

# **The Yeas and Nays of Implying a Duty on a Producing Oil and Gas Lessee to Explore the Lease Further**

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Synopsis

## **§ 11.01. The Implied Covenants.**

[1]ÑA Brief History and Review of Principles.

[2]ÑThe Reasonable and Prudent Operator Standard.

[a]ÑThe Profitability Standard.

[b]ÑThe Standard of Careful and Prudent Operations.

## **§ 11.02. The Controversy Defined.**

[1]ÑThe Factual Situation.

[2]ÑThe Legal Dispute.

[a]ÑThe Mineral Owner's Position.

[b]ÑThe Lessee Company's Position.

[3]ÑThe Heart of the Controversy.

[4]ÑSemantics of the Controversy.

## **§ 11.03. Brief for the Lessor.**

[1]ÑPolicy Arguments.

[a]ÑPolicy Against Speculation.

[b]ÑPolicy of Encouraging Exploration.

[c]ÑPolicy Implied from Legislation.

[2]ÑEquitable Considerations.

[a]ÑFairness to the Lessor.

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[3]ÑAbandonment, a Useful Alternative Theory.

[4]ÑRemedies.

## **§ 11.04. Brief for the Lessee.**

**[1] Policy Basis or Rationale for Rejecting the Covenant.**

**[2] Other Arguments for the Lessee.**

**[a] Public Policy is not Germane.**

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**§ 11.05. Evidentiary Variables at Trial.**

**[1] The General Issue Compliance with the Prudent Operator Rule.**

**[2] Notice and Demand.**

**[3] Factors for Consideration.**

**[a] Elapsed Time Since the Last Well Was Drilled.**

**[b] Size of the Lease, Well Density and Location.**

**[c] Unexplored Deeper Zones.**

**[d] Exclusion of Part of the Lease from a Unit.**

**[e] The Unexplored Geologic Prospects.**

**[f] Another Operator is Willing.**

**[g] Prior Exploratory Efforts of the Lessee.**

**[h] Attitude of the Lessee.**

**[i] Other "Prudent Operator" Factors.**

**§ 11.06. In Closing.**

A Note to the Reader:

This article deals with the covenant to explore further, as it might be argued before a court that has not yet decided whether to recognize the covenant. We consider the arguments, pro and con, as to whether the court should impose on the lessee a duty to spend money on further exploration of a producing lease when the lessor cannot prove that the lessee can reasonably expect to make a profit on that investment. Although much has been written on the topic,<sup>(1)</sup> we will approach the problem a little bit differently, collecting and discussing the theories, policies, elements and factual variables from the points of view of the adversaries, the lessor and the lessee. We will begin with a short review of the history and general principles of the implied covenants in general, then brief the case on the implied duty to explore for each of the parties, and conclude with some thoughts in summary. The alternative theory of Abandonment, which may be of value to lessors in some eastern states, will be treated in the Brief for the Lessor.

**§ 11.01. The Implied Covenants.**

**[1] A Brief History and Review of Principles.**