

# GOVERNMENTAL AFFAIRS WEEKLY REPORT

## Weekly Highlights At-A-Glance

### FEDERAL – Legislative

#### **Methane Waste Prevention Act – H.R. 2711.**

(Update to 7/29/19 Weekly Report) On September 24, the House Committee on Natural Resources Subcommittee on Energy and Mineral Resources held a [public hearing](#) on [H.R. 2711](#), known as the *Methane Waste Prevention Act of 2019*. The bill, introduced by Rep. Diana DeGette (D-CO), is aimed at limiting methane emissions from oil and gas operations by requiring oil and gas producers to capture 85% of all gas produced on public lands within three years of bill enactment, and 99% of all gas produced on such lands within five years of enactment. The measure would also ban venting of any natural gas on public lands, and prohibit methane flaring at any new wells established two years after the bill is passed. While it is unlikely the bill will receive consideration in the Republican-controlled Senate, we will continue to monitor this bill should it move forward in the House. [Read more.](#)

### FEDERAL – Regulatory

**BLM Leasing Plan – California.** The Trump administration has opened the door to new oil and gas drilling in California. On October 4, the Bureau of Land Management (BLM) approved a new plan to open up roughly 722,000 acres of Central and Northern California to new oil and gas drilling. The move doesn't guarantee drilling will take place immediately, as the agency must first approve individual permits authorizing the activity. The leasing decision, published in its [Record of Decision: Central Coast Field Office Resource Management Plan Amendment for Oil and Gas Leasing and Development](#), effectively reverses a de facto moratorium that had blocked new leases in the

region since 2013, when a federal court ruling forced the Interior Department to further evaluate the environmental effects of hydraulic fracturing to stimulate oil and gas production. [Read more.](#)

**BLM Lease Sale – Colorado.** On October 1, the BLM announced it is seeking public scoping comments on approximately 39,256 acres of public lands proposed for the upcoming March 2020 competitive oil and gas lease sale in Jackson, Las Animas, Mesa, Moffat and Rio Blanco counties. The public scoping period ends October 15, 2019 and before beginning an environmental analysis, the BLM would like to hear from the public about issues that should be considered. [Read more.](#)

**BLM Director Appointment.** (Update to 8/12/19 Weekly Report) On September 30, Interior Secretary David Bernhardt announced by [Executive Order No. 3345, Amendment 29](#) that William Perry Pendley will continue as acting BLM Director until a Senate-confirmed appointee is in place. Pendley's assignment will continue until January 3, 2020, unless extended again. Pendley had been BLM Deputy Director of Policy and Programs. Prior to holding this position, Pendley, an attorney, was the president of the Mountain States Legal Foundation. [Read more.](#)

**BLM Headquarters Relocation – Colorado.** (Update to 7/29/19 Weekly Report) On September 20, the BLM announced it entered into a lease for office space in Grand Junction, Colorado for its new headquarters outside Washington, DC. Supporting the move, Sen. Cory Gardner (R-CO) shared, "On behalf of the state of Colorado, I am excited to welcome the Bureau of Land Management to its new home in Grand Junction." The [office location](#) also houses several oil and gas companies as well as the

local branch of the Colorado Oil and Gas Association. "Today marks an important step for the Bureau. The relocation of our headquarters will provide significant benefits, including more efficient operations and being a better neighbor to western communities," said acting BLM Director, William Perry Pendley. "These are things the BLM has always stood for and align well with the Department's priorities." [Read more.](#)

### **Employee Misclassification; Independent Contractors – National Labor Relations Board.**

In a victory for hiring companies and independent contractors, the National Labor Relations Board (NLRB) recently ruled that it does not violate the National Labor Relations Act (NLRA) if an employer mistakenly misclassifies its employees as independent contractors. In [Velox Express, Inc.](#), the NLRB rejected the argument for a "standalone misclassification" violation — that simply misclassifying an employee as an independent contractor inherently coerces employees in the exercise of their NLRA rights, regardless of the employer's intent. The Board called it "a bridge too far" to conclude that an employer coerces its workers by advising them they were classified as independent contractors. Although this case involved medical courier services, the decision applies broadly. In its August 29, 2019 ruling, the NLRB also discussed important legal and policy concerns that weighed against finding a standalone misclassification violation. "Key among them were the many federal, state, and local laws and regulations that apply different standards to determine independent contractor status. An employer's classification decision may be correct under certain laws, but incorrect under the NLRA. Thus, a standalone misclassification violation would assure substantial uncertainty and protracted litigation, which may cause employers to forgo independent contractor relationships." [Read more.](#)

### **FEDERAL – Judicial**

**Joint Operating Agreements; Working Interests; Statutory Pooling – Arkansas.** On August 6, in

*Turner v. XTO Energy Inc.* (Case No. 2:18-CV-02171), the U.S. District Court for the Western District of Arkansas denied a claim by a working interest owner that XTO failed to pay proceeds on all production from a unit targeting multiple formations in violation of the state's pooling statute. The Court held that the plaintiff did not enter into a Joint Operating Agreement (JOA) with the operator to share in all production from the unit and therefore the plaintiff could only receive his four percent share of gas produced from one of the formations at issue, rather than proceeds generated from the sale of gas in the 640-acre unit as could the other working interest owners who entered into the JOA. [Read more.](#)

**BLM Leasing – Colorado.** (*Update to 10/22/18 Weekly Report*) On September 16, the BLM and environmental activist groups reached a court-ordered [Settlement Agreement](#) in the longstanding dispute involving the BLM's "failure to adequately consider greenhouse gas impacts from oil and gas drilling" in its Resource Management Plan (RMP) for the Colorado River Valley Field Office. In the case, [Wilderness Workshop v. Bureau of Land Management](#) (Case No. 16-cv-01822-LTB; 10/17/18), the U.S. District Court for the District of Colorado also found the agency failed to consider any alternatives that would meaningfully limit oil and gas drilling in its planning process. The judge ordered the BLM to consult with Wilderness Workshop and other plaintiffs to work out a remedy. The RMP outlines how the BLM manages about 750,000 acres of mineral estates and would have allowed for more than 4,000 new wells on those lands. Under the settlement, the BLM will revamp the plan "to adequately consider the climate impacts of increased greenhouse-gas emissions from transport and consumption of oil and gas. It must also consider land-management alternatives that would meaningfully limit drilling." According to BLM spokesman David Boyd, the "agency is in the beginning stages of planning how to address and implement the settlement requirements." Boyd noted that "It is all part of the process, and in this case, the settlement outlines what we need to do, so that is what we will do." [Read more.](#)

**Tribal Lands – North Dakota.** On August 5, in *Kodiak Oil & Gas (USA) Inc. v. Burr* (Case Nos. 18-1824, 18-1856), the U.S. Court of Appeals for the Eighth Circuit (North Dakota), addressed a dispute over flaring natural gas from wells on tribal lands and whether tribal or federal law controls. The case arose out of a dispute where tribal members alleged non-tribal oil and gas companies owed them royalties from “wastefully-flared gas.” Some of the companies contested the tribal court’s jurisdiction over them in tribal court. In finding for the oil and gas companies, the Court upheld a federal district court injunction in favor of the companies and affirmed that injunction “because we conclude suits over oil and gas leases on allotted trust lands are governed by federal law, not tribal law, and the tribal court lacks jurisdiction over the non-member oil and gas companies.”

[Read more.](#)

**Leasing; Forum Selection – Ohio.** On August 16, in *Tera II, LLC v. Rice Drilling D, LLC* (Case No. 2:19-CV-02221-SDM), the U.S. District Court for the Southern District of Ohio addressed whether the forum selection clause in the applicable leases is a “clear and unequivocal” waiver of the defendants’ removal rights. Plaintiffs argued that by agreeing that “[a]ny actions or proceedings” concerning the leases “shall be ascertained and determined by the Ohio state court in the county where the Lease is recorded,” the defendants waived the right to remove to a federal court. In denying the plaintiffs’ motion, the Court noted that courts in this jurisdiction “have kept the bar high in order to demonstrate a clear and unequivocal waiver” when faced with a forum selection clause and the plaintiffs’ arguments were unpersuasive. In sum, the Court held that the leases did not clearly and unequivocally waive removal rights regarding the forum selection clause. [Read more.](#)

**Leasing; Royalties – Ohio.** On August 15, in *Zehentbauer Family Land, LP v. Chesapeake Exploration, L.L.C.* (Case No. 18-4139), the U.S. Court of Appeals for the Sixth Circuit (Ohio) addressed claims by the plaintiffs seeking class action certification that royalties were underpaid because

the netback method used by the lessees does not accurately approximate an arm’s-length transaction price and improperly deducts post-production costs from the price. The defendant lessees argued that the trial court improperly certified the class action because the netback method of calculating royalties is insufficient to meet the requirements for class certification in part because market prices applied to the lessors are “highly individualized” and the “predominance” required under the class action statute is lacking. However, the Court held that the plaintiff class abandoned that theory and are proceeding “solely on their post-production-costs theory of liability” and thus upheld the class certification. At this stage in the litigation, however, no determinations of possible liability have yet been made. [Read more.](#)

#### **Lesser Prairie Chicken – Washington, DC.**

Environmental activists are claiming victory in a conservation case involving the Lesser Prairie Chicken and its protection designation under the Endangered Species Act (ESA). On September 12, in *Defenders of Wildlife v. Bernhardt* (Case No. 1:19-CV-1709-RC) the U.S. District Court for the District of Columbia entered an Order for a Stipulated Settlement Agreement between the activists and the U.S. Department of the Interior and the U.S. Fish and Wildlife Service (FWS) which insures the Lesser Prairie Chicken will get a decision about protection under the ESA by May 26, 2021. In 2014, the FWS listed the bird as “threatened” under the ESA, but that protection was later overturned in a court ruling. As AAPL has previously reported, back in August, the FWS [announced](#) a slate of ESA revisions which included removing habitat automatic protections and that determinations to add or remove a species from the lists of threatened or endangered species be based solely on the best available scientific and commercial information, and these will remain the only criteria on which listing determinations will be based. Notably, a group of five states that share Lesser Prairie Chicken range — New Mexico, Texas, Colorado, Kansas and Oklahoma — have already developed a voluntary conservation program with land owners, ranchers and oil and gas companies

through the Western Association of Fish and Wildlife Agencies to cooperatively and responsibly address declining species numbers while “balancing the needs of ranchers and oil and gas developers.”

[Read more.](#)

#### **Leasing; Royalties; Production Costs – West**

**Virginia.** On August 13, the U.S. District Court for the Northern District of West Virginia addressed a dispute brought by royalty owners over the deduction of post-production costs. In *Cather v. EQT Production Co.* (Case No. 1:17-CV-208), the lease at issue was silent on whether the lessee may deduct from royalty payments the costs of severance, costs of production, or costs of any kind, including severance taxes. The lease, however, did permit the lessee, at its option, to prepay any taxes “on or against the land or gas and/or oil in place under the . . . lands” and recoup those payments against any royalties due under the agreement. In finding for the royalty owners, the Court held that “Considering all of these cases, the rule of law with respect to deductions from royalty payments for either post-production expenses or severance taxes could not be more clear. Such deductions are impermissible absent express language permitting them. There is no dispute that the Cather Lease lacks the requisite language authorizing deductions.”

[Read more.](#)

#### **STATE – Legislative**

**Franchise Tax – California.** (Update to 9/23/19 Weekly Report) On October 2, [AB 308](#) was signed into law by Gov. Gavin Newsom (D). The Act extends the minimum franchise tax and annual tax exemptions for a corporation and a limited liability company that are small businesses solely owned by a deployed member of the United States Armed Forces for taxable years beginning on or after January 1, 2020, and before January 1, 2030. The Act takes effect immediately. [Read more.](#)

**Lease Operations – Pennsylvania.** (Update to 6/10/19 Weekly Report) On September 25, [SB 694](#), introduced by Sen. Gene Yaw (R), passed the Senate.

The bill allows an operator who has the right to drill on separate leases or units when the leases do not prohibit a traversing well, to drill a well horizontally under more than one unit or lease. The operator is required to allocate production from the well among the leases related to the acreage of the units. According to the sponsoring memo, “This legislation will provide for a process and accounting mechanism to allow well bores to cross multiple units provided the operator has the right to drill wells on the units via leases with all landowners/members of the units. The operator is then required to reasonably and proportionately allocate the production across the various members of the units. The legislation does not impair any current contracts or leases, does not allow for any production from unleased land, and would not apply in cases where this practice would be contractually prohibited.” The House version of the bill, [HB 247](#), sponsored by Rep. Donna Oberlander (R), has not had any activity since June. [Read more.](#)

#### **STATE – Regulatory**

**Railroad Commission Data Maps – Texas.** On October 1, the Railroad Commission of Texas (RRC) announced the launch of “its first-ever interactive data maps providing oil and gas production and the locations of abandoned wells plugged by the Commission statewide and by individual counties. The data is available 24-hours a day, seven days a week beginning with Calendar Year 2018. From January 2019 forward, the maps will be updated each month with year-to-date statistics.” According to Wei Wang, RRC’s Executive Director, “Instead of having to create spreadsheets and conduct other extensive analysis, users can now quickly determine which county produced the most oil or natural gas in a year.” Wang added that these “are the first of several interactive data visualization tools we are planning to release in the upcoming months to better inform the public about the state’s energy production and our agency’s regulation.” [Read more.](#)

**Green New Deal Opposition.** On August 27, the Interstate Oil & Gas Compact Commission (IOGCC)



adopted Resolution 19.081 at their annual conference in North Dakota. The resolution, sponsored by the state of Texas, “urges The President of the United States and the Congress to oppose the Green New Deal, or any substantively similar legislation, and support allowing states to continue to develop their own energy policies.” Texas was joined by 12 other IOGCC member states in approving the measure. The mission of the IOGCC is to assist “member states in establishing effective regulatory practices to conserve and efficiently recover oil and natural gas resources while protecting health, safety and the environment. The Commission serves as the collective voice of member governors on oil and gas issues and advocates states' rights to govern petroleum resources within their borders.” Members include governors, state oil and gas regulators, industry and the environmental community. [Read more.](#)

## STATE – Judicial

**Leasing; Primary Term – North Dakota.** On August 27, in *Pennington v. Continental Resources, Inc.* (Case No. 20190063), the North Dakota Supreme Court addressed whether a “regulation and delay” provision in applicable leases extended the term of the leases. Plaintiffs claimed that obtaining regulatory approval to drill did not extend the lease terms. Moreover, the plaintiffs argued that the delay in Continental's attempt to obtain the drilling permit for the 2,560-acre spacing unit was unreasonable because Continental could have obtained a permit for a smaller spacing unit during the primary term of the leases. “The district court concluded the delay in obtaining drilling permits for the 2,560-acre spacing unit was beyond Continental's control and was not because of Continental's fault or negligence. However, the court did not address whether Continental acted diligently and in good faith in pursuing a permit to drill the 2,560-acre spacing unit for more than three years.” Here, the Supreme Court found that “a genuine issue of material fact exists as to whether Continental acted diligently and in good faith” and remanded the case back to the trial court for further proceedings. [Read more.](#)

## Life Estates; Surface Owners – Oklahoma.

On September 17, the Oklahoma Supreme Court addressed whether a vested remainderman of his father's life estate in the surface rights of land is a surface owner under the Surface Damages Act (SDA). In the case, *Hobson v. Cimarex Energy Co.* (Case No. 2019 OK 58/116721) the plaintiff filed suit alleging that he is entitled to compensation for the surface damages caused by the drilling of wells and is entitled to be notified of negotiations to determine surface damages because he is a “surface owner” within the meaning of the SDA. The trial court found that a remainderman is not a “surface owner” under the SDA. The appellate court reversed that ruling interpreting “surface owner” to include vested remainder interests under the SDA. However, the state Supreme Court disagreed, holding that the plaintiff is not a surface owner. While the Court did indicate that the SDA's definition of a “surface owner” was “ambiguous” it nevertheless concluded that under the SDA, “a mineral lessee must negotiate surface damages with those who hold a current possessory interest in the property [and] a vested remainderman does not hold a current possessory interest until the life estate has come to its natural end.” [Read more.](#)

**Leasing; Abandonment – Pennsylvania.** On August 23, in *SLT Holdings, LLC v. Mitch-Well Energy, Inc.* (Case No. J-A12007-19), the Pennsylvania Superior Court addressed whether leases at issue had been abandoned by a lack of production. There was a prolonged period of inactivity concerning production at the relevant wells of approximately sixteen years. In affirming the trial court decision, the Court held that there was “no genuine issue of material fact, and we deem the trial court's finding of abandonment to be adequately supported by the record.” In finding abandonment had occurred, the Court also upheld the extinguishment of a right to enter the leased properties at issue. [Read more.](#)

**Leasing; Continuous Development – Texas.** On August 16, in *HJSA No. 3, Ltd. v. Sundown Energy LP* (Case No. 08-18-00113-CV), the Texas Court of Appeals, Eighth District (El Paso), addressed a

dispute over a continuous development provision in a lease, specifically the “interpretation of a continuous-drilling program in an oil and gas lease and whether the provision operated as a special limitation.” The lessee asserted that they had conducted such “drilling operations,” as defined by the lease, without more than a 120 days lapse of operations on the contested acreage for over sixteen years. The Court noted that the lease “language states the lease will terminate upon the happening of a stipulated event—the cessation of production in paying quantities. The language in Paragraph 7(b) also provides that the lease will terminate when lessee ceases to be engaged in a continuous drilling program. The ‘for so long as’ language fixes a natural limit to the lease, and thus unequivocally creates a special limitation because it does not serve to cut short the natural limit of the lease, as would a forfeiture.” The Court, in finding applicable lease terms unambiguous, held that “Sundown was required to engage in a continuous development program to maintain the lease under Paragraph 7(b), and that program required the spudding in of a continuous development well within 120 days of completion or abandonment of a prior well.” The case was remanded back to the trial court for further determinations regarding specific obligations under these terms. [Read more.](#)

**Mineral Rights – Utah.** On August 10, in *Estate of Price v. Hodkin* (Case No. 20170279-CA), the Utah Court of Appeals addressed an action to quiet title in a property’s mineral rights whereby the plaintiff challenged a deed that had been recorded 47 years earlier. In reversing the lower court, the Court of Appeals held that the plaintiff, and her predecessors, unreasonably delayed in bringing the suit, had constructive knowledge of the cause of action, and their lack of due diligence likely prejudiced the defendants in the quiet title action. Thus, the case was remanded back to the trial court for further determinations as to which parties had a legal interest regarding a complex chain of title to mineral rights. [Read more.](#)

## **INDUSTRY NEWS FLASH**

► **Worldwide energy use to rise nearly 50% by 2050.** According to a September 24 report from the U.S. Energy Information Administration (EIA), world energy consumption is expected to rise nearly 50% from 2018 levels by 2050, driven by countries where strong economic growth is driving demand, particularly in Asia. The EIA also sees transportation energy consumption growing nearly 40% and global natural gas consumption growing by more than 40% in the same period. [Read more.](#)

## **LEGISLATIVE SESSION OVERVIEW**

**Session Notes:** Massachusetts, Michigan, New Jersey, North Carolina, Ohio Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania and Wisconsin are in regular session. The District of Columbia Council, Puerto Rico and the United States Congress are also in regular session. New Hampshire and New York are in recess subject to the call of the chair.

After months of negotiation gridlock, **North Carolina’s** House Republicans voted to override Democratic Gov. Roy Cooper’s budget veto on September 11 while many Democratic lawmakers were absent, reports [The News and Observer](#). The Senate calendar does not yet include a veto override; however, Senate President Phil Berger, R-Caswell, did state he will provide 24 hours’ notice to the minority leader before calling the vote, reports [The News and Observer](#). The Senate is scheduled to adjourn on October 31, whereas the House session adjournment date remains unknown.

**Signing Deadlines:** Alaska Republican Gov. Mike Dunleavy has 20 days from delivery, Sundays excepted, to act on legislation or it becomes law without signature. **California** Democratic Gov. Gavin Newsom has until October 13 to act on legislation or it becomes law without signature. **Delaware** Democratic Gov. John Carney has 10 days, Sundays excepted, to act on legislation or it becomes

law. Illinois Democratic Gov. J.B. Pritzker has 60 days from presentment to act on legislation or it becomes law without signature. Maine Democratic Gov. Janet Mills has three days after the convening of the next meeting of the legislature to act on legislation presented on or after June 8 or it becomes law without signature.

**Interim Committee Hearings:** The following states are currently holding interim committee hearings: [Alabama](#), [Alaska](#), [Arizona](#), [California Assembly](#) and [Senate](#), [Colorado](#), [Connecticut](#), [Delaware](#), [Florida House](#), [Georgia House](#) and [Senate](#), [Hawaii](#), [Idaho](#), [Illinois Senate](#), [Indiana](#), [Iowa](#), [Kansas](#), [Kentucky](#), [Louisiana](#), [Maine](#), [Maryland](#), [Mississippi House](#) and [Senate](#), [Missouri House](#) and [Senate](#), [Montana](#), [Nebraska](#), [Nevada](#), [New Hampshire House](#) and [Senate](#), [New Mexico](#), [New York Assembly](#) and [Senate](#), [North Dakota](#), [Oklahoma House](#) and [Senate](#), [Rhode Island](#), [South Carolina House](#) and [Senate](#), [South Dakota](#), [Tennessee](#), [Texas House](#), [Utah](#), [Virginia](#), [Washington](#), [West Virginia](#) and [Wyoming](#).

**Bill Pre-Files:** The following states are currently posting bill drafts, pre-files and interim studies: [Alabama House](#), [Arkansas](#), [Florida House](#) and [Senate](#), [Iowa](#), [Kentucky](#), [Nebraska](#), [New Hampshire](#), [Oklahoma House](#) and [Senate](#), [Oregon](#), [Tennessee](#), [Utah](#) and [West Virginia](#). ■

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