

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D.C. 20240

April 2, 2003

In Reply Refer To:  
3100/3200 (310)P

EMS TRANSMISSION 04/03/2003  
Instruction Memorandum No. 2003-131  
Expires: 09/30/2004

To: All Field Officials and Washington Office (WO-300) Group Managers

From: Director

Subject: Permitting Oil and Gas on Split Estate Lands and Guidance for Onshore Oil and Gas Order No. 1

**Program Area:** Oil and Gas Operations and Adjudication

**Purpose:** This Instruction Memorandum (IM) clarifies the policy, procedures and conditions for approving oil and gas operations on split estate lands (that is, lands involving private or state surface overlying federal minerals). Oil and gas operations include Applications for Permit to Drill (APD) on oil and gas leases, and Sundry Notices (SN). The purpose of this IM is to clarify that in the case of split estate land, one (1) bond is required for oil and gas operations under 43 CFR 3104, and a second bond is required to satisfy Section 9 of the Stock Raising Homestead Act of December 29, 1916, (SRHA) (43 U.S.C. 299) under 43 CFR 3814 if no agreement between the surface owner and lessee or operator can be reached. The Bureau of Land Management (BLM) also recognizes its national policy of coordination and cooperation among the BLM, federal lessees or their operators and private surface owners on split estate lands.

**Policy/Action:** BLM will not consider an APD or SN administratively or technically complete until the federal lessee or its operator certifies that an agreement with the surface owner exists, or until the lessee or its operator complies with Onshore Oil and Gas Order No. 1. Compliance with Onshore Oil and Gas Order No. 1 requires the Federal mineral lessee or its operator to enter into good-faith negotiations with the private surface owner to reach an agreement for the protection of surface resources and reclamation of the disturbed areas, or payment in lieu thereof, to compensate the surface owner for loss of crops and damages to tangible improvements, if any. The lessee or its operator shall include as part of the APD or SN, where surface disturbance will occur on the private surface, the surface owner's name, contact address, telephone number, and any other relevant and necessary contact information, if known. The APD or SN shall also

include a statement by the federal lessee or its operator that it has obtained one of the following:

- (1) a surface owner agreement for access to enter the leased lands,
- (2) a waiver from the surface owner for access to the leased lands,
- (3) an agreement regarding compensation to the surface owner for damages for loss of crops and tangible improvements, or
- (4) in lieu thereof, an adequate bond, sufficient in amount, to secure payment for loss of damages to crops and tangible improvements (See Attachment 1, Self-Certification Statement from Lessee/Operator and Surface Owner Identification Form).

Prior to the approval of any APD or SN, where surface disturbance will occur on the private surface, the authorized officer will ensure compliance with these requirements.

If a good-faith effort by the federal lessee, its operator or representatives has not produced an agreement with the surface owner as described in options (1), (2), or (3) above, the authorized officer of the BLM will require an adequate surface owner bond in an amount sufficient to indemnify the surface owner against the reasonable and foreseeable damages for loss of crops and tangible improvements from the proposed operations. Crops include those for feeding domestic animals, such as grasses, hay, and corn, but not plants unrelated to stockraising. Tangible improvements include those relating to domestic, agricultural and stockraising uses, such as barns, fences, ponds or other works to improve the utilization of water, but not those associated with nonagricultural development. This surface owner bond is not part of the bond obligations under 43 CFR 3104. If the surface owner objects to the sufficiency of the bond under 43 CFR Subpart 3814, the authorized officer for BLM will determine the sufficiency of the bond needed to indemnify the surface owner for the reasonable and foreseeable damages. Such a bond must be provided on Form 3814-1 (See Attachment 2, Bond for Mineral Claimants, OMB No. 1004-0110).

In the context of the bonding for reasonable and foreseeable surface damages to crops and tangible improvements from the proposed operations, BLM has prepared guidance for the federal lessee and its operator. The guidance is contained in Attachment 3 (Bond Processing Directions) which identifies what a Subpart 3814 bond is, the form of the bond, acceptable sureties and the approval and appeal procedures for the amount and sufficiency of the bond. In the instances where the lessee or its operator cannot reach agreement with the surface owner and provides a surface owner bond, the federal lessee or its operator must provide the BLM the original bond and evidence of service of process of a copy of the bond on the surface owner, and evidence that the surface owner was notified of its right to object to the sufficiency of the bond in accordance with the procedures under 43 CFR 3814. After this evidence is provided, the BLM will

independently notify the surface owner, in writing, of its rights under the procedures regarding protests and appeals to the sufficiency of the bond. The 3814 bond will be released after compensation of damages to crops and tangible improvements to the surface owner has occurred and the mineral lessee or operator requests release of the bond. BLM will make a reasonable effort to contact the surface owner and confirm that compensation has been received prior to release of the bond.

On-site visits with the lessee for the purposes of planning the development of the oil and gas resources on the lands are an important opportunity for coordination and cooperation with private surface owners. When scheduling on-site visits with the lessee for the purposes of planning the development of the oil and gas resources, the BLM will invite the surface owner to participate in the on-site visits conducted on their land. Within the context of the 15-days specified in Onshore Oil and Gas Order No. 1, the BLM will make a good-faith effort to schedule the on-site visit at a time convenient to the surface owner and the federal lessee or its operator.

The Surface Owner Agreement between the surface owner and the lessee or its operator is not to be submitted as part of the APD or SN, since it may contain confidential information regarding the agreement between the surface owner and the lessee or operator. However, a completed self-certification statement (Attachment 1) must be part of the application package. The surface owner can at the time of the on-site visit request that specific items be made part of the Surface Use Program, which is described in Onshore Oil and Gas Order No. 1. The authorized officer may include those conditions in the Surface Use Program if the authorized officer deems them beneficial to the development of the lease and consistent with conditions of approval that BLM would employ on the public lands it manages. Those conditions, if they are part of the Surface Use Program, become enforceable under the APD or SN. Non-compliance with the Surface Use Program by the lessee or its operator may result in an incident of non-compliance and assessments under the Oil and Gas Leasing Reform Act of 1987. Relief from non-compliance with conditions of the Surface Owner Agreement that are not part of the APD or SN cannot be obtained by the same process.

**Background:** The Bureau administers lands that are referred to as split estate on which the surface of the land has been patented, while the mineral interests are retained by the United States. Under the Mineral Leasing Act of 1920, the United States grants the right to develop the oil and gas resources to third parties. Onshore Orders have the force and effect of Departmental regulations when those orders were adopted during the Notice and Comment procedures of 5 USC 553. Onshore Oil and Gas Order No. 1 – Approval of Operations on Onshore Federal and Indian Oil and Gas Leases 48 FR 48916 (1983), requires that lessees or their operators enter into access agreements with private surface owners. In the event that there is no agreement between the surface owner and the lessee

or operator, the lessee or operator may comply with provisions of 43 CFR 3814. Therefore, this order extends the requirement of 43 CFR 3814 to all split estate lands. This IM reemphasizes 43 CFR 3814 extension to all split estate lands.

Patents issued under the SRHA reserve coal and other minerals, including oil and gas. These patents provide for the right of a mineral entrant to prospect for, mine and remove reserved minerals. They also provide that any qualified mineral entrant “shall have the right at all times to enter upon the lands ... provided he shall not injure, damage, or destroy the permanent improvements ... and shall be liable to and shall compensate the entryman or patentee for all damages to crops on the land...”

Federal lessees and operators have the right to extract oil and gas from reserved mineral deposits on such patented land, and may use as much of the surface as is reasonably required for all purposes incident to the “mining or removal” as long as one of the four following conditions is met:

- (1) Surface Owner Agreement;
- (2) Written consent or waiver for access to the leased lands is obtained from the private surface owner;
- (3) Payment for loss or damages to crops and other tangible improvements; or
- (4) Execution of a good and sufficient bond or undertaking to the United States, in an amount not less than \$1,000.

Since at least 1990, Bureau policy considered a SRHA entryman or patentee fully protected under the terms of the standard oil and gas lease bond, which is required before any surface disturbing activities can be authorized. State offices were directed to release any SRHA bonds so long as the coverage under an acceptable oil and gas bond was in place. In 2000, the Wyoming State Office requested information from the Solicitor, Rocky Mountain Region, on whether BLM needed to require two bonds, one under 43 CFR 3104 covering oil and gas operations and one under 43 CFR 3814 to satisfy Sec. 9 of the SRHA. The Assistant Regional Solicitor concluded that, given the regulations and in the absence of written consent/waiver or agreement, two bonds were required. The Regional Solicitor’s memorandum (See Attachment 4) was reviewed by the Solicitor and Washington Office leasing staff. The BLM is in agreement with the regional Solicitor’s conclusions. BLM’s prior guidance, contained in Bureau Handbook H-3104-1, concerning the use of 3814 bonds is hereby rescinded.

**Time Frame:** This IM is effective immediately.

**Budget Impact:** Implementation of the new policy in this IM can be accommodated under existing budget allocations.

**Manual/Handbook Sections Affected:** These requirements will be incorporated into the updated versions of BLM Manual 3160-1, BLM Handbook H-3104-1, and Onshore Oil and Gas Order No. 1.

**Coordination:** This IM was coordinated with the Office of the Solicitor.

**Contact:** For questions, call Jim Burd at (202) 452-5017; or for issues specific to adjudication of bonds call Jay Douglas, at (202) 452-0336.

Signed by:  
Kathleen Clarke  
Director

Authenticated by:  
Barbara J. Brown  
Policy & Records Group, WO-560

4 Attachments:

- 1- Self-Certification Statement from Lessee/Operator (1 p)
- 2- Form 3814-1 Bond for Mineral Claimants (2 pp)
- 3- Bond Processing Directions (4 pp)
- 4- Rocky Mountain Regional Solicitor's Opinion, March 2, 2000 (5 pp)

**SELF-CERTIFICATION STATEMENT  
FROM LESSEE/OPERATOR**

**SURFACE OWNER IDENTIFICATION**

Federal or Indian Lease No. \_\_\_\_\_

I hereby certify to the Authorized Officer of the Bureau of Land Management that I have reached one of the following agreements with the Surface Owner; or after failure of my good-faith effort to come to an agreement of any kind with the Surface Owner, have provided a bond and will provide evidence of service of such bond to the Surface Owner:

- 1) \_\_\_\_\_ I have a signed access agreement to enter the leased lands;
- 2) \_\_\_\_\_ I have a signed waiver from the surface owner;
- 3) \_\_\_\_\_ I have entered into an agreement regarding compensation to the surface owner for damages for loss of crops and tangible improvements.
- 4) \_\_\_\_\_ Because I have been unable to reach either 1), 2), or 3) with the surface owner, I have obtained a bond to cover loss of crops and damages to tangible improvements and served the surface owner with a copy of the bond.

Surface owner information: (if available after diligent effort)

Surface Owner Name: \_\_\_\_\_

Surface Owner Address: \_\_\_\_\_

Surface Owner Phone Number: \_\_\_\_\_

Signed this \_\_\_\_\_ -- day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
(Name of lessee/operator)

I (Surface Owner) accept \_\_\_\_\_ do not accept \_\_\_\_\_ the lessee or operator=  
Surface Owner Agreement under 1, 2, or 3 above.

Signed this \_\_\_\_\_ -- day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
(Signature of Surface Owner if an agreement has been reached)

Attachment 1

## **BOND PROCESSING DIRECTIONS**

### **General:**

For patents issued subject to the provisions of the Stock-Raising Homestead Act (SRHA) of December 29, 1916 (39 Stat. 864; 43 U.S.C. 299), mineral entrymen may need to file a bond with the Bureau of Land Management in order to mine and remove the deposits underlying the private surface. Onshore Oil and Gas Order No. 1, extends these provisions to all split estate situations. For oil and gas lessees and operators, such activities include those necessary or incidental to carry out exploration, development or production. A bond is required when the mineral entryman is unable to secure a written consent or waiver or enter into an agreement to pay compensatory damages. The right of the mineral entryman to enter, reenter and occupy as much of the surface as is required for activities reasonably incidental to extraction and removal of the mineral deposits is a specific provision of Sec. 9 of the SRHA. Because the mineral estate is considered the dominant estate, any other type of patent which reserves any portion of the mineral estate to the United States is deemed to include this right of entry. The SRHA also provides that the mineral entryman shall not injure, damage, or destroy permanent improvements of the homestead entryman or land owner and shall be liable to and shall compensate the homestead entryman or land owner for all damages to the crops on the land. (See 43 U.S.C. 299(a) as implemented by 43 CFR 3814(c)). The BLM encourages its lessees to communicate and cooperate with the landowner to obtain their consent to the development and extraction of federal minerals. When those efforts fail, a bond will be required.

### **When is a 3814 bond required?**

A 3814 bond shall be required whenever a lessee/operator files an Application for Permit to Drill (APD) and the lessee/operator fails to include a copy of consent or waiver signed by the entryman/land owner; or when the lessee/ operator fails to include certification of an agreement to pay compensatory damages properly executed by both the lessee/operator and the entryman/land owner.

An increase to a 3814 bond shall be required whenever a lessee/operator files a Sundry Notice (SN), if the SN expands the area of private surface disturbance and the loss to crops or permanent improvements increases.

### **Can the 3814 bonding requirement be met by increasing the lessee/operator=s oil and gas lease bond?**

No. Departmental regulations at 43 CFR 3814.1(c) state that, in lieu of a consent/waiver or agreement, a bond on Form 3814 of no less than \$1,000 shall be required. The Secretary of the Interior (and any of his or her designees) is without authority to disregard his or her own duly promulgated regulations on the SRHA.

### **Can the 3104 bonding requirement be met by a 3814 bond?**

No. Departmental regulations at 43 CFR 3104.1(a) state that prior to any surface disturbing activities related to drilling operations, the lessee, operating rights owner (sublessee), or operator, shall submit an individual, statewide or nationwide bond of no less than the minimum amount for such bond to assure BLM that all lease obligations will be performed. The 3814 bond does not cover plugging and abandonment, reclamation or compliance with lease terms.

### **What form must be used to file a 3814 bond?**

A Form 3814 Mineral Claimants Bond shall be used for all bonds submitted under 43 CFR 3814.1.

### **What is the amount of a 3814 bond?**

A 3814 bond shall not be less than \$1,000. This is the minimum, not the maximum amount of the bond. The amount shall be sufficient to indemnify the entryman or landowner for projected loss of crops and damage to tangible improvements and will be determined by the field office manager only if the surface owner objects to the bond amount. The authorized officer shall take into account the projected area of disturbance, the probable life of the well or wells needed to develop the oil and gas, and an average annual inflation rate of 5 percent.

### **Where is a 3814 bond filed?**

A 3814 bond must be filed in the proper State Office. It shall be entered into the Automated Bond and Surety System within 5 days of receipt and maintained of record in the appropriate lease casefile. The State Office fluid minerals bond coordinator will promptly notify the appropriate field office of the filing, whether the bond is acceptable on its face and that any additional information required by the regulations has also been filed. The authorized officer must verify the bond amount as sufficient in case of protest. The acceptance decision cannot be written before the end of the 30-day protest period. The protest period begins when the entryman/land owner receives a copy of the bond. A copy of the acceptance decision will be sent to the lessee/operator, the landowner (by certified mail) and to the field office (by electronic mail).

A copy of the bond must be served on the entryman/land owner by the lessee/operator. A copy of the certified mail card showing receipt and any accompanying letter or material must be sent to the field office authorized officer. The APD or Sundry Notice is not complete until the authorized officer receives this copy, all else being regular.

### **What kind of surety is acceptable for a 3814 bond?**

Under the regulations at 43 CFR 3814.1(c), two competent sureties (individuals) or a bonding company are the only acceptable sureties for a 3814 bond.

### **What does Acompetent surety@ mean?**

A competent surety is one that is financially capable of paying the face amount of the bond. Regulations at 43 CFR 3814.1(c) require that, if individual sureties are used to secure the bond, the following also be filed at the same time with authorized officer B

- (1) Affidavits of justification by the sureties;
- (2) A certificate by a judge or clerk of the court of record, a U.S. district attorney, a U.S. commissioner, or a U.S. postmaster as to the identity, signatures, and financial competency of the sureties;
- (3) Evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

The above-referenced materials shall be filed with the bond in the proper State Office. The State Office fluid minerals bond coordinator will send a copy of item No. 3 to the field office to document the well file.

If a corporate surety is used to secure the bond, it must be qualified to underwrite Government bonds. Qualified corporate sureties are listed on Department of the Treasury=s Circular 570. The circular is available online at B

<http://fms.treas.gov/c570/c570.html>

The circular is also published in the Federal Register on or about each July 1. Updates are also available online or through the Federal Register. You can sign up for automatic notification at the above-listed website.

### **What if the homestead entryman/landowner does not agree with the bond amount?**

The entryman or landowner has 30 days from the date he or she receives a copy of the bond within which to object (protest) to the authorized officer. The bond will not be approved or accepted before the end of this period.

If a timely objection (protest) is received, the authorized officer will immediately evaluate it. If the authorized officer determines that the bond amount is not sufficient, a certified notice will be sent to the mineral entryman disapproving the bond, stating an acceptable amount, and stating the appeal rights of the mineral entryman.

If the authorized officer determines that the bond as filed is sufficient, the State Office fluid minerals bond coordinator will send a certified notice disallowing the objection (protest) to the homestead entryman or landowner and stating his or her appeal rights. The bond will be accepted concurrently. An electronic copy of this decision will be sent to the field office authorized officer to document the well file. The APD or SN shall also be approved concurrently, all else being regular.

**What if the homestead entryman/landowner appeals the decision to disallow his or her objection?**

The appeal must be filed in the proper State Office as that is the office that wrote the decision. The State Office fluid minerals bond coordinator will notify the field office authorized officer who will forward to the bond coordinator the originals of all appropriate materials. Appropriate materials include everything used to determine the bond amount, and all correspondence had with the lessee/operator or entryman/landowner about the bond.

The filing of an appeal does not stay approval of the APD or SN. Operations may continue during the pendency of the appeal.

**What data entry must be made for a 3814 bond?**

Data entry in the Automated Bond & Surety System will be sent by separate IM.

**When will the 3814 bond be released?**

The 3814 bond will be released after compensation of damages to crops and tangible improvements to the surface owner has occurred if any damages actually resulted from the lessee or operator's actions and the lessee or operator requests release of the bond. BLM will make a reasonable effort to contact the surface owner and confirm that compensation has been received prior to release of the bond.