

MITIGATE OR COMPENSATE

The bedrock the **Polluter Pay Federation** concept is built on is the basic principle in Alberta ‘surface rights’ that an energy developer (an “operator” as defined in section 1 of the *Surface Rights Act*) must either:

- mitigate the losses of the registered surface rights owner (or someone acting with the owner’s authority) for all losses of any kind whatsoever; or,
- compensate the surface owner accordingly (technically for a forced-taking of his or her rights).

In part because Alberta’s energy laws are highly complex, and the rights energy developers acquire from others to conduct energy activities on the land (on the surface of land) are deemed to be expropriated from the owners or others that hold them, all landowners have the right to belong to an organization that protects their rights and educates them at the cost of the “operator”. The proposed **Polluter Pay Federation** is such an organization and more (polluterpayfederation.ca).

Simply put, if the operator does not educate the landowner the landowner may educate himself or herself at the operator’s sole cost. A person whose rights are taken against their will is entitled to be treated fairly including related to recover of all associated costs, losses, and damages. To know the nature of a dangerous energy activity, all related laws and remedies, and the like when one has no choice but to stand aside and let the activity be conducted is a right that can be exercised and enforced.

1. What is a Right of Entry?

Some energy developers own the surface rights (thought of as owning the land, more precisely a fee simple estate interest in land, which is ownership of many rights – a bundle of rights - to use land rather than owning the land itself). However, most developers do not hold an estate in fee simple and therefore must acquire the necessary rights to use a land surface (a “**right of entry**”) for an energy activity from the person that holds such rights (the registered owner or someone who leases or otherwise is using the rights of the registered owner – called an “occupant” in the *Surface Rights Act*).

Most but not all energy-related activities are illegal without a revocable licence, permit, or other approval (“**authorization**”) granted by the appropriate body with jurisdiction pursuant to an Alberta law to bestow a revocable privilege on the holder of a provincial statutory authorization. Similarly, for activities that require a provincial statutory authorization, an acquired surface right of entry is also a revocable privilege.

2. From Where Does an Energy Developer’s Surface Right of Entry Flow?

The right to use land owned by another for specific energy purposes, listed in [section 12](#)(1) of the *Surface Rights Act*, flows from one of two statutory sources depending on the nature of the energy activity:

1. **Activity: Removal of Minerals:** The ability to seek a right of entry for a well or a mine flows from (1) ownership of a subsurface mineral or alternately a *profit à prendre* (in Alberta a right acquired pursuant to a mineral lease agreement); and (2) a well or mine licence or approval of the Alberta Energy Regulator (the “AER”); or,
2. **All Other Activities:** For facilities related to oil and gas or power transmission lines, pipelines, power lines, telephone lines, or to reclaim land associated with the foregoing activities including wells and mines, the ability to seek a right of entry flows from the statutory authorization.

One must read the licensing statute (Act) that pertains to legalization of the energy activity to determine how a surface right of entry to use the land is to be acquired (or revoked) and to determine which decision maker or body can grant or revoke rights and privileges. As shown in the attached Flow Chart, there are numerous decision makers covering an infinite number of remedies available to oil and gas developers, landowners, members of the public, and other stakeholders including indigenous rights holders.

All of the foregoing come together and flow into the *Surface Rights Act*, which law impacts common law rights that were previously enjoyed by holders of a *profit à prendre* prior to laws that predated the *Surface Rights Act*. As surface rights lawyer Brian K. O’Ferrall (now a justice of appeal) wrote in a 1987 paper regularly referenced by the judiciary, surface rights will not make sense unless one understands the roles of those who issue statutory approvals (licences, permits and other approvals), or the AER and AUC.

2.1 Land Tenure and Classification of Interests in Property

Land rights and related land tenure issues in Alberta are misunderstood by many, particularly at the Alberta Energy Regulator (the “AER”) and by those who hold or must acquire and maintain land rights for various energy development purposes. An AER lawyer stated in a letter dated December 12, 2016 that the AER has no jurisdiction to decide matters of tenure. In fact the AER decides, or at least at law is charged with deciding, the vast majority of land tenure disputes in respect of upstream oil and gas development in Alberta.

The root of mass confusion appears to be lack of understanding pertaining to classifications of property rights, of which there are three main categories (Bruce Ziff, *Principles of Property Law*):

1. Real Property

- a) Possessory (fee simple, surface and minerals) and Non-Possessory interests (easements, *profit à prendre*) in real property

2. Personal Property

- a) Possessory chattels real such as by lease agreement (not including so-called lease agreement for energy purposes contemplated in section 12(1) of the *Surface Rights Act*)

3. Unique Interests in Property (including statutory interests for various Alberta energy activities):

- a) Aboriginal title
- b) Any interest in property created by a Surface Rights Board right of entry order
- c) The so-called “surface lease” or “facility surface lease” agreement (possessory rights):
 - (i) Well site, facility sites, pipeline risers etc.
- d) The Alberta Utility Right-of-Way (section 69, *Land Titles Act*, non-possessory rights):
 - (i) Buried pipelines and other utilities
 - (ii) Overhead power lines and related support structures

As the American government has recognized, [land rights matter](#). **“Strengthening land and property rights is central to ending extreme poverty, reducing hunger, and promoting resilient societies. Clear, secure land rights create incentives that enhance food security, economic growth, and sustainable development. Land rights are a central and vitally important global development issue.”**

Important Alberta land rights issues are proper acquisition and maintenance of land rights required for energy development (no trespassing), reversion of such rights to the owner at the end of the life of the energy development, and proper related compensation until such rights revert to the owner – to ensure that polluters alone, rather than landowners, taxpayers, and municipalities are held responsible to “pay for the costs of their actions” ([section 2\(i\)](#), *Alberta Environmental Protection and Enhancement Act*).

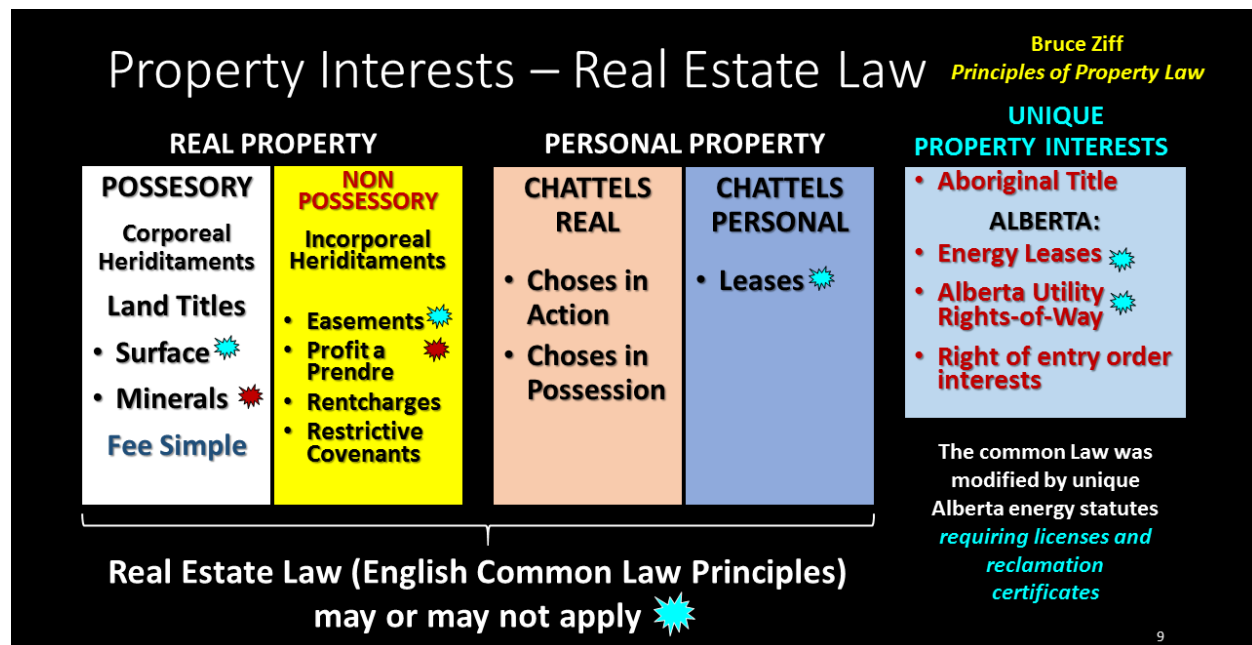


Figure 1: Alberta Interests in Property – Classifications

To believe that a former common law principle still applies, which has been modified by a statute such as the *Surface Rights Act*, *Land Titles Act*, or the *Law of Property Act*, is to err at law or in jurisdiction. Errors of such types are commonplace in Alberta. The negative results are enormous and very broad in scope. The primary goal of the **Polluter Pay Federation** is to protect and restore abused property rights.

2.2 Common Law Rights Varied by the Surface Rights Act

Originally a person could use the surface of land owned by others to access underlying minerals without compensating the surface owner; however, this common law right has not existed in Alberta for approximately one hundred years. Laws, now the *Surface Rights Act*, were adopted to provide for compensation to be paid to a landowner for all losses arising from the issuance of a provincial statutory authorization to conduct certain energy activities on their land.¹

The statutory scheme adopted includes a number of steps one must go through as an energy developer to acquire the necessary rights, which vary depending on the licensing (statutory authorization) law in question and the nature of the energy activity. Somewhat generalized and simplified:

1. The prerequisites to obtain a licence, permit, or other approval must be in place, if any, and the necessary provincial statutory authorization must be in place and valid. These allows the authorization holder to “seek “ the necessary surface rights by:

¹ Activities listed in section 12(1) and section 13 of the *Surface Rights Act*.

- a) making an offer to those who hold the surface rights (the owner and/or occupant), where the offer must include a copy of a proposed agreement for surface land use,² and an accurate sketch or plan of survey that precisely shows the **portion** of the titled parcel of land necessary to conduct the authorized energy activity;³ or,
 - b) if the offer made is refused, application to the Surface Rights Board for an order of such Board granting right of entry (a right of entry order).
2. The interest in land acquired should be registered on the certificate of title, and in the case of a “Utility Right of Way” the instrument (agreement or right of entry order) must be registered on title before the licence, permit, or other approval holder can legally enter upon or use the land for the authorized activity (singular).

The purpose and role of the Surface Rights Board (the “**Board**”) is to arbitrate disputes to balance the rights of entry developers with owners and occupants of the surface. This is to be done with terms and conditions of right of entry orders (loss mitigation) and compensation for unmitigated losses.

2.3 Recent Changes Impacting Statutory Rights of Entry (Alberta Bill 12, 2020)

The exceptions to the foregoing (right of entry by agreement or right of entry order) are that, pursuant to the provisions of section 101 of the *Oil and Gas Conservation Act*, as well as section 28 of the *Pipeline Act*, which sections were amending circa July of 2020,⁴ entry upon land (a right of entry) is granted by law to persons other than the registered owner for the following specific purposes only:

1. Suspension of a well or facility or discontinuance of a pipeline.
2. Abandonment of a well, facility, or pipeline
3. Land remediation (remediation of land impacted by a released substance)
4. Land reclamation (restoration of “specified land” to a near-equivalent capacity).⁵

The **mitigate or compensate** principle applies. The surface owner is entitled to be compensated for any losses arising from such entries. If the parties cannot reach agreement, the Surface Rights Board must arbitrate the compensation dispute (similar to when a right of entry order is granted).

2.4 The Remedial Purpose and Intent of Right of Entry Orders

The purpose and intent of a right of entry order, as well as the *Surface Rights Act* in such regards, is remedial in nature (all Alberta laws must be interpreted as being remedial in nature).⁶ A right of entry order is a statutory remedy that a provincial statutory authorization holder may obtain so that the surface rights owner or occupant cannot “sterilize” or effectively negate a *profit à prendre* right or other right that flows from a facility, pipeline, or power transmission line licence or permit.

² Commonly (somewhat improperly) referred to as a surface lease agreement (wells and facilities) or a right-of-way agreement (or easement agreement in the past) for buried pipelines or powerlines or overhead power lines.

³ *Land Agents Licensing Regulation* ([section 7](#)).

⁴ *Liabilities Management Statutes Amendment Act*, 2020, SA 2020, c 4 (Bill 12, 2020, passed).

⁵ “Specified land” is defined in Part 6, [section 134](#)(f) of the *Environmental Protection and Enhancement Act*.

⁶ *Interpretation Act*, section 10.

2.5 Who Really Decides a Right of Entry Order Must (or Must Not) Issue?

Notwithstanding that the Board possesses sole jurisdiction (power granted by law) to issue right of entry orders, a common law principle dictates that it is really the AER or the Alberta Utilities Commission (the “AUC”) that makes the expropriation or land tenure decision that the Surface Rights Board must issue right of entry order (and some if not all of the terms and conditions of land use),⁷ in the event that the registered landowner exercises his or her right to refuse to sign an agreement proposed by the energy developer.

Provided that an authorization to seek entry onto the land is made by the AER or AUC, the Surface Rights Board simply carries out a role that has been likened to that of a ‘rubber stamp’. At least this is the principle related to wells and power transmission lines. For other activities the licensing laws differ and the Board may be required to play a very different role – these matters have never been adjudicated including in relation to licence or permit exempt activities. For example, the *Pipeline Act* is unique. The AUC or the AER may decide that necessary surface rights must be acquired only by negotiation with the landowner, thereby providing the landowner with effective powers to veto an approved pipeline project.

2.6 Compensation Orders

After a provincial statutory approval is granted, a right of entry order can be obtained in as little as two weeks provided that all requirements are met. The Operator pays a portion of the Last Offer to the owner or occupant, is free to use the land, and the Surface Rights Board holds a compensation proceeding, and issues a compensation order, at a later date. The Board in making a compensation order may consider:

- a) **Initial Losses:** All of the factors (infinite) listed in section 25(1) of the *Surface Rights Act* in determining compensation for the first year or other initial period for unique one-time losses and damages. Note that potential damage to the land is a factor, but compensation for this factor is rarely if ever awarded because the operator is obligated to conserve, remediate, and reclaim land at its sole cost, and the Board reasonably assumed (at least in the past) that the operator would do so in future.
- b) **Ongoing or Recurring Losses** (section 27, *Surface Rights Act*). Annual or other periodic compensation is **estimated in advance** for ongoing losses of a recurring nature (usually not deemed to be a factor for buried pipelines or overhead power lines for example).

3. When and How Does a Surface Right of Entry Terminate?

The reasons why a legal right of entry might terminate are many and varied. Included is failure to operate in compliance with safety laws. Most inappropriately usually only the following reasons are considered:

1. Upon issuance of a reclamation certificate, a surface lease agreement may be surrendered prior to the end of its term (surface lease agreements must have a stated term often, 25 years with one 25 year extension for example) and such surrender is binding on the registered surface rights owner.

⁷ The judicial rule or doctrine against collateral attack.

2. Upon issuance of a reclamation certificate (and for some limited other reasons),⁸ the Surface Rights Board may terminate a right of entry order. Note that, unlike private lease agreement, right of entry orders are for indefinite terms – until a reclamation certificate is issued provided that the Operator actually enters upon the land (otherwise the right of entry can be terminated without a reclamation certificate).

Upon a surrender or termination (for any reason), the rights acquired by private agreement, or by way of a right of entry order, from the registered surface owner revert back to such registered owner (the right of reversion). The operator's obligation to pay continues until a reclamation certificate is issued.

4. Alberta's Polluters and Potential Polluters are Increasingly Refusing to Pay

Alberta's comprehensive statutory scheme, considered as a whole, reflects the principle that the potential or actual polluter alone must pay for the cost of all their actions or their lack of action, such as land cleanup.

The obvious problem is lack of enforcement, particularly at the AER, because Alberta laws are extensive, comprehensive and clear in their reflection of the polluter pays principal.

Other than compensation paid to surface owners and termination of some rights of entry, the Board has very limited powers and is rarely involved in most cases. The vast majority of remedies that landowners have available to them at law, other than compensation, are available from the AER (or AUC for some activities). This is misunderstood. That which is rarely or barely understood is, if a surface owner is to be compensated for all of his or her losses and required by law, they must seek to mitigate those losses by requesting remedies that only the AER can grant. Otherwise they have effectively consented to absorbing the loss by way of inaction.

The ways and means being employed by oil and gas developers to avoid their obligations to landowners and society, including compensation obligations, are varied and growing. They include:

- a) **Little or no Security or Bonding:** No security put up to cover end of life (of the energy activity) obligations.⁹ There is one cause for this area of illegality: Effective lobbying by industry of the AER, which body must work together with the Board to strictly enforce laws that reflect the polluter pays principle,¹⁰ but is clearly not doing so.
- b) **Refusals to Pay Contrary to Law:** Refusals to pay compensation owed to landowners as well as municipal taxes. Survival of insolvent or profit-crazed oil and gas developers had taken priority over the rule of law in Alberta.
- c) **Surface Rights Board Backlog.** The Board is to act as a collection agency for landowners, but is tardy in doing so because of the massive overload caused by bankruptcies and refusals to pay.

⁸ See section 28, *Surface Rights Act*, and section 144, *Environmental Protection and Enhancement Act*, which is the law governing reclamation certificates, as well as Board termination forms available from the Board's website.

⁹ The cost of abandoning (decommissioning a well, facility, power line, or pipeline), land remediation, and land reclamation.

¹⁰ *Togstad v. Alberta (Surface Rights Board)*, [2015 ABCA 192 \(CanLII\)](#) at para. 7 (leave to appeal denied by the Supreme Court of Canada).

4.1 “Orphaned” Wells and Facilities and Similar Problems

Alberta devised a simple, legislated scheme called the Orphan Fund, which like most aspects of Alberta Energy laws is being largely ignored, to ensure that when corporate polluters no longer exist, the remaining members of industry pay for some, but not all, of their sins. A levy, to be properly calculated by the AER each year, is charged to cover the end of life obligations of wells and facilities that have no parent company. However, this levy is not fully charged as required by law and does not cover the cost of compensating landowners until reclamation certificates are issued – the taxpayer does this.

Rather than being caused to pay the full levy required by law, a non-profit corporation created by industry called the Orphan Well Association has been allowed to borrow from government the taxpayer, whereby the funds necessary for the Orphan Well Association to deal with the end of life obligations of orphans (wells and facilities designated by the AER as “Orphans”) are coming largely from the taxpayer and not the polluter as required by law. The Regulator is working for industry, rather than in the public interest.

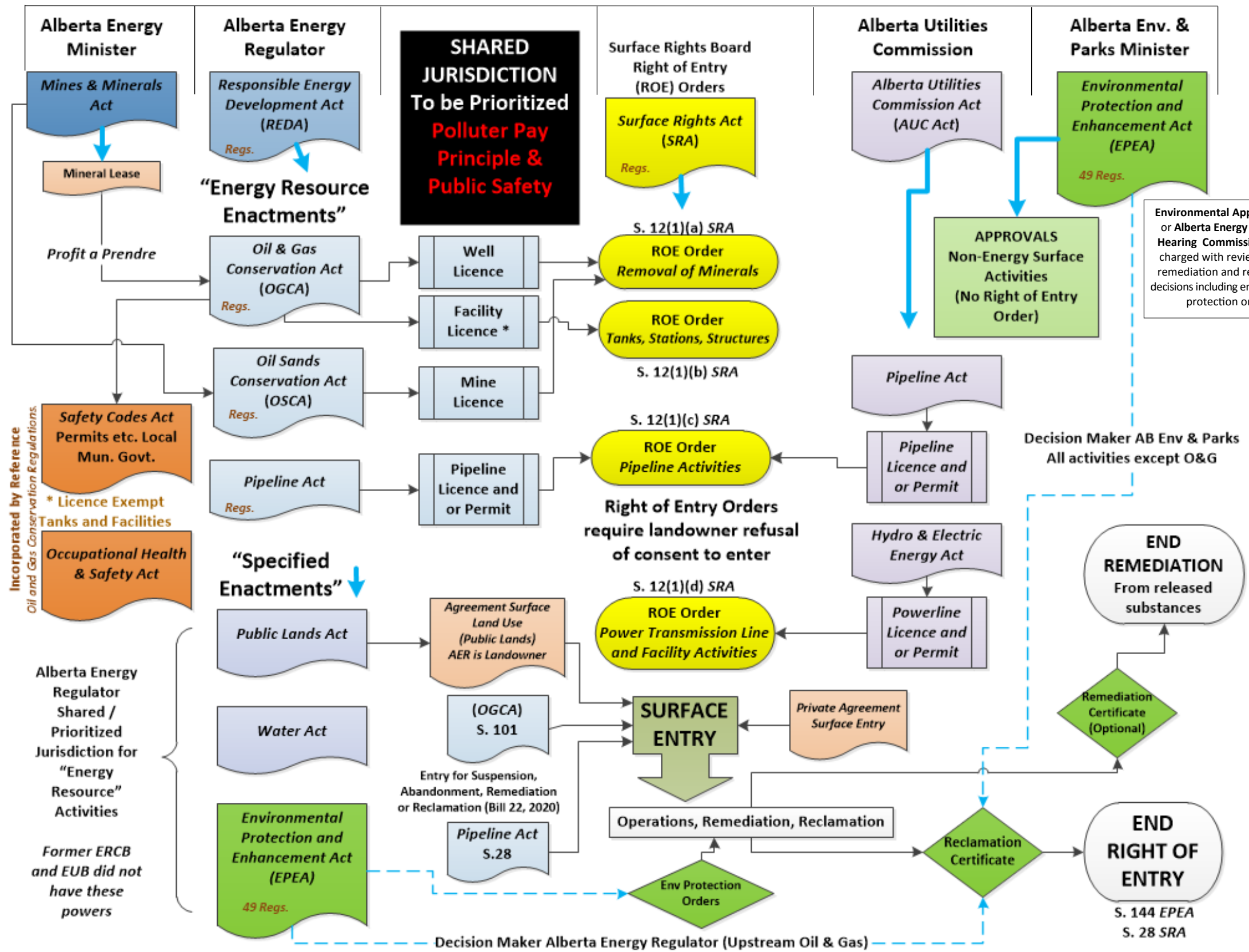
5. Solutions Readily Available at Law

The problems faced by landowners, taxpayers, and municipal governments – indemnified parties - are simple and involve (1) industry lobbying of government with no countervailing lobby; and, (2) deviation from the rule of law. In short many problems stem from corruption or ignorance within law enforcement agencies, or a mixture of both. The root problems are less important than the fact that the cures are readily available in existing Alberta law. The solution is as simple as a return to the rule of law.

However, educating the public and lobbying government are far more complex than should be the case. A return to the rule of law requires categorized solutions including but not limited to the following:

1. Revocable privileges (licenses, permits, or approvals) must be revoked when required by law.
2. Doors to remedies at the AER, which are illegally slammed shut on landowners and other stakeholders, must be opened wide. Transformation of the Alberta Energy Regulator into a **regulator, law enforcement, and quasi-judicial dispute resolution commission** (eleven idle hearing commissioners must be put to work) as required by law is urgent and absolutely necessary. The industry must be regulated. The AER’s Liability Management System (*Directives* 011, 006, 011 and 067 in particular among others) must be scrapped.
3. Until the foregoing are achieved, landowner compensation must significantly rise as contemplated by law. This will cause industry to become regulatory compliant voluntarily to stay profitable. A litigation fund is required because the solutions to reform at the AER (and the AUC and the Board to lesser degrees) lie with the courts as does ensuring there is a return to the rule of law.
4. Lobbying of the government for a return to the rule of law is the key. Landowners can join the **Polluter Pay Federation** at the cost of the operators on their land (through recovery of membership fees), which is consistent with the Polluter Pays Principal.

Landowners may not profit from any *Surface Rights Act* activity on their land but must also not be out of pocket. This is the basis of the [Polluter Pay Federation funding model](#) envisioned by the Steering Committee. Funds are required to restore property rights being abused by industry members pursuant to the Polluter Pays Principle, or in a manner whereby indemnified parties are never out of pocket.



An Alberta Energy Developer Must By Law:

- OBTAIN / MAINTAIN PERMISSION TO CONDUCT ACTIVITIES THAT ARE OTHERWISE ILLEGAL:**
 - a) The right to access a mineral
 - b) A licence, permit, or other approval (unless the activity is exempt) from:
 - Alberta Environment and Parks, for which no orders granting right of entry issued by the Surface Rights Board are available.
 - The Alberta Energy Regulator (AER)
 - The Alberta Utilities Commission (AUC)

REVOCABLE PRIVILEGES
- OBTAIN / MAINTAIN A SURFACE RIGHT OF ENTRY:**
 - a) by consent of the owner (or land occupant), memorialized by written agreement (surface lease or right-of-way contract); OR, if landowner consent is withheld:
 - b) by Order of the Surface Rights Board (a right of entry order);
 - c) as granted by statute (Sec. 101 OGCA, Sec. 28, Pipeline Act).
- OPERATE IN COMPLIANCE WITH ALL ALBERTA AND FEDERAL LAWS AND REGULATIONS INCLUDING PUBLIC SAFETY AND ENVIRONMENTAL LAWS.**
 - a) Remedy loss of licence (permission)
 - b) Remedy loss of right to use the surface
- CONSERVE AND RECLAIM SPECIFIED LAND:**
 - a) Remediate soils contaminated by releases of various substances
 - b) Reclaim land used (unless exempt)
 - c) Obtain a Reclamation Certificate (whereby surface rights agreements may be surrendered and right of entry orders may be terminated and **RIGHTS REVERT TO THE LANDOWNER**)
- COMPENSATE (Polluter Pay Principle):**
 - a) Mineral owners (or rights are lost) or pay royalties as required
 - b) Surface Owners (or rights are lost) for ALL RELATED LOSSES
 - c) Surface Occupants for ALL RELATED LOSSES

Alberta's Main Remedial Statutes Governing Energy Development. Not shown in Flow Chart: *Critical Infrastructure Defence Act*

- Numerous Alberta ministries, agencies, boards, commissions, permit issuers, and peace officers share overlapping jurisdiction under numerous remedial statutes.
- Which decision makers decide what issues is complex and confusing. Energy developers obtain remedies like right of entry orders, but other stakeholders' rights are denied.
- The undeniable rights of titled landowners most abused are: The right to participate in decisions that affect them, compensation rights, the right to have taken rights (to use their land) revert back to them with the land remediated or reclaimed at the cost of the 'operator' as strictly required by law, and most importantly the right to be safe.

Polluter Pay Federation

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