

# APPENDIX K—FEDERAL OIL AND GAS OPERATIONS ON SPLIT ESTATE LANDS

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## K.1 PURPOSE

The purpose of this appendix is to summarize the Bureau of Land Management's (BLM) procedures for considering proposals to conduct exploration and production operations on split estate federal oil and gas leases. This appendix is provided for information purposes only, and is not necessarily a complete statement of rights, obligations, or processes. This appendix is not a part of the BLM's land use plan decision for the Resource Management Plan (RMP). Any conflict with any statute or regulation is unintentional. In the event of a conflict, the statute or regulation controls. Federal oil and gas lessees and operators, and private surface owners, are advised to confer with the BLM at the time an action is proposed for BLM's consideration, in order to obtain information about the current regulations and policies that may apply to the proposal. Nothing in this appendix affects the authority of any Tribe or of the Bureau of Indian Affairs in any way. This RMP applies to federal lands as defined by the Federal Land Policy and Management Act of 1976, and does not apply to lands held in trust for any Tribe or for any individual Indian or Indians.

## K.2 DEFINITIONS

*Casual use (operations)*: “Casual use means activities involving practices that do not ordinarily lead to any appreciable disturbance or damage to lands, resources, or improvements. This term does not apply to private surface. Casual use includes surveying activities.” (Onshore Oil and Gas Order No. 1, part II).

*Lease*: “Means any contract, profit share arrangement, joint venture or other agreement issued or approved by the United States under a mineral leasing law that authorizes exploration for, extraction of or removal of oil or gas.” (Onshore Oil and Gas Order No. 1, part II).

*Lease facility or production facility*: “Production facilities means a lessee's or lease operator's pipes and equipment used on the leasehold to aid in extracting, processing, and storing oil and gas...” (64 Federal Register [FR] 32140). See also BLM Manual Section 2880 (“Mineral Leasing Act Rights-of-Way”) at page 9.

*Lease site*: “Means any lands, including the surface of a severed mineral estate, on which exploration for, or extraction and removal of, oil or gas is authorized under a lease.” (43 Code of Federal Regulation [CFR] 3160.0-5).

*Lessee*: “Means any person holding record title or owning operating rights in a lease issued or approved by the United States.” (43 CFR 3160.0-5).

*Operator*: “Means any person or entity including but not limited to the lessee or operating rights owner, who has stated in writing to the authorized officer that it is responsible under the terms and conditions of the lease for the operations conducted on the leased lands or a portion thereof.” (43 CFR 3160.0-5).

*Public lands*: “Means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management...” (Federal Land Policy Management Act of 1976, Sec. 103(e)).

*Private surface owner:* “Private Surface Owner means a non-federal or non-state owner of the surface estate and includes any Indian owner of surface estate not held in trust by the United States.” (Onshore Oil and Gas Order No. 1, part II).

*Split estate:* “Split Estate means lands where the surface is owned by an entity or person other than the owner of the Federal or Indian oil and gas.” (Onshore Oil and Gas Order No. 1, part II). “When tribal lands are held in trust or are subject to federal restrictions against alienation the Bureau of Indian Affairs is the Surface Managing Agency, but if lands are held in unrestricted fee, those lands are treated the same as private surface.” (Preamble to Onshore Oil and Gas Order No. 1 revisions, 72 FR 10322-10323, March 7, 2007).

*Surface Managing Agency:* “Surface Managing Agency means any Federal or state agency having jurisdiction over the surface overlying Federal or Indian oil and gas.” (Onshore Oil and Gas Order No. 1, part II).

## **K.3 GENERAL**

In considering and authorizing exploration and development of split estate federal oil and gas leases, the BLM prefers that the operator and split estate surface owner reach a Surface Access Agreement for proposed oil and gas operations. The BLM coordinates with both the operator and surface owner, in accordance with the requirements of Onshore Oil and Gas Order No. 1, and generally provides the surface owner’s lands the same level of resource (soil, water, vegetation, air, visual, cultural, etc.) protection as would be required on BLM-administered public lands.

“The BLM will offer the surface owner the same level of surface protection that the BLM provides on Federal surface. The BLM will not apply standards or conditions that exceed those that would normally be applied to Federal surface, even when requested by the surface owner.” (The Gold Book, page 12).

Federal mineral lessees may enter onto a privately owned surface to the extent necessary to explore and produce the federal minerals in compliance with the relevant statutes, BLM regulations, and land use designations. The BLM does not have the authority to regulate a surface owner’s use of the surface estate, but does have the authority to regulate the activities of federal mineral lessees and mining claimants. The BLM adds lease stipulations to split estate federal oil and gas leases in order to ensure that leasing decisions conform to the approved RMP for the area.

## **K.4 OPERATIONS**

### **K.4.1 Geophysical**

The BLM’s authority to permit geophysical operations is described under 43 CFR §3150.0-1:

*Geophysical exploration on public lands, the surface of which is administered by the Bureau, requires Bureau approval. The procedures in this part also apply to geophysical exploration conducted under the rights granted by any Federal oil and gas lease unless the surface is administered by the U.S. Forest Service. However, a lessee may elect to conduct exploration operations outside the rights granted by the lease, in which case authorization from the surface managing agency or surface owner may be required... The procedures of this part do not apply to... operations conducted on private surface overlying public lands unless such operations are conducted by a lessee under the rights granted by the Federal oil and gas lease...*

As BLM Handbook H-3150-1<sup>1</sup> at pages 1–2 explains:

*In those situations where Federal minerals are underlying private surface and the private surface owner's consent is obtained, the BLM is not to become involved. However, when landowner consent for access to the surface cannot be obtained for geophysical exploration operations on a Federal lease by the lease operator, the geophysical operation is to be authorized using the Sundry Notice process...<sup>2</sup>*

*When the geophysical exploration operator is the Federal lessee or designated operator of the lessee, it is to file a Sundry Notice... with the BLM and provide notification to the surface owner by certified mail that it intends to enter onto the lands and conduct lease operations. The lessee/operator must then submit proof to the BLM authorized officer that the surface owner has been notified. The lessee or operator must also submit proof to the BLM authorized officer that it has a current and adequate bond payable to the United States for use by the surface owner for damages caused during exploration operations. The authorized officer must give the surface owner 30 days to comment on the proposed action before approving the Sundry Notice.*

When a surface access agreement is reached to conduct geophysical operations on split estate lands with leased or unleased federal oil and gas, the BLM does not become involved.

The BLM will not accept a Notice of Intent (NOI) to Conduct Geophysical Operations, BLM Form 3150-4 or bond to permit entry to split estate lands with unleased federal oil and gas, since the BLM has not issued an oil and gas lease to allow for operations under 43 CFR Part 3160 (see 43 CFR 3150.0-1).

In order to conduct geophysical operations on split estate lands where a federal oil and gas lease has been issued and where an agreement with the surface owner has not been reached, the lessee or the operator must first obtain BLM authorization through an NOI that proposes entry to those lands in order to conduct geophysical operations. The lessee or designated operator must provide to the BLM a certification that a good-faith effort was made to: (a) notify the landowner prior to entry; (b) obtain a Surface Access Agreement; and (c) deliver a copy of the proposed NOI to the surface owner.<sup>3</sup> The NOI must also identify the surface owner and include the owner's name, address, and telephone number, if known. A good and sufficient bond to secure payment of applicable damages for the use and benefit of the surface owner must be provided to the BLM on BLM Form 3160-19. The lessee or designated operator must also submit to the BLM evidence of service of a copy of the bond upon the surface owner. Prior to authorizing the NOI proposing entry to the lands for which the bond has been submitted, the BLM notifies the surface owner and provides a 30-day period during which the surface owner may protest the sufficiency of the bond. If the sufficiency of the bond is protested, the BLM reviews the bond amount and determines if it is adequate. That decision by the BLM is subject to State Director review (SDR) upon a request by any adversely affected party and the State Director's decision is subject to appeal to the Interior Board of Land Appeals (IBLA).<sup>4</sup>

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<sup>1</sup> *Onshore Oil and Gas Geophysical Exploration Surface Management Requirements*. January 9, 2007.

<sup>2</sup> *In BLM Washington Office Instruction Memorandum (IM) 2009-121, "Approval of Notice of Intent to Conduct Geophysical Exploration to Federal Oil and Gas Lessee on Split Estate", dated May 8, 2009, the BLM recognized that the Sundry Notice form (BLM Form 3160-5) is an imperfect form to use for permitting of geophysical operations. This policy clarified that the BLM will "no longer require the lessee or its operator to file a Sundry Notice" for the purpose of proposing entry to federal leases where a surface owner denies access to the lessee or its operator. In its place the BLM would use the NOI form (BLM Form 3150-4).*

<sup>3</sup> *See Onshore Oil and Gas Order No. 1, Part VI.*

<sup>4</sup> *See 43 CFR §3165.3(b). See, e.g., William P. Maycock, 176 IBLA 206 (2008).*

## **K.4.2 Notice of Staking/Application for Permit to Drill**

### **Surveying and Staking Activities**

The lessee or operator is encouraged to contact the surface owner of split estate lands early in the process of planning for exploration and development of a federal lease. This facilitates early discussion about the goals and objectives of both the surface owner and operator. Communication between the lessee or operator and surface owner can reduce potential conflicts, thereby reducing misunderstandings and permit processing times.

For surveying and staking activities, “[t]he operator is responsible for making access arrangements with the appropriate Surface Managing Agency (other than the BLM and the Forest Service) or private surface owner.” (Onshore Oil and Gas Order No. 1, part III.D.2.a).

“No entry on split estate lands for surveying and staking should occur without the operator first making a good faith effort to notify the surface owner. Also, operators are encouraged to notify the BLM or the Forest Service, as appropriate, before entering private lands to stake for Federal mineral estate locations.” (Onshore Oil and Gas Order No. 1, part III.D.2.b).

Aside from surveying and staking the proposed well location, road, pipeline, and/or other lease facilities, the operator may also be required to conduct resource condition surveys of the leased lands.

“As provided in the oil and gas lease, the BLM may request that the applicant conduct surveys or otherwise provide information needed for the BLM’s National Historic Preservation Act consultation with the State Historic Preservation Officer or Indian tribe or its Endangered Species Act consultation with the relevant fisheries agency. The Federal mineral lessee has the right to enter the property for this purpose, since it is a necessary prerequisite to development of the dominant mineral estate. Nevertheless, the lessee or operator should seek to reach agreement with the surface owner about the time and method by which any survey would be conducted.” (Onshore Oil and Gas Order No. 1, part VI).

### **Onsite Inspection(s)**

On split estate lands, the onsite inspection provides the opportunity for the BLM, operator, and surface owner to evaluate and discuss the proposed well location or lease facility in the field.

“Within 10 days of receiving the application, the BLM, in coordination with the operator and Surface Managing Agency, including the private surface owner in the case of split estate minerals, will schedule a date for the onsite inspection (unless the onsite inspection has already been conducted as part of a Notice of Staking).” (Onshore Oil and Gas Order No. 1, part III.E.2.a).

“On non-National Forest System lands, the BLM will invite the Surface Managing Agency and private surface owner, if applicable, to participate in the onsite inspection. If the surface is privately owned, the operator must furnish to the BLM the name, address, and telephone number of the surface owner if known.” (Onshore Oil and Gas Order No. 1, part III.C).

At the onsite inspection, the BLM will consider applicable Best Management Practices (BMP) that would avoid or mitigate environmental impacts to natural resources. The onsite inspection provides the surface owner with the opportunity to review the proposed well location and/or lease facilities; provide information to the BLM and operator about resources, improvements, and land uses; and express preferences for BMPs to be used for lease operations.

“All parties who attend the onsite inspection will jointly develop a list of resource concerns that the operator must address in the application for permit to drill (APD). The operator will be provided a list of these concerns either during the onsite inspection or within 7 days of the onsite inspection. Surface owner concerns will be considered to the extent practical within the law.” (Onshore Oil and Gas Order No. 1, part III.C).

“The BLM will invite the surface owner to the onsite inspection to assure that their concerns are considered.” (Onshore Oil and Gas Order No. 1, part VI).

## **Required Components of a Complete Application for Permit to Drill for Split Estate Operations**

### **Description of Surface Ownership**

A description of the surface ownership (with name, address, and telephone number, if known) along with a certification must be included in the APD submitted by the operator to the BLM.

“The operator must indicate (in a narrative) the surface ownership at the well location, and of all lands crossed by roads that the operator plans to construct or upgrade, including, if known, the name of the agency or owner, phone number, and address. The operator must certify that they have provided a copy of the Surface Use Plan of Operations (SUPO) required in this section to the private surface owner of the well site location, if applicable, or that they made a good faith effort if unable to provide the document to the surface owner.” (Onshore Oil and Gas Order No. 1, part III.D.4.k).

### **Surface Access Agreement or Waiver**

For operations on leased split estate lands, the operator must undertake a good faith effort to reach a Surface Access Agreement.

“[I]n the case of actual oil and gas operations, the operator must make a good faith effort to notify the private surface owner before entry and make a good faith effort to obtain a Surface Access Agreement from the surface owner... The Surface Access Agreement may include terms or conditions of use, be a waiver, or an agreement for compensation. The operator must certify to the BLM that: (1) It made a good faith effort to notify the surface owner before entry; and (2) That an agreement with the surface owner has been reached or that a good faith effort to reach an agreement failed.” (Onshore Oil and Gas Order No. 1, part VI).

“The operator must make a good faith effort to provide a copy of their Surface Use Plan of Operations to the surface owner.” (Onshore Oil and Gas Order No. 1, part VI). The operator must also provide a copy of any revisions to the SUPO to the surface owner. If required under Onshore Oil and Gas Order No. 6 (“Hydrogen Sulfide Operations”), the BLM requires the operator to provide a copy of the Public Protection Plan to the surface owner.

“The surface use agreement between the surface owner and the operator is confidential. However, the APD Surface Use Plan of Operations must contain sufficient detail about any aspects of the agreement necessary for National Environmental Policy Act of 1969 (NEPA) documentation and to determine that the operations will be in compliance with laws, regulations, Onshore Orders, and agency policies.” (The Gold Book, page 12).

“If the BLM’s requirements conflict with provisions in the Surface [Access] Agreement, the operator or surface owner should disclose that conflict at the onsite or to the BLM in writing, and the BLM should consider those conflicts in making its final decision.” (BLM’s Split Estate Report to Congress at page 15).

Thus, to the extent terms of the agreement may conflict with Conditions of Approval (COA) to the APD, the BLM should be made aware of those terms, so that they can be considered in the BLM's final decision.

“The BLM does not review the Surface Use Agreement and does not enforce portions of the Surface Use Agreement that are not contained within the approved APD.” (BLM's Split Estate Report to Congress at page 17.)

### **Bonding In Lieu of a Surface Access Agreement or Waiver**

It is the preference of the BLM that the operator and surface owner reach a Surface Access Agreement. However, in those cases where an agreement is not reached, the BLM follows the procedural requirements in the BLM's regulations and policies. A good and sufficient bond to secure payment of applicable damages for the use and benefit of the surface owner must be provided to the BLM on BLM Form 3160-19. The lessee or designated operator must also submit to the BLM evidence of service of a copy of the bond upon the surface owner. Prior to authorizing the APD proposing entry to the lands for which the bond has been submitted, the BLM notifies the surface owner and provides a 30-day period during which the surface owner may protest the sufficiency of the bond. If the sufficiency of the bond is protested, the BLM reviews the bond amount and determines if it is adequate. That decision by the BLM is subject to SDR upon a request by any adversely affected party and the State Director's decision is subject to appeal to the IBLA.<sup>5</sup>

“If no agreement was reached with the surface owner, the operator must submit an adequate bond (minimum of \$1,000) to the BLM for the benefit of the surface owner sufficient to: (1) pay for loss or damages; or (2) as otherwise required by the specific statutory authority under which the surface was patented and the terms of the lease. Surface owners have the right to appeal the sufficiency of the bond. Before the approval of the APD, the BLM will make a good faith effort to contact the surface owner to assure that they understand their rights to appeal.” (Onshore Oil and Gas Order No. 1, part VI).

“The bond amount will be reviewed by the BLM to assure that it is sufficient based on the appropriate law.” (Preamble to Onshore Oil and Gas Order No. 1 revisions, 72 FR 10323, March 7, 2007).

If operations under an approved APD result in loss or damages that are compensable under the statutes by which the lands were patented, the surface owner may obtain judgment from a court of competent jurisdiction. The BLM will then release from the bond the amount ordered by the court to the surface owner.

### **Approval of the APD**

The BLM considers the views of the surface owner before approving the APD. The BLM must prepare an environmental record of review (43 CFR 3162.5-1(a)) to document its evaluation of potential resource impacts, including documentation of NEPA compliance.

“The BLM must comply with NEPA, the National Historic Preservation Act, the Endangered Species Act, and related Federal statutes when authorizing lease operations on split estate lands where the surface is not federally owned and the oil and gas is Federal. For split estate lands within Forest Service administrative boundaries, the BLM has the lead responsibility, unless there is a local BLM/Forest Service agreement that gives the Forest Service this responsibility.” (Onshore Oil and Gas Order No. 1, part VI).

“After the APD is approved the operator must make a good faith effort to provide a copy of the Conditions of Approval to the surface owner. The APD approval is not contingent upon delivery of a copy of the Conditions of Approval to the surface owner.” (Onshore Oil and Gas Order No. 1, part VI).

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<sup>5</sup> See 43 CFR §3165.3(b). See, e.g., *William P. Maycock*, 176 IBLA 206 (2008).

### **K.4.3 Sundry Notices**

Operations proposed by Sundry Notice that will result in additional surface disturbance or re-disturbance of previously reclaimed areas require a SUPO.

“Prior to commencing any operation on the leasehold which will result in additional surface disturbance, other than those authorized under § 3162.3–1 or § 3162.3–2 of this title, the operator shall submit a proposal on Form 3160–5 to the authorized officer for approval. The proposal shall include a surface use plan of operations.” (43 CFR 3162.3-3).

“The operator must certify on Form 3160–5 that they have made a good faith effort to provide a copy of any proposal involving new surface disturbance to the private surface owner in the case of split estate.” (Onshore Oil and Gas Order No. 1, part VIII.A).

For review of Final Abandonment Notices submitted by an operator on split estate lands, the BLM will consider the views of the surface owner.

“If applicable, the private surface owner will be notified and their views will be carefully considered.” (Onshore Oil and Gas Order No. 1, part XII).

“In cases where the Surface Managing Agency or private surface owner desires to acquire an oil and gas well and convert it to a water supply well or acquire a water supply well that was drilled by the operator to support lease operations, the Surface Managing Agency or private surface owner must inform the appropriate BLM office of its intent before the approval of the APD in the case of a dry hole and no later than the time a Notice of Intent to Abandon is submitted for a depleted production well... The Surface Managing Agency or private surface owner must reach agreement with the operator as to the satisfactory completion of reclamation operations before the BLM will approve any abandonment or reclamation. The BLM approval of the partial abandonment under this section, completion of any required reclamation operations, and the signed release agreement will relieve the operator of further obligation for the well. If the Surface Managing Agency or private surface owner acquires the well for water use purposes, the party acquiring the well assumes liability for the well.” (Onshore Oil and Gas Order No. 1, part IX.B).

“Completion of a well as plugged and abandoned may also include conditioning the well as water supply source for lease operations or for use by the surface owner or appropriate Government Agency, when authorized by the authorized officer. All costs over and above the normal plugging and abandonment expense will be paid by the party accepting the water well.” (43 CFR 3162.3-4(b)).

### **K.4.4 Emergency Operations**

“In the event of an emergency, the operator may take immediate action without prior Surface Managing Agency approval to safeguard life or to prevent significant environmental degradation. The BLM or the Forest Service must receive notification of the emergency situation and the remedial action taken by the operator as soon as possible, but not later than 24 hours after the emergency occurred. If the emergency only affected drilling operations and had no surface impacts, only the BLM must be notified. If the emergency involved surface resources on other Surface Managing Agency lands, the operator should also notify the Surface Managing Agency and private surface owner within 24 hours.” (Onshore Oil and Gas Order No. 1, Part IV.d).

## K.5 REFERENCES

- Onshore Oil and Gas Order No. 1
- Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development (“The Gold Book”)
- 43 CFR Part 3150
- 43 CFR Part 3160
- 43 CFR Subpart 3814
- BLM Wyoming–Wyoming Oil and Gas Conservation Commission Memorandum of Understanding
- BLM Handbook H-3150-1 (Geophysical Handbook)
- BLM Form 3160-019 (“Bond For Surface Owner Protection”)
- BLM Brochure: Split Estate–Rights, Responsibilities, and Opportunities
- BLM Brochure: Split Estate–Cultural Resource Requirements on Private Surface–Federal Minerals for Oil and Gas Development
- BLM-Washington Office Instruction Memorandum 2003-131 (“Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1”), April 2, 2003.
- BLM-Washington Office Instruction Memorandum 2007-165 (“Split Estate Report to Congress–Implementation of Fluid Mineral Leasing and Land Use Planning Recommendations”), July 26, 2007.
- Energy Policy Act of 2005, Section 1835 (“Split-Estate Federal Oil and Gas Leasing and Development Practices”).
- Energy Policy Act of 2005–Section 1835–A Report to Congress (December 2006).
- BLM-Washington Office Instruction Memorandum 1989-201 (“Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands”), January 4, 1989.