



Chapter 16

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Hidden Provisions of Oil and Gas Leases *or* “You Can’t Fool Me — There Ain’t No Sanity Clause”

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Synopsis

§ 16.01.	Introduction.....	468
§ 16.02.	The Granting Clause: What May the Lessee Do?	471
	[1] — General Principles	471
	[2] — Specific Applications.	475
	[a] — Seismic Exploration.	475
	[b] — Secondary Recovery Operations; Use of Water.	477
	[c] — Pipelines.	478
	[d] — Gas Storage Wells and Disposal Wells.	480
§ 16.03.	The Delay Rental and Royalty Clauses: To Whom Must Delay Rentals and Landowners’ Royalties Be Paid?	483
	[1] — Payment to an Agent.	483
	[2] — Transfers by Lessors.	486
	[a] — The Effect of Assignment Provisions.	486
	[b] — The Apportionment of Delay Rentals and Royalties.	487
	[i] — The Apportionment Rule Versus the Nonapportionment Rule.	487
	[ii] — The Effect of Entirety Provisions.	488
	[iii] — The Effect of Lesser Interest Provisions.	490
	[3] Transfers and Other Actions by Lessees.	491
	[a] — The Effect of Assignment Provisions	491
	[b] — The Effect of Surrender Provisions.	493
	[4] Nonpayment and the Effect of Notice-Before-Forfeiture Provisions.	494
	[a] — Nonpayment of Delay Rentals: The “Unless” Lease Versus the “Or” Lease.	495
	[b] — Nonpayment of Royalties.	498
§ 16.04.	Other Administrative Provisions.....	499
	[1] — Provisions Relating to Assignment.	499
	[2] — Provisions Relating to Title.	502
	[3] — Provisions Relating to Termination.	504

[a] — Surrender and Release Provisions..... 504
 [b] — Provision Authorizing Removal
 of Equipment. 505
**§ 16.05. Protections for the Unwary: Is There
 a Sanity Clause? 507**
§ 16.06. Conclusion. 510

§ 16.01. Introduction.

Over the last 16 years, attendees at the Annual Institutes of the Eastern Mineral Law Foundation and aficionados of the published Proceedings of those Annual Institutes have savored the fruits of a multi-faceted and continuing examination of the oil and gas lease. Among the oil and gas lease provisions that have been dissected and scrutinized are the habendum (term) clause and certain related savings provisions,¹ the granting clause,² the royalty clause,³ the shut-in royalty clause,⁴ the pooling provision,⁵ and the free gas clause.⁶ The attention given these provisions is well

¹ Veryl N. Meyers, “Continuation of the Oil and Gas Lease Beyond Its Primary Term — Long May It Waive,” 4 *E. Min. L. Inst.* ch. 17 (1983). *See also*, P. Nathan Bowles, “Rights and Duties of the Lessee Upon Termination of an Oil and Gas Lease,” 10 *E. Min. L. Inst.* ch. 19 (1989).

² Russell H. Carpenter, Jr., “Oil and Gas in Grants and Reservations of ‘Minerals’: When Is a Mineral Not a ‘Mineral’?” 5 *E. Min. L. Inst.* ch. 10 (1984); and Bruce N. Kramer, “The ‘Mother Hubbard’ or ‘Cover All’ Clauses in Mineral Deeds and Leases,” 13 *E. Min. L. Inst.* ch. 12 (1992).

³ Jerry D. Jordan and Benita Kahn, “Current Royalty Owner Issues,” 4 *E. Min. L. Inst.* ch. 19 (1983); Terence V. Lynam, “Royalty and Overriding Royalty Payments and Deductible Expenses,” 6 *E. Min. L. Inst.* ch. 14 (1985); Russell L. Schetroma, “Oil and Gas Royalties: Apportionment as Achieved by State Law, Contract, and Administrative Action,” 7 *E. Min. L. Inst.* ch. 13 (1986) [hereinafter cited as “Schetroma”]; and Kevin L. Sykes, “The Royalty Clause: A Guide for the Commoner,” 11 *E. Min. L. Inst.* ch. 22 (1990).

⁴ John S. Lowe, “Shut-In Royalty Payments,” 5 *E. Min. L. Inst.* ch. 18 (1984)

⁵ George W. Hardy, III, “Pooling and Unitization in the Eastern United States: Part I,” 2 *E. Min. L. Inst.* ch. 16 (1981).

⁶ William Roy Rice, “Operation of the Free Gas Clause in the Oil and Gas Lease,” 4 *E. Min. L. Inst.* ch. 16 (1983); and Nicholas J. Parrish, “Limiting a Lessor’s Free Gas Usage When the Lease Does Not Provide a Numeric Limitation,” 15 *E. Min. L. Inst.* ch. 13 (1995).

deserved, for they can justly be characterized as “essential” terms of the agreement between the lessor and the lessee, primarily because their subject matter — what the lessor and the lessee each expect to receive as a result of the bargain they have made — is so obviously of critical importance to both parties.

The same can be said of the so-called “implied covenants,” which several other authors have essayed to illuminate.⁷ These covenants, which impose duties deemed so important that they are implied by law in all oil and gas leases, even though they may not even be suggested in the written agreement that constitutes the lease, are truly “hidden” provisions that become, as characterized by more than one shocked and befuddled lessee, “the binding contract I never agreed to be bound by.”⁸

There are a number of lease provisions that, like the implied covenants, may be characterized as “hidden.” The simple fact, however, is that the provisions that will be addressed in this chapter are “hidden” only because they satisfy one of the author’s two definitional criteria:

1. They are clauses of the type that virtually no one bothers to read at all; or
2. They are clauses of the type that, even if read, are not fully understood.

⁷ See, e.g., Veryl N. Meyers, “The Oil and Gas Lessee’s Obligation to Protect Its Lessor,” 2 *E. Min. L. Inst.* ch. 13 (1981); Claude L. Vander Ploeg, “The Implied Covenant of Reasonable Development — A Delicate Balance,” 3 *E. Min. L. Inst.* ch. 18 (1982); and Tom R. Mason, “The Yeas and Nays of Implying a Duty on a Producing Oil and Gas Lessee to Explore the Lease Further,” 15 *E. Min. L. Inst.* ch. 11 (1995).

⁸ Cautious and knowledgeable lessors may attempt to avoid this situation by including in their leases a provision that expressly negates the implied covenants, such as the following:

This Lease contains all of the agreements and understandings of Lessor and Lessee respecting the Leased Premises, and no verbal representations or promises have been made or relied on by Lessor or Lessee supplementing or modifying this Lease or as an inducement thereto. No implied covenants or obligations shall be read into this Lease or imposed on either Lessor or Lessee.

The enforceability of such clauses — which are hidden provisions designed to counteract other hidden provisions — remains open to question. See generally, John K. Keller, “Drafting the Modern Oil and Gas Lease,” 2 *E. Min. L. Inst.* ch. 15, § 15.03[4] (1981).