The following discussion is based on questions posed at a series of Extension educational sessions held in western North Dakota during January and February, 2012.

*This discussion is not a substitute for legal advice. Persons are urged to seek professional counsel for answers to their specific questions.*

**SURFACE ISSUES**

**Can a surface owner stop a mineral owner or mineral developer from developing minerals?**

No. The common practice is for the mineral owner to lease to a mineral developer who then has the legal right to pursue developing the mineral interests — again, without needing permission of the surface owner. This legal concept that the surface owner cannot stop the mineral owner is sometimes described as “the mineral estate dominants over the surface estate”.

**What is being done for the people who live on the land as surface right owners and have no mineral rights?**

North Dakota Legislature has enacted statutes requiring the mineral developer to compensation for surface damages; able to regain mineral ownership (as mentioned in other response)

**What are the rights of the surface owner?**

North Dakota statutory law requires a mineral developer to compensate the surface owner for ALL damages to the surface. Following the 2011 Legislative Session, North Dakota law defines two types of surface damages (N.D.C.C. chap. 38-11.1). One statute addresses “damages and disruption”; the second statute addresses “loss of production.”

- Payments for “damages and disruption” are intended to compensate the surface owner for “lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations.” The statute also states that the “surface owner must be compensated for harm caused by exploration only by a single sum payment.”
- Payments for “loss of production” are intended to compensate the surface owner for “loss of agricultural production and income caused by oil and gas production and completion operations”. These damages “must be paid annually” (“unless the surface owner elects to receive a single lump sum payment”).

The mineral developer's compensation to the surface owner is to be negotiated so surface owners need to be ready to negotiate with the mineral developer.

The mineral developer must provide notice at least 20 days before initiating operations and include a settlement offer as part of the notice. The surface owner is entitled to compensatory/actual damages and possibly punitive damages if the mineral developer fails to provide the 20-day notice. Apparently if the surface owner and mineral developer do not reach an agreement as to compensation, the developer can proceed with mineral development after the 20 days. The parties will need to litigate if they are unable to reach an agreement. For this reason, the 2011 North Dakota Legislature authorized the North Dakota Department of Agriculture to provide a mediation service to assist in negotiating a resolution without litigation. See N.D.C.C. 6-09.10-04.

**Who is responsible for cleaning up well sites and abandoned wells when production stops?**

The mineral developer/oil company is responsible for “cleaning up” a well site and plugging an abandoned well - - with oversight by the Industrial Commission.

**Any thoughts on “fracking” as it is being done in North Dakota?**

Fracturing or “fracking” is the technological process used by oil companies to loosen the oil-holding geological strata so the oil can move to the well bore and be brought to the surface. Fracking is widely used in North Dakota at this time. There is concern that fracturing can damage or contaminate underground water sources. Accordingly, the North Dakota Industrial Commission (and to a lesser extent, the North Dakota Department of Health) oversees the industry’s use of fracting.
Much of North Dakota's oil production at this time is occurring about 10,000 feet below the surface – well below the depths at which we are retrieving water. The general practice is that the vertical bore (about 10,000 feet) is cased so ground water does not seep into the well and fluids from the well do not seep into the groundwater. The horizontal bore at the bottom of the well (often 10,000 feet long) is not cased. This is where the oil is retrieved; this also is where the fracking occurs.

The depths at which oil is found in North Dakota, careful casing of the vertical portion of the well and careful management of "production water" that is brought to the surface at the well site are minimizing risks associated with fracking. Mineral developers are responsible for conducting -- and state government is responsible for overseeing -- fracking practices.

**Is there anything a water user should consider doing at this time to minimize future concerns about water quality?**

It has been suggested that surface owners, for example, have their well water analyzed before any mineral exploration and development occurs so the data can be used as a benchmark against which subsequent analyses can be compared to determine if intervening mineral activities have impacted the water source.

**Mineral development is described as requiring extensive quantities of water for drilling, fracking and production; fracking is the major water use. How is this critical issue being managed?**

North Dakota owns the water in the state; this includes surface water, groundwater, and water flowing in interstate rivers while the water is in North Dakota. All water uses in North Dakota are either with implied permission (e.g., well water for household purposes or water in a stock pond for livestock production) or explicit permits from the state (for irrigation, municipal, or industrial uses – including mineral development).

The State Water Commission is responsible for granting water permits. Mineral developers who use water or entities that provide water to mineral developers need a water permit for an industrial use.