

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

300 EAST 18TH STREET • POST OFFICE BOX 346

CHEYENNE, WYOMING 82003-0346

TELEPHONE: 307/632-5105

TELEFAX: 307/637-3891

WWW.BUDDFALEN.COM

KAREN BUDD-FALEN³

FRANKLIN J. FALEN²

BRANDON L. JENSEN¹

¹ ALSO LICENSED IN CO

² ALSO LICENSED IN NE, SD & ND

³ ALSO LICENSED IN NM & ID

BETHANY A. GROSS⁵

TERESA SLATTERY⁴

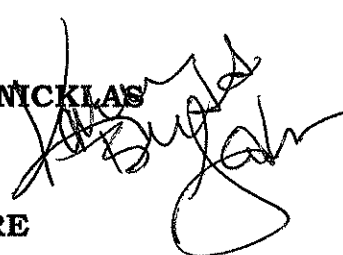
⁵ ALSO LICENSED IN MT

⁴ ONLY LICENSED IN IL

MEMORANDUM

TO: BOWMAN-SLOPE SOIL AND WATER CONSERVATION
DISTRICT LAND USE PLAN STEERING COMMITTEE

VIA: EMAIL
bowsloscd@ndsupernet.com

FROM: KAREN BUDD-FALEN & CONNER NICKLAS
BUDD-FALEN LAW OFFICES, LLC 

THROUGH: BRENDA YOUNKIN & ABBY MOORE
Y-2 CONSULTANTS

DATE: SEPTEMBER 12, 2017

RE: OVERVIEW OF FEDERAL RECLAMATION
REQUIREMENTS

This memorandum focuses on the legal authority and guidance that is applicable to pipeline reclamation on federal lands. There are no federal requirements or regulations that apply to pipeline reclamation on private lands. Reclamation of lands disturbed from surface mining activities is regulated by the Surface Mining Control and Reclamation Act. 30 U.S.C. § 1201. In contrast, the reclamation of oil and gas lands is not regulated through a uniform federal act. State oil and gas conservation commissions, boards, or divisions regulate reclamation on private and state lands. In North Dakota, the pertinent authority for private lands reclamation would be the North Dakota Industrial Commission ("Commission"). The Commission codified their reclamation standards in the North Dakota Agency Code. See N.D.A.C. § 43-02-03, *et seq.*

I. RECLAMATION ON BLM PIPELINE RIGHTS OF WAY

The Bureau of Land Management ("BLM") manages energy development, including leasing, permitting, inspection, and enforcement for 256 million surface acres and 700 million sub-surface acres of mineral estate in the United States. The Mineral Leasing Act of 1920 (30 U.S.C. § 181-287), amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, PL 100-203, among

other things, authorizes the Secretary of the Interior to regulate all surface-disturbing activities associated with any lease and to impose mitigation and reclamation measures in order to “conserve surface resources.” Chapter six of the BLM’s Gold Book outlines the reclamation standards expected by the BLM and the USFS. The Gold Book, formally titled Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development is the comprehensive guidance document for oil and gas development on public lands.

The BLM is also required by the Federal Land Policy and Management Act of 1976 (“FLPMA”) to ensure that authorized actions are carried out in a manner that does not result in “permanent impairment of the productivity of the land or the quality of the environment.” In order to promote a consistent and science-based approach to reclamation, protocols identify minimum information and operational requirements and performance-based criteria that are expected to satisfy BLM’s responsibilities under FLPMA and North Dakota’s Public Land Health Standards. BLM regulations established in 43 C.F.R. § 3160 (i.e., Onshore Oil and Gas Order Number 1) require that a reclamation plan be submitted with the Surface Use Plan in the Application for Permit to Drill (“APD”). The Onshore Order Number 1, Section XII. B., in referencing Section III.D.4.j., requires that surface reclamation plans must be designed to return the disturbed areas to productive use and meet the objectives of the land and resource management plan. Title 43 C.F.R. § 2800 describes requirements for surface use plans and associated reclamation plans for rights-of-way. The reclamation plans would be designed to return the disturbed area to a condition that would meet the objectives of the applicable Record of Decision/Resource Management Plan.

A. Specific to Wells

A reclamation plan is included in the Surface Use Plan of Operations (“SUP”). The SUP is a component of an application for permit to drill to the BLM. The SUP should discuss plans for both interim and final reclamation. Reclamation is required of any disturbed surface that is not necessary for continued production operations. The operator should submit a new reclamation plan with the Notice of Intent to Abandon (“NIA”) or Subsequent Report Plug and Abandon (“SRA”) using the Sundry Notices and Reports on Wells Form 3160-5 when abandoning wells and other facilities that do not have an approved reclamation plan or when the operator would like to update the plan. See BLM and US Dept. of Ag., Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development, 44 (4th. Ed., 2007) (hereinafter “Gold Book”).

B. Specific to Pipelines/Flowlines

As mentioned above, the “Gold Book” is the BLM guide for oil and gas development. As per the Gold Book, some examples of reclamation standards specific to pipelines would include:

Pipeline routes and roads should be co-located as much as possible to reduce reclamation needs and impacts to other resources. Pipeline trenches are to be compacted during backfilling and must be maintained to correct backfill settling and prevent erosion. Reclamation involves placing fill in the trench, compacting the fill, regrading cut-and-fill slopes to restore the original contour, replacing topsoil, installing temporary waterbars only where necessary to control erosion, and revegetating in accordance with a reclamation plan. Waterbars and other erosion control devices must be maintained and repaired as necessary.

Following successful revegetation, surviving water-bars must be flattened to blend with the slope and then revegetated. If berms of topsoil were originally placed over the trench to accommodate settling, the surviving berms should also be flattened to blend with the surrounding landform and revegetated.

Final abandonment of pipelines and flowlines will involve flushing and properly disposing of any fluids in the lines. All surface lines and any lines that are buried close to the surface that may become exposed due to water or wind erosion, soil movement, or anticipated subsequent use, must be removed. Deeply buried lines may remain in place unless otherwise directed by the authorized officer.

Gold Book, at 45. The Gold Book is the only inclusive guidance for reclamation on federal lands.

C. Bonding for BLM Pipeline Rights-of-Way

The regulations concerning rights-of-way for land managed by the BLM are published in title 43 of the Code of Federal Regulations, part 2800. The regulations specifically authorize granting rights-of-way for pipelines. 43 C.F.R. § 2881.5. The regulations specifically consider bonding for pipelines, the purpose of which is:

to cover any losses, damages, or injury to human health, the environment, and property incurred in connection with your use and occupancy of the right-of-way or TUP [temporary use permit] area, including terminating the grant or TUP, and to secure all obligations imposed by the grant or TUP and applicable laws and regulations.

43 C.F.R. § 2885.11.

However, bonding is not a mandatory requirement to secure a BLM pipeline right-of-way. Instead, the regulations only require complying with this bonding requirement "[i]f the BLM requires" and it is a term of the right-of-way grant. In theory, therefore, there would be funds to provide for reclamation since the bond would cover damage to the environment or property under the definition above. Additionally however, the regulations do not contemplate any monetary value of the bond, except that it must cover those damages discussed above (losses, damages, injury, and termination of the grant).

If the well and associated facilities are covered by an individual lease bond, the period of liability on that bond can be terminated once the final abandonment has been approved. The principal (operator or lessee) can request termination of the period of liability from the BLM State Office holding the bond. If the well is covered by a statewide or nationwide bond, termination of the period of liability of these bonds is not approved until final abandonment of all activities conducted under the bond have been approved. The operator may request termination of the bond on the Final Abandonment Notice. Gold Book, 49. This creates a certain level of accountability for proper abandonment since the termination of the bond is tied to the approval of abandonment.

D. Bonding for National Forest Special Use Permits

The regulations concerning National Forest special use permit are more limited and general in nature. The regulations authorize granting of special use permits for pipeline easements. 36 C.F.R. § 251.53(e). The Forest Service regulations also contemplate bonding, but again, only if the officer authorizing the right-of-way requires bonding for the grant. 36 C.F.R. § 251.56(e) ("An authorized officer may require the holder of a special use authorization ... to furnish a bond or other security to secure all or any of the obligations imposed by the terms of the authorization or by any applicable law, regulation or order."). Therefore, bonding is contemplated and allowed as a requirement for all special use permits, not just pipeline easements. Finally, the National Forest regulations do not set out specific terms for pipeline easements, such as being liable for damages, removal, and restoration.

II. ISSUES FOR BOWMAN-SLOPE LAND USE PLAN

Given these legal requirements the policies that the Bowman-Slope land use plan may include are (but are not limited to):

- A.** Appropriate seed mix for reseeding
- B.** Fencing
- C.** Retention and use of water ponds or sources (if any) are developed
- D.** Amount of time livestock are removed from area once reseeding occurs
- E.** Issues regarding the intersection of federal reclamation requirements and private lands
- F.** Continued use of access roads to pipelines or wells once reclamation is completed.

Should you have any questions, please do not hesitate to contact us.