

The Oil and Gas Lease In Oklahoma: A Primer

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Oklahoma has the second most crude oil wells of any state in the United States, and the third most natural-gas wells.¹ Oklahoma is also the third-leading producer of natural gas and the seventh-leading producer of crude oil among the United States and federal offshore territories.² Given these numbers, the likelihood that an Oklahoma attorney will encounter an oil and gas lease in practice is high. Yet, oil and gas leases present unique legal issues, and the law governing their execution, duration and interpretation is distinct from ordinary principles of property law or contract law.

Attorneys should be familiar with the basic legal rubric that applies to oil and gas leases before undertaking even the slightest encounter with an oil and gas lease. Otherwise, the risk of serious error is quite real. It is far beyond the scope of this article to cover the vast array of legal issues and doctrines that oil and gas leases bring into play. Rather, this article will present the basic concepts of Oklahoma law on oil and gas leases with which every Oklahoma attorney should be familiar.

OWNERSHIP OF OIL AND GAS

Before examining the law governing oil and gas leases, it is helpful to discuss the basic principles of oil and gas ownership. Under Oklahoma law, the owner of a tract of land does not hold an ownership interest in the oil or gas under his land until those substances are extracted to the surface and reduced to possession.³ The Oklahoma doctrine of oil and gas ownership is commonly referred to as the "exclusive-right-to-take" theory.⁴ Early on, the Oklahoma courts recognized that oil and gas are "fugacious [substances] and are not susceptible to ownership distinct from the soil."⁵

With this realization, the courts concluded that the rule of capture applied to fugacious minerals - such as oil and gas - that were capable of subsurface migration within a reservoir. Under the law of capture, a landowner or mineral owner has the "exclusive right to drill for, produce, or otherwise gain possession of [petroleum-based] substances."⁶ Included in these exclusive rights is "the right to reduce to possession oil and gas 'coming from land belonging to others.'"⁷ The rule of capture allows a landowner or mineral owner to drill as many wells as they wish, drill those wells as close to the boundary line of neighboring tracts of land, and operate the wells in the most efficient manner possible. The neighboring landowner's remedy is not an action for conversion or equitable relief to prohibit or reduce their neighbor's operations. Rather, their remedy is to drill their own well. In modern times, the rule of capture has been made subject to the Conservation Act, which sets limits on well spacing and drilling in order to prevent waste and protect correlative rights.⁸

The mineral owner holds several rights as a result of their exclusive right to take the oil and gas underlying a certain tract. Included in these rights are 1) the right to develop the minerals 2) the executive right (*i.e.*, the power to execute a lease conveying the development right); 3) the right to receive bonus (*i.e.*, a cash payment made for execution of a lease); 4) the right to receive delay-rental payments; 5) the right to receive royalty; and 6) the right to receive shut-in royalty.⁹ The owner of the mineral estate may, in theory, sever any or all of these interests to different persons.¹⁰

Before reviewing the nature and attributes of the oil and gas lease, it also bears noting that the surface owner may or may not be the owner of the exclusive right to take oil or gas. Under the common - *law maximcujus est solum ejus est usque ad coelum et ad inferos* - "the owner of the soil owns to the heavens and also to the lowest depths" - the owner of the surface tract of land also owns the exclusive right to take oil and gas from under that land.¹¹ Consistent with general property law, however, the exclusive right to take is freely alienable, devisable and descendible.¹² In other words, the surface owner may sever their interest in the petroleum substances that underlie their land. After severance, the interest in oil and gas will be a separate estate, commonly referred to as the "mineral estate."

THE NATURE OF THE OIL AND GAS LEASE

It is essential to observe at the outset that, although it is called a "lease," the common-law doctrines governing real-property landlords and tenants do not apply to an oil and gas lease.¹³ The oil and gas lease is *sui generis*; it is part conveyance, part executory contract.¹⁴ The oil and gas lease is a conveyance, as it is through the lease that the mineral owner conveys a property right to the lessee - usually an oil company - "to explore for and produce oil and gas, reserving a royalty interest in production."¹⁵ The lease is a contract in that the lessee accepts these property rights subject to certain express and implied promises to the lessor.¹⁶

The Oklahoma courts have determined that the property right conveyed in an oil and gas lease is a "profit à prendre capable of legal existence as a servitude 'unattached' to land (in gross), and may be transferred in gross, either in whole or in part, as an estate in real property."¹⁷ The profit à prendre, also known simply as the "profit," is a common-law property interest that is a "liberty in one person to enter another's soil and take from it the fruits not yet carried away."¹⁸ The analogy that Oklahoma courts have often used to describe the profit is that it is similar to a right to enter onto another's land and either hunt or fish.¹⁹

While the oil and gas lease does not convey absolute title to the oil and gas that may lie beneath the surface, it does convey an interest in the land. An oil and gas lease must therefore be in writing and signed, as it falls within the statute of frauds.²⁰ The lease

must also identify the lessor, the lessee, the interest conveyed, and an adequate description of the leased premises.²¹ Also like a deed, an oil and gas lease must be delivered in order to be effective.²²

THE GRANTING CLAUSE - THE RIGHTS GRANTED

The granting clause of an oil and gas lease, much like the granting clause of a garden-variety deed, identifies the nature of the interest granted. Three types of granting clauses are commonly found in leases throughout the oil and gas industry.²³ The "exclusive right" granting clause purports to grant the lessee the exclusive right to mine and produce petroleum products from the leased premises.²⁴ The "lease and let" granting clause purports to either 1) lease and let the land to the lessee for the limited purpose of producing petroleum products, or 2) lease and let the oil and gas on the premises to the lessee for the purpose of producing them.²⁵ The "conveyance of title" granting clause purports to grant title to all petroleum products in place under the land, along with the exclusive right to take those substances.²⁶

In Oklahoma, however, the distinction between these clauses is largely, if not entirely, academic. Given the Oklahoma theory of oil and gas ownership, the Oklahoma courts have determined that regardless of which type of granting clause is in a particular lease, the interest conveyed will be an exclusive right to take - the above-described profit à prendre.²⁷ A typical granting clause in an oil and gas lease might read as follows: the lessor hereby "grant[s], demise[s], lease[s] and let[s] unto the said lessee for the sole and only purpose of exploring by geophysical and other methods, mining and operating for oil and gas, and of laying of pipelines on the described premises."²⁸

While it may not appear expressly on the face of the lease, the execution of an oil and gas lease also impliedly conveys to the lessee an easement for reasonably necessary surface usage.²⁹ This implied easement arises because, for purposes of oil and gas development, the mineral estate is recognized as the dominant estate, and the surface estate is recognized as the servient estate.³⁰ The implied easement of reasonably necessary surface usage allows the lessee to "surface ingress and egress and the authority to occupy the surface to the extent reasonably necessary for exploring and marketing the oil and gas."³¹ These rights are, however, limited both by the reasonableness standard, as well as the provisions of the Oklahoma Surface Damages Act.³² The Surface Damages Act provides that "the oil and gas lessee must engage in negotiations with the surface owner and seek an appraisal of surface damages, and the surface owner is entitled to damages caused by the reasonable use of the surface by the oil and gas lessee."³³

THE HABENDUM CLAUSE

While the granting clause sets forth the interest that is granted, the habendum clause sets forth the duration of that interest. The typical habendum clause provides for a fixed term - called the "primary term" - that is usually a term of years, during which the lessee has the option, but not the duty, to begin production of oil or gas. The usual clause also provides for a term of potentially infinite duration - called the "secondary term" - after the expiration of the primary term, during which the lessee retains the exclusive right to take so long as petroleum products are produced from the leased premises. Thus, a typical habendum clause would read, "It is agreed that this lease shall remain in force for a term of [five years] from this date and as long thereafter as oil or gas of whatsoever nature or kind is produced from said leased premises or on acreage pooled therewith, or drilling operations are continued as hereinafter provided."³⁴

The Primary Term

During the primary term of the habendum clause, the face of the lease does not expressly place any duty upon the lessor to drill an exploratory well.³⁵ Early in the history of the oil and gas industry, however, the courts held that there was an implied covenant to drill an exploratory well. The rationale behind this implied covenant was that the true consideration behind the oil and gas lease was the payment of royalty, irrespective of any bonus the lessor may have received.

But this implied duty was problematic for the typical lessee. It was not a cost-effective reality for the lessee to have the duty to drill an exploratory well on every tract of land upon which it held a lease. Enter the drilling clause, also known as the delay-rental clause. The delay-rental clause gives the lessee the choice between paying payments, at the time interval provided by the lease, and drilling an exploratory well. A typical delay-rental clause might read as follows:

If drilling operations or mining operations are not commenced on the leased premises on or before one year from [the date of lease execution], this lease shall then terminate as to both parties unless lessee on or before the expiration of said period shall pay or tender to lessor, or to the credit of lessor in [the lessor's bank] or any successor bank, the sum of one hundred seventy and no/100ths-dollars, (\$170.00), hereinafter called "rental" which shall extend for 12 months the time within which drilling operations or mining operations may be commenced.³⁶

This type of delay-rental clause is known as an "unless" clause. If the lessee fails to either drill a well or pay delay rentals as provided for in the delay-rental clause, the lease terminates by its own terms.³⁷ The lessee's intent to comply, good-faith efforts, or mistakes by the lessee will not excuse the lessee's failure to satisfy the provisions of the delay-rental clause. For the delay-

rental clause is strictly construed against the lessee. The lessee must pay delay rentals in the proper amount, on or before the due date, to the proper persons, and in the proper manner. But if the failure to satisfy the delay-rental clause is caused "by independent causes not contributed to by the lessee," a court may excuse the failure.³⁸ Further, the lessor may be estopped from asserting that the lease has terminated if prior to the due date, the lessee makes a good-faith payment of a delay rental but the payment is inadequate due to a reasonable mistake by the lessee, and the lessor failed to advise the lessee of the payment's inadequacy.³⁹

Another option is the so-called "paid-up lease." In a paid-up lease, the lessee simply pays all delay rentals in advance and the parties agree that there is no duty on the lessee to drill an exploratory well during the primary term. An example of a provision denominating a lease as paid up is as follows: "This is a PAID-UP LEASE. In consideration of the down-payment, Lessor agrees that Lessee shall not be obligated, except as otherwise provided herein, to commence or continue any operations during the primary term or make any rental payments during the primary term."⁴⁰ While the paid-up lease may seem superior at first blush, it is not without problems all its own. The lessee runs the risk that the lessor will convey their interest to a third party during the primary term, and the lessee will then owe delay rentals to the new owner.⁴¹ One way to alleviate this risk is the change-of-ownership clause, which provides that the lessor must give notice to the lessee if the mineral ownership changes.⁴² If the lessor does not provide notice after an ownership change, the lessee is not relieved of the duty to pay delay rentals. But payment of delay rentals to the previous owner will prevent lease termination during the primary term.

The Secondary Term

After the primary term has expired, the lease will remain in force "as long thereafter as oil or gas is produced" from the leased premises. Under Oklahoma law, the term "produced," as used in the habendum clause, means "production in paying quantities."⁴³ "Production in paying quantities," in turn, means "production of quantities of oil and gas sufficient to yield a profit to the lessee over operating expenses, even though the drilling costs or equipping costs are never recovered, and even if the undertaking as a whole may result in a loss to the lessee."⁴⁴ The phrase "in paying quantities" signifies a return to the lessee beyond its "lifting expenses" - in other words, those "costs associated with lifting the oil from the ground after the well has been drilled."⁴⁵

But in order to meet the production-in-paying-quantities standard, Oklahoma law does not require that the lessee actually market or sell the oil or gas. Rather, to propel the lease into the secondary term, the lessee need only "have found oil or gas upon the premises in paying quantities by completing a well" on the leased premises prior to the expiration of the primary term.⁴⁶ Oklahoma law expressly rejects the requirement of marketing the oil or gas to propel the lease into the secondary term. During the secondary term, a variety of conditions can arise that may affect the lessee's ability to maintain the oil or gas well in a manner capable of producing in paying quantities. Thus, a variety of clauses has developed that will serve as substitutes for production.

One of these provisions is the shut-in royalty clause. The shut-in royalty clause provides that the lessee may make cash payments to the lessor a substitute for production during the secondary term. The shut-in royalty clause usually only applies to a gas well, because there is almost always a market for oil, and even if there were not, oil can be stored above ground.⁴⁷ Gas, on the other hand, cannot be stored above ground. So if there is not a nearby market and a pipeline connection available at the end of the primary term, the lease may terminate. This problem is greatly diminished in Oklahoma, due to the Oklahoma view that production "in paying quantities" does not require marketing. But the shut-in royalty clause is not irrelevant in Oklahoma. At a given well, it may be years before a field of wells produces sufficient quantities for a pipeline company to make a pipeline connection available.⁴⁸ And despite having satisfied the habendum clause's production requirement, the lessee may have additional duties under the implied covenant to market for which the tender of shut-in royalty payments could substitute.⁴⁹ Many leases also contain a well-completion clause, also known as a continuous-operations clause. The importance of the well-completion clause depends upon whether the lease on its face requires completion of a well prior to the expiration of the primary term or whether the lease only requires commencement of a well.⁵⁰ If the habendum clause of the lease requires completion, a continuous-operations clause would allow the lessee to complete a well first drilled during the primary term.⁵¹ In order for a continuous-operations clause to allow the lessee to maintain the lease, drilling of the well must have been commenced during the primary term of the lease.⁵²

Another clause that allows a lessee to maintain the lease when there is not an actively producing well after expiration of the primary term is the dry-hole clause. The dry-hole clause allows the lessee to drill another well if the lessee commences drilling of a well during the primary term - but upon completion of the well during the secondary term, it turns out the well is a dry hole.⁵³ A typical dry-hole clause might read as follows: "If prior to discovery of oil or gas on said land, lessee should drill a dry hole or holes thereon, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter."⁵⁴

When small tracts of land are involved, where state regulations under the Conservation Act limit the number of wells that can be drilled, where a group of lessees wish to allocate risks, or for a large number of other reasons, a group of leases may be pooled together. The leased premises pooled together in this manner are typically referred to as the pooled unit. Pooling may be voluntary or it may be compulsory, as the result of action by the Corporation Commission.⁵⁵ To facilitate pooling of interests, many leases have a pooling clause that deems "production or operations anywhere on the pooled unit constructive production for purposes of the lease."⁵⁶ A typical pooling clause would read: "production, drilling, or reworking operations anywhere on a unit that includes all or part of this lease shall be treated as if it were production, drilling or reworking operations under this lease."⁵⁷ Yet another clause typically found in an oil and gas lease is the force-majeure clause. A force-majeure clause "excuses [the] lessee from performing if prevented from doing so by any circumstance or condition beyond its control."⁵⁸ Force-majeure clauses

are, however, strictly construed. For example, inability to sell gas at a profit due to market conditions is not sufficient to invoke the force-majeure clause.⁵⁹ Moreover, the force-majeure clause will only maintain the lease during the secondary term; the clause does not apply where the event beyond the lessee's control occurs during the primary term.⁶⁰ But the force-majeure clause may apply where an order of the Oklahoma Corporation Commission or other applicable law prevents the lessee from producing on the premises.⁶¹ In any event, the lessee must provide notice to the lessor as a prerequisite to invoking the force-majeure clause.⁶² A final clause commonly found in the oil and gas lease that may serve to modify the secondary term is the cessation-of-production clause. In the absence of a cessation-of-production clause, Oklahoma courts do apply the temporary-cessation-of-production doctrine. Under this doctrine, a temporary cessation of production during the secondary term will not automatically result in termination of the lease.⁶³ Rather, the lessee will maintain the lease if, considering all facts and circumstances, the cessation of production was not unreasonable in length and the lessee acted diligently in seeking to restore production.⁶⁴ Not wanting to be relegated to questions of fact and equitable considerations, the lessees developed the cessation-of-production clause. A typical cessation-of-production clause might read, "If after expiration of the primary term production shall cease, the lease shall not terminate provided lessee resumes operations for drilling within 60 days."⁶⁵ The lessee's trade-off for the certainty of the cessation-of-production clause is that it operates in derogation of the common-law temporary-cessation-of-production doctrine.⁶⁶ In other words, if the lessee does not resume production within the period provided for by the clause, it will lose the lease.

THE ROYALTY CLAUSE

The royalty clause provides for payment to the lessor of a share of production. The lessor is paid its share of production or its proceeds free from the costs of production.⁶⁷ There have been substantial litigation over what costs are "costs of production." For present purposes, it suffices to note that the lessee bears the costs required to achieve the first marketable product.⁶⁸ As to oil, the royalty clause typically provides that the lessor receives a one-eighth (1/8) share of gross production.⁶⁹ In contrast to oil, gas royalties are typically paid from the proceeds after the lessee sells the gas. The typical gas royalty clause often makes a distinction between gas that is sold "off the premises" and gas that is sold "at the wellhead." For gas sold "off the premises," the lessor's royalty is paid based upon the "market value" of the gas. For gas sold "at the wellhead," the lessor's royalty is paid based upon the "amount realized."⁷⁰

For purposes of the royalty clause, "market value" is the price at which a willing, non-obligated buyer would buy and at which a willing, non-obligated seller would sell.⁷¹ Where the lessee has entered into a long-term gas-purchase contract at arm's length, that contract price is the market price in Oklahoma.⁷² Otherwise, there are three methods by which "market value" may be proved: 1) the actual sales price; 2) the prevailing market price; and 3) the work-back method. Under the actual-sale method, "[if a] producer enters into an arm's-length, good faith gas purchase contract with the best price and terms available to the producer at the time, that price is the 'market price' and will discharge the producer's gas royalty obligation."⁷³ Under the prevailing-market-price method, the market value is established by looking to "[a]rm's-length wellhead sales or offers of purchase from the same well and close in time to the sale at issue.[or] arms'-length sales from other wells in the vicinity."⁷⁴ When using the work-back method, "the market value at the wellhead is calculated by subtracting allowable costs and expenses from the first downstream, arm's-length sale."⁷⁵

By statute, Oklahoma requires that royalties be paid to the lessor or the other persons legally entitled to receive the royalty payments.⁷⁶ The well operator is also liable if it fails to make royalty payments "to the legal royalty owners as a result of failing to act diligently in determining these owners."⁷⁷ The lessor or other person legally entitled to receive royalties can recover damages in the amount of the royalty that should have been paid, along with interest at a rate of 12 percent.⁷⁸

COVENANTS IMPLIED IN THE OIL AND GAS LEASE

In addition to the express clauses discussed above, there are a number of covenants that are implied in the oil and gas lease. The most important of these covenants is the implied covenant to protect against uncompensated drainage. This implied covenant obligates the lessee "to protect the lessors' land from drainage of the minerals from under their land caused by wells on adjoining lands."⁷⁹ The covenant may require the lessee to drill an offset protection well or seek administrative exceptions at the Oklahoma Corporation Commission.⁸⁰ But the implied covenant to protect against uncompensated drainage is measured by the reasonably prudent operator standard. Under the reasonably prudent operator standard, "the lessee [is required] to drill the offset well only if, in the judgment of a reasonably prudent operator, it would be a profitable undertaking."⁸¹ Further, for the lessee to be in breach of the implied covenant the drainage must be "substantial."⁸² Unless the lessee owns a greater interest in the draining well (a situation called "fraudulent drainage"), the lessee is not an insurer against drainage.⁸³

There is also an implied obligation on the lessee to maintain a well so long as the well is capable of producing in paying quantities. Under this implied covenant, the lessee may not plug a well that is capable of producing in paying quantities.⁸⁴ If the lessee does plug or destroy a well capable of producing in paying quantities, the lessor may recover damages.⁸⁵

An implied covenant also obligates the lessee to market the oil or gas from wells on the leased premises. Under the implied covenant to market, the lessee must, within a reasonable time after the discovery of oil or gas sufficient to satisfy the habendum clause, obtain a market and actually produce and sell oil or gas.⁸⁶ The actual length of time within which the lessee may satisfy

this duty to market "depend[s] upon the facts and circumstances of each case."⁸⁷ As with other implied duties, the lessee must act as a reasonably prudent operator in marketing the oil or gas.⁸⁸ The failure to comply with this duty may result in termination of the lease.⁸⁹

Oklahoma courts may recognize an implied obligation of further development through additional drilling if a reasonably prudent operator would undertake further development under the circumstances.⁹⁰ While other jurisdictions have adopted an implied covenant of further exploration, which would require additional drilling on portions of the leased premises previously unexplored, the Oklahoma Supreme Court has expressly rejected this doctrine.⁹¹ The court found that the implied covenant of development and the reasonably prudent operator standard were sufficient to protect the lessor's interests and that a separate implied covenant of further exploration would not recognize the economic realities of the industry.

CONCLUSION

The law governing oil and gas leases is unique. This article has only set forth the most basic provisions of these leases and the elementary legal doctrines governing this field of law. Beyond the basic principles described in this article, there are a host of remedies available to both the lessor and the lessee for breaches of the express and implied terms of an oil and gas lease, including lease cancellation. The principles governing oil and gas leases are derived in part from contract law, in part from property law, and in part from the ingenuity of the courts and lawyers that have shaped the law in this area.

But given the high level of mineral ownership and the high level of oil and gas production in this state, all lawyers are likely to encounter this area of the law at some point in their careers. From the litigator to the title examiner, from the family-law attorney to the transactional lawyer, all will probably encounter the oil and gas lease in some form or fashion. And attorneys must have more than a basic knowledge of the core concepts governing the oil and gas lease to effectively represent, draft for, and advise their clients who have needs that concern the oil and gas lease.

1. See IPAA Oil and Gas Producing Industry in Your State, at 9, available at www.ipaa.org/reports/econreports/IPAAOPI.pdf.
2. See *id.*
3. *Arrowhead Energy Inc. v. Baron Exploration Co.*, 1996 OK 120, n.1, 930 P.2d 181, 182 n.1; *Bonner v. Okla. Rock Corp.*, 1993 OK 131, ¶ 20, 863 P.2d 1176, 1185.
4. *Sabine Corp. v. ONG Western Inc.*, 725 F. Supp. 1157, 1178 (W.D. Okla. 1989); *In re Levy*, 1939 OK 355, ¶ 2, 94 P.2d 537, 538.
5. *Sunray Oil Co. v. Cortez Oil Co.*, 1941 OK 77, ¶ 8, 112 P.2d 792, 793.
6. *Atl. Richfield Co. v. Tomlinson*, 1993 OK 106, ¶ 20, 859 P.2d 1088, 1094; see also *Feely v. Davis*, 1989 OK 163, ¶ 8, 784 P.2d 1066, 1068; *Frost v. Ponca City*, 1975 OK 141, ¶ 8, 541 P.2d 1321, 1323.
7. *Tomlinson*, 1993 OK 106, ¶ 20, 859 P.2d at 1094 (quoting *Kuykendall v. Corp. Comm'n*, 1981 OK 105, ¶ 17, 634 P.2d 711, 716); see also *Wood Oil Co. v. Corp. Comm'n*, 1950 OK 207, ¶ 10, 239 P.2d 1023, 1026.
8. See 52 Okla Stat. §§ 86.1 - 153. A comprehensive discussion of the Conservation Act is far beyond the scope of this article. For current purposes, it is sufficient to note that the Conservation Act vests the Oklahoma Corporation Commission with the authority to regulate the number of wells that may be drilled, the capacity at which those wells may be operated, and may also require unitization of several tracts into a well spacing and drilling unit. In the context of the oil and gas Conservation Act, "waste" refers to the common-law doctrine of waste, as well as economic waste and inefficient use or production of either oil or gas. See 52 Okla Stat. §§ 86.2 - 86.3. "Correlative rights" refers to the "relative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners 1) not to injure the common source of supply and 2) not to take an undue proportion of the oil and gas." *Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 1964 OK 231, ¶ 10, 396 P.2d 510, 512.
9. See Owen L. Anderson, et al., *Hemingway Oil and Gas Law and Taxation*, § 2.1, at 39 (4th ed. 2004).
10. See *Anderson v. Mayberry*, 1983 OK CIV APP 10, ¶¶ 3-6, 661 P.2d 535, 536.
11. *Lewis v. Sac & Fox Tribe of Okla. Housing Auth.*, 1994 OK 20, ¶ 30 & n.30, 896 P.2d 503, 516 & n.30.
12. See *Cuff v. Koslosky*, 1933 OK 487, ¶ 15, 25 P.2d 290, 294.
13. See *Rich v. Doneghey*, 1918 OK 689, ¶ 8, 177 P. 86, 90; *Cont'l Supply Co. v. Marshall*, 152 F.2d 300, 305-06 (10th Cir. 1945).
14. Eugene Kuntz, et al., *A Treatise on the Law of Oil and Gas*, § 18.2 (1964).
15. John S. Lowe, et al., *Cases and Materials on Oil and Gas Law*, 125 (4th ed. 2002).
16. *Id.*
17. *Shields v. Moffitt*, 1984 OK 42, ¶ 11, 683 P.2d 530, 532.
18. *Bonner*, 1993 OK 131, ¶ 10, 863 P.2d at 1182.
19. *Id.*
20. *James Energy Co. v. HCG Energy Corp.*, 1992 OK 117, ¶ 16, 847 P.2d 333, 338.
21. See Kuntz, *supra* note 14, §§ 22.2 - 22.3. Professor Kuntz notes that, consistent with both property and contract law, the identities of the lessor and the lessee, along with the description of the leased premises, may be proved by extrinsic evidence.
22. *Allen v. Morris*, 1958 OK 78, ¶ 3, 323 P.2d 736, 738.
23. Kuntz, *supra* note 14, § 23.1(a).
24. *Id.*
25. *Id.*

26. *Id.*

27. *Rich v. Doneghey*, 1918 OK 689, ¶ 8, 177 P. at 89; *see also Ewert v. Robinson*, 289 F.2d 740 (8th Cir. 1923); *Nicholson Corp. v. Ferguson*, 1925 OK 783, ¶ 26, 243 P. 195, 199.

28. This language comes from the granting clause at issue in *21st Century Inv. Co. v. Pine*, 1986 OK CIV APP 27, ¶ 34, 734 P.2d 834, 842.

29. *DuLaney v. Okla. State Dep't of Health*, 1993 OK 113, ¶ 8, 868 P.2d 676, 680.

30. *Id.*

31. *Id.*

32. *See Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 20, 139 P.3d 897, 903. The Surface Damages Act is found at 52 Okla Stat. §§ 318.2 - 318.9.

33. *Lierly*, 2006 OK 47, ¶ 20, 139 P.3d at 903 (internal citation omitted).

34. This was the habendum clause at issue in *Geyer Bros. Equip. Co. v. Standard Resources L.L.C.*, 2006 OK CIV APP 924, ¶ 2, 140 P.3d 563, 564-65.

35. *Berton v. Coss*, 1929 OK 384, ¶¶ 25-31, 280 P. 1093, 1096-97; *Donaldson v. Josey Oil Co.*, ¶¶ 2-5, 232 P. 821, 822; *New State Oil & Gas Co. v. Dunn*, 1919 OK 204, ¶¶ 7-8, 182 P. 514, 515.

36. This was the delay-rental clause at issue in *Latham v. Cont'l Oil Co.*, 558 F. Supp. 731, 733 n.1 (W.D. Okla. 1980).

37. *Phillips Petroleum Co. v. Curtis*, 182 F.2d 122, 125 (10th Cir. 1950); *Petroleum Engineers Producing Corp. v. White*, 1960 OK 71, ¶ 10, 350 P.2d 601, 604; *Ellison v. Skelly Oil Co.*, 1951 OK 122, ¶ 14, 244 P.2d 832, 835.

38. *Knight v. Yoakam*, 1959 OK 65, ¶ 26, 338 P.2d 1075, 1080 (quoting *Superior Oil Co. v. Jackson*, 1952 OK 336, ¶ 23, 250 P.2d 23, 27).

39. *Latham*, 558 F. Supp. at 733.

40. *Lowe*, *supra* note 15, at 167.

41. *Kuntz*, *supra* note 14, § 28.6.

42. *Id.* § 37.9.

43. *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 9, 85 P.3d 830, 833; *Pack v. Santa Fe Minerals*, 1994 OK 23, ¶ 8, 869 P.2d 323, 326; *Barby v. Singer*, 1982 OK 49, ¶ 4, 648 P.2d 14, 16; *Stewart v. Amerada Hess Corp.*, 1979 OK 145, ¶ 5, 604 P.2d 854, 857.

44. *Smith*, 2004 OK 10, ¶ 9, 85 P.3d at 833 (quoting *Hininger v. Kaiser*, 1987 OK 26, ¶ 6, 738 P.2d 137, 140).

45. *Stewart*, 1979 OK 145, ¶ 6, 604 P.2d at 857. "Lifting expenses' include but are not limited to the following: costs of pump operation, pumper's salaries, costs of supervision, gross production taxes, royalties payable to the lessor, electricity, telephone repairs, depreciation, and other incidental lifting expenses." *Smith*, 2004 OK 10, n.5, 85 P.3d at 833 n.5; *see also Hininger v. Kaiser*, 1987 OK 26, n.4, 738 P.2d 137, 139, n.4.

46. *Pack*, 1994 OK 23, ¶ 8, 869 P.2d at 326; *State ex rel. Comm'rs of the Land Office v. Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 36, 336 P.2d 1086, 1094.

47. *Anderson*, *supra* note 9, § 6.5, at 273.

48. *Id.* For a discussion of applicability shut-in royalty clauses under Oklahoma law, *see Gard v. Kaiser*, 1978 OK 110, 582 P.2d 1311. *See also* Maurice H. Merrill, *Use and proper drafting of shut-in royalty clauses*, 43 Okla. B.J. 2247 (1972).

49. *See Roye Realty & Developing Inc. v. Watson*, 1990 OK CIV APP 21, ¶¶ 7-9, 791 P.2d 821, 823-24.

50. If the habendum clause of the lease only requires commencement of a well, then the commencement language is said to modify the termination aspect of the habendum clause, giving the lessee a reasonable time within which to complete the well, if it is acting in good faith. *Simons v. McDaniel*, 1932 OK 34, ¶ 17, 7 P.2d 419, 420-21; *see also Vincent v. Tideway Oil Programs Inc.*, 1980 OK CIV APP 23, ¶ 10, 620 P.2d 910, 914. If, on the other hand, the lease itself expressly requires the lessee to complete a well prior to the expiration of the primary term in order to maintain the lease, *Simons* does not apply and the lessee must complete the well. *Carter Oil*, 1958 OK 289, ¶ 36, 336 P.2d at 1094.

51. *See Stalex Petroleum v. Petroleum Inc.*, 308 F.2d 815, 818-19 (10th Cir. 1962).

52. *Id.* at 819.

53. *Kuntz*, *supra* note 14, § 47.2.

54. *Anderson*, *supra* note 9, § 6.8, at 293.

55. *See* 52 OKLA. STAT. § 87.1(e); *see also Chesapeake Operating Inc. v. Burlington Res. Oil & Gas Co.*, 2002 OK CIV APP 125, ¶ 23, 60 P.3d 1052, 1056-57.

56. *Lowe*, *supra* note 15, at 223.

57. *Id.* at 222.

58. *Pine*, 1986 OK CIV APP 27, ¶ 28, 734 P.2d at 841.

59. *Golsen v. ONG W. Inc.*, 1988 OK 26, ¶ 12, 756 P.2d 1209, 1212; *see also Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 566 (10th Cir. 1989).

60. *Kardokus v. Walsh*, 1990 OK 39, ¶¶ 15-16, 797 P.2d 322, 325.

61. *Kuykendall v. Helmerich & Payne Inc.*, 1987 OK 51, ¶¶ 10-12, 741 P.2d 869, 873-74.

62. *Sabine Corp. v. ONG Western Inc.*, 725 F. Supp. 1157, 1168 (W.D. Okla. 1989).

63. *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 11, 85 P.3d 830, 834; *Hunter v. Clarkson*, 1967 OK 114, ¶ 8, 428 P.2d 210, 212; *Cotner v. Warren*, 1958 OK 208, ¶¶ 6-8, 330 P.2d 217, 219-20.

64. *Smith*, 2004 OK 10, ¶¶ 11-12, 85 P.3d 830, 834; *Danne v. Texaco Exploration & Prod. Inc.*, 1994 OK CIV APP 138, ¶¶ 24-26, 883 P.2d 210, 217-18; *Barby v. Singer*, 1982 OK 49, ¶¶ 6-7, 648 P.2d 14, 16-17; *Carter Oil*, 1958 OK 289, ¶¶ 43-44, 54, 336 P.2d at 1095-96.

65. This was the cessation-of-production clause at issue in *Hoyt v. Cont'l Oil Co.*, 1980 OK 1, ¶ 10, 606 P.2d 560, 562 (internal alterations omitted for readability).
66. *Id.* at ¶ 10, 606 P.2d at 563-64.
67. Lowe, *supra* note 15, at 230.
68. *Mittelstaedt v. Santa Fe Minerals Inc.*, 1998 OK 7, ¶¶ 29-30, 954 P.2d 1203, 1210; *Wood v. TXO Prod. Corp.*, 1992 OK 100, ¶ 11, 854 P.2d 880, 882-83; *TXO Prod. Corp. v. State ex rel. Comm'rs of the Land Office*, 1994 OK 131, ¶ 16, 903 P.2d 259, 263.
69. Kuntz, *supra* note 14, § 39.1.
70. See, e.g., *Nisbet v. Midwest Oil Corp.*, 1968 OK 115, ¶ 24, 451 P.2d 687, 694; Anderson, *supra* note 9, § 7.4, at 327-36.
71. *Howell v. Texaco Inc.*, 2004 OK 92, ¶ 17, 112 P.3d 1154, 1159.
72. *Tara Petroleum Corp. v. Hughey*, 1981 OK 65, ¶ 20, 630 P.2d 1269, 1275.
73. *Id.* at ¶ 14, 630 P.2d at 1273.
74. *Howell*, 2004 OK 92, ¶ 19, 112 P.3d at 1159.
75. *Id.* at ¶ 20, 112 P.3d at 1159.
76. See 52 Okla. Stat. § 570.10(A).
77. *Goodall v. Trigg Drilling Co. Inc.*, 1997 OK 74, ¶ 10, 944 P.2d 292, 294; *Olansen v. Texaco Inc.*, 1978 OK 139, ¶ 19, 587 P.2d 976, 981-82.
78. See 52 Okla. Stat. § 570.10(D).
79. *Leck v. Cont'l Oil Co.*, 1989 OK 173, ¶ 10, 800 P.2d 224, 227; see also *Fransen v. Conoco Inc.*, 64 F.3d 1481, 1487 (10th Cir. 1995); *Rogers v. Heston Oil Co.*, 1984 OK 75, ¶ 19, 735 P.2d 542, 546; *Indian Territory Illuminating Oil Co. v. Rosamond*, 1941 OK 410, ¶ 16, 120 P.2d 349, 354.
80. *Leck*, 1989 OK 173, ¶ 10, 800 P.2d at 227; *Rogers*, 1984 OK 75, ¶ 20, 735 P.2d at 546; *Spaeth v. Union Oil Co. of Cal.*, 710 F.2d 1455, 1458 (10th Cir. 1983); *Sinclair Oil & Gas Co. v. Bishop*, 1967 OK 167, ¶¶ 54-55, 441 P.2d 436, 447.
81. *Leck*, 1989 OK 173, n.5, 800 P.2d at 227 n.5.
82. See *Rogers*, 1984 OK 75, ¶ 24, 735 P.2d at 546; Anderson, *supra* note 9, § 8.4, at 423.
83. Anderson, *supra* note 9, § 8.4, at 423-24. For a discussion of the circumstances constituting fraudulent drainage, see *Hall Jones Oil Corp. v. Claro*, 1969 OK 113, ¶ 9, 459 P.2d 858, 863.
84. *Okmulgee Supply Corp. v. Anthis*, 1940 OK 428, ¶ 5, 114 P.2d 451, 452-53.
85. *Gallaspy v. Warner*, 1958 OK 30, ¶ 8, 324 P.2d 848, 852. These damages are reduced to present value. *Id.* at ¶¶ 8-14, 324 P.2d at 853-54.
86. *Pack*, 1994 OK 23, ¶¶ 26-28, 869 P.2d at 330; *Carter Oil*, 1958 OK 289, ¶¶ 44-45, 336 P.2d at 1095.
87. *Pack*, 1994 OK 23, ¶ 26, 869 P.2d at 330.
88. See *id.*
89. *Id.* ¶ 26, 869 P.2d at 331; *Hunter*, 1967 OK 114, ¶ 9, 428 P.2d at 212; *Townsend v. Creekmore-Roomey Co.*, 1958 OK 265, ¶ 7, 332 P.2d 35, 38.
90. *Dixon v. Anadarko Prod. Co.*, 1972 OK 165, ¶ 8, 505 P.2d 1394, 1396; *West v. Sun Oil Co.*, 1971 OK 138, ¶¶ 10-14, 490 P.2d 1073, 1075-76; *Carter v. U. S. Smelting, Refining & Min. Co.*, 1971 OK 67, ¶ 23, 485 P.2d 748, 753; *Spiller v. Massey & Moore*, 1965 OK 143, ¶¶ 18-20, 406 P.2d 467, 471-72.
91. *Mitchell v. Amerada Hess Corp.*, 1981 OK 149, ¶ 23, 638 P.2d 441, 449-50.

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