

# Oil & Gas Law: A View from Practitioners Serving Surface and Mineral Owners

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## Why is a Surface Use Agreement important?

- Because of its dominance, the mineral estate holds an implied easement to use as much of the surface as reasonably necessary for the development of the mineral estate.
- “Reasonable use” extends to a wide variety of oil and gas related activities, including drilling of wells and the building of roads, pipelines, electric lines, as well as storage and processing facilities and the usage of large amounts of water.

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## Why is a Surface Use Agreement important?

- “This right includes the legal privilege to use the surface in a way that interferes with the surface owner’s use of the land and that significantly damages the surface, without the legal obligation to make any compensation whatsoever.”  
- Ernest E. Smith

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## What is a Surface Use Agreement?

- A Surface Use Agreement (SUA) is a contractual agreement between the surface owner and the oil and gas operator addressing the operator’s activities on the surface of the property.
- It can be included as a separate exhibit, or incorporated into the terms of the oil and gas lease.
- The SUA can give the Surface Owner influence over:
  - Location and size of infrastructure and roads
  - Remediation of the surface
  - Use of surface water and groundwater resources
  - Practices designed to minimize disturbance of farming and ranching
  - Monetary damages paid to the Surface Owner

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## How do I get one on my property?

- The Surface Owner’s power to negotiate and obtain a surface protection provisions will depend upon the ownership and leasehold status of the property.
- Perform a baseline evaluation to determine the following:
  1. Are the minerals leased or unleased?
  2. What portion of the mineral estate is held by the Surface Owner?
  3. Who owns severed mineral interest beneath the property?
    - How much does each party own, and how fractured is ownership?
  4. Has drilling and/or production of oil and gas already occurred on the property? Is it active?
  5. If a lease is in place, what surface protections are outlined in the lease?

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## What if the Surface Owner owns little or no mineral interest in the property?

- If there is no lease burdening the property, the Surface Owner will be reliant upon the severed mineral owners to negotiate surface protections.
  - Consider purchasing mineral rights, and reach out to severed mineral owners to establish a good relationship before the leasing offers start to arrive. Make sure they understand the need for surface protections in future Oil and Gas Leases.
  - Negotiate a “Preemptive SUA” with expected surface protections before development begins.
- If an Oil and Gas Lease has already been executed, look at the terms of the lease to determine available surface protections.
  - The operator will have no legal obligation to negotiate a SUA with the Surface Owner in this scenario.
  - The Surface Owner can only rely upon statutory protections enforced in its particular state...

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### Surface Damage Statutes

- Almost all states with extensive oil and gas development have adopted some form of legislation to protect and compensate surface owners faced with development on their property.
- These statutes typically prescribe a procedure for contacting and negotiating with surface owners prior to the beginning of operations.
- However, Texas has no surface damage statute!

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### Typical Elements of a Surface Damage Statute:

- Required Notice to Surface Owner
- Good Faith Attempt to Negotiate Damages
- Bonding Requirements
- Payment for Damages to Land and Crops
- Prescribed Method for Determining Damages
- Penalties for Non-compliance with Statute
- Statute of Limitations for Claims
- Possible Payment for Diminution in Value of Property

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### Surface Damage Statutes are compatible with development

- Bakken Shale (North Dakota & Montana)
- Niobrara Shale (Colorado & Wyoming)
- Permian Basin (New Mexico)
- Woodford Shale, Granite Wash (Oklahoma)
- Marcellus Shale (West Virginia, Pennsylvania)
- Statutes protecting surface owners have no demonstrable impact upon mineral development.

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### Oklahoma Surface Damage Act

- Operator must provide notice to surface owner prior to entry on the property
- The parties must enter into good faith negotiations to determine change in fair market value of the surface that will result from the operator's planned activities
- If the parties cannot agree, the operator must post a bond and the parties will appoint appraisers
- Jury trial and subsequent appeal is available
- Treble damages awarded for failure by operator to follow prescribed procedure; attorney's fees available in limited circumstances

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### New Mexico Surface Owners' Protection Act

- Operator must provide written notice and a proposed SUA at least 30 days prior to commencement of operations
- Compensable damages include loss in property value, agricultural income, improvements and value of use
- If no agreement is reached after 30 days, operator may post bond and continue with operations
- Surface owner has option to appeal proceeding to state district court for resolution

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### Texas has no Surface Damage Act!

- Despite its emphasis on private property rights, Texas is the only major oil and gas state without statutory protections for surface owners
- The operator owes the landowner no compensation unless it engages in unreasonable or negligent use of the surface
- Application of the accommodation doctrine is rare
- Without an interest in the mineral estate, the surface owner is generally powerless to negotiate meaningful surface protections with an oil and gas operator

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### SUA Provisions: Damages and Performance

- Specify agreed amounts for damage payments for all impacts constructed by operator on the property:
  - Well locations
  - Surface locations, tank batteries and other facilities
  - New roads
  - Pipelines
  - Water lines
  - Electric lines
- The size of damage payments will depend upon the particular property and location
- Seek a contractual lien on the operator's working interest in order to secure performance of SUA obligations
- Expressly provide that liquidated damage amounts are in addition to all other remedies available to Surface Owner

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### SUA Provisions: Drilling Locations

- Modern technology allows for the drilling of multiple horizontal wells from the same drilling pad, which greatly reduces fractionation of property
- Consider constructing berms or visual screening where drilling locations interfere with open space and views
- Require the operator to reduce the size of the drilling pad once the well is completed or plugged as a dry hole
- In order to encourage smaller and consolidated drilling locations, require payment per acre of land used
- Require a pipe fence or other barrier capable of turning livestock

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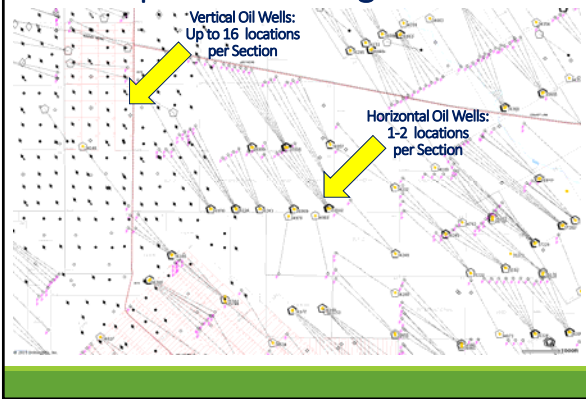
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### Multiple Well Drilling Locations:



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### SUA Provisions: Frac Ponds

- Limit usage to the storage of fresh water only
  - Prohibit storage of produced water, drilling mud, or any other type of fluid in the impoundment
- Require a design sufficient to be used for livestock and wildlife operations once no longer used for the operator's activities
  - Reserve the option to elect for reclamation and restoration of the pond area at Surface Owner's discretion
- Operator must construct and pay for fencing sufficient to prevent livestock and wildlife from entering the pond area

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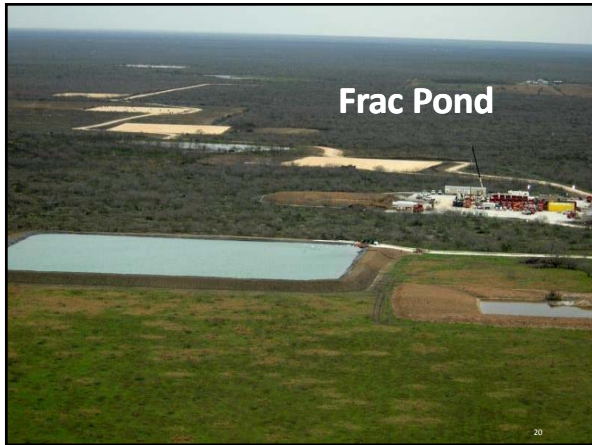
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### SUA Provisions: Required Coordination and Planning

- Require a quarterly or annual Plan of Operations from the operator:
  - Containing details for all operations planned or contemplated by operator during the next period of operations
  - Approved of in writing by both operator and Surface Owner
  - Including an updated map of the property displaying existing and planned locations, pipeline, roads, electric lines, etc.
- Use "Oil Field Corridors" to consolidate operator's facilities and access routes along the exterior of the property or other desired area

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**SUA Provisions:  
Access, Gates and Fences**

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- Allow access to the property only at points of ingress and egress designated by the Surface Owner
- Require that all gates remain locked except for when in active use during entry and exit
  - Can also require that gates be left in condition they are found
- Define the specifications and materials for gates and cattleguards to be installed by operator
  - Give the Surface Owner the option to elect for removal
- Prohibit the operator from accessing portions of the property near homes, livestock operations and hunting areas

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### SUA Provisions: Roads

- Surface Owner should expressly retain the power to designate access points and existing roads for use by operator
- Require that new roads be limited to one road to each location
  - Require coordination on road construction plans
  - Operator must be made solely responsible for repair, maintenance and erosion control
  - Define preferred construction techniques and materials
  - Limit the width of roads and frequency of vehicle turn-outs

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### Oilfield Traffic



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### SUA Provisions: Pipelines

- Pipelines are used instead of trucks to transport oil, gas, produced water and fresh water, thereby removing potential traffic from the property
- Require that the operator and Surface Owner agree on locations prior to the beginning of construction
- Limit the duration of time for construction and usage of temporary workspace outside of the easement
- Make the operator use the "double-ditching" technique to preserve topsoil
- Provide for removal of pipelines by the operator when the lease expires or the lines are no longer in use for a specified period of time

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### SUA Provisions: Pipelines

- Be sure to limit easement agreements to one pipeline along a specified route described by metes and bounds and depicted on a plat
- Require inspection and negotiation of damages for trees to be removed from and near the easement
- Define the permitted substances that may be transported through the pipeline
- Limit or prohibit appurtenant surface facilities such as valve sites, pig launchers and compressor sites
- Require sound abatement at locations where operations may produce excessive noise

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### SUA Provisions: Water Usage

- Absent an agreement otherwise, oil and gas operators may have the right to use water from wells and surface free of charge.  
*In Texas, this includes the right to completely exhaust certain water resources on the property!*
- Surface protections in the lease must address usage of surface water and groundwater by the lessee.

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### SUA Provisions: Groundwater Usage

- In many states, the surface estate owns the groundwater beneath the property.
  - This right to pump groundwater may be subject to regulation by the state.
- The surface owner must make provision in the SUA for water sales to the operator; otherwise, the operator may have free access to as much water as desired.
- Consider addressing the turning over of the lessee's water wells to the surface owner after completion of operations.

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## Water Usage: Hydraulic Fracture

- Each horizontal well fracture simulation ("stage") is similar to fracture treatment for one vertical well
- The amount of water per frac will depend upon:
  - the total length of the lateral wellbore
  - the number of stages (now up to 30-40 per well)
  - Particular characteristics of the shale formation
- This will require millions of gallons of water per horizontal well

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Frac Operation

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## SUA Provisions: Livestock

- Require operator to assume liability for any quarantine or similar government action arising from the operator's actions or omissions
- Set defined monetary penalties for death or injury to particular type of livestock on the property
  - Should include fair market value of the animal and/or the cost of replacement
- Keep speed limits on all roads no higher than 20-25 MPH
- Require that operator and Surface Owner consider livestock and ranching operations when contemplating development activities
- Provide for a set monetary penalty for each time a gate is found unlocked or unopened
- Make operator responsible for costs resulting from intermingling of livestock

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**SUA Provisions:  
Agricultural Operations**

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- Reserve the right to concurrent use of the surface estate, so long as no unreasonable interference with Lessee's operations
- Have the Lessee expressly acknowledge that the property is used for agricultural (or ranching, wildlife and hunting) purposes
- Designate active agricultural operation areas as off-limits for oil and gas development and related infrastructure
- Address calculation of damages for harvested crops and loss of potential value of growing crops

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**SUA Provisions:  
Reclamation**

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- Consider the slope and topography of the property in order to prevent runoff and erosion
- Require that all surface locations be restored to their prior condition and original contours within a specified period of time
- Have the operator segregate and stockpile topsoil for usage in later surface reclamation projects

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**SUA Provisions:  
Reclamation**

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- Designate native seed varieties for reseeding of the property
  - If desired, allow Surface Owner to conduct reseeding and be reimbursed by operator
- Use geo-textile materials or wooden drilling mats to lessen the impact of pad construction
- Ban the use of soil sterilization practices
- Designate preferred method for brush control
- Require washing of equipment before entry

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### Screening Techniques



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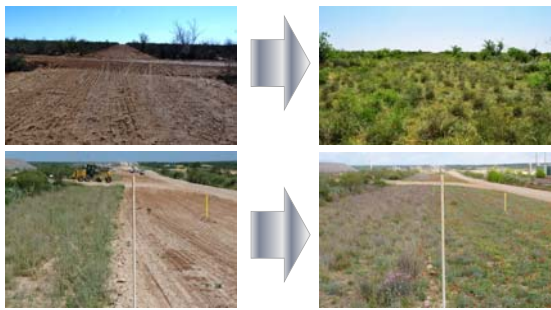
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### Monitoring Reclamation



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### Oil & Gas Law: A View from Practitioners Serving Surface and Mineral Owners

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LAW ASSOCIATION

AALA CONVENTION 2016 – OKLAHOMA CITY, OK

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### Current Issues in Oil and Gas Leasing

- Long laterals
- Multiple laterals
- Drilling locations and production sites to be located on adjacent lands
- Concurrent development

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### 8 "Must Haves" for any Oil and Gas Lease

1. Determine Lessee – Landman/Broker may try to withhold for competitive purposes
2. Do your research:
  - Determine the rates and terms of leases in the area
    - Contact: County Clerk, Abstractors, NARO (National Assoc. of Royalty Owners), state leases, BLM leases
  - Seek additional offers – Are there other companies leasing in the area?
  - Speak with adjacent surface/mineral owners
3. Request multiple royalty options and corresponding bonus rates to consider (1/8<sup>th</sup>, 3/16<sup>th</sup>, 1/5<sup>th</sup>, 1/4<sup>th</sup>)
  - Determine client's needs
  - Consider activity in the area, will a well be drilled?
  - Bonus or Royalty?
4. Always ask for more money – seek the highest and best paid in the area

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## 8 "Must Haves" for any Oil and Gas Lease

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5. Term:

- Avoid primary terms longer than 3 years
- Avoid options to extend
- In the event of an option
  - Limit option to no more than 2 years
  - Negotiate for option bonus at 125-150% or more of original bonus

6. Important Lease Language and Additional Provisions:

- Oil Royalty: "...deliver to the credit of lessor free of cost, in the pipe line to which it may connect its wells..."
- Gas Royalty: "Gross Proceeds" vs. "Net Proceeds"
- Special Warranty: Lessor only warrants title, by, through and under Lessor only
- Depth Severance
- Gas Enhancement
- Pugh Clause
- Shut-In Provision (no more than 2 consecutive years)
- Commencement of Operations
- Indemnity

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## 8 "Must Haves" for any Oil and Gas Lease

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- For Lessors who also own surface:
  - Specify pipelines will be negotiated through a separate Easement
  - Surface damage provisions. Even though a Surface Damage Agreement will be used, it is to the Lessor's benefit to include surface provisions within the lease.
- Surface provisions to include:
  - Payment of damages (Surface and Crop Damages). Payment shall not include any future damages incurred for operator negligence
  - Depth of pipelines
  - Restrict production site to as small as reasonably practical for prudent operations
  - Consult with surface owner concerning surface facilities
  - Cattle guards and fences
  - Maintain a clean production site
  - No deleterious substance to be injected without written consent
  - Closed system (no earthen reserve pits)
  - Provide set back distances from existing structures
  - Surface water will be negotiated
  - Address crossing of terraces, waterways, creeks, etc., as well as restoration and maintenance
  - Irrigation – minimize interference
  - Follow any existing regulations – CRP penalties, wetland requirements, endangered species, etc.
  - Restoration upon completion of operations

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## 8 "Must Haves" for any Oil and Gas Lease

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7. Provisions to Strike

- Full Warranty (substitute Special Warranty)
- Top Lease: If at any time within the primary term of this lease or any continuation thereof, Lessor receives any bona fide offer, acceptable to Lessor, to grant an additional lease (top lease) covering all or part of the afore described lands, Lessee shall have the continuing option by meeting any such offer to acquire such top lease. Any offer must be in writing and must set forth the proposed Lessee's name, bonus consideration and royalty consideration to be paid for such lease, and include a copy of the lease form to be utilized reflecting all pertinent and relevant terms and conditions of the top lease. Lessee shall have fifteen (15) days after receipt from Lessor of a complete copy of any such offer to advise Lessor in writing of its election to enter into an oil and gas lease with Lessor on equivalent terms and conditions. If Lessee fails to notify Lessor within the aforesaid fifteen (15) day period of its election to meet any such bona fide offer, Lessor shall have the right to accept said offer. Any top lease granted by Lessor in violation of this provision shall be null and void.

6. Check Please! No bank drafts.

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### Calculating Damages for Growing Crops

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• *Crop damages, in addition to surface damages, should be considered for wellsite locations, lease roads, easements and rights-of-way*

• Example Crop Damage Resolution for Growing Crops (negotiate prior to damage if at all possible):

- 1. Determine net acreage to be damaged
- 2. Contact local FSA (Farm Service Agency) office for the subject county where the property is located and determine the average yield for the commodity in question upon the subject land (ie: bushels per acre). Also request county wide (or regional) yield for the crop in question as a basis.
- 3. Contact a local Co-Op or grain elevator to determine the current price per unit (i.e. bushel) for the crop commodity
  - If commodity price is abnormally low or high, request a 3 to 5 year price average for said commodity
  - Local commodity prices will vary from nationally posted prices

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### Calculating Damages for Growing Crops

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- 4. Multiply the number of acres damaged by the average yield and price per unit to arrive at a fair market value for said crop damages.
- 5. Wheat crop example: 160 rod pipeline ROW; Width: 30 foot permanent, 50 foot temporary (construction)
  - $2,640 \text{ feet (length)} \times 50 \text{ feet (width)} = 132,000 \text{ square feet} / 43,560 \text{ feet} = 3.03 \text{ acres}$
  - $3.03 \text{ acres} \times 36 \text{ bu./acre (avg. county yield)} = 109.08 \text{ bushels (bu.)}$
  - $109.08 \text{ bu.} \times \$3.50 \text{ bu. (posted wheat price at local elevator)} = \$381.78$
  - Total Crop Damages for Pipeline ROW: \$381.78
- 6. Crop damages also apply to grass pastures and waterways.
- 7. Crop damages should be based on the market price of the appropriate commodity at the time of damage.

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### Important Measurements to Remember:

- One (1) mile = 5,280 feet
- 43,560 square feet in one (1) acre
- 1 chain = 66 feet
- 1 chain = 100 links
- 1 rod = 16.5 feet
- 1 square mile = 640 acres
- 1 vara = 33 1/3 inches or 2.7777 feet
- 1 mile = 1,900.81 varas
- 1 Labor = 1,000 varas
- 1 League = 5,000 varas
- 1 acre = 5,645.376 square varas
- 1 acre = 75.136 varas square

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### Additional Surface Damage Considerations

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### Selling Water

- Fresh water is often times a necessity for drilling companies.
- Sometimes the operator recycles their produced water, but often times fresh water is purchased from the surface owner or an adjacent landowner.
- Negotiate drilling and frac water separately. Contact the local County Commissioners and inquire about the going rates in the area.
- 1. Drilling water: Generally negotiated as a flat fee or day rate – inquire about average days from spud to TD
  - Low volume: < 20,000 BBLs
  - Flat Fee: \$1,500 - \$4,000
  - Day Rate: \$125 - \$200 per day

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## Selling Water

- 2. Frac water: Generally negotiated as a flat fee or per BBL (42 gallons/BBL) – inquire with operator as to the anticipated frac size
  - High volume: 100,000 – 800,000 BBLs or more
  - Flat Fee: Negotiated
  - Per BBL: \$0.15 - \$0.30 per BBL (\$0.20 - \$0.25 per BBL has been common in Oklahoma as of late)
- 3. Request Operator to drill new water well(s) to meet water demand
  - Surface takes ownership and liability of new water well once drilling operations are complete

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## Selling Water

- 4. Monitoring:
  - In the event the Operator uses fresh water of surface owner, a flow meter should be installed at the water source, at the Operator's expense, in order to monitor the volume of water used. Operator shall be required to image the flow meter prior to taking any water and then again once operations cease. The pictures shall be sent to surface owner before operations commence and after operations cease
  - The flow meter must be placed at the water source in order to account for any waste or leaks that may occur via transfer or negligent operations.

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## Soil Farming

- Surface owner may request option for soil farming of the drilling mud
- Operator shall provide surface owner with specific documentation describing the contents and properties of the drilling mud and provide surface owner with adequate time to seek consultation, regarding the contents of the mud, prior to exercising the option to perform soil farming operations
- Should the option be exercised, the drilling mud shall be evenly distributed, as reasonably possible, and shall only be performed if the ground is dry in order to prevent rutting of the soil

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## Matters of Multiplication

### Multiple Laterals

- With regard to surface damages, well site location damages should be negotiated by the number of laterals to be drilled. Operators have the ability to drill, not only multiple wells from the same location, but multiple laterals from the same vertical wellbore.

### Multi-line Easements

- Ensure that all pipeline or electrical line easements are negotiated on the basis of 'one-line' only. If multiple lines need to be run, it is to the benefit of the surface owner for the construction company to lay multiple lines within one ditch, to minimize surface disturbance; however, the surface owner shall be paid for each line in question.

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## The "Going Rate"

Often times, it is difficult to determine the going rate being paid for damages in the area; therefore, contact the following parties in an effort to determine damages being paid:

- County Clerk
- Abstractors
- County Commissioners
- State Land Agency (i.e.: Oklahoma Commissioners of the Land Office, Texas General Land Office, The University of Texas System – University Lands Rate and Damage Schedule)
- Local rural auction companies

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## Protection of Existing Water Wells

- Depending on the Operator, we have experienced success with protecting existing water wells of the surface owner by drafting provisions which contain the following:
  - Exact location, with footages
  - Well ID# (from the county or state regulatory agency)
  - Specify the current use of the well, as well as capacity/rate
- If damaged, Operator agrees to restore said well to as close to original condition as reasonably possible or drill a new water well or wells as a replacement well(s) of original water well.
- Allow for any plumbing and electrical needs that may be required for the installation of a new well

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**River Issues**

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- *Bring on the Roloids!!*
- River properties often serve up heartburn for the practitioner.
- When questions arise as to acreage holdings and so forth, it's important to know the governing state law and obtain a base acreage from which to start your research.
  - 1. What rights do surface and minerals owners possess, with regard to river land, where the property is located? In Oklahoma, the property rights of surface and mineral owners extend to the middle of the river channel.
  - 2. Look to obtain the original Government Survey from the County Clerk or The Bureau of Land Management's General Land Office maintains an excellent website for obtaining copies of the original Government Survey. Here's a link to the survey search page:
  - <http://www.glorerecords.blm.gov/search/default.aspx#searchByTypeIndex=1&searchTabIndex=0>

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**River Issues**

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- 3. Next, search the county records to determine whether a new survey has been completed
- 4. Contact a large surveying company, such as Topographic, to see if they have record of a more recent survey on file: <http://www.topographic.com/home/index.html>
- 5. If the matter concerns a producing mineral property, contact the operator and inquire if a new survey was completed and further ask for their paydeck calculation as to the client's decimal interest. The gross unit acres may shed some light on the issue.

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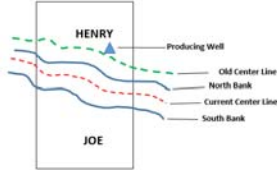
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### River Issues: Case Scenario

- Company X proposed and drilled a well on a stand-up 80.0 acre unit.
- A navigable river ran through the middle of the unit.
- Henry owned the surface and minerals on the North side of the River and Joe owned the surface and minerals on the South side of the River
- Company X, Henry and Joe could not come to an agreement on the proper ownership for each party
- A new survey for the unit was going to cost thousands of dollars




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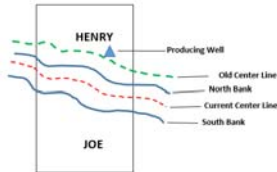
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### River Issues: Case Scenario

- Therefore, Company X's landman invited both Henry and Joe to the local county FSA office.
- With the help of the FSA's GIS expert, the 4 parties huddled around the aerial mapping software and mapped out an outline around both Henry and Joe's property, using the center of the river channel as the boundary between the two.
- Both parties were satisfied with the acreage results.




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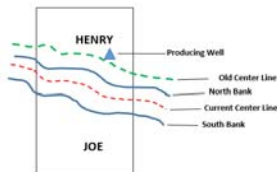
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### River Issues: Case Scenario

- Next, a Stipulation of Interest and Cross-Conveyance was entered into between Henry and Joe, outlining the ownership of both parties.
- Both Henry and Joe signed the stipulation, it was filed of record, and then provided to the operator.
- Royalties were then paid on the basis of the recorded stipulation.




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Thank You!

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