Title: MANAGING LANDOWNER LIABILITY FOR THE ENVIRONMENTAL CONSEQUENCES OF OIL & GAS DEVELOPMENT

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by

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I. Liability and the Leasing of Land for Oil & Gas Development

Mere ownership or control of property can give rise to environmental cleanup obligations under several of the federal environmental laws. Liability is premised on a statutorily-defined "status" regarding the environmental problem. For example, liability can be based upon a person's status as the "owner" of land where an environmental problem exists.[2] Therefore, a person proposing to acquire an oil and gas lease must consider how it may impact their "status" under the environmental laws.[3] The lessee may actually cumulate several status positions as the lease is developed.[4] The landowner/lessor must also be concerned about their environmental status as oil

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[2]*E.g.*, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 107(a)(1), 42 U.S.C. § 9607(a)(1) (imposing liability on the "owner or operator of a vessel or facility" from which there is a release, or threatened release, of a hazardous substance that results in the incurrence of response costs).

[3]*See generally* David E. Pierce, *Structuring Routine Oil and Gas Transactions to Minimize Environmental Liability*, 33 WASHBURN L. J. 76, 88-95 (1993), reprinted at 31 PUBLIC LAND & RESOURCES L. DIG. 176 (1994) (analyzing CERCLA owner, operator, arranger, and transporter liability in the oil and gas context).

[4]For example, under CERCLA acquisition of the oil and gas lease may make the lessee an "owner," development of the lease may confer "operator" status on the lessee, and the creation and disposal of wastes associated with development may give rise to "arranger" and "transporter" status. CERCLA § 107(a)(1), (3), (4), 42 U.S.C. § 9607(a)(1), (3), (4).

and gas development proceeds.[5] The goal for each party is to fully assess their potential environmental status liabilities when considering whether to acquire a lease or mineral interest, or to grant a lease or mineral interest. Once the environmental risks are identified, specific strategies can be pursued to address the risks.

A. Environmental "Status" Liability

In the oil and gas context, status liability under the federal environmental laws will most likely arise under § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),[6] § 7002 and § 7003 of the Resource Conservation and Recovery Act ("RCRA"),[7] § 311(f) of the Clean Water Act ("CWA"),[8] and § 1002(a) the Oil Pollution Act.[9] When assessing liability, it is best to view each Act individually, without any attempt to rationalize or coordinate one Act with the others. Although Congress may, for certain definitions, use references between the Acts,[10] Congress has not achieved any real coordination among the environmental laws. Therefore, an activity that escapes one Act may not escape others and it is often possible to have a single situation covered by several Acts.

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[5]*See generally* David E. Pierce, *The Impact of Landowner/Lessor Environmental Risk on Oil and Gas Lessee Rights and Obligations*, 31 TULSA L. J. 731, 731-37 (1996), reprinted at 34 PUBLIC LAND & RESOURCES L. DIG. 127 (1997) (analyzing landowner's CERCLA liability associated with the activities of their oil and gas lessee).

[6]CERCLA § 107(a), 42 U.S.C. § 9607(a).

[7]RCRA §§ 7002 & 7003, 42 U.S.C. §§ 6972 & 6973 (1994). Technically § 7002 and § 7003 are part of what is known as the "Solid Waste Disposal Act (SWDA)." However, the Resource Conservation and Recovery Act (RCRA) amended substantial portions of the SWDA and most people simply refer to the SWDA as "RCRA." This article will refer to the collective provisions of the SWDA as RCRA.

[8]CWA § 311(f)(2), 33 U.S.C. § 1321(f)(2).

[9]OPA § 1002(a), 33 U.S.C. § 2702(a).

[10]*E.g.*, CERCLA § 101(29) provides: "The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act." CERCLA § 101 (29), 42 U.S.C. § 9601(29); CERCLA § 101(32) provides: "The terms "liable" and "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33." CERCLA § 101(32), 42 U.S.C. § 9601(32).

1. CERCLA "Owner" or "Operator"

CERCLA imposes cleanup liability on the current[11] "owner" of the "facility" where a hazardous substance problem exists.[12] "Facility" is defined broadly to include "any site or area where a hazardous substance has . . . come to be located . . . ."[13] "Owner" is simply defined as "any person owning . . . such facility . . . ."[14] Anyone familiar with the "bundle-of-sticks" analysis of property ownership should be able to recognize several instances in which an oil and gas lessee could be an "owner." If the lessee escapes "owner" status, they may qualify for "operator" status under CERCLA.[15] "Operator" is defined by CERCLA as "any person . . . operating such facility . . . ."[16] This definition substitutes use of, or control over, the facility for title to an interest in the facility. Even though the person may not "own" the facility, if they are using the facility, or have control over the facility, they can be held liable for cleanup costs based upon their "operator" status. If the oil and gas lessee undertakes operations on a lease which includes a facility area, the lessee may become a CERCLA "operator" of the facility.

2. RCRA "Contributor"

The Resource Conservation and Recovery Act (RCRA) imposes cleanup liability on any person "who has contributed or who is contributing" to the: "past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an

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[11]Although CERCLA also imposes liability on "past" owners and operators "at the time of disposal," and on persons that create, manage, transport, and dispose of hazardous substances, the focus of this article is on the pre-leasing concerns of a developer who has had no prior contact with the proposed leased area. CERCLA § 107(a)(2)-(4), 42 U.S.C. § 9607(a)(2)-(4).

[12]CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

[13]CERCLA § 101(9)(B), 42 U.S.C. § 9601(9)(B). In addition to this general catch-all definition, the following examples are provided by the definition: "[A]ny building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft . . . ." Id. at § (A).

[14]*Id.* at § (20)(A).

[15]CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

[16]*Id.*

imminent and substantial endangerment to health or the environment . . . ."[17] If the area is already contaminated at the time the lessee undertakes its development operations, the lessee may be found to have "contributed" to the problem.[18]

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[17]RCRA § 7002(a)(B), 42 U.S.C. § 6972(a)(B) (citizen suit provisions giving "any person" the right to seek a court order to "restrain any person" or to "order such person to take such other action as may be necessary, or both . . . ."). RCRA § 7003(a), 42 U.S.C. § 6973(a) confers identical authority on the Environmental Protection Agency.

[18]It is important to note that § 7002 and § 7003 are not subject to any sort of "petroleum exclusion" such as is found in CERCLA. *See* CERCLA § 101(14), 42 U.S.C. § 9601(14) ("The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof . . . ."). Also, these sections apply to problems created by non-hazardous "solid waste" and would not be affected by the exploration and production waste exemption from the definition of a "hazardous waste" under Subtitle C of RCRA. *See Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes*, 53 FED. REG. 25446 (July 6, 1988).

It is also possible to have a "hazardous" exploration and production waste under § 7002 and § 7003 even though the waste is covered by the exploration and production waste exemption--and is therefore not "hazardous" for purposes of RCRA's Subtitle C program. "Hazardous," for purposes of Subtitle C regulation, is governed by the Subtitle C regulatory definition of "hazardous." Therefore, a developer would not have to concern itself with the Subtitle C generator, transporter, and treatment, storage, and disposal requirements imposed on other Subtitle C hazardous wastes. However, if the lawfully-disposed waste ever creates a problem (meeting the "imminent and substantial endangerment" criteria), it may be dealt with as a "solid waste" under § 7002 and § 7003, and can even be a "hazardous" waste under RCRA's general definition provisions which state:

> The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--
>
> > (A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human heath or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

RCRA § 1004(5), 42 U.S.C. § 6903(5) *See* Connecticut Coastal Fishermen's Ass'n v. Remington Arms, 989 F.2d 1305, 1314-16 (2d Cir. 1993) (noting broader "solid waste" definition in § 7002

3. CWA "Owner or Operator"

Section 311(f) of the Clean Water Act (CWA) imposes cleanup liability on the "owner or operator of an onshore facility" from which there is a discharge of oil or a hazardous substance into "waters of the United States."[19] In *Quaker State Corp. v. U.S. Coast Guard*[20] the owner of surface estate in the land at the time oil seeped from a waste water containment pit was found to be the party responsible for reimbursing the Coast Guard for $430,000 it spent responding to the oil spill.[21] Oil and gas operations had been conducted on the leased land in the past; the pit had been used to manage produced water at some unknown time at least 15 years prior to the spill that triggered the cleanup. Although § 311(f) expressly applies to "oil" as well as "hazardous substances," the discharge must be into "waters of the United States."[22] There is no similar water nexus requirement in CERCLA or RCRA.

4. OPA "Responsible Party"

Section 1002 of the Oil Pollution Act of 1990 (OPA) imposes cleanup liability, and

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than the definition used for Subtitle C program).

[19]CWA § 502(7), 33 U.S.C. § 1362(7) ("navigable waters" defined as "waters of the United States . . . .").

[20]681 F. Supp. 280 (W.D. Pa. 1988).

[21]In a subsequent opinion the judge commented on the potential liability of the mineral interest owner, Kendall Refining Company, by making the following conclusions of law:

> 20. Kendall Refining Company not only was Quaker State's lessor, but was the owner of the oil and gas rights to Lot 128, at least from 1965 through the time of the discharge. Ownership of the oil and gas carries with it the right to use the surface of the land for oil and gas purposes.
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> 21. Quaker State as a matter of law could not be the sole cause of the discharge, due to Kendall's status and involvement with the site, including its request for Quaker State to perform abandonment activities thereon to Kendall's benefit, and due to others' prior use of the site and pit.

Quaker State Corp. v. U.S. Coast Guard, No. CIV.A.87-55, 1990 WL 272708 at *8 (W.D. Pa. 1990).

[22]CWA § 311(b)(3), 33 U.S.C. § 1321(b)(3).

damages,[23] on the "responsible party" for a facility "from which oil is discharged, or which poses the substantial threat of a discharge of oil,"[24] into "waters of the United States."[25] "Responsible party" is defined to include the following:

> (B) Onshore facilities
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> In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.[26]
>
> . . . .
>
> (E) Pipelines
>
> In the case of a pipeline, any person owning or operating the pipeline.
>
> (F) Abandonment
>
> In the case of an abandoned . . . onshore facility . . . pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the . . . facility.[27]

Although the OPA provides for a broader range of compensation and damages than permitted under CERCLA, RCRA, and the CWA, the OPA is limited to "oil" contamination, requires a nexus with "waters of the United States," and applies only to "an incident occurring" on or after August 18,

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[23]OPA § 1002(b), 33 U.S.C. § 2702(b).

[24]*Id.* at § (a),

[25]OPA § 1001(21), 33 U.S.C. § 2701(21) (defining "navigable waters" as "waters of the United States . . . .").

[26]This definition suggests that non-governmental landowners who lease to a third party will remain a "responsible party" as an "owner." It also suggests that a lessee of a governmental body will be regarded as an owner or operator.

[27]OPA § 1001(32), 33 U.S.C. § 2701(32).

1990.[28]

A. Lessee Strategies

To avoid assuming an unwanted status with a contaminated area, the developer needs to be aware of environmental problems associated with the area they propose to lease. At a minimum this will require an onsite inspection of the area to be leased. If there appears to be problem areas, the developer has two basic options: (1) avoid the problem altogether by not leasing the property, or by excluding the problem areas from the lease;[29] or (2) attempt to define and leverage the risk by obtaining reliable information concerning the problem and then obtaining indemnity agreements from the landowner, mineral owner, or other parties having an existing status with the property.[30]

B. Landowner Strategies.

The landowner's basic concern is that a mineral developer will create environmental problems on the land for which the landowner will ultimately be liable because of its status as the "owner" of the property. This problem arises whenever the landowner conveys a mineral interest or grants an oil and gas lease; in each situation the grantee will typically obtain an express or implied right to make reasonable use of the surface to develop the granted minerals.[31] The

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[28]OPA, Pub. L. No. 101-380, 104 Stat. 484, 506 (1990) (OPA § 1020); OPA § 1017(e), 33 U.S.C. § 2718(e) ("Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to August 18, 1990.").

[29]Another option would be to try and tailor the lease rights so they exclude any right to use or control the problem area other than the exclusive right to any oil or gas that might be produced from beneath the area. This would protect the lessee's right to remove oil and gas located within the problem area from adjacent property, without giving the lessee any sort of easement or development rights physically within the problem area. The goal is to avoid any kind of interest that could be construed as conferring on the lessee "control" over the problem area. *See* David E. Pierce, *Incorporating a Century of Oil and Gas Jurisprudence into the "Modern" Oil and Gas Lease*, 33 WASHBURN L. J. 786, 799-800 (1994).

[30]If it is not possible to negotiate an indemnity agreement, or the party offering to indemnify has inadequate assets, the only option may be to invest additional effort in fully defining the problem, and the associated risk as an oil and gas lessee, and then trying to draft the lease to place the lessee in the best position possible should the problem result in a future cleanup action.

[31]*See* David E. Pierce, *The Impact of Landowner/Lessor Environmental Risk on Oil and Gas Lessee Rights and Obligations*, 31 TULSA L. J. 731 (1996).

techniques the lessor can use include: (1) select only well-known, well-financed oil and gas grantees and lessees with a reputation for doing things right; (2) provide for continuing liability of the original grantee/lessee in the event a subsequent transferee fails to comply with the covenants of the agreement; (3) clearly define surface use rights and obligations to minimize the creation of environmental problems; (4) provide for a broad indemnity agreement regarding environmental matters; (5) provide for attorney fees and litigation costs in the event the covenants are breached or it is necessary to sue to establish indemnity rights; and (6) police the agreement to ensure it is being honored.[32]

EXAMPLES OF ENVIRONMENTAL PROTECTION CLAUSES

When leasing:

A. Land Use Restrictions.

1. Drilling Operations. To the maximum extent feasible, LESSEE will minimize the use of surface pits and hazardous materials in drilling operations on the Leased Land. Any pit or other surface disruption associated with drilling operations on the Leased Land will be fully reclaimed and restored to its natural condition immediately following the completion of drilling operations. All substances brought onto the Leased Land, and wastes generated as part of the drilling process, will be removed from the Leased Land immediately following the completion of drilling operations.

2. Production Operations. All equipment designed to separate, dehydrate, treat, compress, process, or otherwise condition Leased Substances will be located off of the Leased Land. Any tanks used to collect and store a Leased Substance prior to marketing will be located off of the Leased Land.

B. Indemnity by LESSEE.

LESSEE will indemnify, hold harmless, and defend LESSOR against any claim, demand, cost, liability, loss, or damage suffered by LESSOR, including reasonable attorney fees and litigation costs, arising out of the following activities conducted by LESSEE, or those having a contractual relationship with LESSEE, on or impacting the Leased Land:

1. Any activity expressly or impliedly authorized or required by this Lease.

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[32]*See* David E. Pierce, *Incorporating a Century of Oil and Gas Jurisprudence into the "Modern" Oil and Gas Lease*, 33 WASHBURN L. J. 786, 795-800 (1994) (discussing language the landowner or lessor can use to apply the listed techniques in either a mineral deed or oil and gas lease).

2. Plugging and abandonment of producing wells, nonproducing wells, existing wellbores, or previously plugged wellbores.

3. Management, use, and disposal of produced water and wastes or substances associated with Lease activities.

4. The generation, processing, handling, transportation, storage, treatment, recycling, marketing, use, disposal, release, or threatened release, of oil, natural gas, natural gas liquids, all other petroleum substances, any waste material, or any "Hazardous Substance" or "Pollutant or Contaminant" as those terms are defined by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) at CERCLA § 101 (14) and (33), 42 U.S.C. § 9601 (14) and (33).

LESSEE's indemnity also includes any environmental problem associated with oil and gas exploration, drilling, development, production, treating, storage, transportation, marketing, processing, abandonment, and related activities at any site existing on the Leased Land as of the Effective Date of this Lease.

LESSEE's obligations created by this SECTION are continuing obligations which will continue in effect, and be enforceable by LESSOR, even after the Lease terminates or otherwise ceases to burden the Leased Land.

Another leasing clause:

ENVIRONMENTAL ISSUES AND INDEMNITY.

a. Land Use Restrictions. To the maximum extent feasible, LESSEE will minimize the use of surface pits and hazardous materials in drilling operations on the Leased Land. Any pits, ponds, or other surface impoundments used in connection with the development or operation of the Leased Land shall comply with all applicable local, state, and federal standards and in any case shall meet or exceed the standards for such structures located within a wellhead protection or critical aquifer protection area as defined by the federal Safe Drinking Water Act or any state law counterpart. Any pit or other surface disruption associated with drilling operations on the Leased Land will be fully reclaimed and restored to its natural condition immediately following the completion of drilling operations. All substances brought onto the Leased Land, and wastes generated as part of the exploration, development, or production process, will be removed from the Leased Land immediately following the completion of drilling operations. All equipment designed to separate, dehydrate, treat, compress, process, or otherwise condition Leased Substances will be located off of the Leased Land. Any tanks used to collect and store a Leased Substance prior to marketing will be located off of the Leased Land. No injection or disposal well will be placed on the area encompassed by the Leased Land. No pipe, chemicals, or other material or equipment will be placed on the Leased Land except items that are on-site for immediate use in operations. Equipment or material placed

on site and not actively used for ten consecutive days will be deemed not to be for immediate use in operations. Within five days after a development or production operation is completed, all the associated development structures, equipment, and any other material brought to or generated at the site will be removed from the site. If any topsoil has been disturbed by the operation, the area will be graded to its original contour, and the topsoil replaced, properly seeded, fertilized, and maintained until the original cover in the affected area is reestablished.

b. Assumption of Liability. LESSEE assumes the following liabilities associated with the Leased Land: LESSEE acknowledges that it is entering into this Lease without relying on any representations by LESSOR concerning the condition, environmental or otherwise, of the Leased Land. Instead, LESSEE is relying solely upon its independent investigation to determine the status of the Leased Land. As partial consideration for this Lease, LESSEE agrees to assume all liabilities it may incur as an owner or operator of the Leased Land, including any environmental cleanup obligations that may be imposed under any local, state, or federal law, including the common law. LESSEE further agrees to hold LESSOR harmless from any claim LESSEE may have or acquire, in contribution or otherwise, associated with the condition of the property or LESSEE's liability as an owner or operator. This includes, without limitation, any claim or cause of action LESSEE may have at common law or under any local, state, or federal statute such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or a state or local counterpart. LESSEE agrees to assume all liabilities associated with any activity conducted on the Leased Land, by LESSEE, its contractors, and any other person or entity exercising or purporting to exercise rights through LESSEE or on LESSEE's behalf.

c. Agreement to Remedy Environmental Problems. LESSEE agrees to remedy any Environmental Problem resulting from, arising out of, or in any manner associated with any activity by LESSEE, its contractors, and any other person or entity exercising or purporting to exercise rights through LESSEE or on LESSEE's behalf, that presently impacts, or is likely to impact, the Leased Land. In the event an Environmental Problem is identified, LESSOR will give LESSEE notice of the Environmental Problem and LESSEE will, at its sole risk and expense, take the necessary action to define and remedy the Environmental Problem. For purposes of this section, "Environmental Problem" means any situation which: violates any local, state, or federal requirement, is reportable under any environmental law, gives rise to a cleanup, sampling, testing, monitoring, assessment, or similar obligation under any common law, statutory, or regulatory theory, concerns conditions, structures, or substances that require special environmental handling for their proper renovation, demolition, or disposal, or exposes LESSOR to a substantial threat of liability associated with the health, safety, and welfare of the public, workers, or the environment.

d. Agreement to Indemnify. LESSEE will protect, indemnify, hold harmless, and defend LESSOR against any claim, demand, cost, liability, loss, or damage suffered by LESSOR (including LESSOR's reasonable attorney fees and litigation costs) resulting from, arising out of, or associated with one or more of the following events: LESSEE's breach of any covenant, obligation, or duty created by the terms of this Lease. LESSEE's failure to comply with the LESSOR's retained rights under this Lease. Any matter encompassed by LESSEE's assumption of liabilities, including

environmental liabilities, under the terms of this Lease. Any activity expressly or impliedly authorized or required by this Lease. Any matter associated with producing wells, nonproducing wells, existing wellbores, unplugged wells, or previously plugged wellbores. Any matter associated with the management, use, and disposal of produced water and wastes or substances associated with the development or operation of the Leased Land. Any matter associated with this Lease relating to the generation, processing, handling, transportation, storage, treatment, recycling, marketing, use, disposal, release or discharge, or threatened release or discharge, of oil, natural gas, natural gas liquids, all other petroleum substances, any waste material, or any "hazardous substance" or "pollutant or contaminant" as those terms are defined (now or in the future) under CERCLA and its state counterpart. Any matter relating to LESSEE's ownership, use, or occupancy of the Leased Land or any area impacting the Leased Land. LESSEE's obligations created by this Section are continuing obligations which will remain in effect, and be enforceable by LESSOR, even after the Lease terminates or otherwise ceases to burden the Leased Land. In the event LESSOR conveys or assigns all or any part of its interest in the Leased Land, LESSOR will nevertheless continue to be covered by LESSEE's indemnity. However, LESSOR's grantees or assignees will also be covered by LESSEE's indemnity to the extent of the interest they receive in the Leased Land. **LESSEE's indemnity obligation will apply even though the basis for LESSOR's liability arises out of LESSOR's statutory or common law strict liability, sole or concurrent negligence, or any other statutory, tort, or contract theory.**

When conveying a mineral interest:

3. RESTRICTIVE COVENANTS. Grantee promises to comply with the following restrictions concerning the rights it is receiving in the Land by this Conveyance (the "Conveyed Property"), which shall be deemed covenants that run with the Conveyed Property:

a. Pits. No pits, ponds, or other surface impoundments will be used in developing or operating the Conveyed Property.

b. Production-Related Equipment and Storage Tanks. No above ground or underground storage tanks will be placed on the area encompassed by the Conveyed Property. No equipment designed to separate, treat, dehydrate, compress, or process the Conveyed Property will be placed on the area encompassed by the Conveyed Property.

c. Injection and Waste Disposal. No injection or disposal well will be placed on the area encompassed by the Conveyed Property. No solid, liquid, or gaseous waste will be stored or disposed of on the area encompassed by the Conveyed Property.

d. Hazardous Substances. No substance, defined as a "hazardous substance" (now or in the future) under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Kansas statutory counterpart to CERCLA, and any amendments or

substitutions for CERCLA and its Kansas counterpart, will be brought onto the area encompassed by the Conveyed Property.

e. Storage of Equipment or Material. No pipe, chemicals, or other material or equipment will be placed on the area encompassed by the Conveyed Property except items that are on-site for immediate use in operations. Equipment or material placed on site for longer than five consecutive days will be deemed not to be for immediate use in operations.

f. Restore Development and Production Areas. Within five days after a development or production operation is completed, all the associated development structures, equipment, and any other material brought to or generated at the site will be removed from the site. If any topsoil has been disturbed by the operation, the area will be graded to its original contour, and the topsoil replaced, properly seeded, fertilized, and maintained until the original cover in the affected area is reestablished.

g. Set-Back Requirements. No equipment, material, or operation site will be located within 300 feet of any house, garage, barn, stream, creek, pond, lake, or other structure, improvement, or water source located on the area encompassed by the Conveyed Property.

Grantee acknowledges that Grantor may, in addition to damages and any other remedy at law or equity, obtain injunctive relief to enforce the covenants specified in this conveyance.

4. GRANTEE'S ASSUMPTION OF LIABILITY. Grantee assumes the following liabilities associated with the Conveyed Property:

a. Condition of the Area Encompassed by the Conveyed Property. Grantee acknowledges that it is purchasing the Conveyed Property without relying on any representations by Grantor concerning the condition, environmental or otherwise, of the Conveyed Property or the area encompassed by the Conveyed Property. Instead, Grantee is relying solely upon its independent investigation to determine the status of the Conveyed Property and the area encompassed by the Conveyed Property. As partial consideration for this conveyance, Grantee agrees to assume all liabilities it may incur as an owner or operator of the Conveyed Property and the area encompassed by the Conveyed Property, including any environmental cleanup obligations that may be imposed under any local, state, or federal law, including the common law. Grantee further agrees to hold Grantor harmless from any claim Grantee may have or acquire, in contribution or otherwise, associated with the condition of the property or Acme's liability as an owner or operator. This includes, without limitation, any claim or cause of action Grantee may have at common law or under any local, state, or federal statute such as CERCLA or a state or local counterpart.

b. Activities on the Area Encompassed by the Conveyed Property. Grantee agrees to assume all liabilities associated with any activity conducted on the Conveyed Property or the area encompassed by the Conveyed Property, by Grantee, its lessees, contractors, and any other person or entity exercising or purporting to exercise rights through Grantee or on Grantee's behalf. In

addition to such liabilities, Grantee will be strictly liable for any damage to: cultivated land, growing crops, pasture land, unimproved land, livestock, fences, roads, ditches, culverts, trees, turf, terraces, springs, water wells, groundwater, personal property, fixtures, and improvements located now or in the future on the area encompassed by the Conveyed Property.

5. GRANTEE'S INDEMNITY OF GRANTOR. Grantee will protect, indemnify, hold harmless, and defend Grantor against any claim, demand, cost, liability, loss, or damage suffered by Grantor, including Grantor's reasonable attorney fees and litigation costs, associated with or arising out of one or more of the following events:

a. Breach of Covenant. A breach of any restrictive covenant contained in paragraph numbered 3 of this conveyance.

b. Assumption of Liability. Any matter encompassed by Acme's assumption of liabilities, including environmental liabilities, under paragraph numbered 4 of this conveyance.

c. Specific Operations.

(1) Any activity expressly or impliedly authorized or required by this Conveyance.

(2) Plugging and abandonment of producing wells, nonproducing wells, existing wellbores, or previously plugged wellbores.

(3) Management, use, and disposal of produced water and wastes or substances associated with the development or operation of the Conveyed Property.

(4) Grantee's generation, processing, handling, transportation, storage, treatment, recycling, marketing, use, disposal, release or discharge, or threatened release or discharge, of oil, natural gas, natural gas liquids, all other petroleum substances, any waste material, or any "hazardous substance" or "pollutant or contaminant" as those terms are defined (now or in the future) under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Kansas statutory counterpart to CERCLA, and any amendments or substitutions for CERCLA and its Kansas counterpart.

d. Other Matters. Any matter relating to Grantee's ownership, use, or occupancy of the Conveyed Property or the area encompassed by the Conveyed Property.

A CHECKLIST FOR THE NARO LANDOWNER CONSIDERING TO LEASE THEIR LAND

☐ ***Have your surface rights already been determined by a prior severance of a mineral interest?*** If so, your bargaining position is reduced because the prospective lessee may already possess the rights they need to develop the minerals. The following items assume the surface owner presently owns *all* the mineral rights. If less than *all* the mineral rights are owned, in most states *any* mineral owner has the right to make reasonable use of the surface for mineral development. Even though there has been a prior mineral severance, the surface owner still has the ability to enforce concepts of "reasonable use," "accommodation doctrine" rights, rights under the deed or lease (or other documents) in which the surface owner is a third party beneficiary, and statutory rights.

☐ ***Is it time to lease?*** To obtain the terms necessary to protect the landowner's interests the lessor must have the necessary bargaining power. Often this means refusing the lease unless, and until, the speculative value of the leased land justifies the investment necessary to negotiate and prepare an acceptable lease–*and hire an oil & gas attorney to represent you.*

☐ ***Would I loan money to the person or entity seeking to lease my land?*** Promises are cheap. To ensure a promise is kept, or damages are collectible if breached, the lessee must be reputable.

☐ ***Ensure the party you deal with initially remains "on the hook" once they transfer the lease.*** It does little good to obtain a promise from a reputable developer if they can absolve themselves of continuing liability by assigning the lease to someone else.

☐ ***Define the lessee's surface use rights with precision.*** Ensure the minimal use necessary is made of the surface and that nothing remains on the land as development progresses.

☐ ***Define your surface rights with precision.*** Ensure you can do the things you need or want to do on the surface throughout the duration of the lease.

☐ ***Provide for a broad indemnity agreement regarding environmental matters–including well plugging and abandonment.*** Remember, however, this is merely a *promise*.

☐ ***Provide for attorney fees and litigation costs in the event it is necessary to enforce the lease terms.*** In most states you will not get these unless you provide for them in your lease.

☐ ***Make sure any fights are conducted where it will be convenient for you–and hopefully inconvenient for them.*** Avoid any sort of arbitration or mediation requirements that would make it more difficult to economically pursue a remedy. Select your local district court as the place to resolve lease disputes; decide if you want to avoid federal court using an exclusive choice-of-forum clause.

☐ ***Be vigilant; actively police the agreement to ensure it is being honored.***