GORDON ARATA MONTGOMERY BARNETT

NEW ORLEANS | LAFAYETTE | BATON ROUGE | HOUSTON

The New AAPL FORM 610-2015

What's Changed

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PLANO Executive Night Seminar 2019

Who are we?

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Agenda

- Introduction
- Generally – how new?
- Key changes – improvements
- Others: imperfect progress -> future issues?
- Unresolved issues – (lack of) fit with Louisiana law

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- **Introduction**

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Introduction – We have a new form JOA!

- AAPL has created a new form 610 JOA
- Previous version from 1989—30 years old

Why do we have a new form JOA?

Factors	Examples
• Recent court decisions – mainly in Texas	• *Reeder* – gross neg for all activities • *Seagull v. Eland* – WI assignor liability for future costs
• Industry changes	• Horizontal drilling; no separate completion election
• Better reflect industry practice	• Operator can handle suits; Non-owning operator
• Technology changes	• Email for notice
• Progress is good	• Art. XVI prevails; parties who refuse to sign

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Is anyone here using it?

- If no, not abnormal – same happened with 1989 Form
  - –1990-92, rarely used
  - –1993-94, became common
- By that schedule:
  - – 2019 – will begin to be used
  - – 2020 – will become common

Our message

- It's a helpful document
- Can use – most changes good

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Newish (1/2): Minor changes from 1989

Similar to 1989 form

- Same structure
- Table of contents virtually identical

- Do you use the 1989 form?
- If yes, you'll recognize and be comfortable with this

Changes?

- Mainly improvement – modest but real
- Some improvements, but could create future issues
- **Not panacea:**
  - some issues unresolved
  - Especially for Louisiana

Newish (2/2): Reflects conservative and deliberative process of committee

- Committee:
  - Formed & first meeting November 2011
  - Nine (9) members, national, lawyers and landmen
- Used 1989 Form as template:
  - not broke, don't fix
  - Changes only where "absolutely necessary"
- Consensus – Only changed if national consensus
- Proposal – Generated proposed revision,
  - reviewed extensively with peers before finalizing

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Improvements (1/7): Horizontal drilling

The Biggest & most important change

- Main impetus for new JOA Form
- New horizontal techniques of shale plays not accommodated by '89 Form
  - New: not in 1989 -> not in 1989 Form
    - Shale, its unique drilling techniques
    - Tech: long laterals, fracking
- Legal, land & regulatory, has changed:
  - huge drilling blocks, rig contracts
  - changes in leasing & pooling.

- Industry changed
- Law, legal practice with
- JOA Form not – getting outdated

Displacement

Displacement shall have the same meaning as defined by the state regulatory agency having jurisdiction over the Contract Area, in the absence of which, the term **shall** otherwise **mean the length of a Lateral.**

Drillsite

When used in connection with a Horizontal Well, **Drillsite shall mean** (i) the **surface hole location**, and (ii) the **Oil and Gas Leases** or Oil and Gas Interests **within the Drilling Unit** on or **under which the wellbore, including the Lateral, is located.**

Extension Operations

Extension or Extend shall mean an operation related to a Horizontal Well whereby a Lateral is drilled *in the same Zone* to a Displacement greater than (i) the Displacement contained in the proposal for such operation approved by the Consenting Parties, or (ii) the Displacement to which the Lateral was drilled pursuant to a previous proposal.

If an Operator desires to Extend the Lateral beyond the original proposal, upon approval of the designated percent of parties, the Extension Operation may be conducted and is binding on *all* Consenting Parties – in other words those who object are dragged-along in the Extension.

Horizontal Rig Move-On Period

Horizontal Rig Move-On Period shall mean the number of days *after* the date of rig release of a Spudder Rig until the date a rig capable of drilling a Horizontal Well to its Total Measured Depth has moved onto location.

Horizontal Well

Horizontal Well shall have the same meaning as the term defined by the state regulatory agency having jurisdiction over the Contract Area, in the absence of which the term **shall mean a well containing one or more Laterals** which are drilled, Completed or Recompleted in a manner in which the horizontal component of the Completion interval (1) extends at least one hundred feet (100') in the objective formation(s) and (2) exceeds the vertical component of the Completion interval in the objective formation(s).

Lateral

Lateral shall mean that portion of a wellbore of a Horizontal Well between the point at which the wellbore initially penetrates the objective Zone and the Terminus.

Plug Back

When used in connection with a Horizontal Well, Plug Back shall mean an operation to test or Complete the well *at a* stratigraphically *shallower Zone* in which the operation has been or is being Completed and which is *not* in an existing Lateral.

Sidetrack

When used in connection with a Horizontal Well, Sidetrack shall mean the directional control and deviation of a well *outside* the existing Lateral(s) so as to change the Zone or the direction of a Lateral from the approved proposal (unless done to straighten the hole or drill around junk in the hole or to overcome other mechanical difficulties).

Spudder Rig

Spudder Rig shall mean a drilling rig utilized only for drilling all or part of the vertical component of a Horizontal Well; (a rig used only for setting conductor pipe shall not be considered a Spudder Rig).

Terminus

Terminus shall have the same meaning as the term defined by the state regulatory agency having jurisdiction of the Contract Area, in the absence of which, the term **shall mean the furthest point drilled in the Lateral.**

Total Measured Depth

Total Measured Depth, when used in connection with a Horizontal Well, **shall mean the distance from the surface of the ground to the Terminus**, as measured along and including the vertical component of the well and Lateral(s).

When the proposed operation(s) is the drilling of, or operation on, a Horizontal Well, the terms “depth” or “total depth” wherever used in this agreement shall be deemed to read “Total Measured Depth”.

Drilling Obligation for a Horizontal Well

For any Horizontal Well …, **Operator shall drill such well to the Objective Zone(s) and drill the Lateral in the Zone(s) to the proposed Displacement**, *unless* drilling operations are terminated pursuant to Article VI.G (impenetrable substance or condition in the hole renders further operations impractical) or *Operator deems further drilling is neither justified nor required*.

The Operator may now terminate horizontal drilling operations if it deems further drilling is neither "justified nor required." This provision appears to increase the discretion of the Operator.

Multi-Well Pad Costs

If multiple Horizontal Wells are drilled or proposed to be drilled from a single pad or location, the costs of such pad or location **shall be allocated**, and/or reallocated as necessary, to the Consenting Parties of each of the wells thereon.

Horizontal Well Completion
(No Separate Completion Election)

Without the consent of all parties, no well shall be drilled, Deepened or Sidetracked, except any well drilled, Deepened or Sidetracked pursuant to the provisions of Article VI.B.2. Consent to the drilling, Deepening or Sidetracking *shall* include:

All necessary expenditures for the drilling, Deepening or Sidetracking, testing, Completion and equipping of the well, including tankage and/or surface facilities.

Imp. (2/7): Exculpatory clause, prudent O

1989: in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred **[]** except such as may result from gross negligence or willful misconduct

New clause

O shall conduct its activities under [K] as a reasonably prudent oper, in a good and workmanlike manner … in accordance w/ good oilfield practice, and … applicable law…

However, in no event shall it have any liability as O to the other parties for losses sustained or liabilities incurred **in connection with authorized or approved operations under this agreement** except such as may result from gross negligence or willful misconduct.

Analysis & Implication

- Response to *Reeder**:
  - all of O's "activities" under JOA covered: no breach of K claims
  - v. *Abraxas*, etc., under 1982
- New: Rejects *Reeder*, adopts *Abraxas*
  - only approved ops need gross neg
  - not other contractual obligations

Good – New reflects risk to Operator

- Operations, downhole – neg nuts
  - and not standard: IADC, MSAs
- Not so normal contractual activities– higher not needed

Improvements (3/7): Operator authority better matches practice

Mixed-bags (more later)

- Non-owner Operator
- Authority:

–to defend third-party uninsured suits

–to make ordinary pooling filings

- Not all WI execute—treat as non-consent
- Update Exh. A

Clear wins

- Clarified rules of resignation, removal, successor
  - separated Resignation v. Removal
  - **Successor vote – no 2-party deadlocks**
  - **Operatorship not assignable nor forfeited**
- **Allow "deviations from approved proposals"**
- **Definitions: clarify – rework is a subsequent op**
  - **new: "Workover" is routine maintenance**
- Broadened routine maint. drag-along:
  - workovers & artificial lift included
  - not SWD wells, other ancillary facilities
- **Title, Operator authority clarified: (i) landman costs repaid, (ii) obtain cures, (iii) approve title**

The Operator - Non-Assignment of Operatorship & Independent Contractor

Operatorship is neither assignable nor forfeited except in accordance with the provisions of Article V.

The Operator's Assignee must now comply with the voting mechanism in the agreement to claim operatorship.

In its performance of services for the Non-Operators, Operator shall be an independent contractor *not* subject to the control or direction of the Non-Operators *except* as to the type of operation to be undertaken in accordance with the election procedures.

Selection of Successor Operator

The successor Operator shall be selected by the affirmative vote *of one (1) or more* parties owning majority interest based on ownership as shown on Exhibit "A"

The Assignee of an Operator is entitled to vote the assigned interest.

In the event that such vote results in a tie, the candidate supported by the former Operator or the majority of its transferee(s), shall become the successor Operator.

Operator Deviations From Approved Proposals

If Operator, *in its reasonable judgment*, deviates from an approved proposal based upon information derived from facts and circumstances determined *subsequent* to the commencement of the operations relating to such proposal (including, without limitation, revision of the originally proposed Completion staging and design), such deviations in and of themselves will not result in liability of the Operator to the Parties.

This provision appears to greatly expand the discretion of the Operator in that it permits the Operator to deviate from an approved drilling and/or completion program.

Workover

Workover shall mean *routine maintenance and repair work* performed on a well but does not include a Rework operation.

A **Rework operation** is proposed pursuant to the subsequent operations provision and is subject to non-consent penalty provisions.

A **Workover operation** is subject to a drag-along provision, rather than a non-consent provision.

Title Examination

If requested by Operator, a party shall be responsible for securing curative matter and pooling amendments or agreements required in connection with Leases or Oil and Gas Interests contributed by such party; otherwise, Operator shall be responsible for such activities.

Generally, the Operator will be responsible for securing title opinions, curing title issues and approving title. The title and curative costs are billed to the joint account.

Improvements (4/7): Minor ops fixes

Art.	Change	Analysis/Comment
• …	• Notify WI operations commenced	• "use reasonable efforts"
• VI.F	• Any party may propose to abandon a non-economic well	• Non-Consenting parties too; practical effect?
• VII.C	• Advanced payments 30 days to pay	• Was 15; only next month's cost
• VII.D	• Usury savings clause	• For non-consent penalties
• VII.F	• Disproportionate taxes = "burden"	• Borne by contributing party
passim	• "under this K", not "on the K Area"	• Needed: build facilities off area, ops for other units on
• XIV.C	• Regulatory agencies: –All now!, not just FERC & DOE –Oper misinterprets rule? Liable	• For proportionate part only, – unless willful/gross neg • No safe harbor…

Imp. (5/7): Substantive & important

	New provision	Before?	Comments
Assignor & Assignee liability for future operation costs	• Assignor: pre-transfer costs – not liable: future ops it did not consent to – ops it did – jointly & severally with Assignee • Assignee liable – costs incurred post-transfer – w/ assignor, if its consent – No assumption needed	• Seemingly same… • *Seagull*, TX SC: – Assignor liable costs of later ops – Assignee *not* liable absent express assumption	• Improvement: – *Seagull* bad – Assignor liable, did not consent to op – contra JOA principles • Assignee – can't let off! – Don't need assumption if reference in public records • Q: P&A costs, when incurred?
Content of well proposals	• Content required set forth – Vertical or horizontal op – Plans, incl depth, locations, objective – Rig plans, if stimulation – Estimated costs – AFE • Horizontal & vertical wells	• Ambiguous! – industry practice not reflected • Required in 1989-H, copied here	• Improvement in principle – – memorializing practice – Reduces room for bad faith or sharp practices • We'll see how courts apply

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Transferee of Interests Responsible for Costs and Expenses of Transferor

The transferee shall be jointly and severally liable with its transferor for payment of its share of all costs and expenses attributable to an approved operation … in which its transferor had agreed to participate.

Improvements (6/7): Substantive & minor

	New provision	Before?	Comments
Definitions	• Added "Affiliate" • "Consenting Party" swallowed "Drilling Party"	• Not defined, ambiguous • Duplicate, confusing	• "Affiliate": 2005 COPAS def – "common control" – 50% ownership
Non-Consent Parties – limited access	• Non-Consenting parties: – no access to sites & records of that op – Well accounting	• Access rights	• Good rule • Consider whether to restrict further, esp. re: invitees
Default royalty owed by WI	• "[A]ll burdens except Subsequently Created Interests".	• Was blank, • Filled: lowest % royalty in Lease	• Reflects Texas practice • Better rule

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Non-Consenting Parties' Access to Contract Area and Records

A Non-Consenting Party is *not* entitled to access to the well location, information and reports relating to such non-consented operation until the earlier of: full recoupment by the Consenting Parties of the non-consent penalties, or 2 years following the date the non-consented operation was commenced.

Thereafter, Operator shall promptly furnish such access, information and reports *upon* receipt of a written request from the Non-Consenting Party.

Prior to payout, a Non-Consenting Party shall be entitled to review the joint account records pertaining to a non-consented operation *to the extent necessary* to conduct an audit of the payout account.

Improvements (7/7): Form & Style

- Scrivener's guides/notes
  - p. 2 – "Scribener's Instructions"
  - **p. 18: Art. XV(E): "Conflict of Terms", that Article XVI prevails**

- Readability/formatting
  - no more numbers on side
  - spacing/formatting of paragraphs

- Clarified term "commencement of operations", V.D.7(a)
  - replaces cumbersome, potentially ambiguous
  - 'when spudded or date drilling operations are commenced'

- **Preparer representation – form is Form 610-2015**
  - …and no changes except shown in strikethrough
  - Reflects industry practice
    - nice to have memorialized
    - …potential source of conflict?

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Conflict Between Articles I – XV and the Special Provisions of Article XVI

In the event of any conflict between the provisions of Articles I through XV of this agreement and the provisions of Article XVI, if any, the provisions of Article XVI, if any, shall govern.

Preparer Representations

_____, who has prepared and circulated this form for execution, *represents and warrants* that the form was printed from and, with the exception(s) listed below, is identical to the AAPL Form 610-2015 Model Form Operating Agreement, as published in computerized from by AAPL.

No changes, alterations, or modifications, other than those made by strikethrough and/or insertion and that are clearly recognizable as changes …have been made to the form.

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- **Helpful but imperfect changes -> future issues?**
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Imperfect progress (1/4): Email Notices

Each Email Notice shall clearly state that it is a notice or response to a notice under this agreement.

An Email Notice shall be deemed delivered only when affirmatively acknowledged by email reply from the receiving party. Automatic delivery receipts issued, without direct acknowledgement of the Email Notice, are not evidence of Receipt for purposes of this agreement.

If the receiving party fails … to affirmatively acknowledge…, then Receipt of the notice shall only be deemed to have occurred when received … as otherwise provided in the agreement.

- So close!
  - allowing good
  - reflects practice
- Receipt rules?!?
  - Not in your control, can't rely on it
  - Ruins it
- Modify to allow, I do: standard language

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Imperfect (2/4): Operator's new duties

	New provision	Before?	Benefit	Issue
Update Exhibit A, parties' interests	• Oper updates – reflect assignments, fix mistakes • Distributes, asks consent of party if new interest • No consent? Legal opinion – Can change, and – Conclusive – Wi must sue	• No duty • Operator maintained list on own • Freedom, but no clarity, risk	• List useful • Oper new duty, not new risk • Clarity what to do, if do conclusive	• To protect neutral, cautious • Some Os not… then mixed bag. • Small interests – legal costs • Pushes to suit
Claims & lawsuits	• Takes defense of non-insured claims • WI – can opt-out, 14 days, – owe share of defense costs	• Not in Op authority • Consent each suit	• Reflects practice • Practical	• Next slide discuss, Sam
Agency to file ordinary course pooling filings	• Limited: record pooling declarations & orders – after notice to WI, who can opt out	• No agency • Art. IV.A – Title, can conduct unit hearings	• Closer to practice • Helpful	• La. Conservation practice missed • Active role of Operator

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Claims and Lawsuits

If the amount required for settlement exceeds the amount authorized in the agreement, Operator shall promptly give notice to Non-Operators and *Operator shall assume and handle the claim or suit on behalf of all parties unless*, within 14 days after receipt of such notice, a party gives notice to Operator and the other parties of its affirmative election to assume and handle the claim or suit on its own behalf, which assumption and handling shall be done at said party's own expense and over and above said party's proportionate share chargeable to the joint account ….

Imperfect progress (3/4): Non-Owning Operator

The Operator shall own an interest in the Contract Area except as provided in this Article V.A and subject to the provisions of Article V.B.5.

A non-owning operator may serve as Operator but, as a condition precedent to serving as Operator, the non-owing operator and the Non-Operators must enter into a separate agreement, or insert Article XVI provisions to this agreement, to govern the relationship between them.

Unless such separate agreement or Article XVI provisions provide otherwise, said non-owning operator shall be bound by all terms and conditions of this agreement applicable to Operator.

The failure of a non-owning operator and Non-Operators to enter into such a separate agreement or such Article XVI provisions shall disqualify said non-owing operator from serving as O … [must designate WI owner]

- Normal: Operator aligned with WI – reimbursed, not paid, profit from WI
  - Pays share of costs of operations, signs JOA, consent/proposal rights
- Now: allow, require agreement– no common rules, force parties to talk

Removal of Non-Owning Operator

A **non-owning Operator** may be removed at any time, with or without cause, by the affirmative vote of parties owning a majority interest based on ownership as shown on Exhibit "A."

If good cause for removal of such non-owning Operator, exists, the non-owning Operator may be removed by the affirmative vote of Non-Operators owning a majority interest based on ownership as shown on Exhibit "A" remaining *after excluding the voting interest* of any non-operator who is an Affiliate of non-owning Operator.

Imperfect progress (4/4): not all execute

Improvement

- New option:
  - to treat non-signatories like non-consent parties
  - Divide their interest proportionately among other WI owners
- Before – Operator could take all risk, get all revenue.
  - Now: that's 1 of 2 options

Partial improvement

- Partial improvement: Oper can keep its from preparing for drilling of initial well
- Helpful to Operator:
  - no longer out on limb with costs
  - Or having to wait for everyone, missing rig dates

… only partial because issue

- *Only* from funds prepaid for Initial Well, already received at termination
- Why only prepaid?
  - all who executed?
- Incentives:
  - reward malingering late-payors?
  - penalizes early payors
- At least: be cautious paying early, advise clients accordingly

Failure of Parties to Execute the Operating Agreement

If operations on a well are commenced without execution of this agreement by all persons listed on Exhibit "A", or in the event that subsequent to the commencement of operations on the well previously unknown or undisclosed persons owning working interests are discovered, the parties executing the agreement agree to one of the following:

Option No. 1: *Operator shall indemnify executing Non-Operators* with respect to all costs incurred for the well which would have been charged to each such person under this agreement as if such person had executed the same, *and Operator shall receive all revenues* which would have been received by each such person as if such person had executed the same.

Option No. 2: *Operator shall advise all parties* of the total interest of the parties that have executed this agreement. *Each party* executing this agreement, within forty-eight (48) hours after delivery of such notice, *shall advise Operator* of its desire to (i) limit participation, (ii) carry *only* its proportionate part of non-executing persons' interests, or (iii) carry its proportionate part of non-executing persons' interests *plus* all or a portion of its proportionate part of any non-executing persons interests that any executing party did not elect to take.

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Louisiana exceptionalism – for future

Issue & Cause

- Form JOA, always been:
  - poor fit with La. law & practice
  - But nobody uses La. form OA
- Why? Two causes:
  - Conservation practice – mandatory unitization, active role of operator
  - Terminology
    - can't redefine "common" terms used everywhere else
    - but different here

Illustration

- Conform to existing well spacing rules, proposed wells must, VI.B.8
  - 2015: or to exception already approved
  - Not practice in Louisiana
    - propose, drill, then get permit
    - Can't do this under Form JOA
- Terminology – "Zone"
  - Form: a stratum of earth w/ a common accumulation of oil & gas separately producible…
  - La. – multiple pools in 1 Zone

QUESTIONS?

FIN

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