

Chapter 11

To Infinity and Beyond: Extending Your Lease to Its Secondary Term in the Appalachian Basin

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§ 11.01. Introduction.

The continuation of oil and gas leases has been a subject of interest, a point of contention, and a basis for litigation for lessors and lessees practically from the time that such leases were first entered into. Perhaps one of the most litigated areas in this fertile ground is the issue of whether an oil and gas lease reaches its secondary term, terminates at the conclusion of the primary term, or terminates even sooner.

It comes as no surprise that this age-old issue has received renewed interest in the Appalachian Basin as the amount of leasing activity, development and investment has skyrocketed with the focus on newly accessible shale gas resources in that region. This new set of circumstances raises the stakes for all parties involved and presents new questions of law

or questions that have not been addressed in decades or more by the courts in the region — in other words, the perfect recipe for litigation. These issues can only be expected to continue or increase as many leases from the initial wave of shale-gas activity in the Appalachian Basin reach the end of their primary term and as operators are forced to make decisions on how best to preserve their investments in these leases.

The primary driver of lease preservation into the secondary term is production from the leasehold. Indeed, production of natural gas is the central purpose of the oil and gas leases. However, a number of related questions and common lease provisions can also affect whether a lease will reach its secondary term or terminate at the end of the primary term or sooner. While there are a number of such related issues, this chapter will consider certain questions that commonly arise for operators in the Appalachian Basin as leases progress through and approach the end of their primary terms. Specifically, we will focus on how those issues are or have been treated by the statutes and courts in the Appalachian Basin states of Pennsylvania, West Virginia and Ohio, both historically and in more recent decisions that have been issued.

In Section 11.02, we look at what courts have considered to be “commencement of operations” sufficient to satisfy such a requirement in a lease. In Section 11.03, we discuss how delay rentals and forfeiture provisions have been treated by courts of the Appalachian Basin states. In Section 11.04, we look at certain issues that are unique to dual-purpose leases that may be held by production or storage activities. In Section 11.05, we discuss what circumstances may arise that will cause a court to equitably extend a lease and estop it from terminating. In Section 11.06, we consider certain cases that have addressed arguments that leases were extended by *force majeure*. Finally, in Section 11.07, we address the issue of pooling and unitization and how it may affect whether a lease extends to its secondary term. While this chapter is not intended to be a comprehensive discussion of these complex issues, it should serve a primer for those who face any of the issues set forth above.