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Chapter 14

General Reflections Upon the Evolving Eastern Oil and Gas Lease

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Synopsis

§ 14.01. Introduction and Scope.

This chapter will explore the unique considerations faced by modern oil and gas operators in crafting the core industry document for use in Eastern states. Eastern oil and gas operations have become marked by a great diversity in the lease document style. A few ancient forms specific to individual states continue. The majority of leases are based upon various forms used by companies that primarily operate in Western states. These lease forms do not take into account certain unique issues and requirements of Eastern oil and gas law.

The most dominant difficulty encountered by Western operators in beginning operations in Eastern states is a lack of understanding of the largely undeveloped state of Eastern oil and gas law. Experienced operators assume that all states have formal oil and gas laws that are consistent with what is known in one or more of the Western producing states. This is not accurate.

In addition, many operators approach Eastern operations on the assumption that Eastern states provide similar regulatory regimes to those known and operated in the West. Again, this is a serious misconception. Concepts such as mandatory spacing, governmental unitization, and even comprehensive operational regulation are not yet fully developed in many Eastern states. Eastern regulatory agencies can be anticipated to be more cautious than Western counterparts when they encounter unfamiliar technologies and processes. Core regulatory structures in some areas are simply not compatible with modern operating requirements.

The importance of a thorough reconsideration of the oil and gas lease form for use in Eastern states arises from the coincidence of several new factors, among which are the following:

a.) the extensive exploration of Eastern states as potential areas for shale gas production;

b.) the introduction of new technologies that not only have never been encountered by Eastern regulatory agencies and courts, but have not yet been fully explored by Western regulators and judges;

c.) the growing recognition of oil and gas operations as a source of wealth by land owners and the plaintiffs' bar;

d.) landowners are seeking *en mass* to undo done deals, to invalidate established leases, and to seek every advantage available to them under claims and facts never before considered by the courts;

e.) local general practice, real estate and agri-business attorneys are recognizing the need to develop expertise in oil and gas law to assist their clients in reaching appropriate use and other agreements; and

f.) anti-development individuals and organizations are stridently seeking to encourage the adoption of negative statutory provisions, to impose ever more burdensome regulation, to encourage and prosecute time-consuming and expensive experimental litigation and, in some unfortunate circumstances, to create irrational fear of oil and gas operations in local communities.

These factors have coalesced and can be anticipated to continue to put stress upon leasing efforts in general, upon the requirements for acceptable and marketable oil and gas lease forms, and upon the parallel development of Eastern oil and gas law against which the enforceability and validity of oil and gas lease forms will be determined.

Unfortunately, the common law system is not an efficient method to produce a governing law for an active industry. Court decisions will always be made in hindsight and may have surprising and unsettling retroactive impacts.

Finally, there is a substantial need for operators to review and to reconsider their lease forms internally. This need arises from many reasons, the two most common of which known to this author are practices of lease "adoption" and lease "evolution."

Far too often, an operator simply "adopts" the lease form used by a large operating company on the assumption that the form "must be good if they use it." Operational vagaries that have driven the language of the "adopted" form are not known to the "adopting" company. The large company's internal lease management infrastructure giving rise to specific terms of the "adopted" lease is not known, and usually not available to, the "adopting" company. The "adopting" company too often winds up with a large number of signed leases and finds it difficult to administer terms — terms that are not really understood until challenges are made.

Lease "evolution" appears to be the product of two forces. The first is technological. Leases are no longer limited to having a pre-printed form existence. Leases can be and are prepared on modern word processors. These word processor-based lease forms can be modified at any level of the company in any office. The new processor-based lease forms provide greater flexibility to company officials in adjusting lease terminology to new situations.

This flexibility, however, too often runs awry, giving rise to the second trigger for lease "evolution" — lack of centralized control over lease modifications. Individual field offices may make changes to address "local" conditions. Many companies require no senior management sign-off of such changes. Some companies even permit field landmen to carry the word processor version of the company lease to farm kitchen tables as part of the leasing process. "Necessary" changes are simply made at the farmer's table as part of the lease form that is signed. No record of the change exists except in the recorded lease which is never read until a dispute arises. Many companies have lost control of their lease forms and senior management is too often shocked and amazed at the terms of leases signed in the company's name.

This chapter is not intended to produce a lease form that should be simply copied and employed or that will be perfect for all uses and considerations. It will produce a lease language package that is intended to provoke the thinking of those charged with developing oil and gas leases for use in Eastern states.

Once a proposed document that meets all operational concerns is developed, it is essential that the final form be reviewed by competent counsel in the state or states in which its use is proposed prior to implementation. Eastern oil and gas law is changing rapidly. Language that is appropriate on one day may well be found to be inappropriate on the next. Eastern states are not monolithic in their jurisprudence. They cannot be anticipated to move in lockstep on similar issues of oil and gas law. A lease that is usable in one state may not be appropriate in another. Certain states actually require specific language in leases to assure enforceability.

This chapter certainly is not a treatise on the oil and gas lease. The task of producing such works has already been well accomplished.[1] Rather it is a short, conversational and general discussion of select issues and concerns that may properly be considered in evaluating selected common provisions of the oil and gas lease for use in Eastern states. The product of this chapter is intended as a tool to the ongoing development of leases appropriate for use under Eastern oil and gas law, not as an end to that process.

§ 14.02. Lease Form Revision Projects in Contemporary Context.

Individual operators need to rely upon the standard forms in order to assure safe operations capable of ongoing monitoring and compliance. Use of form language keyed to the jurisprudence of the state in which the leased property is located adds a measure of safety to the leasing process.

The days in which such forms will be signed largely unread and without professional review are dying in most Eastern states. Land professionals long for a simple two-page lease. Frankly, evolving exploration and production technologies, and the need for lease specificity in the absence of developed law, press for much longer documents.

Prudent landowner lawyers understand the economics of the industry and the need for some standardization of lease terms. They, too, want lease forms that reflect the jurisprudence of their states. Litigation of non-standard language is no more in a landowner's interest than in the interest of lessees. As Eastern lawyers become more and more expert in their understanding of oil and gas terminology and the economic impact of various "standard" lease terms, they can be anticipated to become more sophisticated in requesting addenda and modifications to standard forms.

An educated and more sophisticated local bar should be a benefit to the industry rather than a burden. Many operators are more than frustrated by requirements of local attorneys that essential clauses of the lease be removed

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1 *See, e.g.* Earl A. Brown, *The Law of Oil and Gas Leases*, (Matthew Bender/Lexis Nexis Publications, 2009.)