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Editor's Headline: Split Estates, Solid Problems

I live downwind of the Laramie River Power Station, a power plant fired by coal that comprises three units and is 40 years old. The older a power plant, the more pollution—heavy metals, soot particulates—it is likely to emit. No matter its age, it always sucks a lot of water from a nearby river, which destroys larva and fish eggs; then it emits the water as vapor in the atmosphere or pumps it back, still hot, into the river, further damaging aquatic life. When you become familiar with the destruction that coal burning wreaks on human health and the environment, you have reason to worry.

So it seemed like a good thing when a company got in touch about putting a solar farm on my now-defunct wheat fields. Naturally, I was all for it. If we use wind and solar energy, burning coal becomes moot, right?

Unfortunately, the project came to nothing. I hold title to the land as "split estate" (SE), which means I own the surface rights while someone else—several someones, actually—own the subsurface as so-called mineral rights. Since the extractive industries rely on access to the minerals, I can see that a solar company would be reluctant to put expensive equipment on acreage where, perish the thought, a different industry operator may decide dig up the land to recover fossil fuels.

My position is not unusual. I've learned that 48% of land owned in Wyoming is via SE, where mineral rights have been reserved by the U.S., by the state, by a former private owner, or a combination of these. Indeed, it's difficult to find private land in Wyoming that isn't SP.

Needless to say, surface owners like myself are negatively affected by all this. And Wyoming is not alone—other western states have the problem also, which, I understand, dates back to the original land grants during Abe Lincoln's time in the White House. Some Wyoming ranchers, particularly those with large stretches of rangeland, have had to sue industry operators, with mixed results, for damages to their acreage. When the separation of surface land and mineral rights come into conflict, issues emerge during development, especially about subsequent reclamation of abandoned wells.

Litigating a case is contingent on landowners willing and able to endure the process—financially, emotionally, and otherwise—and securing an attorney who'll take the case on a contingency basis. Some ranchers, faced with uncertain reclamations and limited financial resources, find it beyond them to sue negligent industry operators.

From 1998 to 2008, the energy boom that arose from coalbed methane (CBM) extraction, resulted in over 16,000 wells being drilled in a 20,000 square miles of the Powder River Basin. It didn't take long for serious conflicts of interest to spring up. The CBM boom went bust, and problems on stalled reclamations have remained unaddressed. As the fracking industry picked up speed, its operators also abandoned leaky wells with insolence, wells that remain huge environmental hazards. Since May 2017, more than 4,140 natural-gas wells have sat orphaned in Wyoming, the primary reason being industry bankruptcy and abandonment.

In 2017 I attended a meeting of the Powder River Basin Resource Council, whose attorney was gathering information on how the extractive industries have affected Wyoming

residents. Troubling stories started to appear from ranchers, farmers, anglers, and other stakeholders. One ranching couple told of extensive CBM damage to their land when a surge of coalbed brine flooded their rangeland that destroyed all vegetation. The only thing growing there now is salt-tolerant shrubbery. Another couple told of losing calves to truckers who wouldn't wait for the livestock to get out of their way, of fifty-gallon drums filled with wastewater left on the premises, of roads hopelessly eroded and muddied by truck traffic. Others told of natural-gas contamination of stock wells in addition to their personal-use well when fracked wells started leaking. One man said he could hold a match to water coming from his kitchen spigot and the water would catch on fire. Industry operators have trucked bottled water to his household without, however, acknowledging liability. As for his livestock, the problem remains unsolved.

One of the few good outcomes prevailed in the case of Brett Sorenson, who owns a ranch along the Powder River near the town of Arvada. The surface estate is owned by Sorenson while the mineral estate is held by seven private parties—the State of Wyoming, and Sorenson, among them.

In the 1990s, Sorenson entered into a surface damage and use agreement (SUDA) that granted Pennaco (which held leases to the mineral rights), access to, and use of, his land for exploration and production of minerals. In return, Pennaco was to pay for the damages to and use of the surface estate, and to reclaim the land once operations ended.

Pennaco drilled 10 coalbed methane (CBM) wells and constructed more than five miles of road and four miles of pipeline. The company honored its contract until 2010, when it sold its interest in the leases to CEP-M, which assigned the interests to another company, High Plains Gas. After these transfers, Sorenson no longer received any payments whatsoever. In 2015, he

sued Pennaco for unpaid SUDA payments, and for damages resulting from the failure to repair water wells and reclaim the land.

Wyoming's district court determined that, because there was no exculpatory clause included in the SUDA, Pennaco was obligated to honor the agreement it had entered into with Sorenson, and that it was required to fulfill its obligations under the agreement regardless of whether it sold or assigned them to another entity. That is to say, absent an express clause that terminates its obligations, the original lessee will continue to be responsible to the lessor for covenants in the lease. (Many oil and gases leases now contain clauses eliminating contractual liability of this nature.)

The jury found that Sorenson suffered more than a million dollars in damages, and the district court entered judgment on the jury's verdict. The court also awarded Sorenson costs and attorneys' fees.

Pennaco appealed, saying the district court erred when it determined that Pennaco remained liable under the agreement for obligations accrued after it assigned its interest to a third party. Pennaco's attorneys further argued that the district court abused its discretion by adjusting Sorenson's attorneys' fees upward 2.5 times from an amount calculated by multiplying the number of hours by the hourly rate.

The Wyoming Supreme Court affirmed the lower court's decision in toto. Though Pennaco tried to escape its obligations by pushing them onto other entities, the company must pony up.

A good outcome, for once. Nevertheless, no Wyoming landowner, not even one with a small patch like mine, is exempt from potentially experiencing a Sorenson scenario—and with an adverse outcome. When industry operators lease the mineral rights on adjoining parcels, you're

under tremendous pressure to comply. If need be, they'll secure a court order to coerce compliance. Moreover, having learned their lesson, they'll include in their contracts a clause that terminates the original lessee's obligations, once its interest is sold to a third party. If the new owner declares bankruptcy, you're out of luck.

You may be tempted to skip hiring an attorney who'll read and explain the contract to you, but I wouldn't advise it. Who knows, a lawyer may be able to bargain for better terms on your behalf.

As for my own situation, even though the solar-farm effort has come to nothing, I may yet contribute my smidgen to renewables. An energy company has offered a contract for an "Option to Lease" my acreage for wind-turbine installation, to begin once it has documented compliance within all state and federal regulations.

On my land, certain limitations come into play. Notably, the turbines must be 200 feet or more away from any structure that could be damaged, were a turbine to fall. My acreage is traversed by a corridor of utility poles, on which the state of Wyoming holds an easement. Then there are roads, snow fences, a silo, a stock well, and so on. Last not least, two underground oil pipes pump their products to a transfer station, and regulations demand that the turbines be 200 feet away from the lines also. The company says, it should be able to put at least one turbine in my corner of the woods, and that it has contracts with the owners of the large parcels next to my land.

Wind-farm operators seem unconcerned over split-estate issues. Perhaps they think they can work with extractive industries, should it come to that; perhaps they believe these industries to be on their last leg anyway and unlikely to scout for new opportunities. Whatever the reason,

they wouldn’t put money on the table if they didn’t think their project would succeed. Solar-energy farms are absent in Wyoming, but wind farms do exist here and there.

Right now the 32-page contract for Option to Lease is under review with my daughter-in-law, who is an attorney. If I reach an agreement with the company, the Option will provide an annual income, however modest, from my former wheat farm. So, I’m upbeat. A few years down the road I may be watching turbine installations around here. Wouldn’t that be something?