



# Consents to Assign

Permian Basin Landmen's Association

April 14, 2021



# Road Map

- The Basics: Oil and Gas Lease
- Consent to Assign Provisions & Enforceability
- Legal Guidance on Consent to Assign Provisions
- Remedies for Non-Compliance
- Drafting Solutions



# The Basics: Oil and Gas Leases

- Contract law and property law
- Free transferability vs. freedom to contract
- Difference from a typical lease agreement
- What is granted in a lease?
  - Right to profit?
  - Interest in the minerals?
  - Fee simple determinable?



# Varying Perspectives



## Lessor

Protect against  
future operators

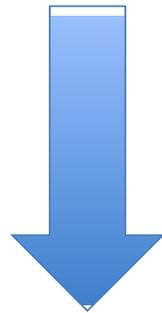
## Lessee

Restrictions  
affect value



# Consent to Assign Provisions

“Hard” Consent



Includes  
consequences

“Soft” Consent



No specific  
remedy



# Consent to Assign Provisions

“This lease shall  
not be assigned.”

**NOT ENFORCEABLE**

*Outright restraint void  
or inconsequential*



# Consent to Assign Provisions

“This lease shall not be assigned  
without lessor consent.”

**LIKELY NOT ENFORCEABLE**

*Lessor may withhold or condition  
consent to additional consideration*



# Consent to Assign Provisions

“This lease shall not be assigned without lessor consent, such consent not to be unreasonably withheld.”

**LIKELY ENFORCEABLE**



# Consent to Assign Provisions

“Any assignment made without prior written consent of lessor shall be void.”

**LIKELY NOT ENFORCEABLE**



# Consent to Assign Provisions

“Any assignment made without prior written consent of lessor shall result in a forfeiture of all rights granted hereunder.”

**LIKELY NOT ENFORCEABLE**



# Consent to Assign Provisions

“This lease shall not be assigned to Terrible Exploration Company without lessor’s written consent. Any assignment made to Terrible Exploration Company without prior written consent shall result in all rights reverting to Lessor.”

**LIKELY ENFORCEABLE**



# Lessons from Texas Authorities

**Include a standard in a non-consent provision**

*Barrow-Shaver Res. Co v. Carrizo Oil & Gas, Inc.*

If a party's right to consent is not qualified by the written language of the agreement, then the right is likely unrestricted



# Lessons from Texas Authorities

**Include a standard in a non-consent provision**

*Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth.*

Include some standard in the clause, whether it is a reasonableness standard, or specifically objective standard



# Lessons from Texas Authorities

- *Mayo Foundation for Medical Education and Research v. BP America Production Co. (2020)*
  - Discussed the validity of consent to assign provisions in oil and gas leases
  - Discussed under what circumstances a party may refuse to consent to such an assignment



# Reasonableness

- *Mayo Foundation for Medical Education and Research v. BP America Production Co. (2020)*
  - Original: “The right and obligations of Lessee hereunder are not assignable or transferable in any respect as to segregated portions of the leased premises or as to only certain depths under the leased premises”
  - Modified: “The rights and obligations of the Lessee hereunder are not assignable or transferable in any respect by it, except upon the written approval of Bank One Trust Company, N.A., as Agent, or any successor Agent, which approval shall not be unreasonably withheld.”



# Reasonableness

- Assignee's solvency and track record on making timely royalty payments.
- Assignee's industry reputation for honesty and reliability.
- Assignee's prior working relationship with lessor.
- Assignee's capacity to operate the leasehold in an efficient manner.
- Whether Assignee is a "lease flipper" that will not actively develop the property.
- Whether Assignee would increase the number of noncost bearing interests on the property, such as overriding royalties and production payments.



# Lessons from Texas Authorities

## Material Change May Constitute Good Cause

*Pletz v. Standard Homes Co.*

Withholding consent due to  
immediate economic concerns  
is not unreasonable



# Lessons from Texas Authorities

## Effect of Circumvention Language

*Clayton Williams Energy, Inc. v. BMT O & G TX, L.P.*

Alternative business structures can  
avoid the consent requirement



# Lessons from Texas Authorities

## What is the Texas Two Step?



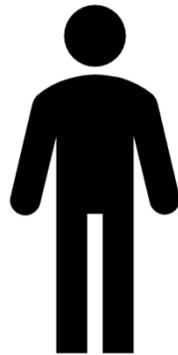


# Texas Two Step

**PARTY A**



**3<sup>RD</sup> PARTY**



*“Except for transfer to an affiliate or subsidiary, the rights of the parties hereto shall not be assigned without the written consent of the other parties, which consent shall not be unreasonably withheld.”*



# Texas Two Step

- Tex. Bus. Orgs. Code Ann. Section 10.008(a)(2)(c)
  - Upon merger, interests in real property “owned by each organization that is a party to the merger is allocated to and vested... in one or more of the surviving or new organizations...without... any transfer or assignment having occurred.”



# Texas Two Step

- Case Law: *Tenneco Inc. v. Enter. Pro. Co.*
  - Step 1: Lessee assigns interest to new subsidiary
  - Step 2: New subsidiary sells 100% of its stock to the acquiring 3<sup>rd</sup> Party



# Texas Two Step

- Avoiding Work-Around
  - Require consent to transfer to affiliates
  - Require consent to change in control
  - Include non-circumvention language

*No Party shall enter into any agreement, contract or arrangement with any Person or take any other action or enter into or cause any Person to enter into any alternative transaction with the purpose of circumventing the intent and obligations of the Parties hereunder, including any transfers to Affiliates and subsequent sale of some or all of the equity of such Affiliate to a Third Party (i.e., a “Texas two-step” or similar transaction).*



# Remedies for Non-Compliance

- Damages
  - Lessor
  - Lessee
- Specific Performance
- Termination



# Drafting Solutions

- Three Words
  - “That the rights of the parties hereto shall not be assigned without the written consent of the other parties, which consent shall not be unreasonably withheld, **conditioned, or delayed.**”



# Lessor's Concerns

- “Any reason” clause
- Estoppel, ratification or waiver
- Minimum level of objective standards
- Lease termination provision
- Limit remedies
- Assignment to competitor
- Require additional information
- Change of control



# Lessee's Concerns

- Objective standards
- Alternative dispute resolution
- Consent after notice
  - “if within fourteen (14) days of receipt of notice, Lessor does not object in writing by registered mail or certified mail (return receipt requested) clearly articulating Lessor’s reason for withholding consent, Lessor is deemed to have consented to this assignment..”



# Disclaimer

These materials are public information and have been prepared solely for educational purposes to contribute to the understanding of ethics, energy, and oil and gas law. These materials reflect only the personal views of the author and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the author and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the author or Steptoe & Johnson PLLC. While every attempt was made to insure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.



# Questions?

Kacie.Bevers@Steptoe-Johnson.com

(281)203-5770