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**It Ain't Over Till It's Over:
Maintaining a Lease During the Secondary
Term Through a Variety of Savings Clauses**

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I. INTRODUCTION¹

“It ain’t over till it’s over.”

- Lawrence Peter “Yogi” Bera

That famous quote was bestowed on us all by noted American philosopher, poet, and baseball player/manager Yogi Bera when the team he was managing at the time, the New York Mets, was a long way back in the National League pennant race. Yogi wasn’t ready to give up. What Yogi knew was the same thing many oil and gas lessees hope they know – that you always have a fighting chance, even if you must resort to Plans B, C, and D. Bera’s Mets stormed up the standings and won the pennant in 1973. This article will examine a number of lease provisions called “savings clauses,” under which lessees often find at least an argument to postpone termination of their leases until they can accomplish actual production. In some cases, a lease may be postponed much longer than the lessor anticipates or argues. This article is focused predominantly on Texas law.

II. THE NATURE OF AN OIL AND GAS LEASE

Under Texas law, an oil and gas lease grants a fee simple determinable estate, also called the leasehold estate, to the lessee. *Anadarko Petro. Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002). Thus, the lessee’s leasehold estate may continue indefinitely as long as the lessee uses the lease premises for the purpose identified in the lease. *See Texas Co. v. Davis*, 113 Tex. 321, 254 S.W. 304, 309 (1923). However, the leasehold estate will automatically terminate if the event by which it is limited occurs. *Gulf Oil Corp. v. Reid*, 161 Tex. 51, 337 S.W.2d 267, 269 (1960). Stated conversely, the leasehold estate will automatically terminate if the event required to perpetuate the lease, i.e. production, does not occur timely.

A lease’s habendum clause defines the duration of the leasehold estate. *Gulf Oil Corp. v. Southland Royalty Co.*, 496 S.W.2d 547, 552 (Tex. 1973). A typical habendum clause states that the lease lasts for a relatively short fixed term of years (the primary term) and then “as long thereafter as oil, gas or other mineral is produced” (the secondary term). *See, e.g., Reid*, 337 S.W.2d at 269 n. 1; *see also* 1 SMITH & WEAVER, TEXAS LAW OF OIL & GAS § 4.3 (1996). In Texas, such a habendum clause requires actual production in paying quantities to perpetuate the lease past the expiration of the primary term. *Reid*, 337 S.W.2d at 269–70; *Garcia v. King*, 139 Tex. 578, 164 S.W.2d 509, 512 (1942). Thus, a typical Texas lease that lasts “as long as oil or gas is produced” automatically terminates if actual

¹ The author wishes to thank Isaac Cole for his valuable contribution to this article during his clerkship with Harris, Finley & Bogle, P.C. Isaac is a law student at Texas A&M Law School expecting to earn his J.D. degree in May 2021.

production permanently ceases during the secondary term. *See Amoco Prod. Co. v. Braslau*, 561 S.W.2d 805, 808 (Tex. 1978).

However, automatic termination under the habendum clause can be avoided or delayed by other lease provisions that extend the lease. *Southland Royalty*, 496 S.W.2d at 552. Those other provisions are commonly referred to as “savings provisions” or “savings clauses.” The purpose of this article is to identify the most common savings clauses, provide a general discussion of each, and provide sample clauses of each type. In many cases, savings clauses in a lease can seem inconsistent, internally and/or in connection with other lease provisions, and it can often be difficult to harmonize and give effect to a lease’s granting clause, habendum clause, savings clause, and other clauses in a lease – not to mention how those clauses may intersect with any implied duties in an oil and gas lease. Ultimately, when a lease terminates “is always a question of resolving the intention of the parties from the entire instrument.” *Southland Royalty*, 496 S.W.2d at 552.

III. SAVINGS CLAUSES

A. General Discussion

A savings clause is any express lease provision that can be used to maintain the lease past its primary term in the absence of actual production on the lease premises. *See ConocoPhillips Co. v. Koopman*, 542 S.W.3d 643, 654 (Tex. App.—Corpus Christi 2016), *aff’d* 547 S.W.3d 858 (Tex. 2018) (“A savings clause is structured to maintain a lease in lieu of actual production in a variety of scenarios.”). Where a dispute arises regarding the continuing validity of a lease, the plaintiff bears the burden of proof that the lease has not been maintained by production, and also that the various savings clauses in the lease did not maintain the lease. *See Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 431 (Tex. App.—Amarillo 1993, no writ). As with most lease provisions, there is no standard list of savings provisions, and the parties are free to agree on any savings clauses they are capable of drafting. Following is an effort to provide a reasonably exhaustive list of the types of savings clauses seen most commonly in current practice, along with an explanation of each type and selected judicial treatment and interpretation of them. As noted above, the intention of the parties as expressed in the entire lease is the overarching principle of lease construction.

Each section below also contains a number of sample clauses from reported cases, treatises, and other sources. In many instances, more than one savings event or condition is combined into one lease clause, which is reflected in some of the samples. The samples are not intended as model clauses, and the author makes no comment or endorsement regarding the substance or draftsmanship of the samples.

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