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**Consent Asked For - But Not Received
The Enforceability of Consent to Assignment or
Transfer Provisions**

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Introduction

Restrictions on assignability come in many forms in oil and gas instruments, but perhaps the most prevalent is the consent to assign or transfer provision often found in oil and gas leases, and less often in other oil and gas instruments, such as mineral deeds, participation agreements, farmout agreements and assignments of oil and gas lease. These provisions can take several forms, some of which are illustrated below:

- Lessee shall not assign this oil and gas lease, either in whole or in part, without the prior written consent of the Lessor.
- Lessee shall not assign this oil and gas lease, either in whole or in part, without the prior written consent of the lessor, *which consent shall not be unreasonably withheld*.¹
- Lessee shall not assign this oil and gas lease, either in whole or in part, without the prior written consent of Lessor, and any purported assignment without Lessor's consent shall be void and of no effect.
- The Lessee . . . shall not make any assignments of undivided interests, overriding royalties or oil payments without the written consent of the Lessors, save and except assignments to banks and oil well supply companies for the purpose of obtaining money, supplies and equipment to operate and develop the leased premises In the event the Lessee should attempt to assign any undivided interests, overriding royalties or oil payments without the written consent of the Lessors . . . this lease shall ipso facto terminate as to the interest so assigned, as well as all of the remaining interest owned by the person or corporation making such assignment.²

This paper does not deal with consents to assignment or transfer by governmental authorities, most of which are primarily ministerial in nature and are obtained only after the assignment of an interest has been completed. Instead, this paper will deal exclusively with consents included by non-governmental parties in oil and gas instruments.

Why Consents to Assignment

We know that consent to assignment provisions are popular with Lessors. Are Lessors merely trying to make life difficult for the Lessee or is there a real business purpose that Lessors are trying to accomplish? If we assume that the principle incentive for a mineral owner to grant an oil and gas lease is to secure royalty payments from the development of the minerals, then the Lessor may view the restriction on assignability as

¹ Palmer v. Liles, 677 S.W.2d 661, 663 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.)

² Knight v. Chicago Corp., 188 S.W.2d 564 (Tex. 1945)

furthering that purpose. The Lessor may want to ensure that the oil and gas lease does not end with excessive non-cost bearing burdens that will discourage development. The Lessor may want to ensure that the assignee has the financial ability and operational expertise to develop the minerals. The Lessor may want to ensure that the assignee is not one of those companies who have a reputation for treating its royalty owners badly. If the Lessor is also the surface owner, the Lessor may also want to ensure that the assignee is not one of those companies known for turning the surface estate into moonscape. These would all appear to be valid business reasons for a mineral owner to include a consent to assignment provision in an oil and gas lease.

Enforceability of Restraints on Alienation Generally

Restraints on alienation are not per se unenforceable. For example, while preferential rights to purchase found in the standard form AAPL Operating Agreement are clearly restraints on alienation, they are enforceable.³ Also, a preferential right to purchase minerals contained in a surface deed was enforceable (See *Forderhuase*).⁴ What is invalid and unenforceable is an unreasonable restraint on alienation. In order to understand the nature of a consent to assignment provision, we need to review Texas law on restraints on alienation.

In *Navasota*⁵ the Court citing RESTATEMENT OF PROP. §404(1)(b), (c) (1944) defined a restraint on alienation as:

. . . an attempt by an otherwise effective conveyance or contract to cause a later conveyance . . . to impose contractual liability on the one who makes the later conveyance *when such liability results from a breach of an agreement not to convey*; or . . . to terminate or subject to termination all or part of the property interest conveyed. [Emphasis added]

Restraints on alienation are classified as (1) disabling restraints, (2) promissory restraints, and (3) forfeiture restraints. A disabling restraint would cause a later conveyance to be void. A forfeiture restraint would terminate the interest conveyed.⁶

The *Navasota* Court classifies a preferential right to purchase as a “promissory restraint on alienation, but not an unreasonable restraint on alienation. In *Forderhuase*, a deed of the surface estate granted to the grantee a preferential right to purchase the minerals if the grantor decided to sell the minerals. The court held that the mineral estate retained by grantor was subject to the preferential right to purchase. The court also ruled, without comment, that the preferential right to purchase did not violate the rule against perpetuities. The central question in *Forderhuase* was, however, whether execution of an oil and gas lease was a sale of the minerals, subject to the preferential right to purchase. The Court held that the common oil and gas lease creates a determinable fee, and, therefore, grantor’s execution of an oil and gas lease was a sale of the minerals, subject to

³ *Navasota Res. L.P. v. First Source Tex., Inc.*, 249 S.W.2d 526, 539 (

⁴ *Cherokee Water Co. v. Forderhuase*, 641 S.W.2d 522 (Tex. 1982)

⁵ *Navasota Res. L.P.* 249 S.W.2d at 538

⁶ *Sonny Arnold, Inc. v. Sentry Savings Association*, 633 S.W.2d 811, 814 (Tex. 1982).

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