

Negotiating Surface Use Agreements

University of Wyoming Extension

Department of Agricultural and Applied Economics



Education

A person may contact you and say, “hey, we just leased the minerals under your property, here is a surface use agreement (“SUA”).” What do you do now? Just like with mineral leasing, there are two important things you should undertake. First, know what the terms within the agreement mean. This allows you to ask educated questions and understand what obligations are imposed by the agreement. Second, know the people involved with the agreement.

Key Terms

Dominant & Servient Estate	<p><u>Dominant Estate</u> (Mineral Owner): This is the person or entity that owns the minerals below the surface. This is the dominant estate because the mineral owner has the legal right to enter onto the surface of the land to explore for and develop mineral deposits.</p> <p><u>Servient Estate</u> (Surface Owner): This is the person or entity that owns the surface above the minerals under lease. A surface owner still has rights under Wyo. Stat. § 30-5-401 through 410. The surface owner also owns the pore space per Wyo. Stat. § 34-1-152.</p>
Bonding (“Bond On”)	If a SUA agreement cannot be negotiated, an Operator can still enter the surface owner’s property. Under Wyo. Stat. § 30-5-404(b), an Operator can post a \$2,000 surety bond per well site.
Site Damage	Damage to the surface from drilling operations
Reclamation	Restoring the surface to a similar state before drilling operations were commenced on the property.
Seismograph Damages	Seismic testing is conducted to assist the Operator in deciding where to drill. These damages should be covered under the SUA.

People

After becoming acquainted with certain SUA terms, you should also figure out who handed you the agreement. Below is a list of people that are typically part of the agreement.

Lessor	Mineral owner that has leased the mineral interests.
Lessee	The person or entity that has leased the rights to explore for oil and gas on the property.

Landman	This is usually the person handing you the SUA. However, the Landman may be contracted by a company, employed by a company, or working independently. It is a good idea to clarify exactly who the Landman is representing.
Surface Owner	This will be you, the person with rights to the surface. This can be the same as the mineral owner unless the surface and mineral rights have been “severed”.
Operator	The entity that will drill on your property. This may be the Lessee or be contracted by the Lessee. As a surface owner, this is the entity with which you will likely encounter the most if a SUA is executed or the Lessee chooses to bond-on.

Negotiation

After learning the basics, the next step is to negotiate the terms of the SUA. Rarely are the initial terms satisfactory.

Income Maximization

The Lessee/Operator will often threaten bonding if you don't sign the SUA. However, these people want a comprehensive SUA just like you. A good SUA protects both the Operator's and Surface Owner's interests so don't be afraid to ask for more money or more protections to your property. Remember, like any negotiation, the first offer is usually the lowest. Potential payment options include:

- Lump sum amounts or annual rents
 - By acres used
 - By distances of roads, pipelines or transmissions lines constructed
 - By facilities (tank battery, well pad, evaporation pond, etc.)
- Overriding royalty: The surface owner gets paid based on the mineral production of the acreage—if the well produces minimally then payments are minimal, but if production is high then the payments are high.
- Combination of the foregoing



Don't get too greedy but don't be a pushover! A \$2,000 bond per well site is a low amount under the statute. However, the Operator is still on the hook for actual damages under Wyo. Stat. § 30-5-401 through 410. Try to get as much protection as you can under a comprehensive SUA in order to reclaim and protect your property. However, try to find an amicable solution as failure to sign an SUA creates a situation where the government becomes involved.

Term of the Agreement

In general, you should attach the term of the SUA to that of the lease and negotiate the terms of the SUA at the same time as the lease. Essentially, when the lease is over so too should

the SUA. In addition, set specific time limits for any temporary or development work. You want construction or development phase over as quickly to allow your to resume operations, or if they want long time periods, ensure that you are paid for the loss of your land.



Specify plugging timelines and restrict pore space! The Operator may not want to continue operations. Ensure wells are plugged appropriately and within a reasonable timeframe. Also, remember in Wyoming that the pore space belongs to the surface owner under Wyo. Stat. § 34-1-152. Thus, any requests for disposal or storage wells must be made with the surface owner. Ensure that a separate agreement is required for any use of the pore space.

Protection

This is the most important aspect of the SUA. Unlike a mineral lease, the surface owner wants assurances that his property retains its value, remains usable for its intended purpose and is restored to its pre-operation status.

Acres/Development Limitations

Limit the acres to be used. A SUA that incorporates a “site plan” is preferable. A site plan is basically a map showing what is to be placed on the property and where it will be located. This includes roads, facilities, pipelines, power lines, and other changes to the surface. This provides a definitive depiction of how the land will be utilized. The surface owner can then request the right to have notice of and agreement to any changes from the plan and propose alternatives.



Define operating locations in the SUA! Most standard leases allow the Operator to decide where everything will be located. Try to figure this out before operations begin. Consider adding references to “excluded” areas to help protect the essential parts of your property such as your residence, facilities, irrigation structures or livestock ponds. Retain the right to be consulted as the final decision-maker and to propose alternatives. Essentially, try to make everything a “mini” negotiation.

Coordinate Operations

As a surface owner, you may have farming or ranching operations ongoing. Try to incorporate certain provisions in the SUA to account for seasonal changes. For example, if you plan on planting crops in the spring and harvesting them in the fall, you may to restrict drilling operations during these periods. Place timelines within the SUA to restrict activities based on your needs.

In addition, make sure roads, structures or other facilities conform to your use of the land. Again, a site plan provides a great starting point as it allows the surface owner to restrict certain areas from development. The last thing you want is a well put in the middle of your best wheat field. If you ranch, require the Operator to put in place cattle guards or gates to keep your livestock where you want them.



Don't block access to your property! The Operator may be difficult to work with or is refusing to consider a proposed alternative. However, a company may sue you for interfering. Standby charges for delaying operations can exceed \$100,000 per day in some instances. If you are tempting to block their access, stop and consider alternatives including consulting legal counsel to advise you.

Reclamation

Consider negotiating sufficient compensation upfront to provide a reserve amount in case the Operator fails to fully reclaim the property. Be upfront about actual dollar amounts attached to different reclamation activities. Include provisions for crop damages and destroyed fencing. This may include provisions that stop an Operator from moving forward on additional activities until a portion of your property is reclaimed. In addition, require the property to be reclaimed to the same status as before operations began. Many companies have failed to keep up with changes in agricultural practices and consider specifying your preferred reclamation method. This includes reclaiming the property under no-till methods or to standards set by local extension offices.



Set a baseline of information for damage assessment! Operations can impact the surface owners water, soil, air quality and improvements. Take pictures and make the Operator responsible for getting independent providers to come and analyze water and air quality levels before operations begin. In a dispute with an Operator, you have more bargaining power if you have evidence of any changes.

Reducing Liability

Below are few clauses that should be included in every SUA to reduce a surface owner's liability for activities on the property.

- Delete any warranties or representations by the surface owner in the agreement. The Lessee needs to due its due diligence work to ensure the property meets its requirements.
- Require indemnification for any damages that are the result of their operations.
- Require proof of insurance and try to be named an additional insured on the policy. Take a look at the policy limits to make sure they would make you whole in the event of major damage.
- Include provisions that restrict, or require notice, on assignment. The surface owner needs to keep informed as to the current person entering the property.
- Guard your water. Make sure that if the Operator wants to use any water they need to receive your permission and pay for it.