

Consent Provisions in Natural Resources Agreements

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§ 3.01. Introduction.

The natural resources industry is built on agreements. A host of leases and other contracts are necessary in order to ensure that minerals are orderly and (hopefully) profitably, discovered, recovered, processed and sold. The often unenviable task of formulating, negotiating, drafting, and reviewing these agreements falls to attorneys and other professionals in the industry. These people must then expend considerable energy, time and expense crafting agreements designed to accomplish concrete and immediate goals such as assembling the most productive and economical land position, achieving the highest possible royalty or sales price, and finding the most skilled and responsible parties to carry out the work. Given the importance of agreements to the industry, it comes as little surprise that contracting parties are often keenly interested in their ability to control the ongoing relationships these agreements create. Hence, the “consent” provision has become more commonly employed in the industry. Despite its widespread importance to numerous aspects of the industry, however, the effect of various consent provisions and how they should be effectively drafted is rarely examined as a discrete subject. Because these consent provisions have a significant effect on the relationship of the parties to an agreement, and especially on the ability of those parties to engage in future business ventures, a study of the subject is warranted.

This chapter discusses the various “consent” provisions found in all manner of agreements in the natural resources industry. These provisions, sometimes carefully negotiated and drafted, but often slapped on to the end

of an agreement as “boilerplate,” require that one party to the agreement seek the consent of their contracting counterpart prior to engaging in some activity, usually the transfer of some interest in the agreement. Perhaps most commonly found in leases of mineral property, consent provisions are also found in a host of other agreements. In many instances, these consent provisions grant considerable leverage to the party whose consent is required, or impose significant hurdles to the future business ventures of the party who must seek consent. Anyone involved in negotiating or drafting agreements in the natural resources industry should have a basic knowledge of some of the rules governing consents, and how they can affect operations.

Understanding where to look for consent provisions is the first step toward interpreting, negotiating and drafting effective consent provisions. Therefore, the chapter begins with a brief overview of where to look for consent clauses. Next, special treatment is given to consent provisions in the context of real property agreements, primarily leases, as these agreements are governed by real property law, primarily that of landlord and tenant, and are among the most likely to contain a consent requirement. Consent provisions are next addressed in the context of a host of other agreements governed primarily by contract law. The chapter also examines trends in judicial interpretation of consent requirements, focusing particularly on cases where the withholding of consent was determined to be unreasonable. Finally, the chapter concludes by examining the effect of breach of consent requirements, or in other words, what happens when a contracting party acts without asking the permission of its contractual counterpart. Throughout the chapter, drafting recommendations and examples are provided.

§ 3.02. Where to Find Consent Requirements.

It is impossible to provide an exhaustive list of agreements that feature consent requirements. The ability of players in the natural resources industry to draft agreements dealing with the unique circumstances of individual deals will always outpace any inventory of typical agreements. But several types of agreements commonly feature consent provisions, and therefore, should always be closely examined for such provisions during negotiations and drafting. The first and perhaps most important is the lease. Whether for coal, oil or gas, the real property lease will contain a consent provision in most cases. Because of their importance, leases are discussed in considerable