

PRESENTED AT

43rd Annual Ernest E. Smith Oil, Gas and Mineral Law Conference

April 14, 2017
Houston, Texas

**WE ARE NOT OUT OF THE WOODS YET: SELECTED
ISSUES FOR CONSIDERATION IN AN
ECONOMICALLY STRESSED ENVIRONMENT**

W. John English, Jr.

Author contact information:

W. John English, Jr.
Baker & Hostetler LLP
811 Main Street
Suite 1100
Houston, Texas 77002
jenglish@bakerlaw.com
713-646-1384

WE ARE NOT OUT OF THE WOODS YET: SELECTED ISSUES FOR CONSIDERATION IN AN ECONOMICALLY STRESSED ENVIRONMENT^{1,2}

John English
Baker & Hostetler LLP

I. INTRODUCTION³

Oil and gas exploration and production (“E&P”) is usually conducted by two or more parties in cooperation with each other. This is so because of the high investment risk, the large capital investments required, the long payout period, the need for shared technical expertise, specific regional experience, possession of seismic and other necessary information, and, in some instances, compulsory regulatory requirements. This cooperation usually begins at the earliest stages, such as bidding and the initial well, and continues for the economic life of the interests in which the parties are invested. The cooperation may also extend to joint marketing and construction of gathering lines and other facilities through the use of different contracts reflecting the nature of the risk, rights and obligations involved.

In the U.S., the joint operating agreement is the agreement that is most basic to this relationship. Properly drafted, it regulates the rights and obligations of the parties, spelling out on a percentage of interest basis, the respective rights, obligations and liabilities of each party. The joint operating agreement also allows the parties to share risks and costs; establish an economy of scale in contracts and procurement for the covered E&P operations; establish joint bidding procedures; impose confidentiality restrictions; create areas of mutual interests; impose limits on transfers; create certain tax advantages; and in Texas, prevent the joint and several liability of the parties to third parties.

In Texas, the American Association of Professional Landmen (“AAPL”) forms have become the industry standard joint operating agreement for most onshore projects. These forms were first introduced as the Ross-Martin form 610 Model Form Joint Operating Agreement in 1956 and were revised in 1977, 1982, 1989, 2013, and 2015. The 2013 revisions were made to include provisions relating to horizontal operations.⁴ The 2015 revisions were adopted by the AAPL’s Board of Directors in December, 2015, in an effort to address judicial interpretations, “...commentary...by...attorneys and scholars identifying certain shortcomings and providing

¹ The views and opinions expressed by the author in this paper are his personal views and opinions; they do not express the views or opinions of Baker & Hostetler LLP or its clients.

² Portions of this paper were presented at the 42nd Annual Ernest E. Smith Oil, Gas and Mineral Law Conference Fundamentals April 14, 2016.

³ The author acknowledges with gratitude the invaluable assistance and sharp eye of Mary S. Lee (his long-standing and long-suffering assistant); and Joe Martin, BakerHostetler IT department.

⁴ For a discussion of the horizontal revisions *see* Michel E. Curry, “The Model Form Joint Operating Agreement Subsequent Operations and A Discussion of Related Horizontal Well Issues”, 2014 Fundamentals of Oil, Gas and Mineral Law (University of Texas Law School); and Jeff Weems, “Changes Within the AAPL 610-1989 Model Form Operating Agreement: Horizontal Modifications and Other Developments Regarding the Model Form Operating Agreement”, 2013 Advanced Oil, Gas & Energy Resources Seminar (State Bar of Texas).

suggested improvements and, most significantly, advances in technology such as hydraulic fracturing and horizontal drilling... .”⁵

In this paper, we will focus on the 2015 AAPL Model Form Joint Operating Agreement (the “JOA”) because it still seems to be the most widely used of the AAPL forms. You should note that the suggestions which will be discussed in this paper will require physical changes to the JOA, not simply filling in a blank or making an election provided in the JOA. This paper will focus primarily on the basics of identifying creditors and debtors under the JOA, the liens and security interests created under the JOA, and the methods of perfecting those liens and security interests. It will also provide a brief review of other options provided by the JOA to parties who are trying to protect their financial interests. Finally, as advertised there will also be a discussion of two ethical considerations that must be addressed by a Texas lawyer dealing with these issues.

II. THE JOA

A. Organization.

The JOA is organized into several distinct categories which are intended to answer a series of specific broad questions. One of those questions is “Who pays what?”⁶ Ancillary questions are “What liens and security interests are granted?” and “How are the liens and security interests perfected?” The answers to the first two questions are provided in the JOA; the answer to the third is provided by Texas law.

B. Who pays what?

Generally speaking a party who consents to a proposed operation also agrees to pay its share of all necessary expenditures incurred in connection with that operation.

Article III B of the JOA provides that unless changed by other provisions, all costs and liabilities incurred in operations under the JOA shall be borne and paid by the parties as their interests are set forth in Exhibit A to the JOA.

Under Article VI B, all operations for which notices are properly given under the JOA shall be conducted at the risk and expense or the account of the parties participating in the operation.⁷ Article VI C 1 provides that any party that consents to the operations described in that Article has also consented to all necessary expenditures for the described operations.

⁵ MacDonald, “The A.A.P.L. Form 610-2015 Model Form Joint Operating Agreement – Commentary of the Form 610 Revision Task Force’, Paper 1, p.1, Rocky Mountain Mineral Law Foundation\AAPL Special Institute on Joint Operations and the New AAPL Form 610-2015 Model Form Operating Agreement (2016). For a detailed analysis of the changes made by the 2015 revisions, *see* Rocky Mountain Mineral Law Foundation\AAPL Special Institute on Joint Operations and the New AAPL Form 610-2015 Model Form Operating Agreement (2016).

⁶ Curry *supra* at note 3.

⁷ *See* JOA Article VI B (1) and (2).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: We're Not Out of the Woods Yet: Selected Issues for Consideration in an Economically Stressed Environment

Also available as part of the eCourse

[2017 Ernest E. Smith Oil, Gas, and Mineral Law eConference](#)

First appeared as part of the conference materials for the

43rd Annual Ernest E. Smith Oil, Gas and Mineral Law Institute session

"We're Not Out of the Woods Yet: Selected Issues for Consideration in an Economically Stressed Environment"