

Comparison of State Surface Damage Acts

1. Minimum amount of notice to landowners required

- a. Montana: 10 days written notice.
- b. Montana as amended by SB 258: 45 day written notice, which must include offer to enter into good faith negotiations regarding compensation for damages.
- c. North Dakota: 20 day written notice, which must inform landowner of rights under the Act. Failure to provide such notice makes operator potentially liable for punitive and actual damages.
- d. Oklahoma: written notice of unspecified number of days.
- e. Colorado proposed legislation: 30 days written notice
- f. Wyoming: Senate File 61: 5 days for non-surface disturbing activities and 30 days for surface-disturbing activities.

2. Point at which operator may exercise right of entry

- a. Montana: after providing required notice and obtaining necessary permits.
- b. Montana as amended by SB 258:
 - i. Operator provided at least 45 days of notice to landowner.
 - ii. Operator obtained all necessary permits from
 - iii. Operator and landowner have reached a surface use agreement addresses damages or
 - iv. If no agreement reached,
 1. Operator petitions court for appointment of appraisers to make a recommendation to the parties and court concerning the amount of damages
 2. Appraisers submit final report
 3. Court issues an order determining damages based on appraisers report.
- c. North Dakota: after providing required notice and obtaining necessary permits.
- d. Oklahoma: (similar process)
 - i. After providing required notice and obtaining necessary permits; and
 - ii. Reach written agreement regarding damages or
 - iii. If agreement not reached, operator petitions court for appointment of appraisers to make a recommendation to the parties and court concerning the amount of damages. May enter surface after petitioning for appointment of appraisers.

- e. Colorado proposal: after binding arbitration process determines damages.
- f. Wyoming:

- i. SF 60-requires

- 1. After providing required notice and obtaining necessary permits
 - 2. After good faith negotiations
 - 3. Reach surface agreement regarding damages or
 - 4. Secure consent for entry or waiver thereof or
 - 5. Executing a surety bond to secure payment of damages (arbitration to determine damages)

3. Negotiation Process

- a. Montana: informal negotiation process.
- b. Montana as amended by SB 258:
 - i. Requires good faith negotiations in an attempt to reach a written surface use agreement resolving damages issue.
- c. North Dakota: informal negotiation process.
- d. Oklahoma: duty of operator and landowner to enter into good faith negotiations to determine surface damages within five days of receipt of required notice.
- e. Colorado: Requires good faith negotiations in an attempt to reach a written surface use agreement resolving damages issue.
- f. Wyoming: none at present.
 - i. SF 60-Requires good faith negotiations to reach surface use agreement.

4. Surface Use Agreement Requirements

- a. Montana: None-no public policy encouraging resolution of damages and other issues through surface use agreements.
- b. Montana as amended by SB 258: Operator required to negotiated in good faith with landowner to reach a surface use agreement that covers the following:
 - i. Placement of roads.
 - ii. Points of entry upon the surface.
 - iii. Construction and placements of pits.
 - iv. Use and impoundment of water on the surface of the land.
 - v. Removal of plants
 - vi. Surface drainage changes caused by development.

- vii. Mitigation measures including reclamation and actions to control weeds, dust, and traffic.
- viii. Compensation for damages.
- ix. Disruption of surface owners operations.
- x. Loss or impairment of ground water wells
- xi. Any other activities or facilities necessary for oil and gas operations.

- c. North Dakota: none
- d. Oklahoma: none
- e. Colorado proposal

- i. Location of operations
- ii. Reclamation
- iii. Minimizing surface damage
- iv. Damages

- f. Wyoming: none at present

- i. SF 60 cover:

- 1. Payment for damages
- 2. Reclamation of disturbed areas
- 3. Protection of surface resources to the extent possible.

5. Incentive to Encourage non-judicial resolution of damages

- a. Montana: none

- b. Montana as amended by SB 258: modeled after North Dakota Act

- i. Requires operator to make a final written offer for damages to landowner within 30 days of filing a petition for appointment of appraisers.
- ii. If landowner rejects offer and court awards an amount of compensation greater than written offer of operator, court shall award landowner reasonably attorney fees, court costs, and interest on amount awarded from the day drilling commenced.

- c. North Dakota:

- i. Requires operator to make a written offer of settlement to landowner.
- ii. If landowner rejects offer and court awards an amount of compensation greater than written offer of operator, court shall award landowner reasonably attorney fees, court costs, and interest on amount awarded from the day drilling commenced.

- d. Oklahoma: none
- e. Colorado: none

f. Wyoming: none

6. Process if No Surface Use or Damage Agreement Reached

a. Montana:

- i. Landowner must file a lawsuit in state district court to obtain payment for damages caused by oil and operations.
- ii. Because operator can exercise right of entry prior to determination of damages by a Court, landowner may incur damages to agricultural lands for years before receiving payment from the company.

b. Montana as amended by SB 258: modeled after Oklahoma Landowner Protection Act

- i. Operator required to petition court for appointment of appraisers to estimate compensation amount for damages.

c. North Dakota:

- i. Landowner must file a lawsuit in state district court to obtain payment for damages caused by oil and operations.
- ii. Because operator can exercise right of entry prior to determination of damages by a Court, landowner may incur damages to agricultural lands for years before receiving payment from the company.

d. Oklahoma:

- i. Operator required to petition court for appointment of appraisers to estimate compensation amount for damages.

e. Colorado: binding arbitration initiated by either party

f. Wyoming: none

- i. SF 60-either party trigger dispute resolution process including mediation and arbitration.
- ii. Landowner files action for damages in district court.

7. Damages to which Landowner is Entitled

a. Montana: strict liability (rather than negligence)

- i. Loss of agriculture production
- ii. Loss of agriculture income.
- iii. Lost land value.
- iv. Lost value of improvements.

- b. Montana as amended by SB 258:
 - i. Adds lost use of and access to the surface owner's land. Example: if oil and gas operations prevent access to a portion of a field and field no longer planted, decreases fair market value of surface estate.
- c. North Dakota: strict liability (rather than negligence)
 - i. Loss of agricultural production.
 - ii. Loss of income.
 - iii. Lost land value.
 - iv. Lost value of improvements.
- d. Oklahoma: strict liability (rather than negligence) but not specified in statute but articulated by Oklahoma Supreme Court in *Davis Oil v. Cloud*, which upheld constitutionality of Act against takings and due process claims. All go to determining the fair market value of surface estate after oil and gas operations occur.
- e. Colorado: includes loss of production and income, loss of land value, and lost value of improvements.
- f. Wyoming: SF 60 includes loss of production and income, loss of land value, and lost value of improvements.

8. Appeal Rights:

- a. Montana: yes
- b. Montana as amended by SB 258
 - i. Yes but cannot delay oil and gas operations.
- c. North Dakota:
- d. Oklahoma:
 - i. Yes and cannot delay oil and gas operations IF the operator deposits the award of compensation with the clerk of court for the use of the landowner.
- e. Colorado: yes
- f. Wyoming: yes

9. Bonding-Financial Assurances cover damages to surface estate

- a. Montana: none required.
- b. Montana as amended by SB 258: none required.
- c. North Dakota: none

- d. Oklahoma: yes-\$25,000 per operator.
- e. Colorado: none
- f. Wyoming: minimum of \$2000 per well.

10. Status of reform legislation

- a. Wyoming: Senate File 60 passed Senate 25 to 3 with two legislators excused for conflicts.
 - i. Hard to understand why bill has such broad support in Wyoming Legislature if no problem that needs fixing.
- b. Colorado: Legislation has been introduced yesterday.