

Natural Legacies:

Your Educational Guide to Conservation in BC



Subsurface Rights and Conservation Covenants

What is the difference between surface and subsurface rights?

Surface rights refer to any right in land that is not a mining right. A person who owns surface rights is a person to whom the surface rights of land have been granted, sold, leased or located.¹ Mineral and petroleum rights relate to the resources located in, on or under a piece of land.

While most titles to property do not include the subsurface rights, some small areas of the province that were colonized early, such as parts of Vancouver Island and the Fraser Valley, still have linked surface and subsurface rights, but it is rare.² Subsurface oil and gas rights on Crown and fee simple land, some 99 plus percent of the province are owned by the province and sold by auction to the highest bidder.³

SUBSURFACE RIGHTS AND CONSERVATION COVENANTS



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Who owns Oil and Gas in BC?

Where subsurface oil and gas rights in BC have not been expressly granted to the surface owner they are owned by the provincial government and are sold by tenure auction. The province owns most subsurface oil and gas rights. Landowners can use the Petroleum Tenure Online website www.ptonline.gov.bc.ca to ascertain who owns the resources under their land.⁴ Ownership of an oil and gas tenure confers rights to the exploration, development, and production of those resources.⁵

How does a new Oil and Gas Tenure affect an existing conservation covenant?

A covenant created under s.219 of the *Land Title Act* will not prevent surface access for exploration and extraction of a subsurface resource even if the covenant is in place before the oil and gas tenure is acquired.⁶ If the subsurface rights are owned with the surface rights then it may be possible for a conservation covenant to be placed on them, but they must be owned rather than tenured as certain work requirements are attached to holding a tenure.⁷ Based on landowner feedback in the pre tenure sale stage the Ministry of Natural Gas Development *may* place specific conditions on the exploration and extraction of oil and gas on conservation covenanted land, but there is no legal guarantee.⁸

How does an existing Oil and Gas Tenure affect the introduction of a conservation covenant?

There is nothing preventing the placement of a conservation covenant on the surface of private land where the subsurface has already been tenured. However, as when subsurface oil and gas rights are tenured underneath an existing covenant, the new covenant will be unenforceable against exploration and extraction of the petroleum resource in question. Generally, if the proposed covenant is in a part of the province that is likely to see oil and gas activities (such as where tenure has already been sold) the parties must carefully assess the likelihood of oil and gas development on the covenant lands.⁹

¹ Lara McGuire and Jonquille Pak, "understanding Mining Rights in Ontario" online: Canary Institute <http://www.canaryinstitute.ca/publications/Understanding_Mining_Rts.pdf>.cc

² "Petroleum and Natural Gas Rights in British Columbia" online: BC Ministry of Energy and Mines <<http://www.empr.gov.bc.ca/Titles/OGTitles/Documents/PNGrightsBC.pdf>>.

³ "Petroleum and Natural Gas Rights in British Columbia" online: BC Ministry of Energy and Mines <<http://www.empr.gov.bc.ca/Titles/OGTitles/Documents/PNGrightsBC.pdf>>.

⁴ "Petroleum Titles Online" online: Ministry of Energy <<https://www.ptonline.gov.bc.ca/defaultssl.html>>.

⁵ "Surface Rights in British Columbia" online: Oil and Gas Commission <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/373369/surface_rights.pdf>.

⁶ *Petroleum and Natural Gas Act*, RSBC 1996, c 361, ss 142, 159; *Land Title Act*, RSBC 1996, c 250, s 219(10); *Greening Your Title: A Guide to Best Practices for Conservation Covenants*: 2nd ed, Hilyer & Atkins, 2005 at page 55, West Coast Environmental Law;

⁷ *Petroleum and Natural Gas Act*, RSBC 1996, c 361, s 43; BC Reg 95/2004, s 4.

⁸ "Landowner's Information Guide" online: Oil and Gas Commission of British Columbia, page 27 <<http://www.bcogc.ca/node/11032/download>>.

⁹ Jason Unger, "Legal Aspects of Conservation covenants" pages 1-6, online: Environmental Law Centre <http://www.ealt.ca/media/uploads/LegalAspectsofConservationEasements_ELc.pdf>.