land management doctrine has, generally speaking, limited the exploration and development of domestic oil and natural gas resources in the United States to federally managed public lands. However, triggered by a combination of political speculation and market forces concerning shrinking global energy reserves, federal management of energy resource development has, since 2000, steadily and increasingly begun to impact privately owned properties known simply as “split-estates.”

As the value of oil and natural gas has risen dramatically since 2000, the level of domestic exploration and development of energy resources in the U.S. has also sharply increased. While public lands have been greatly impacted by this increase in activity, one result of shrinking energy reserves on these lands is that domestic energy development is no longer, generally speaking, limited to publicly owned parcels. Current estimates are that 3-5% of all domestic energy exploration and development is occurring on the privately owned surface estate of split-estate landowners.[1] These estimates are anticipated to continue increasing as long as oil and natural gas prices create an incentive for exploration. This means that more private landowners will be impacted by the problems associated with split-estates.

Located throughout the Rocky Mountain region of the United States, a split-estate property is defined as a parcel of property consisting of two separate legal estates: the “surface estate” and the “mineral estate.”[2] In the states of New Mexico, Colorado, Wyoming, Montana, and Utah this translates to roughly 51 million acres of surface estate properties being owned and managed by private parties such as ranchers, farmers, homeowners, and retirees and the subsurface mineral estate being owned, leased and managed by the federal government.[3]

Due in part to early 20th century legislation—the Stock Raising Homestead Act of 1916 (SRHA)[4] and the Mineral Leasing Act of 1920 (MLA)[5]—the Department of Interior, through the Bureau of Land Management (BLM), auctions and administers mineral leases to the underlying mineral estates to private energy development interests for the purpose of exploring, extracting, refining, and marketing domestic energy resources. Thus, one result of “severing” ownership and management of the two property estates into separate entities has been a significant rise in conflicts between private surface owners, private extractive industries, and federal authorities.

In essence, due to SRHA and MLA legislation, access, exploration, and development of the leased mineral estate cannot be denied except under extraordinary and/or narrowly defined circumstances.[6] In turn, this type of relatively unrestricted access and development has greatly disrupted and negatively impacted the ownership and management of privately owned surface estates throughout the West. Of particular concern to surface owners in the West is the leasing of the underlying federal mineral estate to private energy development interests for the purpose of exploring and extracting Coal-Bed Methane Natural Gas (CBM). Due in part to the processes involved in accessing and extracting CBM deposits, the negative impacts to the surface estate can take multiple forms and can be quite significant. For example, the loss, displacement and/or degradation of surface and subsurface water sources, livestock and livestock grazing areas, native flora and fauna, and most significantly, real estate values.[7] Compounding these multiple negative impacts to the surface owner’s estate is that federal regulations governing the actions, bonding requirements, and mitigation responsibilities of
energy interests, are woefully inadequate and ill-defined.

Of particular concern to surface owners is the legal history regarding conflicts arising from ownership and management of the severed estates that compose a split-estate property. In these cases precedent rulings have favored the mineral estate and its development, mainly because the federal government is the owner of the mineral rights and leases those rights out at its own discretion and for its own monetary benefit. The courts have ruled that rights of the mineral estate retain legal “dominance” over those of the surface estate.[8] This position is due, in part, to the defining of federal ownership of the mineral estate as outlined in both the SHRA and MLA, but it is also due, in part, to the General Mining Act of 1872.[9]

As the “dominant” estate under the SHRA and MLA, the courts have relied on Texas legal doctrine known as the “Accommodations Doctrine” to determine the “reasonableness” of actions taken by owners of either the surface estate or the mineral estate.[10] However, given the divergent interests involved, “reasonable” to one party is not necessarily “reasonable” to the other. The legal determination of reasonableness is a matter of considerable subjectivity.[11] Nonetheless, in conflicts arising on split-estates, courts still rely on judgments of reasonable action in determining whether harm could have been avoided and whether damages are owed as a result of that harm[12]. Because of the legal dominance afforded to the mineral estate, this has meant that the burden of proving unreasonable action on the part of the energy development industry is the responsibility of the surface estate property owner.[13]

However, a relatively recent Colorado decision reinterpreted the reasonableness test of the Accommodations Doctrine. In ruling for the plaintiff surface estate owners, the court declared, in part, that reasonableness under the Accommodation Doctrine was a two-way street. In essence the court suggested that the responsibility of proving reasonable action had not caused harm should be as equally onerous and burdensome as proving reasonable action had caused harm.[14]

Looking specifically at the negative impacts associated with CBM development, coupled with the inadequacy of federal regulations and lower court rulings favoring the right of access and development in the mineral estate, Western state legislatures have responded by enacting state statutes that seek to enhance the property rights of the surface owners’ estate, as well as the responsibilities of the extractive industries to those property owners.[15]

For policymakers and administrators alike, these legislative actions have equated not only to a tricky balancing of rights and responsibilities, but in most instances they have also led to long, contentious, and heated legislative battles as the affected parties seek to influence elected officials and protect their interests[16].

For example, premised on existing state statutes in other energy producing states such as Oklahoma and Texas, Wyoming’s newly enacted Surface Owner Protection Act of 2005[17] is a case in point and should serve as an example to other Western states seeking to either enact new legislation—as is the case in Colorado and New Mexico—or, revisit previously enacted legislation—as is the case in Montana.[18] Each of these states has, since 2000, experienced the remarkable rise in federal leasing activity and increased energy production. In turn, each of these states has also experienced a significant increase in conflicts between federal and private energy producing interests and the property rights interests of the states’ surface estate owning citizens.

The experience of these neighboring Western states to mitigate the problems and balance the rights associated with split-estate properties should give Utah’s policymakers cause for concern. This concern is not without warrant given:

- current levels of energy leasing and development activity occurring in the State of Utah
have set records for the BLM,[19] the absence of state legislation addressing the rights and interests of the state’s surface owners,[20] the reliance of Utah courts on the reasonableness test of the Accommodations Doctrine and,[21] according to the latest BLM audit, there are roughly 9.7 million acres of split-estate property holdings in the State of Utah that hold the potential of energy development activity.[22]

Compared to its Western neighbors Utah is not unique in its experience with the dynamics of energy development and its attendant environmental and private property rights problems. Indeed, the State of Utah compares equally in every energy-related policy domain being impacted by the rise in energy resource development[23].

In some ways, it could be argued that Utah faces even more challenges than its neighbors in protecting the economic interests of the state’s private surface owning citizenry. Because of the speculated potential for Utah’s supplying domestic energy resources—both traditional methods of extraction and non-traditional methods (such as tar sand and oil shale) —[24] the conflicts between surface and mineral rights holders will only increase. Additionally, while traditional methods impact the surface estate to a moderate degree, the proposed non-traditional methods in the extraction of energy from tar sands and oil shale suggest even greater levels of impact to the economic and property rights interests of the state’s split-estate property owners.

Later this year, as required under Section 1835 of the Energy Policy Act of 2005,[25] the Department of Interior (DOI) will issue a report reviewing current policies and practices in the management of Federal subsurface energy resource development and its effects on the privately owned surface estate. In this report, comparisons of the rights and responsibilities under the SRHA and MLA for owners of the mineral and surface estates will be revisited and assessed. Finally, the report will make recommendations for legislative and administrative action to balance the reasonable access and extraction of energy resources with the surface owner concerns for minimizing impacts to the private surface estate.[26]

In conclusion, should policymakers in the State of Utah wish to avoid a divisive battle that pits the energy industry against Utah’s agricultural and livestock industry, legislation that incorporates the legislative balancing of its neighboring states, as well as the findings contained within the mandated DOI report to Congress, should be crafted and implemented.

Notes


See Getty Oil Co. v. Jones 470 S.W.2d 618 (Tex. 1971).

Interview conducted in chambers on June 23, 2004 with U.S. District Court Judge Clarence A. Brimmer, District of Wyoming.

See generally “Supporting Declarations” of first person accounts to the Western Organization of Resource Council’s ”Oil and Gas Industry Responsibility Petition” to the Dept. of Interior and BLM available at, www.worc.org/issues/art_issues/bonding_petition.html.

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See Alspach at 105 (summarizing existing Accommodation Doctrine case law).

See Gerrity Oil & Gas v. Magness, 946 P.2d 913 (Colo.1997).


Wyoming Surface Owner Accommodation Act, Wyoming Statutes 30-5-401 through 30-5-410.


[20] See generally “Surface Owner Protection Legislation” for a summary description concerning previously implemented surface owner protection or damage compensation laws in western states excluding Utah, available at www.earthworksaction.org/SOPLegislation.cfm#STATELAWCHART.


[22] Data collected per in person & follow-up telephone conversation with Utah BLM Field Office representative August 17, 2005. BLM’s 2005 audit approximates split-estate acreage within Utah as 9,631,220 total acres.


[26] For further information regarding Congress’s directive to BLM, as well as other information concerning federal action and split-estates, best management practices, rights and responsibilities: See BLM’s split-estates website at www.blm.gov/bmp/Split_Estate.htm.