



ARLINGTON, TEXAS

AAPL 2021 ANNUAL MEETING

PROFESSIONAL DEVELOPMENT AND LAND CONFERENCE

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BUYING COMPANIES INSTEAD OF ASSETS

(or Pros and Cons of Buying the Cow)

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Deal Structures – Buying the Assets

- Typical A&D transaction
 - Direct acquisition of seller's asset(s) for cash and/or other consideration (perhaps buyer stock)
 - Conveyances of assets must be prepared
 - Detailed property descriptions
 - Consents to assign/other third-party rights
 - Careful to exclude assets if necessary
 - Is buyer able/willing/qualified to operate (if applicable)?



Deal Structures – Buying the Company

- **Stock Acquisition**
 - Transfer of shares for cash and/or other property
 - Stock Purchase Agreement
 - each stockholder is party to the agreement
 - buyer has the opportunity to obtain direct recourse against seller's stockholders for breaches and representations
 - (at least those stockholders who were active in the business)
 - If no conveyance, are any third-party rights triggered?
 - Permits/operatorship perhaps less of a hurdle



Deal Structures – Merger

- Yet a third way...
 - Merger of seller into buyer under applicable state merger laws
 - Seller's assets & liabilities are assumed by buyer without the need for assignments
 - Must be approved by stockholders of both companies
 - May require time-consuming (and expensive!) proxy statement and registration statement with SEC if public company
 - Often favorable tax treatment



Third Party Rights

- Right to Operate
 - Most joint operating agreements provide that the transfer of the operator's interest in the joint property triggers a vote of the working interest owners to select a new operator.
 - AAPL Form 610 Operating Agreement
 - Different vintages (see Richard Hemingway's excellent presentation) may differ on whether successor operator obtained a right to vote, and whether transfers to affiliates were exempted from the resignation provisions.
- Asset vs. Stock transaction results



Third Party Rights

- Preferential Purchase Rights
 - Right of First Refusal
 - Right of First Offer
 - “All or substantially all”
 - Note change of control provisions
 - Areas of mutual interest
- Asset vs. Stock transaction results



Third Party Rights

- Approval of Lease Assignments
 - Fee lands
 - State lands
 - Federal lands
 - Onshore
 - Offshore
 - Indian
- Asset vs. Stock transaction results



Third Party Rights

- Permit Transfers
 - Onshore/BLM
 - Offshore/BOEM
 - Record title
 - Operating rights
 - P&A liability/decommissioning bonding (financial assurance)
 - FERC
- Asset vs. Stock transaction results



Third Party Rights

- Intellectual Property
 - Seismic licenses
 - G&G data
- Contract Rights
 - Software licenses
- Asset vs. Stock transaction results



Third Party Rights

- Let's Dance: the Texas Two-Step
 - *Tenneco Inc. v. Enterprise Products Co.*
 - *Galveston Terminals, Inc. v. Tenneco Oil Co.*
 - *Fina Oil and Chemical Co. v. Amoco Production Co.*
 - *Citgo Petroleum Corp. v. Occidental Chemical Corp.*
 - *Williams Gas Processing--Wamsutter Co. v. Union Pacific Resources Co.*



Liability Considerations

- **Environmental Liabilities:**
 - under the Resource Conservation and Recovery Act (“RCRA”) as a “generator” or as a “treatment, storage, or disposal facility” for the presence of exploration and production wastes
 - under state law for exploration and production waste management including spill remediation, pit permitting, operation, and closure requirements, produced water management, and groundwater protection
 - under the Clean Air Act for failure to have required operating permits for major sources such as compressor stations, dehydrators, or treatment facilities
 - under the Clean Water Act or state law for discharges of oil or of waste water or other pollutants into navigable waters without required permits



Liability Considerations

- **Environmental Liabilities:**
 - under state regulation or common law tort or nuisance theories for soil or groundwater contamination from produced water discharge or other waste disposal
 - for leaking underground storage tanks or above ground storage tanks
 - under state or federal law or under the terms of acquired leases or under tort law for unplugged wells or for improperly plugged wells, and for failure to perform required reclamation or other surface restoration



Liability Considerations

- **Royalty Liabilities**

- Failure to pay royalty does not of itself support lease forfeiture but creates only a contractual breach enforceable against the defaulting payor
 - not against the defaulting party's successor in the absence of an express assumption of that liability
- In the absence of express assumption language, an intervening assignee of a lease will generally not be liable to the lessor for unpaid royalties accrued prior to his acquisition of interest or for unpaid royalties accruing after his disposition of interest
- On federal leases, although the regulations do not appear to obligate an assignee to take on responsibility for unpaid royalties accruing during the ownership of his assignor, the United States does have the potential remedy of lease cancellation available
- Purchaser can assume (wittingly or not) the obligation for underpaid royalties by its predecessor



Continued Education Component Code

- ARTX-1



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