Findings and Recommendations

Based on the direction of House Bill 790, **(Appendix A)** passed by the 2005 Legislature, the subcommittee delved into nine areas; conducting research, listening to presentations and soliciting public comment. Following are the specific subject areas as well as findings and recommendations. Recommended legislation is included in the proposed bill draft located in **Appendix B**. The proposed brochure is in **Appendix C**.

Study the procedures and time lines for giving notice to surface owners.

Finding: Much public testimony centered around what some perceive to be a lack of informed communication between mineral developers and surface owners. Many of those commenting said communication needs to be improved.

Recommendation: The EQC should produce an informational brochure that explains, among other things, the general and legal history of split estates, the process of mineral leasing and the rights of the surface owner and mineral developer. It should be easy to reproduce, including being downloadable from the Internet. It should serve as an initial source for the owners of minerals and the surface to find more information.

Recommendation: The brochure should be required by statute to be distributed when notice of seismic exploration activity is given as well as when the mineral developer provides notice of drilling operations to the surface owner.

Finding: Many surface owners said the current 10 day minimum notice of drilling operations does not provide enough time to plan for the effects of drilling on the property. While industry representatives said the current notice time line works well, some noted that they often provide more than 10 days notice.

Finding: Wyoming and North Dakota require 30 days and 20 days notice respectively.

Recommendation: Legislation should extend the minimum notice period to 20 days and the maximum notice to 180 days. Legislation also should allow the surface owner to waive the notice requirement.

Recommendation: Legislation should clarify that a surveyor may enter the property prior to drilling operations provided existing law is followed, which includes a 15-day written notice, unless waived or not acknowledged. Legislation should state that the suggested 20-day minimum notice must be provided prior to any activity that disturbs the land surface.

Recommendation: Legislation should clarify that there is an existing penalty for violating provisions of the notice requirements.

Finding: Current law requires that "surface users" be notified of seismic exploration operations. But the law says that "surface owners" shall be notified of drilling operations. The term "surface user" is not defined in statute and could be construed to mean the owner of the land, the lessee of the land, or both. Since the name of lessees are not typically public record - while the owners are part of the record - in practice it seems that the "surface owner" is typically notified of seismic exploration operations.

Finding: While the surface owner needs to be notified of seismic and drilling operations, there are situations where an employee or a lessee may be the one most affected by the operations or is the person in charge of daily decisions on the property.

Recommendation: Legislation should change the term "surface user" in the seismic notification section of law to "surface owner" to clarify who should be noticed. Legislation also should make it the responsibility of the surface owner to notify any lessees or others who may be affected by seismic or drilling operations of the impending activity.

Study minimum provisions for surface use agreements. Elements that should be considered include road development, onsite water impoundments, quality and disposal of produced water.

Finding: Industry representatives testified that requiring surface use agreements and mandating what should be included in them infringes upon private negotiations between a surface owner and a mineral developer. They also said such provisions could limit what could be negotiated. Others advocated that surface use agreements be mandated and put in writing.

Recommendation: Based on the findings, surface use agreements should not be required.

Recommendation: The EQC should produce an informational brochure that outlines items that may be included or negotiated in a surface use agreement. The brochure should be required by statute to be distributed when seismic exploration activity is conducted as well as when the mineral developer provides notice of drilling operations to the surface owner.

Study how to address disagreements on estimated damages.

Finding: Both surface owners and mineral developers said disagreements over damages do occur, for a variety of reasons. Wyoming has a government mediation program as well as an outside organization where parties may voluntarily participate in mediation of disputes. Some states use forms of arbitration. Both Wyoming and the Bureau of Land Management allow mineral developers to post a surface bond if an agreement on damages cannot be reached.

Recommendation: Legislation should clarify that the surface owner and mineral developer shall attempt to negotiate an agreement on damages.

Recommendation: Legislation should clarify that at any point during the negotiations, the surface owner and mineral developer, upon mutual agreement, may enter into dispute resolution processes, including mediation.

Recommendation: The EQC should support the efforts of outside organizations that may offer mediation services to surface owners and mineral developers.

Study bonding requirements based on the type of activity.

Finding: From site tours in Havre, Sidney and the Decker area, it is clear that conventional natural gas, oil, and coal bed methane operations have different effects on the surface. Even different types of oil drilling operations may have unique surface impacts.

Finding: Seismic exploration requires a bond which indemnifies the owners of property against physical damages that may arise as the result of seismic exploration.

Finding: The Board of Oil and Gas Conservation requires bonds conditioned for performance of the duty to properly plug each dry or abandoned well.

Finding: There exist several current funding sources for remediation of sites that, for whatever reason, is not covered by a bond. Those sources include the Oil and Gas Production Damage Mitigation Account, 82-11-161, MCA; the Reclamation And Development Grants Program, 90-2-113 (2), MCA; and the Coal Bed Methane Protection Act, 76-15-905, MCA.

Recommendation: Based on the findings, there are no recommendations at this time.

Assess current reclamation and bonding requirements for coal bed methane operations.

Finding: Coal bed methane wells in Montana fall under the same state reclamation and bonding regulations that cover conventional natural gas wells and oil wells.

Recommendation: Based on the findings, there are no recommendations at this time.

Evaluate statutes for surface damage, coal bed methane exploration, coal bed methane operations, and coal bed methane reclamation.

Finding: Coal bed methane operations in Montana generally fall under the same state regulations that cover conventional natural gas wells and oil wells.

Finding: There exist some statutes specific to coal bed methane operations, including 82-11-175, MCA, which addresses CBM wells that produce ground water and 76-15-905, MCA, which establishes the coal bed methane protection program to compensate private landowners or water right holders for damage caused by CBM development.

Recommendation: Based on the findings, there are no recommendations at this time.

Explore approaches for balancing mineral rights and surface rights.

Finding: The legal history of split estates in this country holds that in order for the mineral right to be recognized as an asset, there must be reasonable access to it. That means the mineral owner must be allowed onto the surface. But the owner of the surface also has rights and is entitled to damages caused by the extraction of the mineral.

Recommendation: Legislation should clarify that the surface owner and mineral developer shall attempt to negotiate damages.

Recommendation: Legislation should note that at any point during the negotiations and upon mutual agreement, the surface owner and mineral developer may enter into dispute resolution processes, including mediation.

Recommendation: The EQC should support the efforts of outside organizations that may offer mediation services to surface owners and mineral developers.

Recommendation: The EQC should produce an informational brochure that explains, among other things, the general and legal history of split estates, the process of mineral leasing and the rights of the surface owner and mineral developer. It should be easy to reproduce, including being downloadable from the Internet. It should serve as an initial source of information for the owners of minerals and the surface to find more information.

Recommendation: The brochure should outline items that may be included or negotiated in a surface use agreement.

Recommendation: The brochure should be required by statute to be distributed when notice of seismic exploration activity is given as well as when the mineral developer provides notice of drilling operations to the surface owner.

Identify the relationship between federal law and state law related to split estates.

Finding: In general, when the minerals are owned by the federal government, federal regulations apply. When the minerals in Montana are owned by the state or private parties, state laws and rules apply.

Recommendation: The EQC should produce an informational brochure that explains the difference in regulations between federal and state agencies and provides contacts to find out more information.

Evaluate necessity and feasibility of post-operation reclamation requirements or alternatives, including water pits and impoundments.

Finding: State law requires the restoration of surface lands to their previous grade and productive capability after a well is plugged or a seismographic shot hole has been utilized and necessary measures to prevent adverse hydrological effects from the well or hole, unless the surface owner agrees in writing, with the approval of the Board of Oil and Gas Conservation, to a different plan of restoration.

Finding: The Montana Board of Oil and Gas Conservation considers water pits and impoundments to be regulated under this statute and the rules that enforce it.

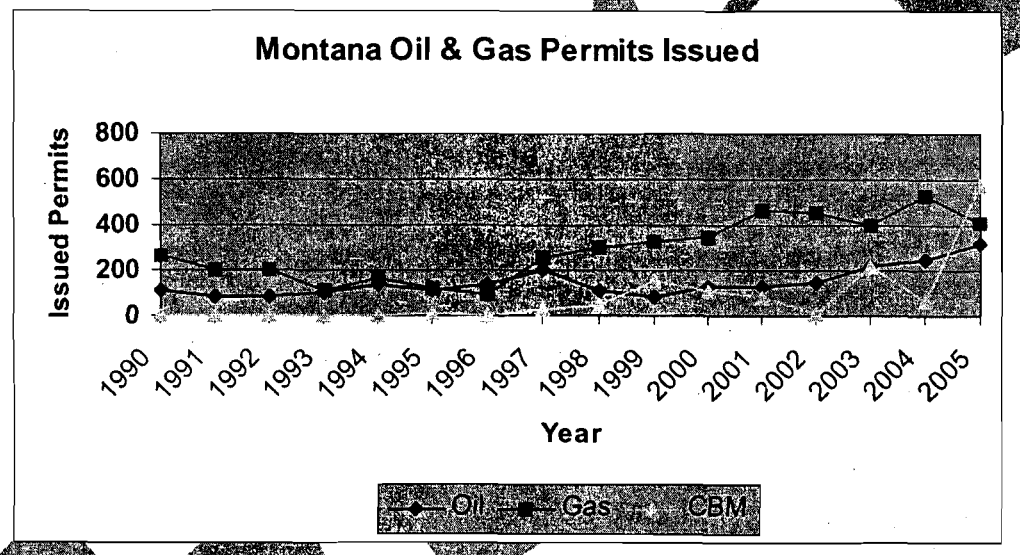
Recommendation: Based on the findings, there are no recommendations at this time.

Chapter 1 - Split Estate and Coal Bed Methane Issues Rise to the Fore

The early 1990s were mostly slow years for oil and gas drilling in Montana. It wasn't until 1997 that the Montana Board of Oil and Gas Conservation issued more than 400 drilling permits in a single year.

But new technologies, increasing demand, and the emergence of coal bed methane gas as an energy source have contributed to a resurgence in mineral development. Drilling for oil, conventional natural gas, and coal bed methane has increased in recent years. In 2005, the Board of Oil and Gas Conservation issued 1,305 drilling permits for those minerals.

The increased drilling activity likely played a role in the heightened awareness of split estate issues in Montana.



A split estate occurs when the right to develop oil or gas deposits has been severed from the surface lands. Therefore, one party will own the land and the right to use it for such things as building a house or grazing cattle, but another party owns the right to develop the underlying oil or gas deposits. Sometimes, it helps to think of a plot of land as a bundle of sticks, each stick representing a property right. The right to plow or build on the surface is one stick, the right to mine or drill for minerals is another stick.

Prior to colonization of the United States, the English recognized that reserved mineral rights were an asset. The right to future development of those minerals would mean additional revenue. As land was settled in Montana and the rest of the West under numerous Homestead Acts, the government reserved the rights to develop coal and other minerals. For more information about the history of split estates in Montana, please see **Appendix D**.

Because mineral rights were reserved under the Homestead Acts, the federal government is the largest owner of minerals. In Montana, the Bureau of Land Management owns nearly 8 million acres of surface land and administers more than 37 million acres of subsurface rights, which are typically leased. About 5 million acres of BLM oil and gas deposits are under private land. The state of Montana, which also leases mineral rights, owns nearly 5 million acres of surface lands and mineral rights, and about 1.3 million acres of only mineral rights. Private owners may sell the surface to one party and the minerals to another. Or, the

owner of an estate may sell the surface but retain the minerals. Between federal, state and private ownership of either estate, there could be any combination of ownership. For more information on the distribution of federal split estate lands, please see **Appendix E**. The breakdown of state-owned split estates is contained in **Appendix F**.

Both the surface and mineral owners in a split estate have property rights. But courts have held that the mineral right has no value unless the oil or gas can be removed from the ground. That means mineral owners have the right to reasonable use of the surface, regardless of whether or not the surface owner grants permission. However, state and federal regulations further define this relationship. Many states, including Montana, have laws that regulate how surface owners are compensated damages to the land during mineral development. To see a comparison of these laws, please see **Appendix G**.

During the 2005 Legislature, lawmakers considered several measures dealing directly or indirectly with split estates and coal bed methane. Two of the most high profile were Senate Bills 258 and 336.

Carried by Sen. Mike Wheat of Bozeman, SB258 would have required the developer to provide notice of upcoming drilling activity to the surface owner 45 days before commencement. Current law is 10 days. Among other things, the measure also would have required the mineral developer and the surface owner to enter into "good faith" negotiations to determine the compensation due the surface owner for damages to the land during development. If no agreement could be reached, the developer would have been required to post a bond.

Senate Bill 336, proposed by Sen. Lane Larson of Billings, would have created a Coal Bed Methane Reclamation Act similar to the mining laws administered by the Department of Environmental Quality. Currently, oil and gas reclamation is under the purview of the Board of Oil and Gas Conservation.

Both measures failed. (The text of both bills can be found on the Web at: www.leg.state.mt.us)

But lawmakers, recognizing that the issues brought forth in the proposals were pertinent to Montanans, did pass House Bill 790. The measure was carried in the House by Rep. Jim Peterson and in the Senate by Sen. Glenn Roush. The law created the Split Estate/Coal Bed Methane Subcommittee of the Environmental Quality Council. The bill provided $50,000 for the subcommittee to study many of the issues raised in the failed Senate bills.

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