

WEEKLY HIGHLIGHTS AT-A-GLANCE**FEDERAL – Regulatory**

- **BLM Lease Sale – Utah.** On November 16, the BLM announced that it proposes to offer 156 parcels, totaling nearly 217,519 acres, in lands managed by the Canyon Country, Green River, and West Desert Districts at its March 26, 2019 quarterly oil and gas lease sale. The sale also includes 116 parcels removed from the December 2018 quarterly sale in order to comply with a prior federal court preliminary injunction against the BLM in [Western Watersheds Project v. Zinke](#) (Case No. 1:18-cv-00187-REB) that required lengthier comment periods on environmental compliance documents associated with parcels that intersect Priority or General Habitat Management Areas for Greater Sage-Grouse. The lease sale notice initiates a public comment period on associated environmental documents that ends on December 17, 2018. [Read more.](#)
- **EPA Administrator Nominee.** On November 16, President Trump announced he will nominate the current acting Environmental Protection Agency (EPA) Chief, Andrew Wheeler, as the agency's administrator. Wheeler has been the EPA's acting administrator since July 5, 2018 when Trump named him to the position after then-EPA Administrator Scott Pruitt resigned. At the time, Wheeler was the EPA Deputy Administrator. Wheeler previously served as a special assistant in the EPA's Pollution Prevention and Toxics office during the George H.W. Bush presidency. As an attorney, Wheeler was co-chair of the Energy and Natural Resources team at the Faegre Baker Daniels law firm, which he joined as counsel in 2009. [Read more.](#)
- **Federal Lands Oil and Gas Production Report.** Despite former president Obama's eye-popping [statement last week](#) where he took credit for the current oil and gas production boom, the facts predictably indicate otherwise. According to a new report released by the Congressional Research Service, [U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas](#) (October 23, 2018), the share of oil and natural gas production on federal lands has dropped significantly from their highs in fiscal year 2009. The share of crude oil on federal lands dropped to 23.7 percent in fiscal year 2017 from 35.7 percent in fiscal year 2009. The share of natural gas production on federal lands dropped to 13 percent in fiscal year 2017 from 25.2 percent in fiscal year 2009. Production on federal lands has not been able to fully recover from Obama Administration policies that resulted in a moratorium on offshore energy permitting and long delays in approving drilling permits. In contrast, oil production on private and state lands in fiscal year 2017 was 108-percent higher than in fiscal year 2009 and natural gas production on private and state lands in fiscal year 2017 was

48-percent higher than in fiscal year 2009. Production of oil and natural gas on non-federal lands is skyrocketing as hydraulic fracturing and horizontal drilling have increased production dramatically. [Read more.](#)

FEDERAL – Judicial

- **Endangered Species – U.S. Supreme Court.** On November 27, the U.S. Supreme Court struck a blow to environmentalists in an endangered species case dating back to 2014 that may have positive effects, not just on the timber and paper company litigant, but on other industries, such as oil and gas, when such development intersects with Endangered Species Act designations. In [Weyerhaeuser Company v. U.S. Fish and Wildlife Service](#) (Case No. 14-31008), the Supreme Court held that an area is eligible for designation as “critical habitat” under the Endangered Species Act of 1973 only if it is actually habitat for the listed species and a decision by the secretary of the U.S. Department of the Interior not to exclude an area from critical habitat under federal law is subject to judicial review. In other words, development of land will only be limited when that land is existing habitat for the listed species, not because the area was once listed as “habitable” by a species. The U.S. Fish and Wildlife Service had argued that “habitat remains ‘habitat’ even if it would require human intervention (such as restoration) to become optimal for a species’ long-term conservation.” The Supreme Court disagreed and also held that a federal agency’s decisions in this area are subject to judicial review. In vacating and remanding the case, the Supreme Court directed that the appellate court must first “assess the Service’s administrative findings” regarding the term “habitat” and secondarily, “The Court of Appeals should consider in the first instance the question whether the Service’s assessment of the costs and benefits of designation and resulting decision not to exclude Unit 1 was arbitrary, capricious, or an abuse of discretion.” [Read more.](#)
- **Deeds; Minerals Definition – 9th Circuit Court of Appeals (Montana).** On November 6, the U.S. Court of Appeals for the Ninth Circuit, on appeal from the U.S. District Court for the District of Montana, ruled on a case involving a surface deed conveyance with a reservation of minerals and dinosaur fossils found on the estate. In *Murray v. Bej Minerals, LLC* (Case No. 16-35506), the appellate court held that dinosaur fossils are deemed “minerals” under Montana law and are thus part of the mineral estate rather than the surface estate. [Read more.](#)

STATE – Regulatory

- **Energy & Environment – Oklahoma.** Last Wednesday, Oklahoma Governor-elect Kevin Stitt (R) tapped a close ally of former U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt to be the state’s top environmental official. Ken Wagner, who will become the [Oklahoma Secretary of Energy & Environment](#) under the new administration, is currently senior adviser for regional and state affairs to

acting EPA chief Andrew Wheeler. “Wagner is well respected among environment leaders, energy industry experts, and state regulators in neighboring states,” said Stitt. “He will play a critical role in advising my administration on policy that encourages robust and responsible development of our natural resources, ensures clean air and clear water for all Oklahomans, and makes our state an example for others to follow.” [Read more.](#)

STATE – Judicial

- **Bonus Payments; Leasing – Ohio.** On November 5, in *Thompson v. Custer* (Case No. 2018 Ohio 4476), the Ohio Court of Appeals, 11th District, ruled on a bonus payments matter and the application of the amended 2006 Dormant Minerals Act. In the case, the court held that neither the one-half owner of the mineral estate nor the lessee owed half of the bonus payment to the other one-half owner of the oil and gas, concluding that the payment of bonus to the one-half owner did not constitute a conversion or unjust enrichment. [Read more.](#)
- **Rule of Capture – Pennsylvania.** (*Update to 7/9/18 Weekly Report*) On November 20, the Pennsylvania Supreme Court agreed to review the appeal in [Briggs v. Southwestern Energy Production Company](#) (Case No. 2018 PA Super 79). Per the Supreme Court’s Order ([No. 443 MAL 2018](#); [63 MAP 2018](#)), the issue on appeal is “Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and beneath the driller’s own property and the hydraulic fracturing fluids are injected solely on or beneath the driller’s own property?” On June 12, 2018, the Pennsylvania Superior (appellate) Court refused to reconsider its ruling after Southwestern Energy petitioned the Court to rehear the case with more judges after a two-judge panel ruled on April 2, 2018 “that the rule of capture did not bar a claim for trespass under circumstances where an operator’s hydraulic fracturing activity resulted in the drainage of gas from an adjoining tract that was not a part of the operator’s lease.” In that case, the Pennsylvania Superior Court recognized claims for subsurface trespass from hydraulic fracturing and rejected the argument that the Rule of Capture precluded such claims as a matter of law. The Court, in drawing a distinction between hydraulic fracturing and conventional drilling, held that the [long-established “Rule of Capture” principle](#) did not apply to prohibit a trespass claim by an adjoining unleased landowner against a producer when that producer utilizes hydraulic fracturing for a horizontal well. According to the Marcellus Shale Coalition, the “panel’s decision disrupts longstanding rules of law on which property owners, production companies, and many other stakeholders in Pennsylvania have relied to conduct their affairs.” AAPL will continue to monitor and report on case developments for possible amicus engagement and related updates. [Read more.](#) For a deeper analysis and insight into the case see the Pennsylvania Bar Association’s Spring 2018 Shale Energy Law Committee report [here.](#)

- Mineral Rights; Notice; Statute of Limitations – Texas.** On November 16, the Texas Supreme Court delivered an opinion in a case that “concerns whether the statute of limitations bars a claim for breach of a recorded right of first refusal to purchase a mineral interest.” In the case, *Archer Trust No. Three v. Tregellas* (Case No. 17-0093), the grantors of the right conveyed the mineral interest to a third party without notifying the holders. More than four years later, the right holders learned of the conveyance and sued the third party for breach. The court of appeals reversed a trial court judgment in favor of the holders, ruling that the statute of limitations barred the claim. “Specifically, the court of appeals held that the right holders’ cause of action accrued when the grantors conveyed the property without notice and that the discovery rule does not apply to defer accrual.” The Texas Supreme Court agreed with the appellate court’s first conclusion but it disagreed with its second. In so doing, the Supreme Court held that the holders of a right of first refusal on mineral rights could not have discovered a sale had taken place without being notified, thus allowing the holders’ suit to be filed after the four-year limitations window had passed. [Read more.](#)
- Mineral Rights; Leasing; Assignments – Texas.** On November 15, in *M & M Resources, Inc. and Energy Land Resources v. DSTJ, LLP, DSTJ Corporation and Milestone Operating, Inc.* (Case No. 09-18-00083-CV), the Court of Appeals for the Ninth District of Texas (Beaumont) decided a case involving the assignment of mineral rights. The court held that whereby the parties are seeking “determination of superior title to the mineral estates at issue” since that dispute over an assignment of mineral interests involves “ownership of the possessory interest in the mineral estates at issue, we conclude the proper and mandatory vehicle for resolving those claims is a trespass to try title action.” [Read more.](#)

INDUSTRY NEWS FLASH:

◆ **Energy companies form Permian Strategic Partnership.** As reported in the *Midland Reporter-Telegram*, a group of 17 oil and gas companies have formed the Permian Strategic Partnership, pledging more than \$100 million to support private investment in the Permian Basin in Texas and New Mexico to support the boom in production. The partnership said local organizations and oil company employees have singled out roads, schools, health care, affordable housing and the training of workers as areas for investment to support the oil and gas industry. According to the group, they will act as “an industry resource that will partner with local leaders and stakeholders to strengthen communities across West Texas and southeast New Mexico for decades to come.” [Read more.](#)

State-by-State Legislative Session Overview

Puerto Rico and the **United States** Congress are also in regular session. **Massachusetts**, **New York** and **Rhode Island** are in recess to the call of the chair. **Pennsylvania** adjourned on November 14.

The following states are expected to convene for the 2019 legislative session on the dates provided: **California** (December 3) and **Maine** (December 5).

North Carolina convened a special session on November 27 to vote on implementation legislation for voter identification requirements passed by constituents on November 6 during the midterm elections. The special session is currently in recess until December 3, according to the [North Carolina Legislative website](#).

Utah is scheduled to convene a special session on December 3 to cast a critical vote on the medical cannabis compromise bill, reports [Fox 13 Salt Lake City](#).

Illinois Republican Gov. Bruce Rauner has 60 calendar days while the legislature is in session to act on legislation or it becomes law without signature. **Maine** Republican Gov. Paul LePage has three days after the next meeting of the legislature to act on special session legislation or it becomes law without signature. **Missouri** Republican Gov. Mike Parson has 45 days from presentment to act on legislation or it becomes law without signature. **New York** Democratic Gov. Andrew Cuomo has 10 days from presentment, Sundays excepted, to sign or veto legislation or it becomes law without signature. **North Carolina** Democratic Gov. Roy Cooper has 10 days from presentment to act on special session legislation or it becomes law without signature. **Rhode Island** Democratic Gov. Gina Raimondo has six days from presentment, Sundays excepted, to act on legislation or it becomes law without signature.

The following states are currently holding 2019 interim committee hearings: [Alabama](#), [Alaska](#), [Arizona](#), [Arkansas](#), [California Assembly](#) and [Senate](#), [Colorado](#), [Connecticut](#), [Florida House](#), [Hawaii](#), [Idaho](#), [Illinois Senate](#), [Indiana](#), [Iowa](#), [Kansas](#), [Kentucky](#), [Maine](#), [Maryland](#), [Minnesota](#), [Mississippi Senate](#), [Missouri House](#) and [Senate](#), [Montana](#), [Nevada](#), [New Hampshire House](#) and [Senate](#), [New Mexico](#), [New York Assembly](#) and [Senate](#), [North Carolina](#), [North Dakota](#), [Oklahoma House](#), [Oregon](#), [Rhode Island](#), [South Carolina](#), [South Dakota](#), [Tennessee](#), [Texas House](#) and [Senate](#), [Utah](#), [Vermont](#), [Virginia](#), [Washington](#), [West Virginia](#), [Wisconsin](#) and [Wyoming](#).

The following states are currently posting 2019 bill drafts, profiles and interim studies: [Arkansas](#), [Florida Senate](#), [Georgia](#), [Iowa](#), [Kansas Senate](#), [Kentucky](#), [Montana](#), [Nevada](#), [New Hampshire](#), [North Dakota](#), [Oklahoma House](#) and [Senate](#), [Tennessee](#), [Texas](#), [Utah](#) and [Virginia](#).

General Oil and Gas

General

Ohio [HB 723](#) (Rep. Glenn Holmes (D)) was heard in the House Energy and Natural Resources Committee on November 27; the committee heard testimony from the bill's sponsor but did not vote on the bill during the hearing. The bill would prohibit the Chief of the Division of Oil and Gas Resources Management from issuing more than 23 injection well permits in any one county. If the chief has already issued more than 23 permits in a county, the bill would then prohibit the chief from issuing any further permits in that county. It would also require the chief to notify relevant state legislators within three business days of a new well permit request. The bill would take effect 90 days after becoming law.

Hydraulic Fracturing

General

Ohio [HB 562](#) (Rep. David Leland (D)) was heard in the House Energy and Natural Resources Committee on November 27; the committee heard testimony from the bill's sponsor but did not vote on the bill during the hearing. The bill would prohibit the Chief of the Division of Oil and Gas Resources Management from issuing a permit to drill a new horizontal well when the well pad would be located in a state park, state wildlife area, state forest, nature preserve or any county, township or local park. The bill would take effect 90 days after becoming law.

Ohio [HB 578](#) (Rep. Glenn Holmes (D)) was heard in the House Energy and Natural Resources Committee on November 27; the committee heard testimony from the bill's sponsor but did not vote on the bill during the hearing. The bill would prohibit the Chief of the Division of Oil and Gas Resources Management from issuing a new injection well permit if:

- The surface location of the proposed injection well is located within 300 feet of an occupied dwelling. A permit would still be able to be issued if the owner provides written consent and the chief approves the written consent. The chief would not be able to approve the consent if the occupied dwelling is located within 250 feet.
- The surface location is within 300 feet of an occupied private dwelling or any public building.
- The surface location is within 300 feet of any body of water.
- The surface location is within 300 feet of any railroad track or public street.

The bill would also specify that 37.5 percent of the existing per barrel injection well fee be paid directly to the municipal corporation or township. The bill would take effect 90 days after becoming law.

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