



Oil & Gas Leases - The Granting Clause

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Konomark
Most rights sharable

Implied right to enter, explore, drill, produce (incident of mineral interest)

For mineral estate owner:

“unless the language of the conveyance repels such a construction, as a general rule a grant of mines or minerals gives to the owner of the minerals the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals The incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary exists in the case of a reservation of mineral rights as well as a grant.”
Kerbaugh case (quoting C.J.S.)

**Implied right to enter, explore, drill, produce
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For mineral estate owner:

“Whether the express uses are set out or not, the mere granting of the lease creates and vests in the lessee the dominant estate in the surface of the land for the purposes of the lease; by implication it grants the lessee the use of the surface to the extent necessary to a full enjoyment of the grant. Without such use, the mineral estate obtained under the lease would be worthless.”

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Is that true?

Kerbaugh case (quoting *Texaco, Inc. v. Faris*, 413 S.W.2d 147, 149 (Tex.Civ.App 1967))

Accommodation Doctrine

“There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage. And there may be necessitous temporary use governed by the same principle. But ... where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”

Getty Oil v. Jones (quoted in *Kerbaugh*)

Accommodation Doctrine

Kerbaugh:

The burden is on the lessors to provide evidence of reasonable alternatives.

If there are no reasonable alternatives, then there's no balancing to do.

If there are reasonable alternatives, then alternatives must be weighed with due regard or the surface owner. There must be a balancing of the interests of the mineral owner and surface owner.

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You can see how the mineral estate is called the "dominant estate." The mineral-interest owner wants its minerals. The surface owner wants its enjoyment of the minerals. Which must yield if conflict is unavoidable? The surface estate must yield.

**Implied right of mineral owner/lessee
("inherent surface rights to find
and develop the minerals")**

From David E Pierce, see CB 2/17-19:

- (a) The right to use and occupy the surface estate for purposes reasonably necessary to develop and operate the lease.
- (b) The right to use and occupy the surface estate at locations reasonably necessary to develop and operate the lease.
- (c) The right to use and consume the surface estate or its products in oil and gas operations.

**Limitations on the
dominance of the mineral interest**

See CB 2/19-27

- (a) The mineral interest owner or lessee may make only such use of the surface estate as is reasonably necessary.
- (b) The use of the surface estate must not violate the accommodation doctrine.
- (c) Use of the surface estate must be related exclusively to obtaining the minerals under the servient surface.
- (d) The state's police power may limit the use rights of the mineral owner or lessee through state statutes, city ordinances, and governmental regulations.
- (e) Lease clauses, restrictive covenants, or other agreements may curtail the use rights of the mineral owner or mineral lessee.

Remedies for lessee breach

See CB 2/28-29

For permanent damage done, the regular rule is that damages are limited to diminution of value of the property.

This can be true even with an express obligation by lessee to restore property to prior condition, so long as there is no express right to specific enforcement or damages measured by costs of restoration. - *Peevyhouse* q'd CB 2/29.

Where damage is continuous or frequently recurring, damages may be held inadequate because there is no fixed time when the injury is complete, so an injunction may be proper. - *Speedman Oil* q'd CB 2/28.

Important note: purchase of real property may not include ability to sue for prior negligence to property unless purchase instrument specifically assigns causes of action. - *Senn v. Texaco* q'd CB 2/29.

Remedies for lessee breach

See CB 2/28-29
(continued)

A rationale offered for limitation of the damages remedy to diminution of value of the property is economic efficiency. (CB 2/29.)

Does that make economic sense?

Then how does *Peevyhouse* fit into the economic analysis - that the limitation of damages can hold even where there is an express obligation of restoration, but not express right to specific performance or express right to restoration damages?

Let's discuss ...

Remedies for lessor breach

See CB 2/28-29

Regular compensatory damages are available.

Consequential damages may be available as well.

Lessors/surface-owners may be subject to statutory penalties as well.

Many courts apply the obstruction doctrine.

Obstruction doctrine: Obstruction by lessor tolls the lease period.

So if the lessor obstructs the lessee from operations for six months, then six months can be tacked on to the end of the lease.

Problem: Blackacre and Industrious Oil Co.

See CB 2/31

What are the rights and liabilities of

- O's successor?
- A's successor?
- Industrious Oil Co.

Substances Granted by the Lease

See CB 2/31-32

Lessors and lessees are often focused on oil, gas, or both at the time of the lease. But sometimes there are other valuable minerals. Are they covered?

- Granting clauses that specifically name substances can avoid some disputes and ambiguities.
- Substances that might be named:
 - Oil and gas
 - Casinghead gas
 - Casinghead gasoline (condensate)
- But where mineral rights are severed, the lessor might not own the substances named in the lease! So drafting won't necessarily solve the problem.
- Recently, lithium is being recovered in commercial quantities of saltwater that occurs with oil.

Substances Granted by the Lease

See CB 2/31-32

Casinghead: The mouth of the well

Casinghead gas: Natural gas (largely methane) that you might get when producing crude oil (essentially on a by-product basis)

Condensate or “casinghead gasoline” or “white oil”: Light liquid hydrocarbons (molecules like those you'd find in refined gasoline) that you might get when producing crude oil (essentially on a by-product basis)

Lithium: A light metallic element increasingly important and valuable for its usefulness in rechargeable batteries.

Lands and Interests Granted by the Lease

See CB 2/32-36

Property descriptions are difficult and prone to error. This is all-the-more the case in oil and gas interests.

Various clauses commonly found in oil-and-gas leases attempt to deal with these potential problems.

Lands and Interests Granted by the Lease

See CB 2/32-36

- **In-gross provisions in granting clause:** provide that lessee payments tied to acreage (e.g., bonus, shut-in royalties, delay rentals) are owed according the acreage as specified in the lease (even if the acreage ends up being more).
- **Mother Hubbard clauses** seek to sweep up all of lessors adjacent/contiguous lands, even if not specified in the lease
- **After-acquired-title provision:** Brings within the lease land that the lessor acquires after the lease begins.

Lands and Interests Granted by the Lease

See CB 2/32-36

- **Proportionate-reduction clause:** Reduces the royalties and other amounts owed to lessor if lessor turns out to own less than the whole interest the lease contemplates having been conveyed.
- **Warranty clause:** The lessor warrants that the lessor actually has the interest the lessor is purporting to lease. If this turns out to be wrong, the lessor is on the hook to lessee for damages for breach of warranty
 - (Warranties are not just for oil-and-gas leases, they are for all kinds of deals, from consumer sales-of-good contracts to massive M&A deals.)