

## **CHAPTER 38-18**

### **SURFACE OWNER PROTECTION ACT**

#### **38-18-01. Short title.**

This chapter must be known as the Surface Owner Protection Act.

#### **38-18-02. Legislative findings.**

1. The legislative assembly finds that it is necessary to exercise the police power of the state as described in this chapter to protect the public welfare of North Dakota which is largely dependent on agriculture and to protect the economic well-being of individuals engaged in agricultural production. This finding recognizes that the people of North Dakota desire to retain a strong agricultural economy and that North Dakota currently produces three percent of the food for the entire nation.
2. Furthermore, the legislative assembly finds that there is an abundance of minerals in North Dakota which can be used for the production of electricity, synthetic natural gas, and other forms of energy, and that energy produced from North Dakota minerals is needed by the nation and North Dakota is capable of producing up to two and one-half percent of the nation's energy needs if the minerals found here are fully developed.
3. The legislative assembly further finds that mining development may temporarily interfere with portions of the agricultural economy.

#### **38-18-03. Purpose and interpretation.**

It is the purpose of this chapter to provide the maximum amount of constitutionally permissible protection to surface owners from the undesirable effects of development, without their consent, of minerals underlying their surface. This chapter is to be interpreted in light of the legislative intent expressed herein. The provisions of this chapter shall be interpreted to benefit surface owners, regardless of how the mineral estate was separated from the surface estate and regardless of who executed the document which gave the mineral developer the right to conduct mining operations on the land.

#### **38-18-04. Applicability.**

This chapter applies to and places requirements on the holder of the mineral estate, on the mineral developer, and on the public service commission regardless of the means used to separate the mineral estate from the surface estate.

#### **38-18-05. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Agricultural production" means the production of any growing grass or crop attached to the surface of the land, whether or not the grass or crop is to be sold commercially, and the production of any farm animals, including farmed elk, whether or not the animals are to be sold commercially.
2. "Disturbed" means any alteration of the topsoil of the land whether the alteration is for the purpose of exploring for coal or for the purpose of carrying out an actual mining operation.
3. "Mineral developer" means the person who acquires at least seventy-five percent of the mineral rights or a lease of at least seventy-five percent of the mineral rights for the purpose of extracting or using the mineral for nonagricultural purposes.
4. "Mineral estate" means an estate in or ownership of all or part of the minerals under a specified tract of land.
5. "Mineral lease" means any lease which purports to convey the minerals or rights relating to the minerals under a specified tract of land separate from the surface, and any other type of lease which gives or conveys rights to minerals.
6. "Mineral owner" means any person or persons who presently own the mineral estate, their successors, assigns, or predecessors in title, under a specified tract of land by

means of a mineral deed, or by an exception or reservation in the deed, grant, or conveyance of the surface, or by any other means whatsoever.

7. "Minerals" means coal.
8. "Mining operation" means any type of activity, the aim of which is to discover the presence of minerals, or to remove the minerals so discovered from their original position on or in the land by any means whatsoever.
9. "Surface estate" means an estate in or ownership of the surface of a particular tract of land.
10. "Surface owner" means the person or persons who presently have valid title to the surface of the land, their successors, assigns, or predecessors in title, regardless of whether or not a portion of the land surface is occupied for a residence.

**38-18-06. Written notice and consent required before permit to surface mine land may be issued.**

1. Before the public service commission may issue a permit to surface mine land, the mineral developer shall give the surface owner written notice of the type of land disturbance or mining operation contemplated by the mineral developer. This notice must sufficiently disclose the plan of work and operations to enable the surface owner to evaluate the extent of the land disturbance on the surface owner's use of the property. The notice must be accompanied by an enlarged United States geological survey topographic map showing the specific locations to be covered by the mining operation. The notice and map must be submitted to the surface owner at least thirty days before the application for a permit to surface mine is to be submitted.
2. The public service commission may not issue a permit to surface mine land unless the permit application is accompanied by statements of consent, executed by each surface owner whose land is included within the permit area, to have surface mining conducted upon the surface owner's land. The requirement established by this section is in addition to the requirements of chapter 38-14.1.
3. A certified copy of a mineral lease executed by the surface owner in favor of the mineral developer proposing the mining project or the developer's agent, or a certified copy of a surface lease executed by the surface owner in favor of the mineral developer proposing the mining project or the developer's agent, if filed with the application for a permit to surface mine, may be used to fulfill the subsection 2 requirement of a statement of consent to have surface mining conducted. Any previously executed mineral lease or surface lease in favor of the mineral developer, the developer's successors, assigns, or predecessors in title runs with the land and is binding on a subsequent mineral owner or owners or surface owner or owners, as the case may be.
4. If the mineral developer desires to have the developer's permit amended to cover additional land, the mineral developer shall file either consent statements or surface or mineral leases executed by the surface owners of such additional land as required by this section with the application to amend the permit to cover additional land. If, in addition, all of the requirements of chapter 38-14.1 are met, the public service commission may issue the amended permit.
5. If the mineral owner or the mineral developer is unable to obtain the surface owner's consent, the mineral owner or mineral developer may bring an action in district court to establish the relative rights of the parties and the measure of damages to the surface owner. At any time after the filing of any such action and either before or after the final decision of the district court, upon a showing to the satisfaction of the court that the surface owner will be adequately compensated for lost production, lost land value, and loss of the value of improvements due to the mining activity, the court shall issue an order which will authorize the public service commission to issue a permit to surface mine land without the consent which would otherwise be required by this section. In the event the damages awarded by the court to the surface owner exceed the amount tendered or otherwise provided for, the court shall award to the surface owner

reasonable attorney's fees in addition to any other sums determined to be due to the surface owner.

**38-18-07. Surface damage and disruption payments.**

1. Unless the mineral lease, surface lease, or consent statement executed by the surface owner provides for payments to the surface owner, the mineral developer shall annually pay to the surface owner a sum of money equal to the amount of damages sustained by the surface owner for loss of agricultural production caused by mining activity, provided that it can be shown that the land disturbed or to be disturbed has regularly been used for agricultural production. The amount of damages may be determined by any formula mutually agreeable between the surface owner and the mineral developer. The payments contemplated by this section only cover land actually mined, disturbed, or to be mined during the year or years during which agricultural production was actually interrupted and which land has not been restored to the level of agricultural productivity required by the plan submitted pursuant to chapter 38-14.1. The payments to be made hereunder must be made before December thirty-first of that calendar year in which the loss occurred.
2. Unless waived by the owner of a farm building, if the coal removal area of a surface mining operation comes within five hundred feet [152.4 meters] of any farm building, the mineral developer shall pay to the owner of the farm building either the fair market value of the farm building or the entire cost of removing the farm building to a location where the coal removal area of the mining operation will not come within five hundred feet [152.4 meters] of such building or buildings. The payments contemplated hereunder are in addition to any payments required by the terms of any mineral lease, unless the surface owner is a party to the lease and the lease provides for damages as contemplated in this subsection in an amount not less than the amount which would be recoverable under this section.
3. The rights granted to the surface owner by this section are hereby declared to be absolute and unwaivable, except as provided in subsection 2. Any instrument which purports to waive rights granted by this section is null and void and of no legal effect.

**38-18-08. Financial obligation to reclaim.**

1. It is hereby declared to be the financial obligation of the mineral developer to pay the entire cost of the surface reclamation necessitated by that developer's mining operation. This obligation is in no way limited by the amount of the bond required of an "operator" by chapter 38-14.1.
2. If a mineral developer fails to begin reclamation of the land disturbed by a mining operation within one year after the completion of the mining operation in accordance with the plan submitted to the public service commission pursuant to chapter 38-14.1 and regulations promulgated thereunder, the surface owner may notify the public service commission, which commission shall take all of the necessary action lawfully authorized to obtain complete compliance with the reclamation plan.
3. An action at law may be maintained to recover sums due to the surface owner under this section and under section 38-18-07. The surface owner must be awarded reasonable attorney's fees for the maintenance of the action in addition to any other sums determined to be due to the surface owner.