

## WHAT TO LOOK FOR IN A SURFACE USE AGREEMENT

The following are highlighted sections in a Surface Use Agreement (SUA) that should be noted by surface owners. Accompanying these are comments on the highlighted sections that surface owners may find useful.

**These comments reflect the analysis and perspectives of the San Juan Citizens Alliance and are not intended to be used as legal advice.**

**Please contact an attorney for legal review, advice or action.**

### **Several generic things should be noted:**

- The Company has been offering the same amount of money for the surface owner's land no matter the value of the affected parcel.
- If the surface owner does not concur with these terms of the agreement, or attempts to negotiate the agreement, or does anything that will require the Company to use the state's regulatory process to secure the necessary permit to drill, the Company will often attempt to drastically reduce the amount it is offering as payment to a minimum cash settlement. In other words, unless the surface owner takes the Company's initial offer, the surface owner may receive less money when the SUA is finally signed.

### **A. Landowner Rights, Duties, and Obligations:**

**1. Damage Compensation.** Landowner agrees that the recited consideration *constitutes full payment for all present and future surface damages* that may occur to the Property as a result of the Company's reasonable operations.

**Comment:** This is the first of several sections in which **the landowner is required to waive rights, and claims.** Remember: The Company is paying \$10,000; that \$10,000 is what "... *constitutes full payment for all present and future surface damages...*" The Surface Owner is being asked to waive any claim to **unspecified future damages to property in perpetuity.** Whatever payment is decided upon between the Surface Owner and the Company is not just an initial payment; it is final payment for ANY damages at ANY time if those damages occur from what the Company's claims as 'reasonable operations.' It should not be left up to the surface owner to have to show that the Company's operation was not 'reasonable', in order to receive payment for damages. If future damage occurs, even in a 'reasonable operation', future damage should be paid for.

**3. Landowner Use of Drillsite.** Landowner agrees to not place or store any personal property or material of any kind on Drillsite, including but not limited to placing or storing vehicles, farm equipment, hay or other crops on Drillsite.

**Comment:** The effect of this is to prohibit the Surface Owner from using up to 2.4 acres of property on which property tax is paid by Surface Owner. (See **The Company's Rights,**

**Duties and Obligations) 1. Drillsite.** "... the drill site of the Well ("Drillsite") will be approximately 2.4 acres...").

**5. Permission to Bury Synthetic Pit Liners.** Landowner agrees that upon reclamation of the Drillsite, and if permitted by applicable law, the Company may bury in place any synthetic drill pit liners used at the Drillsite.

**Comment:** There are both state rule and county regulations that prohibit burial of pit liners on site; inclusion of such language creates an issue where none exists, then unnecessarily clouds the issue. There is no reason to have this stipulation in a surface use agreement in La Plata County.

**7. Waiver of Facility Setback Regulations.** The Company will comply with all applicable state and federal law pertaining to the distance setbacks between the Well and other Well facilities, and Landowner's home and other buildings and improvements. **Landowner hereby waives the right to enforce any local rules or regulations that may provide for more stringent distance setbacks than that provided by state and federal law.**

**Comment:** This is a waiver of rights to any local rules or regulations pertaining to distance setbacks. In the case of La Plata County landowners, this is significant if the county decides to enforce its setbacks which are more stringent than the state's.

**9. Colorado Waiver of Notice and Consultation.** In accordance with sections 305.f and 306.d of the Rules and Regulations ("Rules") of the Colorado Oil and Gas Conservation Commission ("COGCC"), **Landowner waives the right to receive the Notice of Drilling** set forth in COGCC Rule 305.b(1), and **Landowner further waives the right to the Drilling Consultation** set forth in COGCC Rule 306.a. Landowner acknowledges the receipt from the Company of the information brochure for surface owners described in COGCC Rule 305.c(6). Landowner acknowledges and agrees that the Company has complied with all notice and consultation requirements of COGCC Rules 305 and 306.

**Comment:** This is another provision that asks the landowner to waive rights, albeit sloppy written. It is unclear what the Company is asking here, as their references are inaccurate. The Agreement states that the **Landowner waives the right to receive the Notice of Drilling set forth in COGCC Rule 305.b(1)**. However this section of the state's rules **305(b)(1)** does not refer to the Notice of Drilling, but rather to Notice of Application for Permit to Drill. Under COGCC Rule 305.b(1), upon receipt of such notice, the landowner has an opportunity to comment on the Application for Permit to Drill. If that is the opportunity the landowner is being asked to waive, then the landowner will receive no notice and have a much more limited opportunity to participate in the permit process. **Rule 305(f)** refers to the posting of the on-site Notice of when drilling activities will commence, or the Notice to Drill. **305(f)** is a notice to the public and therefore it is questionable that one landowner could waive the public's right to notice.

The landowner would also waive the right to the **Drilling Consultation in Rule 306a**. This rule requires that "the operator shall consult in good faith with the surface owner," and goes

on to define “**good faith consultation.**” “Such good faith consultation shall allow the surface owner or appointed agent the opportunity to provide comments to the operator regarding preferences for the timing of oil and gas operations and preferred locations for wells and associated facilities.”

So, the surface owner would lose that right by signing this agreement; the surface owner should consider if losing that right is in his/her best interest.

Finally, the surface owner should take the time to read the information brochure referenced in this section of the SUA before signing any agreements.

10. **Landowner Use of Property.** Landowner expressly acknowledges that this Agreement shall be deemed to be specifically applicable to, and to fully satisfy, the obligation of the Company to accommodate Landowner’s use of the surface of the Property, existing or future, and Landowner waives any statutory or common law claims to the contrary.

**Comment:** This can be seen as a property rights issue, as it may give the Company the right to say what a landowner can and cannot do with his/her ‘Property’ into the future. **Colorado Revised Statute 34-60-127** requires the Company to limit its impacts to the surface and to reasonably accommodate the use of the surface by the surface owner, and not to unreasonably limit that use. This provision can be seen as waiving the Surface Owner’s right to protection under this statutory requirement.

Arguably, to say that the landowner cannot from this point forward, change plans on how the property is used is an unreasonable limitation of use and violates the intent of that statute by setting terms of the agreement totally in favor of the Company. Also, this would allow the Company to engage in unknown future activities that could be disruptive to the extent that they would unreasonably limit the landowner’s use of the property.

## **B. Company’s Rights, Duties and Obligations**

1. **Drillsite.** Company will use only as much of the surface of the Property as is reasonably necessary for the operation of the Well and associated facilities. **Company estimates that the surface area that will actually be disturbed for the drill site of the Well (“Drillsite”) will be approximately 2.4 acres which shall include the existing drill site of the Well and the additional expected total disturbed area for the Well.**

**Comment:** The surface owner should be aware that the Company is currently offering \$10,000 for the property that the Company believes will accommodate an ‘expansion’ pad. **In its public statements,** the Company has represented that expansion wells and payment for them will be for approximately **.3 acres.** This section however paints another picture entirely, with that \$10,000 payment being for ultimately **2.4 acres.** So, the Company is not only paying for the new well and new pad, they are also paying for the life of the existing well and pad has now been extended by decades. So where the Surface Owner might have thought that the presence of a well and its pad would last for 20-30 years, each new expansion could substantially extend the life of the occupation by the well pad again by that much, as well as taking more land. In other words, once there is a well on the subject

property, and expansion wells are added to the site, there is generational presence of gas activity on the subject property.

10. **Pits, Burial of Synthetic Liners.** The Company, in its discretion, may use synthetic liners for any Well puts used at the Drillsite. Upon reclamation of the Drillsite, and if permitted by applicable law, the Company may bury in place any synthetic drill pit liners used by the Company at the Drillsite.

**Comment:** SEE PREVIOUS COMMENTS UNDER **Permission to Bury Synthetic Pit Liners.**

11. **Reclamation.**

- a. **Initial Construction.** After the drilling and completion of the Well, and the construction of any associated facilities such as the well pad, access roads and pipelines, those areas of land that the Company will not use for continuing production operations will be reclaimed. The areas to be reclaimed include the pipeline surface disturbance areas and the well pad surface disturbance area outside the areas that will be used for ongoing Well operations. Reclamation will consist of filling drilling pits, grading disturbed areas, and seeding with a readily available grass seed mixture reasonably requested by Landowner. Reclamation will be performed within reasonable amount of time after completion of the Well construction of any associated facilities, recognizing practical limitations of weather and season. Seeding will be performed with an appropriate mixture of broadcast and drill methods, but **the Company does not guaranty seed germination.** All mitigation and reclamation activities by the Company on the Property will conform to applicable laws, rules and regulations.
- b. **Subsequent Surface Disturbance.** All subsequent disturbances by the Company to areas reclaimed under the preceding paragraph will be similarly reclaimed by the Company with a reasonable amount of time, recognizing practical limitations of weather and season. The Company will make a reasonable attempt to notify Landowner in advance of any significant subsequent disturbance activities on the Property; including but not limited to, Well servicing, Well re-drill, and pipeline repairs, with exception of emergency repairs.

**Comment:**

a.) The Company's unwillingness to guaranty of seed germination, raises the question of what is the point of reclamation? State **Rule 1003 e 2** says: "Interim reclamation of all disturbed areas no longer in use shall be considered complete when all ground surface disturbing activities at the site have been completed, and all disturbed areas have been either built on, compacted, covered, paved, or otherwise stabilized in such a way as to minimize erosion to the extent practicable, or a uniform vegetative cover has been established that reflects pre-disturbance or reference area forbs, shrubs, and grasses with total percent plant cover of at least eighty percent (80%) of pre-disturbance levels or reference areas, excluding noxious weeds. **Re-seeding alone is not sufficient.**"

Putting language like this in the agreement simply complicates the document, and appears to be an attempt to circumvent state regulation. The surface owner should insist on compliance with state rules.

b.) The concern here is with the term “within a reasonable amount of time”. State **Rule 1003 b** specifies when reclamation must occur: there is a 3 month time period on crop land and a 6 month time period on non-crop land. The term “reasonable amount of time” should be replaced with “the Company will adhere to all applicable state and local rules and regulations regarding reclamation time frames.”

To access Colorado Oil and Gas Conservation Commission (COGCC) Regulations, go to [cogcc.state.co.us](http://cogcc.state.co.us).

### **C. General Provisions:**

8. This Agreement is subject to the terms of a Side Letter Agreement (“SLA”) date \_\_\_\_\_, 2008 by and between Landowner and the Company.

#### **Comment:**

Surface Owners should be aware of the Side Letter Agreement (SLA) that they will also be expected to sign. There are several things to note here:

- While the Surface Use Agreement (SUA) is considered a generic document, the Side Letter Agreement is more specific to the individual property;
- While both the SUA and the Side Letter Agreement apply to the property, the SUA is a recorded public document and the Side Letter Agreement is not. Generally, companies want an Side Letter Agreement to be confidential, as it will have the details of any specific terms between the Surface Owner and the Company. For example, the Side Letter Agreement may have language saying: “This Side Letter Agreement shall not be recorded under any circumstances whatsoever”. Arguably it is up to the Surface Owner, as an equal party to this agreement, to decide whether or not the Side Letter Agreement is recorded. The Side Letter Agreement may add to, delete, contradict, or supersede terms agreed to in the SUA, and thereby can present the Surface Owner with still more confusion about what exactly is going to be expected of both parties.