

## Indemnification Proposals

### Unleased owners<sup>1</sup>

An unleased owner with involvement in neither exploration for, nor production of, gas, oil, or related resources from said owner's property shall have absolute tort immunity from any action arising from any exploration or production activities on or near said owner's property. Mere receipt of payments in lieu of bonus, royalty, or damage payments by an unleased owner shall not constitute involvement in either exploration or production activities. An unleased owner shall be held harmless in that the production company shall have a duty to defend against any third-party actions, including but not limited to private lawsuits and governmental actions of whatever nature, brought against the unleased owner. The unleased owner shall be entitled to indemnification from the production company for any sums ordered paid and expenses, including attorney fees and costs, incurred as the result of any third-party action. An unleased owner shall be entitled to indemnification for any injuries to his or her own property, person, person of a family member or guest, and other economic interests that are not merely speculative. Other interests may include, but are not limited to, loss of value of real or personal property, rollback taxes under the present use value (PUV) tax program, increased taxes as the result of the partial or complete loss of present use value (PUV) tax program eligibility, loss of income from agriculture, forestry, agritourism, or other business resulting from oil and gas exploration and production activities, and losses associated with violations of federal or state conservation programs, provisions of conservation easements, or acceleration or other clauses or provisions in security agreements for which oil and gas exploration or production activities trigger liability. These protections cannot be waived by contract.

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<sup>1</sup> Under the options approach to compulsory pooling, circumstances can be envisioned under which an initially unleased owner should be deemed a leased owner. The line needs to be defined. In general, the determination should be determined based upon the extent to which the owner has assumed the risks and benefits of exploration and production.

## **Production companies**

Where two or more production companies are compelled to participate in a single production unit, with a single company selected to conduct exploration and/or production, rights to indemnification, if any, shall be governed by the terms of the joint operating agreement, either as agreed upon by the parties or, in the absence of agreement, as imposed by the Mining and Energy Commission.

## **Leased owners**

The rights of a leased owner (lessor) shall be determined by the terms of the joint operating agreement, the original lease, or N.C.G.S. §§ 113-421, -422, whichever provides greater protection to the owner.<sup>2</sup>

## **Dissolution of the Unit**

All rights to indemnification shall survive dissolution of the unit.

## **U.S. Constitutional provisions implicated**

- I. Due process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments
  - a. to indemnitee
  - b. to indemnitor

Any time that government creates an entitlement to payment or requires one to pay, the Due Process Clauses of the 5<sup>th</sup> and 14<sup>th</sup> require that there exist an opportunity to be heard. These constitutional requirements can be addressed through the process to establish a pooling order.

- II. 5<sup>th</sup> Amendment Takings Clause
  - a. Minimum constitutional requirement
  - b. Equitable considerations may require more

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<sup>2</sup> An indemnification provision that did not provide at least that contractually agreed upon in a lease might violate the Contract Clause of Article I, section 10 of the U.S. Constitution.

The 5<sup>th</sup> Amendment Takings Clause established the floor for payment when governmental action results in the loss of value to a property owner. Takings jurisprudence is complex and it is often difficult in the individual case to determine whether the right is triggered and if so what the quantum of payment required is. It is not unusual for statutes to require payment greater than that constitutionally required out of the recognition that constitutionally required payments do not usually make the property owner whole.

### III. Contract Clause of Article I, section 10

The Contract Clause forbids states from enacting laws or rules that impair private contracts. An action in violation of the Contract Clause could create liability on the part of the State. There is a distinction between the mere regulation of private contracts and impairment of a contract. As with many areas of constitutional law the line is not always clear.

## Definitions

*Indemnification* - restoration of a victim (an indemnitee) of a loss, in whole or in part, by one (an indemnitor) required by law or contract to do so. Indemnification includes but is not limited to losses to the indemnitee that result from a legal action by a third party against the indemnitee. Potential losses for which an indemnitee may be indemnified include any economic loss including both losses to the property and person of the indemnitee. Such losses do not generally include non-economic losses or losses that are highly speculative.

*Duty to defend* - duty imposed by law or contract upon one party, to defend a legal action brought against another. The duty may include a right on the part of the one assuming the duty to direct the course of the defense, including the choice of counsel.

*Partial or absolute tort immunity* - partial or complete exemption from tort liability. (May require a motion to dismiss and proof of status within the exempt class.)

*Owner* - as defined in N.C.G.S. § 113-389(8) without regard to whether or not such landowner is also a *surface owner* as defined in N.C.G.S. § 113-389(12b).

*Lessee and Lessor* - as defined in § N.C.G.S. 113-389(6a) and (6b), respectively.

