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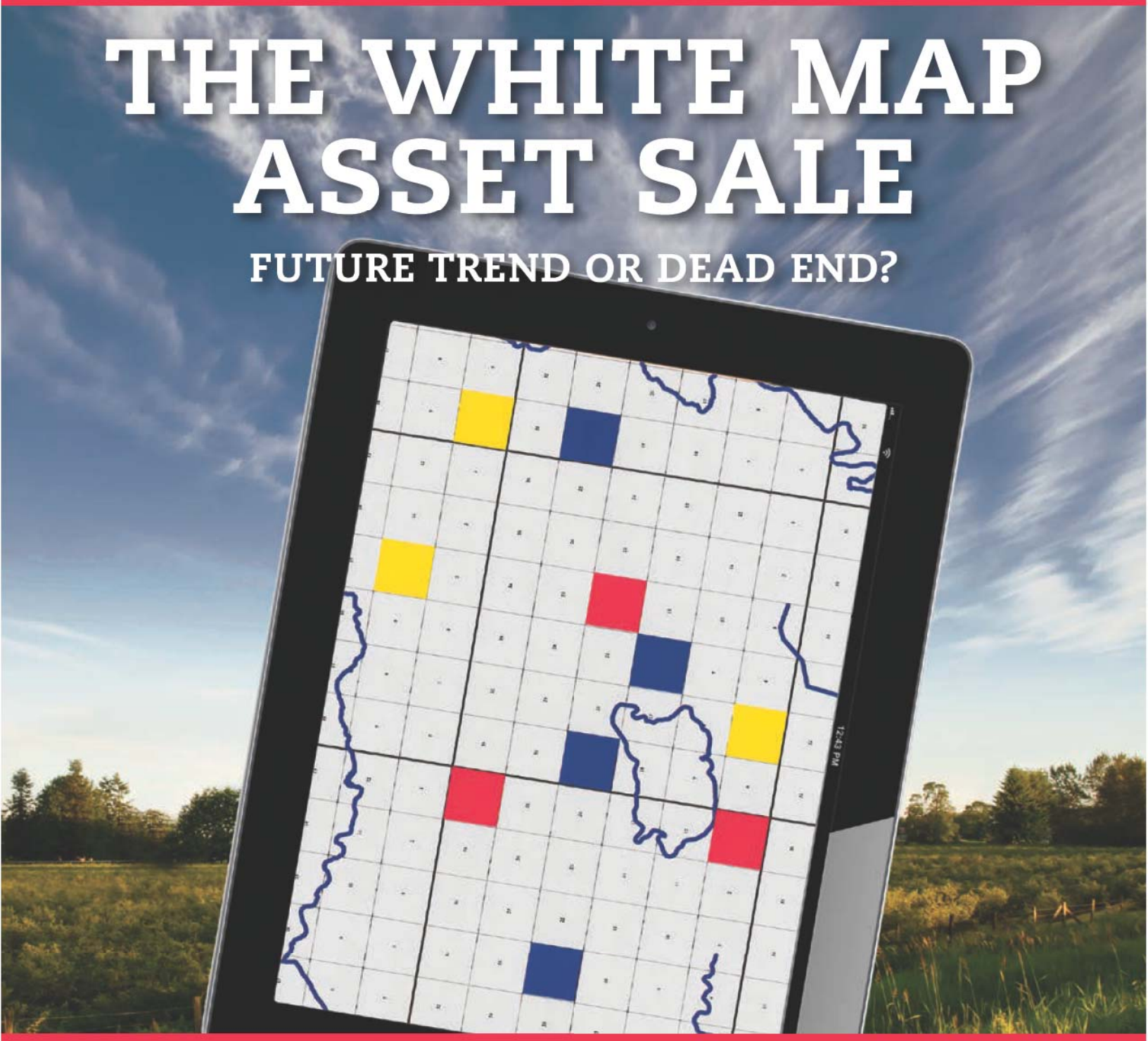
THE WHITE MAP ASSET SALE

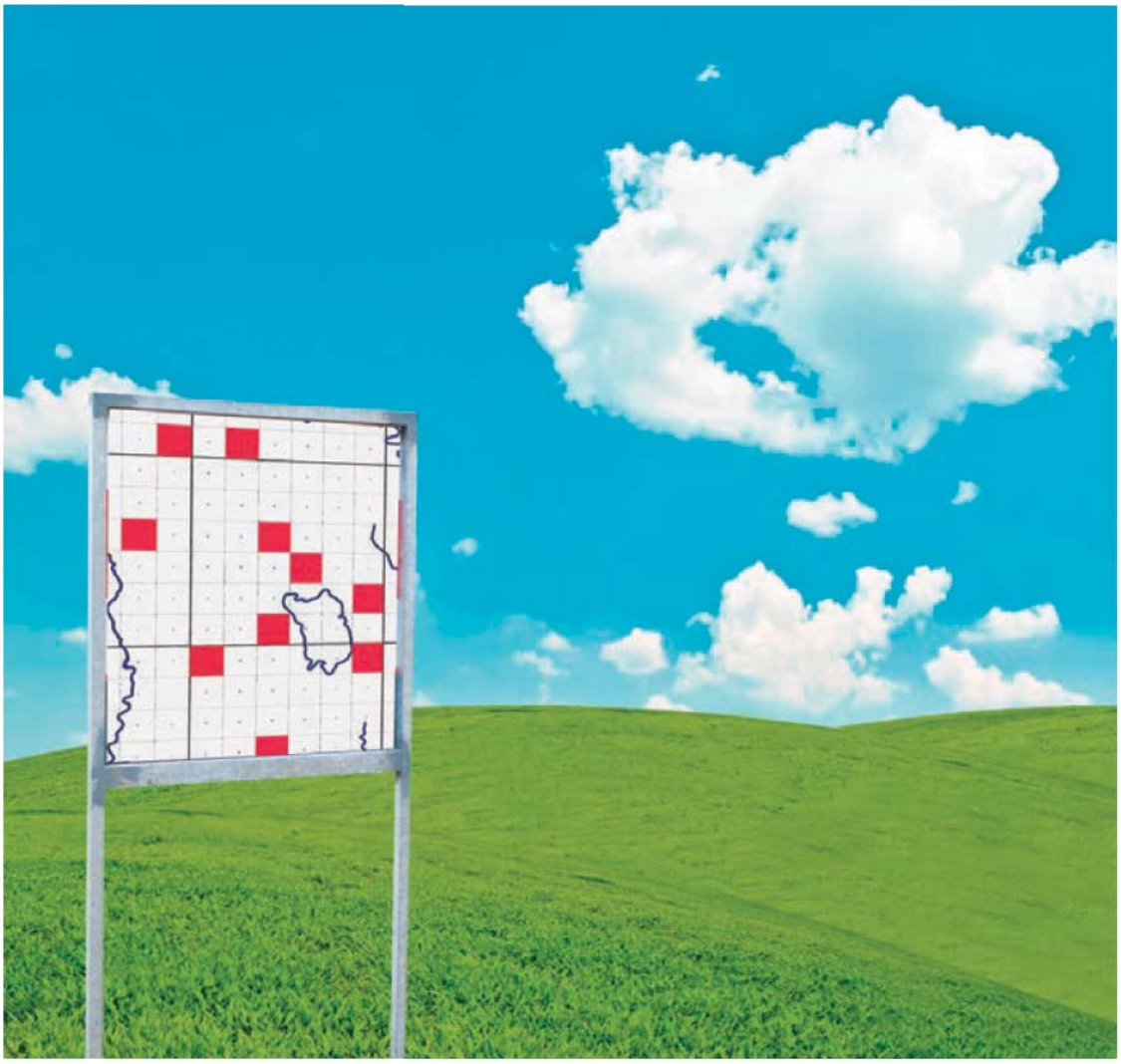
FUTURE TREND OR DEAD END?



The CAPL Surface Lease
Clause by Clause on the New CAPL Surface Lease

Negotiators Notebook
A Call to Action

Vancouver 2012
Another Successful CAPL Conference



The White Map Asset Sale

Future Trend or Dead End?

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THE "WHITE MAP" ASSET PURCHASE AND SALE AGREEMENT (PSA) IS NOT A NEW IDEA. However, the concept has evolved in the last several years to become much more vendor friendly and fulsome than has historically been the case. As we are now in a purchaser friendly asset sale environment (especially for gas), it will be interesting to see if this new risk allocation model is sustainable.

To put it another way, gone are the days a vendor could say take it or leave it, I have five guys lined up to buy this stuff. Purchasers are finally able to be more assertive in requesting changes to the PSA that move the risk allocation pendulum back towards the vendor.

Traditional White Map

First, lets back up a bit. The traditional white map PSA is not the fun and sexy topic I am going to speak about below. The traditional white map PSA has been around for a very long time and is not an aggressive risk allocation device.

The traditional white map PSA attempts to define "Lands" in a general or two dimensional fashion. This general Lands description forms part of the defined "Assets", with the intended result that the Assets will comprise any and all of the vendor's interests and liabilities in the two dimensional Lands as set out in Schedule "A" to the PSA, which is usually a vendor generated mineral property report (MPR). No matter what the MPR

lists for working interests, zones or substances, the purchaser has bought all of the vendor's interest in the two dimensionally described Lands.

I am a big fan of the traditional white map. Nice and clean. No disputes post closing if you figure out there is a misdescription on the MPR. In short, if the MPR refers to section 8, the purchaser has acquired everything in section 8.

A note of caution. Many PSA use the somewhat vague definition of Lands as "the lands set out in Schedule 'A'". The intent may be to white map, but I don't think you get there with this wording. The problem is especially evident in a CS generated MPR which groups the lands, zones and substances under the heading "Lease Description/Rights Held". If the Lands set out in the schedule mean the full Lease Description / Rights Held, I think there is a good chance Lands means only the described lands, zones and substances. To deal with this uncertainty, I have changed my Lands definition to read "the lands areally set out in Schedule 'A'". The problem is that "areally" does not make it through my spell checker and I get asked about why I use that word on every second PSA I prepare. Honestly, it is a word. I checked on Google. I have hoped that others would add the word "areally" in their PSA, but alas it has yet to happen. I must not hang out with cool enough lawyers and landmen.

To properly white map, you must also consider the other constituent elements of the defined Assets. We do not have enough time to go through all the definitions today. However, I will mention the need to ensure that the defined "PNG Rights" refers to the vendors *entire* interest in the Lands. This wording takes care of any working interest misdescriptions or missing royalty interests where vendor is payee. Simple, clean. Not new ideas.

The Problem: Uncertain Environmental Liabilities

Traditional white mapping language (done properly) deals pretty well with unstated or misdescribed rights and interests, but does not deal well with the scope of environmental liabilities. This is because the white map Asset definition is always limited to a two dimensional look down on current mineral interests which comprise the MPR. This occurs as "Lands" can only mean the lands set out in the land schedule.

The obvious problem is that significant environmental liabilities very often do not pertain to the existing mineral rights, tangibles or surface rights and, therefore, do not easily fall within the defined Assets. Rather, they pertain to spills or environmental problems on abandoned sites or are located on expired lands that are, therefore, not Lands or Assets. Such historical environmental liabilities often pertain to the same pool or play that the vendor is buying, but are simply not situated over top of existing mineral rights.

We often try to expand environmental liabilities to cover those "*pertaining to*" the Assets, which helps a bit, but the problem still exists.

Think of it this way – when I occasionally dare to go down into the basement where my three teenage boys live, I am bombarded with a constant disaster scene of dirty dishes, clothes, chip bags, garbage and sometimes, unidentifiable stains and spills strewn across the room. For identifiable assets (such as plates and cups), the inevitable arguments are pretty straight forward: Dad pick up your @#&^ dishes, Son that's not my dish. Arguments ensue, but the boys are not a highly cohesive pack and I can almost always pin specific dishes to a specific child. This is the relatively benign issue of defining what Assets are. Courts are pretty good at deciding such matters between arguing vendors and purchasers.

However, stains and spills are much more difficult to pin down. They could be new, they could be old, maybe even a friend did it. FYI, my boys are very quick to throw friends under the bus if it saves them a bit of clean up duty. Clearly someone made the mess, but it is sometimes impossible to figure out who did it and when. In my own head, I would like to just punish the whole gaggle of boys, however, absent solid evidence I often get stuck with the mess. This is similar to the problem courts have with environmental liabilities and PSA agreements. The facts are fuzzier than tangible asset or PNG rights issues and neither the vendor nor the purchaser wants to be responsible to the cleanup.

CNRL v. Anadarko: A Case Study

This hole in the traditional white map concept was very clearly exposed in the extremely well written Alberta Court of Queen's Bench decision in *Anadarko Canada Corp. v. Canadian Natural Resources Ltd.* (2006 Carswell Alta 1000). Justice Rowbotham was reviewing a PSA from Norcen (now Anadarko) as vendor to CNRL as purchaser. I am almost certain this PSA was drafted by someone at my old firm Blain & Company, and the PSA was the standard white map version we used at that time. At issue was the liability for an old abandoned battery site (abandoned in 1968) located right in the middle of the oil play that was sold to CNRL.

CNRL sought to pass the bill for the cleanup to Anadarko based on the indemnities in the PSA. Simple idea, but man oh man, words are very slippery, especially when we are trying to define the unknown. The indemnity was tied to the "Assets" and Justice Rowbotham determined that Assets as defined in the PSA meant, essentially, the operational, physical tangibles or PNG Rights. An abandoned battery site was not a tangible thing or even an intangible interest (since no surface lease remained) and, therefore, no indemnity was available and Anadarko (as corporate successor to vendor) was stuck with the cleanup bill.

The decision is a great example of a Court determining an issue using the literal interpretation approach to a contractual dispute. I applaud judges who decide this way, even though the decision very pointedly illustrated the limitations of trying to use traditional white mapping concepts with relation to environmental liabilities.

Anyway, the fix was in after this decision. We could no longer rely on traditional white mapping language. The short term answer was to tighten up the two dimensional Lands definition and tie

the environmental indemnity to both the Assets and the Lands. This sort of, kind of, made it more clear that any liabilities on the Lands would pass to the purchaser. This, however, is a poor fix and does not solve the problem of the Lands being tied to the existing mineral lease area and not the whole area you are selling out of.

The Solution: The Land Plat White Map

The simple and ingenious solution to the above problem was the introduction of a standalone White Map Area definition and clause in the PSA. The White Map Area is defined in relation to a scheduled land plat, with the plat showing a great big red outlined box around the general sale area. As they say, a picture is worth a thousand words. In this case, the picture finally and completely removes any confusion as to what lands and area form part of the environmental indemnity granted to the vendor by the purchaser at closing.

The clause is drafted as "*notwithstanding anything to the contrary*" in the PSA. These are magical legal words that are meant to stop Courts from rooting around for inconsistencies in the PSA definitions or providing any scope to start thinking about the parties intentions or fairness or any other such nonsense. Sort of an exclamation point that everyone needs to read and be clear on this particular clause.

After that the clause is very simple. It says the purchaser takes responsibility for all past, present and future environmental liabilities of vendor within the White Map Area (which is the outlined boundary on the land plat). If the problem is in the box, purchaser is responsible.

I also include a provision in my white map clause that any and all interests of vendor in the White Map Area form part of the Assets and will be sold to purchaser at closing. This creates a fairness balance in the clause, which might protect against an equitable challenge in the future. Further, it avoids the logically absurd result that the purchaser could acquire environmental liabilities for something it did not purchase.

So we finally have a bullet proof and simple clause that no one can misunderstand. Perfect. We're done. Let's go for beers. However, a funny thing happened once we made this risk allocation concept extremely clear, purchasers started to notice and complain. What do you mean I am responsible for everything in the outlined box. What the heck is in there? How can I possibly justify this to my president? Etc., etc.

It find it very sad that so many landmen and lawyers are ok with super fuzzy "standard" wording, but cannot live with crystal clear concepts. I am not saying the risk allocation is always appropriate. However, when a White Map Area is rejected, the parties very often simply go back to the old wording which we know does not work very well. This creates endless super fun post closing fights between the vendor and purchaser arguing about a specific environmental liability. All I can say is, don't blame the poor lawyer who drafted the PSA. The traditional words simply do not work very well.

Ultimately, the choice to include a fulsome White Map Area is a matter of negotiation between the parties. Only time will tell if this concept can withstand the return of a buyers' market for asset deals.

Cannot Use a White Map Where Your Retain Interests

You cannot, must not, ever use a traditional or full white map PSA when the vendor intends to retain any zones, substances or working interests in the lands being sold. If you screw this up and use a white map PSA to sell only certain rights, you will have drafted a PSA that sells all the rights in the two dimensional lands irrespective of the exclusions or exceptions set out in the Schedules.

Sadly, this is a common error we encounter on title reviews. Someone pulls up the "standard" PSA and slaps on a MPR where the vendor is selling only certain zones and formations. In my humble view, if a good judge (like Justice Rowbothem) hears your whining about what you really meant to do, you will lose and the purchaser will have acquired all of your interest in the lands. As you should. A PSA is the fundamental contractual document that conveys beneficial ownership in lands. It should be treated with respect and be properly drafted. Your only hope is to get a hippy socialist "factual matrix" judge who lets you off the hook. See *Nexxtep Resources Ltd. v Talisman Energy Inc.* [2012] AJ No. 85 if you want to know what a "factual matrix" approach looks like. Anyway, a poorly drafted PSA for a retained rights sale will leave

you in the very uncomfortable position of waiting for a Court to work it out what you actually sold.

A Word on the CAPL Property Transfer Procedure (PTP)

The PTP is NOT a white map PSA. The PTP incorporates a full-on asset specific set of definitions. Under the PTP, you acquire only the lands, zones, substances and working interests set out in the schedules. No question about it.

Many of us found this to be a rather annoying departure from the traditional white map language found in many common PSA at the time. Jim McLean, our ever diligent and most excellent CAPL volunteer, responded to this issue in the February 2001 CAPL *Negotiator* (as part of a series of articles on the new, at that time, PTP). Jim states that, "Our rational for this structure was to protect the Transferor in circumstances in which it is retaining any interest in the Assets..." and then he goes on to advise that a white map sale could be incorporated into the PTP by way of amendments in the head agreement. Although an excellent answer, I have always secretly believed that Jim, being a very disciplined and organized man, simply expects that the vendor should know exactly what they own, have no mistakes in any of their records, and should be clear and concise on what they are selling.

As the PTP finally appears to be getting some traction, this retained interest approach should not be forgotten. For small deals, no changes are likely necessary as the time and effort can be made to double check and ensure schedules are correct. For larger deals, and especially deals where a full white map is desired, changes are required.

A Note on Wells

Lastly, please note that wells, both as assets and as liabilities, are a peculiar subset of the white map concepts discussed in this article and have their own specific issues. This arises as "Wells" are a separately defined aspect of the Assets and can be incorporated as part of the Assets by either a general definition or by way of a well schedule.

Wells could be a full article on their own. For now, please note that problems typically arise in relation to injection and disposal wells off the lands which are missed in the well schedule and in relation to the scope of abandoned well liability on and off the lands. The use of a White Map Area will cover all wells within the outlined box. Both as assets and as liabilities. A traditional white map PSA or the PTP have many potential gaps in well inclusion or exclusion. The only way to ensure wells are included is to get them on the well list. With respect to abandoned wells, this can sometimes be very difficult to do as the wells are no longer actively linked to your land and accounting systems. Conversely, if you really don't want certain well liabilities, you are best to expressly state same in the PSA.