

**Special Considerations
In Drafting Lease Provisions for
Horizontal Wells**

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**Special Considerations
In Drafting Lease Provisions for
Horizontal Wells**

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■ ■ Antique Appalachian Basin Lease ■ ■ ■ ■ ■

- 80-100 years old
- No storage
- No pooling or unitization
- Flat rate royalty
- Free gas provision

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■ ■ Unitization/Pooling Clause ■ ■ ■ ■ ■

- Consolidate with other lands
- Form a unit of not more than ____ acres or as required by law
- Well drilled deemed to be on leased premises even if not on lease
- Allows you to allocate royalties

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■ ■ Unitization/Pooling Clause ■ ■ ■ ■ ■

Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form an oil and gas development unit of not more than 640 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on such unit. Any well drilled on said development unit whether or not located on the leased premises, shall nevertheless be deemed to be located upon the leased premises within the meaning and for the provisions and covenants of this lease to the same effect as if all the lands comprising said unit were described in and subject to this lease.


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■ ■ Drilling Commitment ■ ■ ■ ■ ■

Examples:


One (1) well drilled and completed in the Marcellus formation in the calendar year 2010, and two (2) wells drilled in the calendar year 2011.

Commencing in the year of this lease and each year thereafter until all of the acreage is developed, Lessee shall drill and complete two (2) wells per year.

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■ ■ Drilling Commitment ■ ■ ■ ■ ■

Lessee shall be obligated to have one (1) well drilled and completed in the Marcellus formation in the calendar year 2010, and two (2) wells drilled in the calendar year 2011. Commencing in the year 2012, and each year thereafter until all of the acreage is developed, Lessee shall drill and complete two (2) wells per year.

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■ ■ Pugh Clause ■ ■ ■ ■ ■

- Releases all acreage not held by a well unit at the end of the lease primary term
- May include specific radius of land to be held by each well

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■ ■ Pugh Clause ■ ■ ■ ■ ■

- If at the end of the primary term, a part but not all of the land covered by this lease, on a surface acreage basis, is not included within a unit or units in accordance with the other provisions hereof, this lease shall terminate as to such part, or parts, of the land lying outside such unit or units, unless this lease is perpetuated as to such land outside such unit or units by operations conducted thereon or by the production of oil, gas or other minerals, or by such operations and such production in accordance with the provisions hereof.

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■ ■ Free Gas Agreement ■ ■ ■ ■ ■

- Provides set amount of gas to residence of Lessor each year
- Normally, the Lessor is responsible for costs and for risk
- Should provide that Lessee is not obligated to provide gas if well is not operating
- Normally, right runs with the land if residence and surface is sold

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■ ■ Free Gas Agreement ■ ■ ■ ■ ■

Lessor may, at Lessor's sole risk and cost, lay a pipeline to any one gas well on the premises, and take gas produced from said well for domestic use in one dwelling house on the leased premises, at Lessor's own risk, subject to the use and the right of abandonment of the well by the Lessee, and subject to any curtailments or shut-in by any purchaser of the gas. The first 200,000 cubic feet of gas taken each year shall be free of cost, but thereafter shall be paid for at the last published rates of the gas utility in the town or area nearest to the leased premises or the field market rate, whichever is higher. Lessor to lay and maintain the pipeline and furnish regulators and other necessary equipment at Lessor's expense. Lessor shall also, at the request of Lessee, install a meter to measure said gas....

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Free Gas Agreement, cont.

Lessor shall subscribe to and be bound by the reasonable rules and regulations of the Lessee relating to the use of said domestic-use gas, and Lessor shall maintain the said pipeline, regulators and equipment in good repair and free of all gas leaks and operate the same so as not to cause waste or unnecessary leaks of gas. If the Lessor shall take excess gas as aforesaid in any year and fail to pay for the same, the Lessee may deduct payment for such excess gas from any rentals or royalties accruing to the Lessor hereunder. Lessor acknowledges that he has been advised as to the risks inherent in the taking of gas in this manner, and Lessor agrees to assume all such risks whether same be caused by Lessor's lines or equipment, or whether same be caused by Lessee's equipment or well operation; and ...




Free Gas Agreement, cont.

Lessor agrees to hold Lessee and the well operator and all parties in interest in any well on the leasehold premises harmless from any claims of any nature whatsoever which may rise by the usage of gas from any such well by Lessor, his heirs, executors, administrators and assigns. Lessor further agrees that upon the sale or transfer of the leasehold premises wherein someone other than the Lessor is entitled to take the gas under this paragraph, that the gas supply will be terminated by Lessee until the Buyer of the property executes an agreement regarding the usage of the gas. In the absence of such an agreement, domestic-use gas under this provision shall terminate. The within right of domestic-use gas shall not be assignable without the written consent of the Lessee.




Assignment Provision

- Allows or restricts transfer of lease rights
- Should always be explicit
- The law presumes a right to assign property interests (the Rule in Dumpor's Case)
- Assignee assumes all rights and responsibilities




■ ■ Assignment Provision ■ ■ ■ ■ ■

This Lease and all of the conditions, covenants and terms thereof shall extend to and bind the successors and assigns of Lessor and Lessee. The rights of either party to this Lease may be assigned in whole or in part and the provisions of this Lease shall extend to and be binding upon their respective heirs, successor, personal representatives and assigns.

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■ ■ Recoupment of Royalties ■ ■ ■ ■ ■


- Allows Lessee to recover an overpayment of royalties to the Lessor
- May include recovery of delay rentals on paid-up leases

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■ ■ Recoupment of Royalties ■ ■ ■ ■ ■


Lessor warrants title to the leased minerals. Upon partial or total failure of title, Lessee shall have the right to recoup any unearned or excess sums advanced or paid to Lessor from monies or royalties thereafter becoming due and payable.

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■ ■ Subrogation Clause 


- Allows Lessee to pay obligations associated with the property and then collect from Lessor
- Puts Lessee in the shoes of party paid, as to all remedies and rights
- Examples: real estate taxes, mortgage payments, or other liens

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■ ■ Subrogation Clause 

Lessor hereby agrees that the Lessee at its option may pay, discharge, or redeem any taxes, mortgages, or other liens existing, levied, or assessed on or against the above-described lands, and in event it exercises such option, it shall be subrogated to the rights of any holder or holders thereof and may reimburse itself by applying any royalty or rentals accruing hereunder to the discharge of any such taxes, mortgages or other liens.

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■ ■ Equipment Removal Provisions 

- Allows Lessee to remove equipment, including casing, upon cessation of production
- West Virginia: Lessor has right to purchase well and casing at FMV less costs of plugging and abandoning the well. Syl. Pt. 6, Wellman v. Energy Resources, Inc., 210 W. Va. 200, 557 S.E.2d 254 (2001).

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■ ■ Equipment Removal Provisions ■ ■ ■ ■ ■

Lessee shall have the right at any time, and from time to time before and after expiration of this Lease, to remove all fixtures installed on the Premises, including the right to draw and remove casing, except that coal protection casing will not be removed without Lessor's consent.




■ ■ Force Majeure ■ ■ ■ ■ ■

- Inability to perform due to an act of God is not a breach of the lease
- Normally, provides a period time after the force majeure event ends for Lessee to begin complying with the lease terms




■ ■ Force Majeure ■ ■ ■ ■ ■

In the event the Lessee is unable to perform any of the acts to be performed by the Lessee by reason of force majeure, including but not limited to acts of God, strikes, riots and governmental restrictions including but not limited to restrictions on the use of roads, this lease shall nevertheless remain in full force and effect until the Lessee can perform said act or acts and in no event shall the within lease expire for a period of ninety days after the termination of any force majeure.




■ ■ Notice and Demand Clause ■ ■ ■ ■ ■

- Requires Lessor to send written demand to Lessee of any alleged breach
- Lessee has period of time to respond and cure the breach
- If Lessee fails to cure within the time provided, only then may the Lessor cancel the lease or sue the Lessee for breach




■ ■ Notice and Demand Clause ■ ■ ■ ■ ■

This Lease shall not be deemed forfeited or canceled and no litigation shall be initiated until Lessor has given Lessee written notice fully describing the breach or default including without limitation the failure to pay any royalties hereunder, and then only if Lessee fails to commence actions to remedy the breach or default within 90 days from the receipt of the notice.




■ ■ Judicial Ascertainment Clause ■ ■ ■ ■ ■

- Also known as the "Right to Cure"
- Requires Lessor to sue Lessee and prove that Lessee breached the lease...
- And then Lessee has reasonable time to cure the breach before the lease can be cancelled or damages owed
- Viewed with disfavor by courts on public policy grounds



■ ■ Judicial Ascertainment Clause ■ ■ ■ ■ ■

This lease shall never be forfeited or terminated for failure of Lessee to perform in whole or in part any of its express or implied covenants, conditions or obligations until it shall have been first finally judicially determined that such failure exists, and Lessee shall have been given a reasonable time after such final determination within which to comply with any such covenants, conditions or obligations.




■ ■ Judicial Ascertainment Clause ■ ■ ■ ■ ■

This clause is unenforceable in West Virginia :


- clause is void under W. Va. public policy
- in spite of clause, courts may render a final judgment (i.e., cancel the lease) in a case in which an oil and gas lease is at controversy

See Syl. Pt. 3, Wellman v. Energy Resources, Inc., 210 W. Va. 200, 557 S.E.2d 254 (2001).




■ ■ "Top Leasing" ■ ■ ■ ■ ■

- Taking a new lease subject to an existing, valid lease
- Top lease starts when existing lease terminates
- Language needs to be clear that the "primary term" of the lease does not start until the existing lease has ended



■ ■ “Top Leasing” ■ ■ ■ ■ ■

In the event that Lessor has previously leased to another any interest in any leased minerals within the Premises subject to this Lease, this Lease shall be considered a top-lease thereto and as said lease terminates or is surrendered, the interest or interests in any leased minerals so terminated or surrendered shall become a part of this Lease.

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■ ■ Right of First Refusal ■ ■ ■ ■ ■

- Provides Lessee right to re-lease the property upon same terms and condition as competitors
- Limits ability of Lessor to lease to another party

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■ ■ Right of First Refusal ■ ■ ■ ■ ■


In consideration of the acceptance of this Lease by the Lessee, the Lessor agrees that if Lessor receives any offer to lease the oil and gas covered by this agreement during the term of this Lease or any extension or renewal thereof or within 90 days after the expiration of this lease, Lessor shall notify Lessee of the terms of said offer and shall offer to lease the oil and gas to Lessee upon such terms prior to executing any agreement with a third party.

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■ ■ Implied Covenants

“Reasonably prudent operator”

- To protect from drainage and loss
- To develop
- To explore



Thank You!
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