3-24-2011

Pitfalls in Assignments and Subleases - A Follow-Up Discussion

Robert L. Theriot

Follow this and additional works at: http://digitalcommons.law.lsu.edu/mli_proceedings

Part of the Oil, Gas, and Mineral Law Commons

Repository Citation
Available at: http://digitalcommons.law.lsu.edu/mli_proceedings/vol58/iss1/16

This Paper is brought to you for free and open access by the Mineral Law Institute at LSU Law Digital Commons. It has been accepted for inclusion in Annual Institute on Mineral Law by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
Pitfalls in Assignments and Subleases -
A Follow-Up Discussion
Robert L. Theriot
Liskow & Lewis
Houston, Texas

I. Introduction

Topic Overview
- General Description Problems
- Reservations & Exceptions
- Dealing with Fractions
- Unclear Terms of Art
- Assumptions and Releases

II. General Description Problems

A. Important to Coordinate
- Granting clause
- Description clause
- Reservation and exception clauses

B. Coordinating Granting & Description Clauses
- Compare the following examples:
  "...assigns 1/2 interest in the following lease: Boudreaux et al Lease dated ..."
  versus
  "...assigns the following lease interest: 1/2 interest in Boudreaux et al Lease dated"
- Important in "Exhibit A" assignments

C. "Minerals Described" vs. "Minerals Conveyed"
- Watch out for references back to granting or description clauses
  - Example: "assigns an 1/2 interest in the following mineral rights: Boudreaux et al Lease dated,...less and except a 10% overriding royalty interest in the minerals conveyed, which are reserved to Assignor."
- What did the Assignor reserve? (a 5% override!)

D. Cover-all (Mother Hubbard) Clauses
- Scope
  - Adjacent or contiguous tracts
  - "Small" tracts, strips & parcels.
  - Errors in description, quantity
- Problems
  - Might pick up unintended tracts
  - Might pick up unintended fractional interests

E. Specific versus Global Grants
- Compare:
1) ... assign $\frac{1}{2}$ interest in all leases in Section...

\textit{versus}

2) ... assign all of Assignor's mineral interests in Section ...

- The Assignee would normally prefer (2) to protect its warranty.

**F. Reservations & Exceptions**

- Methods of limiting the assignment
  - Often ambiguous – what exactly is limited? The grant? The description? The warranty?
  - Can create conflicts if not careful
- Remember:
  - Words matter.
  - Placement matters

**III. "Subject to" clauses**

**A. Example:**

- \textit{This assignment is subject to a 5% overriding royalty reserved [in the prior sublease].}
- “Subject to” clauses do not “reserve” anything to the assignor – only “excepts” from warranty.
- \textit{Texaco v. Newton & Rosa Smith CharitableTrust, 471 So.2d 877 (La App 2d Cir. 1985).}

**B. The Duhig [Dillon] Rule**

- \textit{Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940).}
- \textit{Dillon v. Morgan, 362 So.2d 1130 (La. App. 2d Cir. 1978).}
- The Problem – Cannot fulfill both the grant and the reservation.
- Rule – Grant takes precedence over reservation – the reservation is reduced until the grant is fulfilled.
- A few tips:
  - Make sure the grant is correct – don’t rely on the reservation
  - Use a “proportional reduction” clause to avoid Duhig rule

**C. Placement of Exceptions**

- Place “exceptions” to grant in granting clause or description clause:
  - Ex. Assign all mineral rights in Section 12, less and except a 50% interest in the S/E quarter of Section 12.
- Placements elsewhere may be interpreted as exceptions to warranty or mere “subject to” provisions.

**IV. Dealing with Fractions**

**A. (Double & Triple Fractions)**

- Common Problem in mineral assignments
- Typically caused by fractional assignments (or reservations) out of fractional interests.
- Basic problem – do you intend to assign fraction \textit{of} the fraction or fraction \textit{of} the whole?
- Tricks and Tips
  - 1/4 interest “of" 1/2 means multiply, \textit{i.e.} 1/8th
- 1/4 "out of" 1/2 means subtract 1/4th from the whole.
- State the math: i.e. 25% of 1/5th of 8/8ths.
- When conveying lease interests – state both W/I and NRI being assigned.

V. Unclear Terms of Art

A. Carried Interests
- Generally a cost-bearing working interest, but only obligated to pay out of production.
- Can be carried to a certain point – e.g. casing point.
- Carried on a well-basis, or lease-basis, or basket-basis.
- If carried perpetually, essentially a net profits interest.

B. "Wellbore" Assignment
- What is actually assigned?
  - Unclear in Louisiana.
  - Assigns leasehold but (1) only to diameter of borehole – no rights beyond existing borehole and (2) so much of the surface as necessary to operate well.

C. Mineral Acres
- 1 mineral acre is the 100% WI in 1 acre of land.

D. Royalty Acres
- ???

VI. Assumptions and Releases

A. General Principles
- Assignee/Sublessee “assumes” obligations of lease to extent of interest acquired – Art. 128.
- Assignor/Sublessor not “released” from past or future obligations unless expressly released by lessor – Art. 129.
- As between Assignor & Assignee, parties can vary general rules by agreement.
- Rules may apply to other mineral contracts – JOAs, etc.

B. Limiting liability to lessor
- Consent to assign from lessor is not the same as novation.
- Can assignee limit its liability to lessor for past obligations by limiting its assumption?
- Indemnity from Assignor does not protect from lessor.
- Only clear path is novation or new lease.

C. Application to other contracts:
- Joint Operating Agreements
  - Chieftain Intern. (US) v. Southeast Offshore, 563 F.3d 817 (5th Cir. [La.] 2008).
D. As **Assignor** make sure you use "assumption" language instead of "subject to" language

- Assumption must be express. "Subject to" language may be insufficient to create personal obligation.