

# UNDERSTANDING AND RESEARCHING SURFACE RIGHTS

# Answering Key Questions...

1. How are a lease and an easement different?
2. Which type of conveyance is an oil and gas lease – a lease or an easement?
3. Can I lose my easement?
4. We've got the acreage under lease. Don't we have all the surface rights we need?
5. What are “beneficial uses” of a tract that may require additional surface rights?
6. How do I figure out what rights I have ... and if I might need additional rights?
7. What happens if we don't secure all the surface rights we need?



# HOW ARE A LEASE AND AN EASEMENT DIFFERENT?

# Lease vs. Easement

It's critical to understand the distinction between rights acquired by lease and those conveyed in an easement grant

- A **Lease** typically fixes the Lessee's right to use the property for a limited and *finite* period of time (except Oil and Gas leases which may extend for an indeterminate duration)
- Generally, the sole consideration for a lease is the payment of periodic rentals
- Leases create a separate **term estate** and may not be assigned or subleased unless specifically permitted by the terms of the contract
- The Lessee's interests cease upon expiration and all leased rights revert to the Lessor or fee owner who may then use, sell or re-lease the property again



# Lease vs. Easement

- An **Easement** conveys a specific portion of the total property rights
- Unless otherwise limited, easements are generally granted for an indefinite period of time (“in perpetuity”)
- Consideration for an easement is usually a single payment made at the time of acquisition
- As a **separate and distinct estate**, easements can be bought, sold, transferred, mortgaged or otherwise traded in the marketplace (unless prevented or restricted in the granting instrument)
- Except for certain implied rights essential to enjoyment of the interests conveyed, the Grantee in an easement is limited to only those rights specifically enumerated in the grant

**Key Takeaway:** Since an easement grant conveys specific rights, it is critical those rights are **explicitly** described in the Granting Clause or in the instrument. You may not rely on implied rights as in an Oil & Gas Lease.



WHICH TYPE OF  
CONVEYANCE IS AN  
OIL AND GAS LEASE  
– A LEASE OR AN  
EASEMENT?

# Actually ... it's both!

- An **Oil & Gas Lease** is a hybrid form of lease and easement
  - It is not a lease in the conventional sense in that it conveys a determinable fee estate in the oil and gas, i.e. it can last indefinitely as long as there is production, but terminates upon cessation of production
  - Generally, Oil & Gas Leases are assignable unless specifically prevented by contract terms
  - In addition, it also typically grants certain easement rights (described in the Granting Clause) for the term of the lease
  - Also, an Oil & Gas Lease conveys certain implied rights and imposes implied obligations on the Lessee



# Implied Rights and Obligations in an OG&M

## **Implied rights** include:

- Right to “Reasonably Necessary” use of the surface to explore for and produce gas and oil
- Right to conduct seismic operations, and
- Right to use water, oil and gas for operations free of cost

## **Implied obligations** include:

- Duty to Market
- Duty to Protect against Drainage
- Duty to Reasonably Develop
- Duty to Meet the “Reasonably Prudent Operator” Standard



# CAN I LOSE MY EASEMENT?

# Can I Lose My Easement?

- In a word, **yes!** Though a separate and distinct estate in real property, easements can be lost, terminated or extinguished in a number of ways...
  - Operation of Law – such as misuse, non-use, foreclosure or condemnation for public use
  - Abandonment – if cessation of use is accompanied by clear intent to never use the easement again
  - Failure of, or Non-Compliance with, Conditions – if express conditions in grant are not met, however, the condition *must* include the express penalty of forfeiture
  - Merger – if the dominant and servient estates are united in a common owner
  - Expiration of Term – easements granted for designated time period expire at the end of the term



# Can I Lose My Easement?

- Adverse Possession – while extremely difficult with a non-possessory estate, rights can terminate if adversely possessed for ten years (or other term as defined or prescribed by state statutes)
- Change of Condition / Expiration of Purpose – easements created for a specific purpose terminate when the purpose ceases to exist or is completed or fulfilled
- Cessation of Necessity – an easement by necessity terminates when the necessity no longer exists
- Foreclosure of a junior easement (subordinate the easement or add a provision to subrogate!!!)
- One of Land's key roles is to preserve and maintain property rights
- To safeguard existing easement rights, companies should implement an active surveillance program to prevent encroachments or adverse possession and to avoid claims of non-use or abandonment



WE'VE GOT THE ACREAGE  
UNDER LEASE.  
DON'T WE HAVE ALL THE  
SURFACE RIGHTS WE NEED?

# Don't We Have All the Rights We Need?

- Most Oil & Gas Leases grant rights to construct roads, pipelines and powerlines and use as much of the surface as reasonably necessary to explore, produce and market leased substances
- So it's reasonable to ask: "What other rights do I need and why do I need them?"
- No additional rights are needed when roads, pipelines and other improvements are constructed on, over and through the leased property, provided the facilities serve that lease only
- Lease rights may only be exercised on the leased premises and they expire when the Oil & Gas Lease terminates



# Do We Need Additional Rights?

- As soon as roads, pipelines and improvements constructed by virtue of lease rights are extended to serve adjacent leases and become facilities serving the *field* (vs. the lease), requisite property rights must be secured from the appropriate surface owner(s)
- **Key Takeaway:** As a general rule of thumb, if a parcel of land is used to support operations or otherwise benefit another tract(s) or other leased premise(s), additional surface rights will be required!



WHAT ARE “BENEFICIAL  
USES” OF A TRACT THAT MAY  
REQUIRE ADDITIONAL  
SURFACE RIGHTS?

# Beneficial Uses Requiring Add'l Rights

- Examples of such “benefits” might be simple ingress and egress to adjacent tracts or temporary workspace to facilitate construction activity
- The complexity of drilling and production operations, however, means myriad other surface rights or interests may be needed, for example...



# Beneficial Uses Requiring Add'l Rights

- Easements / corridors for supplementary pipelines
  - field gathering lines, steam or water injection lines, saltwater disposal lines, distribution lines, stormwater or sanitary sewer lines
- Temporary access rights to conduct land, soil or environmental surveys
- Additional acreage to accommodate oversized drillsites (exceeds what is “reasonable and necessary”)
- Surface leases for storage yards, parking lots or warehouse facilities
- Acquiring multiple routes for site access (if required by local fire code)
- Landfarming consent
- Contracting for road construction materials (gravel, caliche)
- Arranging water for drilling operations
- Consent to stack the rig or other temporary storage
- Road use or road sharing agreements
- Canals, docks or navigation easements
- Easements to prevent or restrict surface drainage
- Permission to abandon or junk equipment in place



HOW DO I FIGURE OUT  
WHAT RIGHTS I HAVE...  
AND IF I MIGHT NEED  
ADDITIONAL RIGHTS?

# Sources of Property Rights

- Determining current rights to use and enjoy the surface – on a parcel, within a unit or over an entire field – is typically a research exercise
- Like most projects, a methodical approach should yield the best results
- Begin with existing contracts and agreements to determine what rights of surface use and access were previously granted or acquired
- **Key Takeaway:** Start by researching existing contracts or agreements to determine what rights of surface use and access you already have; never pay twice for something you already bought!



# Think Native vs. Non-Native

- When assessing whether or not additional rights are needed, it may be helpful to think of the property as an island
- Can the proposed project or intended use be completed using only “native” resources, i.e. strictly what exists on the island?
  - Is the use of materials (water, caliche, etc.) authorized and will they be used only on this property?
  - Will the installation or facility serve only the leased premises?
  - Is this the only tract which will benefit from the project or use?
- If the answer to any question is “No” and lease(s) off the island – “non-native” tracts – are served or benefit, you need additional surface rights!



# Think Native vs. Non-Native

- Be aware “non-native” means all of the following:
  - Off lease
  - Off of the proration or spacing unit
  - Off unit for production purposes
- ***Be sure to consider future use***; if there is a reasonable expectation the facility or installation will accommodate or support off-lease production and/or operations, additional surface rights will be needed
- **Best Practice:** Buy those extra surface rights now! They won't be less expensive if the landowner has leverage...

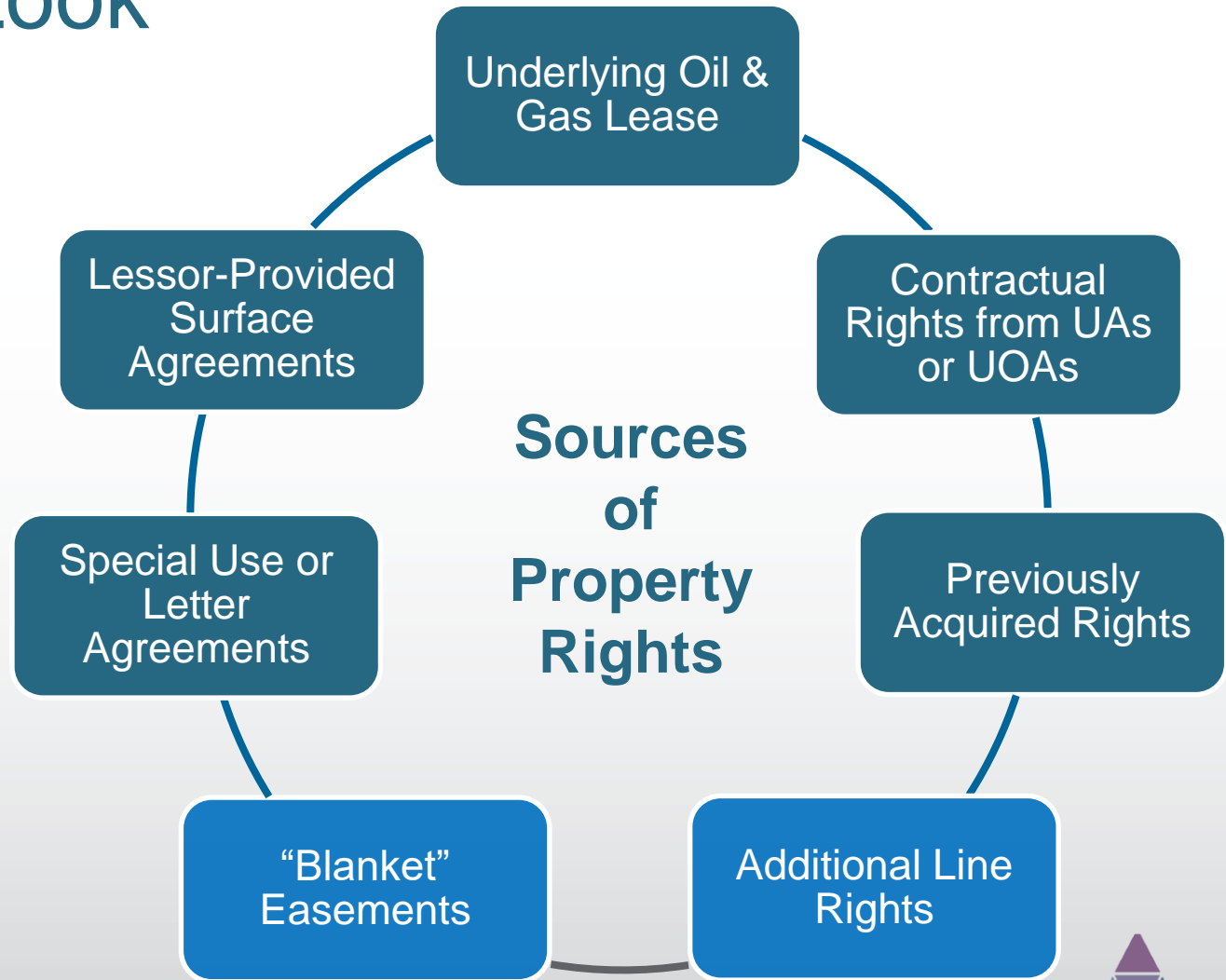


# Where to Look

## CAUTION:

While UAs and UOAs actually modify the terms of any committed Oil & Gas Leases, the same is *not true* of most Joint Operating Agreements.

Don't rely on JOAs as a source of property rights.



# Lease Rights

- Lessee's rights to construct roads, pipelines, powerlines, and to otherwise use the surface is typically defined in the Granting Clause, but may be limited in a later provision(s)

Again, **Read the entire lease!**

- **Key Takeaway:** Most Oil & Gas Leases include a grant of some easement rights for the term of the lease, so the starting point to determine existing surface rights is to examine the underlying lease!



# Proceed with Caution...!

- Use care when relying on lease rights for surface use and access
- Remember the Lessee's right of surface use is constrained by the following:
  - Rights may only be exercised on the leased premises
  - Rights expire upon lease termination
  - Use is typically limited to what is "reasonable and necessary" for operations; i.e. if a standard drillsite in the region is 2.0 acres, it may be difficult to justify an oversized location of 3.0 acres or more



# Rights from Operating Agreements

- When various producers voluntarily consolidate their interests in a field or region to conduct joint operations under a single Operator, they typically execute one or more contracts to memorialize the commercial terms and obligations
- Each party to the agreement – the Operator and all Non-Operators – then commits their leases and interests within the contract area to the joint operation
- A detailed listing of all leases and interests committed to the unit is usually attached as an exhibit to the
  - Unit Agreement (UA)
  - Unit Operating Agreement (UOA)



# Rights from Operating Agreements

- Surface rights contributed by Non-Operators – provided their mineral owners have ratified the unit – will generally extend to unit operations and may be exercised by the Unit Operator
- **Remember...**
  - Again, UAs and UOAs actually modify the terms of any committed Oil & Gas Leases, while most Joint Operating Agreements do not
  - JOAs govern the relationship between co-venturers developing oil and gas on a property and typically **will not be a source of property rights.**

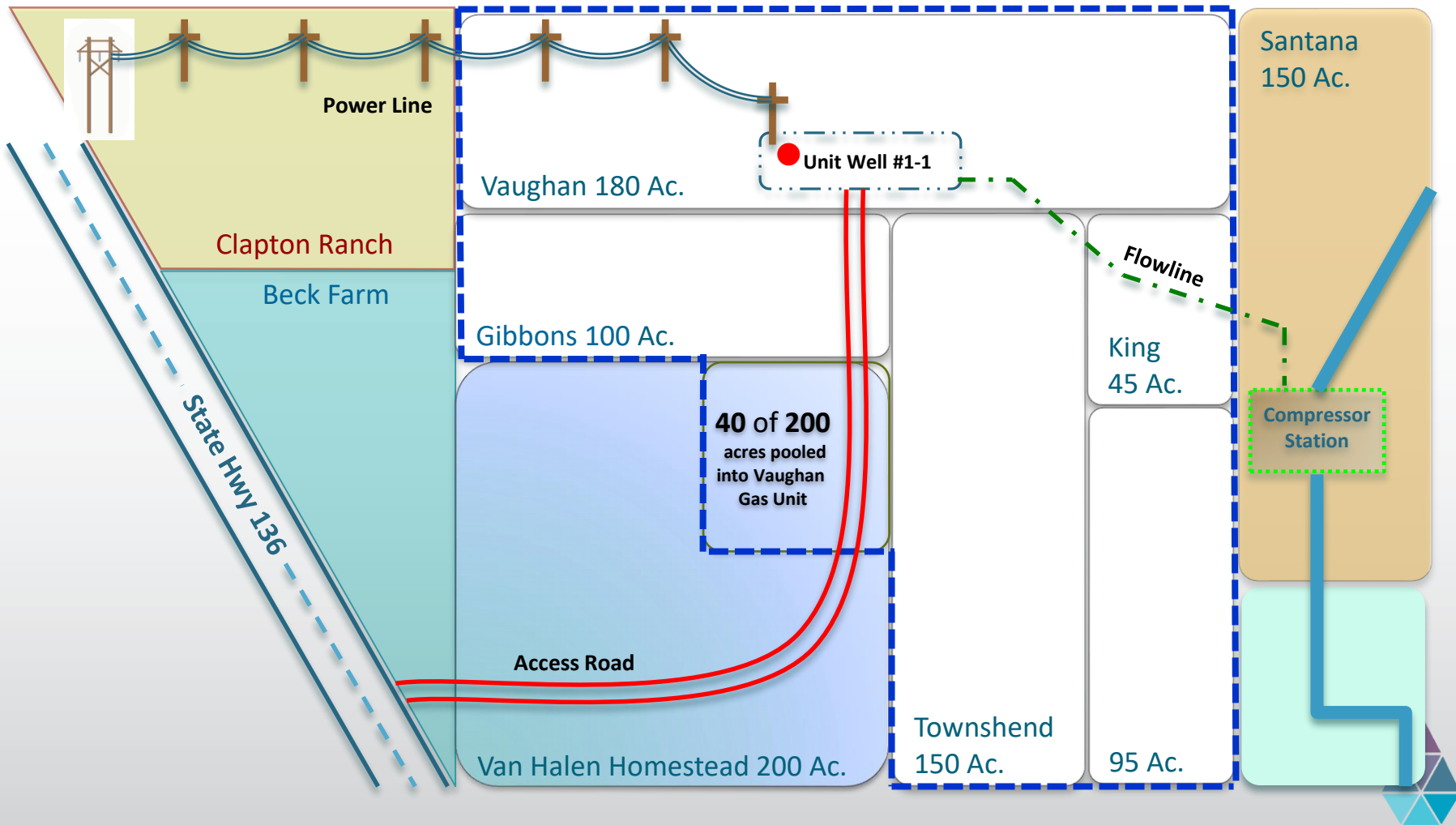


# Unit Rights – Pooled Units

- In certain instances, subject to the pooling provision of the applicable Oil & Gas Lease, the leased premises (or portions thereof) may be combined with other tracts to form a ***Pooled Unit***
- Once consolidated into a unit, surface rights granted in the underlying lease may be extended or enlarged to encompass unit facilities like roads, pipelines and other improvements
- **Again, Proceed with Caution...**
  - Absent pooling language in the lease, mineral owners must ratify a unit agreement, so great care must be exercised to ensure all applicable interests are committed to the unit
  - **Rob's Tip:** Never, ever, ever assume all the leases in a unit use the same form, even if the same landman or brokerage firm took them. If there are 62 leases in the unit, read all 62. **Read the lease!**



# What Rights Do We Need?



# Sources of Property Rights

- There are three last places to look for previously acquired rights of surface use and access or limitations on exercising those rights:
  - Special Use or Letter Agreements (SUAs)
  - Lessor-Provided Surface Use Agreements
  - Conditions or Restrictions imposed by City, County / Parish, State or Federal regulatory agencies
- **Key Takeaway:** If, after researching all existing contracts and agreements, if you cannot assert or affirm adequate rights of surface use for all phases of a proposed operation, you will need to secure the specific rights or interests you need!



# Owner-Provided Surface Use Agreements

- More frequently, property owners (or their attorneys) want to dictate terms for surface use and access or insist on execution of a separate Surface Use Agreement (SUA)
- These proposals range from simple side letters which are relatively innocuous, like accommodating a current or anticipated use (e.g. center-pivot irrigation systems)...
- ... to complex documents stipulating onerous damage payment schedules, are disruptive or result in major interference with operations (e.g. drilling prohibitions during hunting or migratory waterfowl seasons)
- Exercise care when presented with an owner-provided SUA – many of these agreements can be constricting, obstructive and effective deterrents to efficient operations



# Examples of Restrictive Provisions

- Lessee's Development Plan
- Plats
- Setbacks
- Compliance with Laws
- Litter
- Storage and Disposal
- Fencing and Firewalling
- Gates and Gate Guards
- Housing of Employees
- Notice Requirements
- Right to Remove Personnel
- Inspection Schedules
- Insurance
- Road Construction and Maintenance
- Care in Operations
- Removal of Equipment
- Surface Restoration
- Seismic Operations
- Damage Schedules
- Saltwater Disposal
- Water (Groundwater) Protection
- Water Wells
- Well Abandonment
- Abandonment of Pipelines
- Location of Wells and Pipelines
- Plugging
- Erosion
- Fire Prevention
- Recreational Use of Property
- Protection of Natural Features
- Removal of Artifacts
- Vegetation and Plants
- Wildlife and Livestock



WHAT HAPPENS IF WE  
DON'T SECURE ALL THE  
SURFACE RIGHTS WE  
NEED?

# An Unpleasant Reality

- Unfortunately, it is ***not*** uncommon for operators to construct improvements or install facilities for which they later discover had insufficient or no surface rights
- In some cases, construction may occur without Land's knowledge or involvement



# Implications and Consequences

- Most frequently, the causes are:
  - Failure to engage Land early on to research existing rights
  - Lack of – or poor communication between – field personnel, construction contractors and Land
- When this condition exists, the consequences can be severe! Failure to secure adequate property rights:
  - Causes delays which were 100% avoidable
  - Incurs increased costs
  - Invites interference by regulatory agencies, property owners and third parties who may impede or prevent work
  - Creates problems for day-to-day operations
  - Fosters ill will / damages interpersonal relationships



# Implications and Consequences

- Can result in reputational damage for companies
- May violate terms of existing agreements, and
- Causes significant legal exposure, including:
  - Potential litigation
  - Trespass (good faith and bad faith; could lead to double or treble damages!)
  - Claims for damages
  - Title failure
  - Lease maintenance issues or forfeiture of property rights
  - Irreparable losses
- The negative consequences of operating without adequate surface rights should be clearly and regularly communicated to facility engineers, construction crews, contractors and field personnel



# Some Final Thoughts

- Just like Lessors can limit access to their minerals or restrict operations on their property...
  - Leasing only certain formations or horizons
  - Prohibiting the right of surface entry
- ... Landowners can similarly limit or restrict Surface Rights, e.g.
  - Authorizing installation of one and only one pipeline
  - Granting additional uses within non-exclusive easements
- Restrictions like these enhance the landowner's control while reducing operational efficiencies and limiting options
- **Key Takeaway:** Like mineral interests, surface rights can be significantly limited or restricted by Grantors. Exercise care when negotiating for surface interests to ensure you acquire both the rights – and the operational flexibility – you need.



*Thank you!*

As always, your comments, feedback and perspectives are invited and valued.

