



Leasing Vested Remainder Interests and Contingent Future Interests

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Lessees should take caution when leasing minerals that are subject to both possessory and successive interests because development of the minerals requires the consent of all parties that have an interest in the land. Examples of possessory and successive interests include: a life tenant who owns the property until his or her death at which time it reverts back to the owner or passes on to another person (possessory interest) and right to a property at the termination of the former owner's interest (successive interest). These types of interests are often created in dispositive instruments such as wills where a life estate will be created for a spouse followed by a reversion or remainder interest in some other party such as children or grandchildren. This issue is partially addressed by C.R.S. Section 38-43-101, *et seq.*, which provides for the appointment of a trustee to lease contingent future mineral interests on behalf of both known and unknown parties.

Leasing the mineral interests of the defeasible possessory owner (such as a life tenant) can be accomplished by entering into a lease agreement directly with the possessory owner; however, a life tenant is without the right to unilaterally develop the minerals, either personally or through a lessee, by reason of the fact that this constitutes waste. Consequently, it has been suggested in certain jurisdictions that a lease executed by a life tenant is void. However, based on relevant case law, it would seem that this overstates the law in Colorado. Rather, it is generally accepted that any owner of a mineral interest can lease the mineral interest to the extent that it is owned by the lessor. *3 Rocky Mt. Min. L. Inst. 19 (1957)*.

Similarly, it appears that the owners of a future interest can lease their mineral interests. Since they are not presently entitled to possession of the land, the owners of a future interest are without the right to unilaterally develop the minerals, either personally or through a lessee. In effect, the execution of a lease or mineral conveyance by either the life tenant or the remaindermen merely effects a transfer to the lessee or transferee of a veto power over development by the other. *2 Williams & Meyers, Oil and Gas Law §512.1 (2014)*.

Thus, neither the life tenant nor the owner of a future interest can authorize drilling for oil or gas without the consent of the other. A vested or contingent future interest in oil, gas and other minerals is a real property interest which theoretically can be leased, and such a lease would be valid and enforceable between the parties to the lease agreement. Once all possessory and vested

future interest owners are known and can be identified, they can join in the production of oil, gas and other minerals in a manner agreed to by all parties-in-interest. The situation is different when one attempts to develop minerals subject to future interests that are contingent in nature because the vesting of contingent future interests does not occur until the happening of some event, and thus all members of the class are unknown at the time of leasing.

Therefore, obtaining a lease agreement from a court appointed trustee under C.R.S. Section 38-43-101, *et seq.*, is the preferable method for leasing contingent future mineral interests. In fact, the question arises whether the statute provides the *only* recourse for a producer to lease contingent future interest owners. The question does not appear to have been addressed directly by Colorado case law. As a practical matter, if the members of a remainder class is subject to open (that is, can be enlarged or diminished before the interest is vested), it would appear that there is no way to lease all contingent future interests without doing so through a court-appointed trustee. Unless the interests of unknown or unborn class members are represented in the lease agreement, failure lease those interests could constitute waste, and could subject the producers to extensive liability for improperly paid royalties.

In short, where all present possessory and future interests are vested in known parties, their mineral interests can be leased and produced jointly as agreed by all parties-in-interest, but not otherwise. In situations where future interests are contingent or unvested, the present possessory owners may only develop the mineral interest by agreement of a court-appointed trustee authorized to represent the interests of all vested or contingent future interests.

For further information regarding this topic, please contact [Craig M. Berube](#).

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