North Dakota Law Review

Volume 28 | Number 2 Article 1

1952

A Review of Oil and Gas Lease Forms

T. Murray Robinson

A REVIEW OF OIL AND GAS LEASE FORMS

T. MURRAY ROBINSON*

An oil and gas lease is that which it appears to be – a lease upon an interest in real estate.[1] It is the contractual provisions which concern the enjoyment of those privileges granted in an oil and gas lease that make the modern form lengthy.

I. THE FICTION OF THE EXISTENCE OF A STANDARD LEASE FORM.

The "unless" oil and gas lease, as it is now known, began with what was known as the "Producers 88" form, which originated in Oklahoma. In 1916 the Supreme Court of Oklahoma decided in the case of *Brown v. Wilson*[2] that an oil and gas lease which provided that a lessee drill or pay rentals, and containing a surrender clause, was cancellable at the option of the lessor. Following this decision a group of lawyers, including the attorney for the Producers Oil Company, prepared and took a form of lease to a printer. As was the custom, the printer added his serial number to the printed form. The result was the "Producers 88" oil and gas lease form. Its brevity and simplicity attracted many users in Oklahoma, and elsewhere, but its obvious deficiencies caused first one then another attorney to add or delete clauses or phrases, with the result that there are now many, many forms in use. At a meeting of the Southwestern Legal Institute the chairman announced there had been assembled more than two hundred lease forms of which more than one hundred and eighty were "Producers 88" oil and gas lease forms.[3] Most of these contain some of the language originally used. The variations arise primarily by reason of additions. It is believed that this subject can best be developed by starting with the language of the "Producers 88" form. Let it be said emphatically that I do not recommend the use of the original "Producers 88" oil and gas lease form.

In discussing the "Producers 88" form provisions will be suggested which have been used in oil and gas lease forms, either as a substitute for the language appearing in the "Producers 88" form, or supplementing that form. If each of these provisions were incorporated in one form, it would result in many incon-

* T. Murray Robinson is a member of the firm of Robinson, Shipp, Robertson and Barnes, Oklahoma City, Oklahoma.

1. Summers, The Law of Oil and Gas §§151-170 (1938) (Cum. Supp. 1951).
2. 58 Okla. 392, 160 Pac. 94 (1916).
3. Moses, *The Evolution and Development of the Oil and Gas Lease*, in Institute on Oil and Gas Law 28-33 (1951).

sistencies and would be much too long. The variations are offered in the hope that they may be of assistance to you in choosing the lease clauses for the form which you wish to use.

II. The Requisite Provisions of an Oil and Gas Lease.

A. *Date — Lessor — Lessee — Consideration.*

"This Agreement, Made and entered into this..... day of....., 19....., by and between ....., hereinafter called lessor (whether one or more), and..... hereinafter called lessee.

"Witnesseth, that the said lessor, for and in consideration of.....Dollars cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements herein contained on the part of the lessee to be paid, kept and performed . . ."

There must be a valid consideration for the oil and gas lease, but a cash bonus is not necessary.[4] The blanks should be filled in correctly. Failure to do so will not make the lease void.

B. *Rights Granted and Activities Authorized.*

". . . has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and laying pipelines, and building tanks, power stations and structures thereon to produce, save and take care of said products . . ."

To the clause granting rights and authorizing certain activities upon the leased lands, most lease forms have added further rights such as exclusive right to seismograph, the right to build and to maintain permanent rights-of-way, which includes bridges, and the right to impound surface water for the use of the lessee, etc.

There are oil and gas lease forms which add the phrase "and other minerals" after the words oil and gas in the phrase "for the sole and only purpose of mining and operating for oil and gas." Lease men and farmers think and talk about oil and gas rights in the process of negotiating for an oil and gas lease. The phrase "other minerals" should be stricken.

---

4. Summers, The Law of Oil and Gas §§232, 243 (1938) (Cum. Supp. 1951); Rich v. Doneghy, 71 Okla. 204, 177 Pac. 86 (1918). The recitation of a nominal cash payment is adequate. Chi-Okla. Oil and Gas Co. v. Shertzer, 105 Okla. 111, 231 Pac. 877 (1924).

C. *Descriptions of Lands Leased.*

". . . all that certain tract of land situate in the County of....., State of....., described as follows, to wit:
Section ....., Township .....,
Range ....., and containing .....
acres more or less."

A description of the lands leased should be drafted to eliminate uncertainty. In those areas which adjoin lakesites, or which are intersected by rivers, it is proper to add in the description of the land leased, language which eliminates any doubt as to whether or not the lease covers riparian tracts or accreted lands.

In oil and gas leases taken in previously developed, and now abandoned areas, *i.e.*, areas which are now having a second lease play, or a second development, language should be added to the lease to make the lease cover with certainty any rights of reversion which the lessor may have in the outstanding term minerals.

D. *Term*

"It is agreed that this lease shall remain in force for a term of.....years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee."

The language of the term clause, strictly construed, means that on the final day of the term there must be oil and gas production to extend the period.[5] Absent other provisions to the contrary, it is a completion lease, *i.e.*, a well must be completed and be upon production by the end of the primary term of the oil and gas lease. The first time this question was presented to the Supreme Court of Oklahoma it was decided five to four that the term clause was modified by the rental clause, as under the rental clause the lessee could commence a well on the last day of the year for which the rental was paid.[6] Obviously such a right would be wholly useless unless the lessee be allowed to complete his well and to hold the lease during production. There is no sense in taking a chance of a five to four decision in some other court. Therefore to this phrase should be added "or the premises are being developed and operated as provided herein."

---

5. Gypsy Oil Co. v. Ponder, 92 Okla. 181, 218 Pac. 663 (1923); Summers, The Law of Oil and Gas §§284-295 (1938) (Cum. Supp. 1951).
6. Simmons v. McDaniel, 154 Okla. 181, 7 P.2d 419 (1932); Champlain Ref. Co. v. Magnolia Pet. Co., 178 Okla. 203, 62 P.2d 249 (1936).

E. *Royalties* [7]

"In consideration of the premises the said lessee covenants and agrees:

"To deliver to the credit of lessor, free of cost, in the pipe lines or tanks to which he may connect his wells, the equal one-eighth part of all oil produced and saved from said leased premises.

"And where gas only is found, one-eighth of the value of all raw gas at the mouth of the well, while said gas is being used or sold off the premises, payment for gas so used or sold to be made monthly.

"To pay lessor for gas produced from any oil well and used off the premises one-eighth of the value of the raw gas at the mouth of the well, payment for the gas so used or sold to be made quarterly."

Often this paragraph is substituted for the one just quoted:

"To pay lessor for gas produced from any oil well and used off the premises or in the manufacture of gasoline or any other product, at the rate of.....Dollars per year, for the time during which such gas shall be so used, or a royalty of one-eighth (⅛) payable monthly. Payable at the prevailing market rate."

These provisions leave many questions unanswered. If there is no pipeline oil market available, and the oil must be trucked out at substantial cost, is the lessor required to pay his part of these costs? If the purchaser will not, and if the lessee has to, build a pipeline to market natural gas, is the lessor entitled to share in the amount received by the lessee for natural gas sold without deduction for the cost of transportation? What amount is a lessor entitled to receive if his lessee maintains and operates a processing or casinghead plant? May the lessee buy the oil, or the natural gas, and if so, what price must he pay?

The majority of the oil and gas companies prefer a form which authorizes the purchase of all production at wellhead value with payment to the lessor of one-eighth of that production, or stated another way, they desire authority to purchase the lessor's one-eighth share of production at its value at the wellhead. If they do not elect to purchase, they would prefer for the lessor to receive a one-eighth part of the proceeds received from a purchaser with reasonable marketing costs deducted from that sum. The owners of royalty under large scale tracts would no doubt con-

7. Summers, The Law of Oil and Gas §§571-572 (1938) (Cum. Supp. 1951); Adoue, *Royalty and Pooling Provisions in Oil, Gas and Mineral Leases*, in Institute on Oil and Gas Law 195 (1951).

sider such provisions unsatisfactory in that they themselves might desire to market their production, and to obtain a better price for their share. In the event that a connection has to be split between the lessor's and the lessee's share, should all of the cost of the split connection fall on the lessor?

The quoted language does not include the right of the lessee to use produced oil or gas for leasehold operations, unless you imply from the words "Produced and saved." From the standpoint of the lessee, it is desirable that such a clause be included.

F. *Delay Rentals*

> "'If no well be commenced on said land on or before the.....day of....., 19....., the lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit in the.....Bank at....., or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of..... Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for .....months from said date. In like manner and upon like payments or tenders, the commencement of a well may be further deferred for like periods of the same number of months successively."

A number of modern oil and gas lease forms eliminate the necessity of filling in a date for the payment of delay rentals by providing that these rentals be paid on or before each anniversary date of the lease. For reasons known only to perverse land men this part of an oil and gas lease form is more frequently filled in incorrectly than any other part in the form. The result is to impose upon the legal departments, and successor assignees, the necessity of preparing and obtaining stipulations with regard to the proper payment of delay rentals. Most lease forms today provide for a substitute bank, if for any reason the named bank ceases business. A good rental clause would permit payment by check or by a draft mailed to the depository bank.

The delay rentals provided in an "unless" lease cannot be paid with good intentions.[8] Nevertheless, this form is not only the most accepted, but probably the most usable of all oil and gas lease forms. The *drill* or *pay* leases are difficult to get signed, are

8. Summers, *op cit. supra* note 7, §341. But see Brazell v. Soucek, 130 Okla. 204, 266 Pac. 442 (1928); Oldfield v. Gypsy Oil and Gas Co., 123 Okla. 293, 253 Pac. 298 (1927).

foreign to bookkeeping of most lessees, and impose lessee liabilities not anticipated.

The words "on or before" permit a lessee to make payment of delay rentals in advance of the rental paying date. Changes in ownership, and proper notice to the lessee of such change, occur between the date the rental was paid and the last day the rental may be paid in some instances. Such a purchaser of mineral rights has no right to look to the lessee for his share of any delay rental which has previously been paid. To eliminate discussion some companies make duplicate payments.

G. *Lesser Interest Clause* [9]

> "If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which his interest bears to the whole and all undivided fee."

A lesser interest clause is necessary to protect against duplicate royalty payments, as well as against the payment of a one-eighth of the production to each lessor who signs the lease separately.

H. *Severability Clause*

> "If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessor has been furnished with a written (transfer or assignment of a) true copy thereof, and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease insofar as it covers a part or parts of said lands upon which the said lessee or any assignee hereof shall make due payment of said rental."

The need for a severability clause is obvious. A number of leases are subsequently assigned in part. With a severability clause in the lease, assignees do not have to check the rental payments

9. Peerless Oil and Gas Co. v. Tipken, 190 Okla. 396, 124 P.2d 418 (1942), stated that the lesser interest clause was inserted for the protection of the lessee so that if it be determined that the lessor has a lesser interest than that shown in the lease, he takes in proportion to the part his interest bears to the whole.

of owners or other portions of the lease to determine whether or not the lease has remained in force. If there were no such clause in the lease, subsequent assignees would have to check the lease rentals over the entire tract in examining the title for prospective purchasers of a part of the basic lease. As a result of tax needs it may at times transpire that an assignee who owns an undivided one-half interest in an oil and gas lease desires to release that interest in one year, whereas the assignee of the other one-half interest in the leasehold desires to retain the lease for a loss to be taken in another year. The quoted language does not cover such an emergency. If you are confronted with the problem, I have no advice to offer.

If the prospective lessee is, or by assignment is likely to be, a promoter, from the standpoint of the lessor it would be well to limit the right to assign the estate of the lessee without the lessor's prior consent. In absence of such a clause assignments, overrides, and partial interests may be assigned from the basic leasehold resulting in an abstract of title of a considerable size and expense.

I. *Warranty Clause*

"Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof."

This language is still in most of these forms used. In view of the lesser interest clause in the oil and gas lease one would in those instances where the lessee expects to recoup the consideration paid in the event of the lessor's loss, or lack of title, wish to add language which specifically defines the interest warranted

III. ADDITIONAL COVENANTS SUGGESTED FOR LESSEE'S PROTECTION.

A. *Paragraph Extending Term During Further Development.*[10]

"Should the first well drilled on the above described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period which rental has been paid, this lease shall terminate

10. Summers, *op cit. supra* note 7, §303.

as to both parties, unless the lessee, on or before the expiration of said twelve months, shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments."

This language is inadequate to cover all situations. Where production ceases after the end of the primary term of the oil and gas lease, courts have held that the language here stated does not continue a lease in force if the well is reworked, or completed into another producing horizon. The lease expires where production stops in the only well on the leasehold, even though the lessee is completing this well into another producing horizon. For this reason a lessee cannot experiment with any other productive formation but is compelled to hang on as long as he can to the producing horizon in which the well is completed. There is doubt as to the effect of the quoted clause if a well is started and completed between the rental dates. This paragraph appears in one of the lease forms used in my practice, and though subject to criticism, it suggests a language which you might adopt to cover this situation.

"If prior to discovery of oil or gas on said land lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production. If at the expiration of the primary term oil, gas, or other mineral is not being produced on said land but lessee is then engaged in drilling or reworking operations thereon, the lease shall remain in force so long as operations are prosecuted with no cessation of more than thirty (30) consecutive days, and if they result in the production of oil, gas, or other minerals so long thereafter as oil, gas, or other mineral is produced from said land." [11]

11. Loeffler v. King, 228 S.W.2d 201 (Tex.Civ.App. 1950).

B. *Entirety Provision*

All good oil and gas lease forms contain an entirety clause.

> "If the leased premises shall thereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such seperate owners in the proportion that the acreage owned by each owner bears to the entire leased acreage. There shall be no obligation on the part of the lessee to offset wells on separate tracts into which the land covered by this lease may be hereafter divided by sale, devise or otherwise, or to furnish separate measuring or receiving tanks."

In many states, in the absence of such a clause the lessors, or the owners of the minerals which are subject to the oil and gas lease, may convey divided portions of their ownership and thereby increase the lessee's responsibility, such as separately measuring the production from separate tracts, and drilling separate protection wells on each tract. Moreover, under the modern conservation practice it is desirable to keep the basic leasehold as large as possible. In lieu of the specific entirety clause of the kind here quoted, some lease forms simply provide that no conveyance by the lessor shall in any manner increase the obligations of the lessee. The entirety clause has the advantage of judicial approval.[12]

C. *Partial Release*

> "Lessee may at any time execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases."

This language is desirable in leases which cover large tracts of land. Geologists sometimes think that they can guess close enough to make it useful in leases which cover smaller tracts. If the lease covers widely separated tracts, then, of course, its use is obvious. Such a clause protects against demands by the lessor

12. Adoue, *Royalty and Pooling Provisions in Oil, Gas and Mineral Leases*, in Institute on Oil and Gas Law 195, 225-26 (1951).

to drill a well upon a portion of the lease which the lessee believes cannot profitably be developed.

D. *Free Water and Free Use of Oil and Gas for Production Purposes.*

"Lessee shall have the right to use, free of cost, gas, oil, and water produced on such land for its operation thereon, except water from the wells of lessor."

The right to use free water [13] is contained in the granting clause of some lease forms, and the right to use oil and gas [14] is commonly set forth in a royalty clause in a proviso which states that the royalties shall be computed after deduction for oil or gas used for leasehold operations. I quote language from the granting clause of a lease form:

". . .for the drilling of water wells, the building of dikes or ponds, for the production of, or the impounding of, water to be used in lease operations . . ."

In other lease forms you will find this language in the royalty clause:

"Lessees shall have free use of oil, gas, and water for operations hereunder, and the royalty on oil and gas shall be computed after deducting any so used."

These clauses do not answer fully the questions which arise. For example, what is to be done about the lessee's right to use "tail gas" from a casinghead plant returned to the leasehold and used for operational or reinjection purposes in conjunction with the joint operation of several leaseholds? [15]

E. *Right to Remove Machinery and Casing.*[16]

"Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing."

13. Free water means water produced by the lessee through the drilling of wells, the building of tanks, or ponds, or from running streams, etc. Arnold v. Adams, 147 Okla. 57, 294 Pac. 142 (1930). The free water clause has further been limited to the free use of water for houses located upon the leased premises. The lessee was not authorized to use water to supply houses not located upon the lease notwithstanding the fact that these houses were occupied by persons operating the well upon the land from which the water was taken. Vogel v. Cobb, 193 Okla. 64, 141 P.2d 276 (1943).

14. Adoue, *Royalty and Pooling Provisions in Oil, Gas and Mineral Leases,* in Institute on Oil and Gas Law 195, 202-03 (1951); Terry, *Miscellaneous Clauses in Oil and Gas Leases,* in Institute on Oil and Gas Law 237, 258-63 (1951).

15. Tidewater Associated Oil Co. v. Clemens, 123 S.W.2d 780, 784 (Tex. Civ. App. 1938). Here the lessee sold casinghead gas to a gasoline plant which was obligated under a sales contract to return to the lessee sufficient gas for its operations on the lease. The lessor contended that he was entitled to receive one-eighth of the residue gas returned. The court held the lessor was not entitled to a rental on that portion of the residue gas returned to the lease by the purchaser and used in the operation of the lease by the lessee.

16. Terry, *Miscellaneous Clauses in Oil and Gas Leases,* in Institute on Oil and Gas Law 237, 252-53 (1951).

Notwithstanding this clause, one court sustained an injunction brought by the lessor to prevent the removal of casing for the reason that the well was capable of production in quantities which would pay the lessee a small profit. This case will be referred to later.

F. *Right to Operate Salt Water Injection Wells.*[17]

The fee owner only has the right to grant authority to operate salt water injection wells. There is no occasion for including such a clause in an oil and gas lease form signed by the owners of the minerals only, but consent from the fee owner is much easier to obtain when the lease is secured, if he owns a portion of, or an entire interest in the minerals, than at a time when the lessee is faced with the problem of disposing of large quantities of salt water, even though its disposal underground tends to benefit both the lessee and the lessor. It is suggested that there be included in the granting clause a provision that the lessee has the right to drill, maintain, and operate wells for the disposal of salt water and brines produced with oil from the premises.

G. *Right to Grant Pipeline Easements.*

Some of my clients operate in suburban areas where it is difficult to obtain pipeline rights-of-way. These clients are not public service corporations and do not possess the power of eminent domain. Pipeline companies possessing the power of eminent domain would not lay their lines to my clients' wells unless the clients furnished the rights-of-way. In a subsequent comparable area, the oil and gas lease obtained contained this clause:

> "In the event lease operations on the above described land require the laying of a pipeline or lines in or across said lands, whether exclusively to serve the well or wells on the leased premises, or to serve such well or wells and others off the leased premises, the lessee herein shall have the right to assign or grant such a pipeline right of way for the term of this lease, provided that if such pipeline does not exclusively serve the well or wells on the leased premises, upon completion of the laying of such line, a consideration of $1.00 per rod shall be paid the owner or owners of the surface rights of the land crossed by such line. At the request of the surface owner, all pipe lines, except within the well service area, shall be buried below ordinary plow depth."

17. See, for example, West Edmond Salt Water Disposal Ass'n v. Rosecrans, 204 Okla. 9, 226 P.2d 965 (1950), *app. dismissed*, 340 U. S. 925 (1951).

This language has not been tested in a court but it serves to clear the way.

H. *Exclusive Right to Seismograph* [18]

A number of oil and gas lease forms grant to the lessee the exclusive right to explore for oil and gas by drilling, developing, seismographing, and other scientific means. In practice this language seldom operates to prevent a competing company from conducting seismic operations, but it has enabled the lessee to require that he share in the knowledge gained as a condition to the waiver of this exclusive right. It is suggested that a lease form be adopted in which the words "exclusively" and "scientific" appear in the granting clause.

I. *Right to House Employees and to Maintain Compressor Stations.*

The lessees should be able to provide separately lands for housing and boarding employees. A great number of oil and gas lease forms include in the granting clause language which permits excessive use of the surface of the leased areas.[19] I quote from a form:

> "For the purpose of laying pipelines, building tanks, treating and manufacturing plants, refineries, gasoline recycling and repressuring plants, power houses and stations, telegraph and telephone lines, houses for employees, and all other structures necessary or convenient in the conduct of any such operations, regardless of whether or not such structures or facilities are used exclusively for the production from the hereinafter described premises."

J. *Requiring Court Determination of Breach, and Order for Compliance Before Forfeiture.*

An oil and gas lease form once reached a Federal Court containing this clause:

> "The covenants mentioned in this lease, as well as all implied covenants, are not to be understood as conditions, and the breach of one or all will not work a forfeiture, abandonment, or termination of this lease."

A better word which might be used in this clause is "limitations"

18. Summers, *op cit. supra* note 7, §652, n. 3, §§659-661. Yates v. Gulf Oil Corp., 182 F.2d 286 (5th. Cir. 1950), held that a lessee had an implied right to conduct seismic operations over the objection of a surface owner even though no express mention of the privilege was contained in the lease. Hawkins, *The Geological Trespasser and Negligent Geophysical Explorer*, 29 Tex.L.Rev. 310, 313 (1951), Oil and Gas Law 1630, 1633 (1951).

19. Summers, *op cit. supra* note 7, §652.

in place of "conditions", as conditions subsequent require equitable aid to secure enforcement.

To the quoted language, some leases have added:

> ". . . or be grounds for cancellation in whole or in part, unless it shall be ascertained judicially that the lessee has violated such covenants, and lessee shall have ninety (90) days thereafter within which to commence operations in compliance therewith."

Other leases provide that the lessee has no obligation of development during the primary term of the oil and gas lease. Such provisions in a lease are valid, except perhaps in Texas, but even if it be not valid, the lessee is in a better trading position if his ideas of development of the leasehold differ from those of the lessors.[20] Of course some lessors may not sign a lease containing this provision, but from the standpoint of the lessee it unquestionably has merit. With such a clause the lessee is not compelled at his peril to decide correctly whether or not the court will agree with him that he is under no duty to develop further under the circumstances surrounding his lease.[21]

K. *Force Majeure Clause.*

> "All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or if such failure is the result of any such Law, Order, Rule or Regulation."

This language is found in most of the oil and gas lease forms now in current use. Perhaps the language is adequate. I honestly do not know what its effect would be if production could not be had upon the leasehold premises within the primary term of the lease, because a string of pipe could not be obtained. For that reason, although it does not have as wide usage, I like this provision:

> "The breach by the Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease nor cause a termination or reversion to the estate

20. Walker, *The Nature of the Property Interests Created by An Oil and Gas Lease in Texas, The Implied Covenants Burdening the Lessee's Estate,* 11 Tex. L. Rev. 399, 407 n. 26, 412, 417-420 (1933); Oil and Gas Law 447, 455 n. 26, 460, 465-469 (1951).

21. Merrill, *Implied Covenants, Conservation, and Unitization,* 2 Okla.L.Rev. 469 (1949), *Current Problems in the law of Implied Covenants in Oil and Gas Leases,* 23 Tex. L. Rev. 137, 140-49 (1945), *Lease Clauses Affecting Implied Covenants,* Institute on Oil and Gas Law 141 (1951); Gibbens, *The Effect of Conservation Legislation on Implied Covenants in Oil and Gas Leases,* 4 Okla. L. Rev. 337 (1951).

created hereby, nor be grounds for cancellation hereof, in whole or in part, save as herein expressly provided. If performance of any of the express or implied covenants of this lease is rendered impossible or unreasonably burdensome by reason of strikes, embargoes, requirements of the civil or military authorities of the Government of the United States, State, or any subdivision thereof, acts of God, war or the public enemy, the performance of all of the covenants hereof shall be excused during the continuance of the period of said disability or performance and the term of this lease shall be extended for a comparable period."

IV. ADDITIONAL COVENANTS SUGGESTED FOR LESSOR'S PROTECTION.

A. *Liability for Damage to Growing Crops.*[22]

"The Lessee shall pay for damage caused by ite operations to growing crops on said land."

Does this language mean that the lessee is to pay for all of one year's crop of alfalfa, or only the alfalfa crop which is growing on the land at the time the lessee enters? Does the language mean that a lessee is to pay for a fruit crop if he has to cut down a fruit tree? The words "growing crop" have not been satisfactorily defined by the courts in respect to their use in such a clause. Nevertheless, I offer no substitute language. I wish to point out that the farmer's notion of a growing crop may be pasture grass, but if the lessee chooses to stand firm, I doubt his liability under the language to pay for anything more than the planted vegetation destroyed at the time of the entry, less the cost of harvesting.

B. *Limitations on Proximity of Development Operations to Improvements on Land.*[23]

"No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the lessor."

This clause is reasonable unless the leasehold tract is small. One should be careful to see that it is eliminated from any lease which is taken on acreage or townsite property.

C. *Burial of Pipelines* [24]

"When requested by lessor, lessee shall bury its pipeline below plow depth."

This provision is reasonable, except that as the result of some-

22. This clause is expressive of the common law rule.

23. Terry, *Miscellaneous Clauses in Oil and Gas Leases*, in Institute on Oil and Gas Law 237, 255-58, and the case there cited (1951).

24. Cranston v. Miller, 208 Ark. 156, 185 S.W.2d 920 (1945).

one's experience the words "except within the well service area" are added in some oil and gas lease forms.

D. *Free Gas*

> "The lessor to have gas free of cost from any gas well on said premises for all stoves and all inside lights in the principal dwelling house on said land by making *(his)* own connections with the well at *(his)* own risk and expense."

This language in the old "Producers 88" has been held to apply only to gas wells, so that the lessor had no right to require that he be furnished gas from residue lines which return gas to the lease from plants, nor to make any direct connection to a well which produced casinghead gas.[25] It is suspected that the use of this clause came into prominence during the days when wells were shallow and gas pressures low. It would be a foolhardy lessor today who would tie on to most gas wells, and although the clause might in some instances benefit a lessor, it is more likely to encourage him to do a foolish thing now. I recommend against lessees permitting lessors to tie on to the residue lines for various reasons, one of which is the possibility that the lease might be classified as a public utility.

E. *Right to Demand Royalties in Kind.*

If I were to prepare a lease for a lessor owning a substantial interest in a large tract, I would require a proviso to the effect that the lessor would have the right upon demand and furnishing tanks, to cause his oil to be delivered in kind. I do not believe the language of a "Producers 88" lease form should be so interpreted although it has been on occasions. The posted price of oil is not always uniform and above the purchase price, the trading value of a crude oil connections is at times substantial.

F. *Provisions for Surface Rentals or Damages if Pooled With Other Lands Not Sharing Burdens of Development.*

While the situation will not often occur, in town lot or acreage leasing one knows with certainty that the lands of one of the lessors in the drilling unit will have to bear all of the inconvenience of the production of oil. In the Oklahoma City Field, for example, it was very foolish for a lessor to sign an oil and gas lease if he owned vacant lots, for the oil company would drill the well

25. Summers, *op cit. supra* note 7, §587; Hein v. Shell Oil Co., 315 Ill. App. 297, 42 N.E.2d 315 (1942); Cranston v. Miller, *supra* note 24.

upon his lots although he would obtain no more for his lease than the man who had lots covered with residential improvements. The net result was that the owners of vacant lots were deprived of their use for years without having any greater royalty than the owners of improved properties. Some lessees are charitable enough to recognize the equities of the owners who suffer the greater detriment. In one instance in California the lessor who suffered the greater detriment unsuccessfully sued the other lessors for contribution.[26] The way to avoid such a problem is to include appropriate language in the oil and gas lease form for the protection of such a lessor.

V. Additional Clauses for the Benefit of Both the Lessee and the Lessor.

A. *Arbitration.*

More than 1200 oil and gas wells were drilled inside the city limits of Oklahoma City. Many claims for damages arose as a result of the drilling or of the operation of these wells. To facilitate the settlement of these claims, and to avoid litigation, most oil and gas lease forms used on townsite lands contained a clause in this language:

> "The lessee shall promptly pay unto the lessor any and all damage to the surface of the leased premises, or improvements thereon, caused by its operation, and for which the lessee may be liable legally; and, if the amount of such damages cannot be agreed upon, it shall be determined by a board of arbitrators, composed of one member appointed by the lessor, one by the lessee, or assigns, and a third to be selected by the two so appointed, or, if they do not agree, or, if either party shall, for five (5) days after requested in in writing to so appoint an arbitrator, fail to make such appointment, then said arbitrator, or arbitrators, shall be appointed by the District Judge, senior in service, in the County in which said lands are located."

The words "and for which the lessee may be liable legally" have been criticized as leaving a back door escape. In one instance such words were held by the court to be a limitation upon the power of the arbitrators which confined their determination to those damages occasioned by the negligence or the unnecessary acts of a lessee. Under the clause a lessee could not be held

26. Summers, *op cit. supra* note 7, §652.1; Sellery v. Ward, 21 Cal.2d 300, 131 P.2d 550 (1943).

liable for incidental detriment but only for the negligent or inconsiderate use of the property.

B. *Unit Pooling* [27]

In those areas which contain irregularly shaped tracts in order to comply with spacing regulations, or to hold all leases under an intelligently designed well spacing program, a lease should contain a unit pooling agreement. The language I believe most frequently used is:

> "Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof with other lands, lease or leases in the immediate vicinity thereof, when in lessee's judgment it is necessary or advisable to do so in order to develop properly and operate said lease premises so as to promote the conservation of oil, gas, or other minerals in and under that may be produced from said premises, such pooling to be of tracts contiguous to one another and to be into a unit or units not exceeding 40 acres each in the event of an oil well, or into a unit or units not exceeding 640 acres each in the event of a gas well. Lessee shall execute in writing and record in the conveyance records of the county in which the land herein leased is situated an instrument identifying and describing the pooled acreage. The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. In lieu of the royalties elsewhere herein specified, lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis, bears to the total acreage so pooled in the particular unit involved."

C. *Unitization with Portions of a Field.*[28]

With the development of the science of oil production, engineers often recommend control of reservoir substances in such a manner as to move these substances across property lines in a

27. Shank, *Some Legal Problems Presented by thte Pooling Provisions of the Modern Oil and Gas Lease,* 23 Tex. L. Rev. 150 (1945), Oil and Gas Law 1074 (1951); *Pooling Problems,* 28 Tex. L. Rev. 662 (1950), Oil and Gas Law 1568 (1951); King, *Pooling and Unitization of Oil and Gas Leases,* 46 Mich. L. Rev. 311 (1948).

28. Summers, *op cit. supra* note 7, §104.1.

fashion which differs from the movement which occurs under a competitive program of drainage to depletion. In some states there are compulsory fieldwide unit operation laws.[29] When more of the Legislatures understand the problem, more states will adopt these statutory measures. Meanwhile, both a lessee and a lessor are benefited if the reservoir energy is used for reservoir production and not for well or tract production. Both share in additional recoveries. It is my opinion that both would be benefited by the inclusion of a paragraph which contains the meaning conveyed by this paragraph:

> "The lessee is hereby authorized to join with the other lessees or operators of leases covering all or part of any common source of supply from which the within lease is producing, for the purpose of engaging in a program of pressure maintenance, repressuring, water flooding, or cycling operations, calculated to increase the ultimate recovery of oil or gas, and in the event of such joint operations, input wells may be located without regard to lease lines and where proper for the operation as a whole, and the royalties payable to the owners of minerals or royalties under the tract herein leased shall be payable from that portion of the total production allocated by the plan of operations to the within tract, and as if such production had been produced from the within tract, except that no royalty shall be due for that portion of the gas, if any, which may be re-injected."

D. *Abandonment Where Royalties are Excessive.*

In spite of the provision which permits a lessee to draw his casing and to remove his equipment, courts have sustained injunctions against lessees taking this action where the property can be operated at a profit above current operating expenses.[30] A lessor who is fortunate enough to have a quarter or a three-eighth royalty, or for that matter in some instances even an eighth royalty could afford to take over the equipment at its salvage value and to continue to operate the property at a profit if and where the lessee could not do so. A specific provision which controls the right to take over benefits of the lessee, in that he can

29. Arkansas—Ark. Acts 1951, No. 134, Ark. Stat. 1951 Supp. §53-115C, Ark. Stat. Ann. 1951 Supp. §53-115C. Oklahoma—Okla. Sess. Laws 1951, p. 136, 52 O.S. 1951 §§287.1-287.15. Washington—Wash. Laws 1951, c. 146.

30. Moses, *The Evolution and Development of the Oil and Gas Lease,* in Institute on Oil and Gas Law 1, 18 (1951); Terry, *Miscellaneous Clauses in Oil and Gas Leases,* in Institute on Oil and Gas Law 237, 252-54 (1951); Summers, *op cit. supra* note 7, §526; Rennie v. Red Star Oil Co., 78 Okla. 208, 190 Pac. 391 (1920).

properly provide for the payment for the equipment which he will be compelled to leave, and benefits the lessor, in that it fixes his right to take over, and may serve to keep both lessee and lessor out of court.[31]

E. *Compliance with Governmental Regulations.*

If the force majeure clause quoted is used, this in my opinion is all that is required.

31. Wieczorek v. Texas Co., 45 Cal. App.2d 450, 114 P.2d 377 (1941), interprets such a clause.

NORTH DAKOTA LAW REVIEW

Member, National Conference of Law Reviews

VOLUME 28 APRIL, 1952 NUMBER 2