

# GOVERNMENTAL AFFAIRS WEEKLY REPORT

## Weekly Highlights At-A-Glance



**Note:** Due to NAPE Summit next week, the next report will be published on February 10. To attend NAPE Summit in Houston held February 3-7: [click here](#).

### FEDERAL – Legislative

**End Speculative Oil and Gas Leasing Act of 2020 – S. 3202.** On January 16, [S. 3202](#), known as the *End Speculative Oil and Gas Leasing Act of 2020*, was introduced by Sen. Catherine Cortez Masto (D-NV) and referred to the Senate Committee on Energy and Natural Resources. The bill would “prohibit oil and gas leasing on public lands that are determined by the Bureau of Land Management (BLM) to have low or no potential for development. The bill would thereby reprioritize BLM’s administration of these lands for other purposes, like wildlife habitat preservation, outdoor recreation and grazing.” [Read more](#).

**Transparency in Energy Production Act of 2020 – H.R. 5636.** On January 16, H.R. 5636, known as the *Transparency in Energy Production Act of 2020*, was introduced by Rep. Alan Lowenthal (D-CA) and referred to the House Committee on Natural Resources. The bill would impose certain disclosure and reporting requirements by “any entity seeking a lease” for fossil fuel operations on federal land. [Read more](#).

**Listing Reform Act – H.R. 5585.** On January 13, H.R. 5585, known as the *Listing Reform Act*, was introduced by Rep. Pete Olson (R-TX) and referred to the House Committee on Natural Resources. The bill would amend the Endangered Species Act to consider the economic cost of listing a species as endangered or threatened. [Read more](#).

### FEDERAL – Regulatory

**BLM Information Collection.** On January 23, the BLM published a notice for comment regarding land use applications and permits, *Agency Information Collection Activities; Land Use Application and Permit (85 Fed. Reg. 3943)*. The BLM is interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the BLM; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the BLM enhance the quality, utility, and clarity of the information to be collected; and (5) how might the BLM minimize the burden of this collection on the respondents, including through the use of information technology. The public comment period is open through March 23, 2020. [Read more](#).

### FEDERAL – Judicial

**Climate Change Lawsuit – California.** (*Update to 11/19/18 Weekly Report*) On January 17, in [Juliana v. United States](#) (Case No. 6:15-cv-01517), a federal appeals court dismissed the years-long high-profile climate change lawsuit filed by 21 young people who argued that the U.S. government violated their constitutional rights by failing to do enough to reduce climate change despite long-established science showing the dangers of a warming planet. In the Ninth Circuit Court of Appeals three-judge panel opinion written by Obama appointees, the historically liberally-leaning court said it was beyond the court’s authority to “order, design, supervise, or implement” the sweeping changes that the young people were seeking in their potentially landmark lawsuit, and in short, the litigants did not have standing to sue. The Court stated that, instead, the Constitution gives those powers to Congress, the

president and voters, the court concluded. “The plaintiffs’ impressive case for redress must be presented to the political branches of government,” Judge Andrew Hurwitz (D) wrote for the majority. A lawyer for the children said the group intended to appeal the decision to a panel of the full circuit court but according to the Ninth Circuit itself, “as a practical matter, these avenues of relief are unlikely to be fruitful.” [Read more.](#)

**BLM Leasing – California.** On January 17, California sued the Trump administration to halt a BLM plan to open up more than one million acres of federal land in California to oil and gas drilling. In [State of California v. Stout](#) (Case No. 2:20-cv-00504), filed in the U.S. District Court for the Central District of California, Attorney General Xavier Becerra (D) is asking a judge to set aside a December 2019 BLM decision that the state claims would endanger public health and potentially damage water resources, infrastructure, and protected habitats. The lawsuit claims the government violated the federal law by not fully evaluating the impacts on communities and the environment. Specifically, the state claims a final environmental review relied on incorrect assumptions about the frequency of hydraulic fracturing, did not provide adequate public comment opportunities, and ignored the danger to millions of people living near oil and gas wells, according to the news release. A BLM spokeswoman in California defended the agency’s hydraulic fracturing review as having incorporated the best available information, including the state’s own analysis. California Asm. Vince Fong, (R-Bakersfield) has been a vocal critic of state efforts to reign in natural resource development. In a statement regarding the lawsuit, the Assemblyman said, “Again, the Governor continues to take California in the wrong direction. Everyday Californians continue to be harmed by the lack of sensible and commonsense energy policies in Sacramento. It is unfortunate that there seems to be more focus on making political statements instead of helping Californians get affordable and reliable energy,” he said. The government has yet to respond to the lawsuit. [Read more.](#)

**Oil and Gas Proceeds – Oklahoma.** On December 10, 2019, the U.S. District Court for the Eastern District of Oklahoma addressed a dispute regarding withheld interest on late proceeds payments to well interest owners. The Court, in *Cline v. Sunoco, Inc.* (Case No. 6:17-cv-00313-JAG), noted that the Oklahoma Production Revenue Standards Act (PRSA) “dictates when Sunoco must pay the proceeds, and it requires Sunoco to pay statutory interest to interest owners when it pays the proceeds late.” Here, the Court held that the “PRSA requires Sunoco to pay interest on late payments at the same time it makes those payments, and Sunoco cannot require an interest owner to make a demand before paying that interest.” [Read more.](#)

## **STATE – Legislative**

**Oil and Gas Production Tax – Alaska.** On January 21, SB 129 was introduced by Sen. Bill Wielechowski (D). The bill would amend current law regarding certain tax credits, payments of the tax, lease expenditures and adjustments, and making public certain information related to the Oil and Gas Production Tax. [Read more.](#)

**Notarial Acts – Arizona.** On January 23, SB 1226 was introduced by Sen. Kate Brophy McGee (R). The bill would make numerous changes to existing notarial law, including electronic notarial acts, authority to perform notarial acts, and certain requirements, among other provisions. [Read more.](#)

**Hydraulic Fracturing – Arizona.** On January 17, HB 2574 was pre-filed by Rep. Myron Tsosie (D). The bill would prohibit the use of hydraulic fracturing in the state. [Read more.](#)

**Setbacks – California.** (Update to 6/10/19 Weekly Report) [AB 345](#), a well setback bill, has been revived after dying in committee last session. The bill, sponsored by Asm. Al Muratsuchi (D), failed to receive an Assembly vote before the May 31, 2019 session deadline but has since been amended for reconsideration. On January 23, the Assembly Appropriations Committee passed an amended

version of the bill. The amended version now contains “environmental justice” language and, if passed, sets July 1, 2022 as the date for state regulators to adopt regulations protecting public health and safety near oil and gas extraction facilities. The setback language has been amended to read: “The regulations shall include safety requirements and the establishment of a minimum setback distance between oil and gas activities and sensitive receptors such as schools, childcare facilities, playgrounds, residences, hospitals, and health clinics based on health, scientific, and other data. The department shall consider a setback distance of 2,500 feet at schools, playgrounds, and public facilities where children are present.” The amended version relaxes the “mandatory” setback requirements of the original bill to instead allow for discretion by state regulators. At present, the state has a patchwork of local/state requirements for setbacks ranging from 300 to 1,500 feet depending on use location. [Read more.](#)

**Independent Contractors – California.** On January 15, AB 1928 was introduced by Asm. Kevin Kiley (R). The bill seeks to overturn [AB 5](#) passed last year and covered extensively by AAPL and instead requires a determination of whether a person is an employee or an independent contractor to be based on the specific multifactor test set forth in the 1989 California Supreme Court case, [S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations](#) (Case No. 48 Cal. 3d 342), which includes whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired, and other identified factors. [Read more.](#)

**Independent Contractors – California.** On January 14, AB 1925 was introduced by Asm. Jay Obernolte (R). This bill would add small businesses to those entities exempted from the three-part “ABC” test used to determine if a worker is an employee or independent contractor. [Read more.](#)

**Employee Misclassification – New Jersey.** (*Update to 1/20/20 Weekly Report*) On January 20, A5843 was enacted into law. The Act did not require the

governor’s signature under transmittal rules covering prior session bills. The Act, sponsored by Asm. Shanique Speight (D), requires employers to post a notice for their employees regarding employee misclassification. The bill also requires the Department of Labor and Workforce Development to maintain a webpage that contains information regarding employee misclassification. [Read more.](#)

**Employee Misclassification – New Jersey.** On January 14, A1439 was introduced by Asm. Betty Lou DeCrose (R). The bill would revise the test used to determine whether a worker is an employee or an independent contractor. This bill eliminates the B and C factors of the [ABC employment status test](#), thereby limiting the test to factor A (Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service). According to the bill sponsor, “[b]y limiting the factors used in the employment status test to the control test, it will be easier for employers to comply with regulations and categorize workers for purposes of State labor laws.” [Read more.](#)

**Employee Misclassification – New Jersey.** On January 14, S863 was introduced by Sen. Stephen Sweeney (D). The bill “provides that, for the purposes of all State employment laws, individuals who are suffered or permitted to work are employees, not independent contractors” and retains and modifies the [ABC employment status test](#) to redefine the C part of that test. [Read more.](#)

**Subdivided Parcels – New Mexico.** On January 22, HB 28 was introduced by Rep. Cathrynn Brown (R). The bill creates an exception to the existing [New Mexico Subdivision Act](#) for parcels divided for oil and gas operations. [Read more.](#)

**Well Plugging – Oklahoma.** On January 15, Sen. Lonnie Paxton (R) introduced SB 1439. The bill would amend existing law related to well plugging, closure of surface impoundments, and removal of trash and equipment to double the bond requirements to \$50,000, and if an operator operates more than

four wells, that amount is doubled from its current amount to \$200,000. [Read more.](#)

**Hydraulic Fracturing – Virginia.** On January 21, SB 106 passed the Senate Agriculture, Conservation and Natural Resources Committee. The bill, introduced by Sen. Scott Surovell (D), states that “No person shall conduct any hydraulic fracturing in any well that has been drilled through any portion of a groundwater management area declared by regulation pursuant to the provisions of the Ground Water Management Act of 1992 (§ [62.1-254](#) et seq.). For purposes of this section, ‘hydraulic fracturing’ means the treatment of a well by the application of hydraulic fracturing fluid, including a base fluid and any additive, under pressure for the express purpose of initiating or propagating fractures in a target geologic formation to enhance production of oil or natural gas.” [Read more.](#)

**Partition of Heirs Property – Virginia.** On January 16, HB 1605 was introduced by Del. Patrick Hope (D). The bill incorporates major provisions of the Uniform Partition of Heirs Property Act and provides that in partition actions the court shall order an appraisal to determine fair market value of the property, unless the parties have agreed to the value of the property or to another valuation method. The bill also provides factors to be considered by the court when making an allotment of the property when there is a dispute among the parties. The bill further provides that if the court orders a sale of property in a partition action, the sale shall be conducted on the open market, unless the court finds that a sale by sealed bids or at auction would be more economically advantageous to the parties as a group and outlines the procedure for such an open-market sale. [Read more.](#)

**Employee Misclassification – Virginia.** On January 22, [SB 744](#) was reported favorably out of the Senate Finance and Appropriations Committee. The bill, introduced by Sen. Jeremy McPike (D), provides “that, if an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party that pays that remuneration unless such individual or his employer

demonstrates to the satisfaction of the Department of Taxation (‘the Department’) that such individual is an independent contractor.” [Read more.](#)

**Employee Misclassification – Virginia.** On January 8, HB 1407 was introduced by Del. Jeion Ward (D). The bill would prohibit an employer from classifying an individual as an independent contractor if he is an employee. An individual shall be considered an employee of the party that pays the remuneration for purposes of applicable law “unless and until it is shown to the satisfaction of the Department of Taxation that such individual is an independent contractor under Internal Revenue Service guidelines.” [Read more.](#)

**Leasing – West Virginia.** On January 21, SB 554 was introduced by Sen. Randy Smith (R). “The purpose of this bill is to provide a requirement for a lessee to execute and deliver to the lessor, within a specified time and without cost, a recordable release for terminated, expired, or cancelled oil or natural gas leases; provide for a procedure by which a lessor may serve notice to a lessee, if a lessee fails to timely provide the release; require a lessee to timely notify the lessor in writing of a dispute; provide for a recordable affidavit of termination, expiration, or cancellation with specified contents; provide that with proper notification in the absence of a dispute, a recorded affidavit creates a rebuttable presumption of termination and cancellation for the oil or natural gas lease.” [Read more.](#)

**Expedited Permitting – West Virginia.** (*Update to 1/20/20 Weekly Report*) On January 20, HB 4091 passed the House and was transmitted to the Senate. The purpose of the bill, introduced by Del. William Anderson (R), “is to allow for expedited oil and gas well permitting and expedited oil and gas well permit modifications upon the payment of applicable expedited fees, the designation of the proceeds of such expedited fees, and the daily pro rata refund of the expedited fees if the permit is not approved between the 45th and 60th days after the submission of a permit application, and daily pro rata refund of one-half of the modification fees between



the 10th and 20th days after the submission of a permit modification application; all generally related to horizontal well oil and gas permitting." [Read more.](#)

**Spacing Requirements – West Virginia.** On January 20, SB 535 was introduced by Sen. Randy Smith (R). "The purpose of this bill is to eliminate the minimum spacing requirements for the drilling of deep wells which will authorize oil and gas operators to efficiently utilize changing drilling practices and techniques developed in recent years, and encourage cost-effective and efficient exploration and production of oil and gas using evidence based best practices." [Read more.](#)

**Natural Gas Production Tax Credit – West Virginia.** On January 16, SB 520 was introduced by Sen. Chandler Swope (R). The bill would create the Natural Gas Liquids Economic Development Act, noting that the "Legislature declares that facilitating the development of business activity directly and indirectly related to development, transportation, storage and use of the natural gas liquids serves the public interest of the citizens of this state by promoting economic development and improving economic opportunities for the citizens of this state." In efforts to encourage development, transportation and the use of natural gas, the bill would provide for certain tax credits for the production of natural gas, among other natural gas related tax credits. [Read more.](#)

**Oil and Gas Conservation Commission – West Virginia.** On January 15, SB 488 was introduced by Sen. Mark Maynard (R). "The purpose of this bill is to eliminate the requirements that one of the appointed members of the oil and gas conservation commission be a registered professional engineer and have a degree in geology or petroleum engineering from an accredited university or college." [Read more.](#)

## **STATE – Regulatory**

**Railroad Commission – Texas.** On January 22, the Railroad Commission of Texas (RRC) announced the

opening of a new oil and gas field office in Lubbock. "The new Lubbock office will enhance our regulatory capability in the region. It is a key strategic decision to address both operational and recruiting challenges we have experienced in our Western regional offices in recent years," said RRC's Executive Director Wei Wang. "The opening of our Lubbock office enables RRC staff to keep pace with the energy industry's growth in West Texas and the Permian Basin, and ultimately to ensure Texas oil and gas is produced safely and in compliance with our rules." [Read more.](#)

## **STATE – Judicial**

**Rule of Capture; Trespass – Pennsylvania.** (*Update to 9/23/19 Weekly Report*) On January 22, the Pennsylvania Supreme Court finally ruled in the long-running, pivotal case, [Briggs v. Southwestern Energy Production Co.](#) (Case No. 63 MAP 2018). Chief Justice Saylor delivered a victory for all producers with the Court overturning a lower court ruling that could have opened a floodgate of trespass claims about hydraulic fracturing in the state's gas-rich Marcellus Shale. The Pennsylvania Supreme Court held that the "rule of capture" applies to hydraulic fracturing in the state, meaning oil and gas companies can't be held liable for underground trespass when their production technique drains hydrocarbons from adjacent land. In this case, a Pennsylvania family claimed a producer trespassed on their property by extracting gas from an 11-acre parcel of family-owned land by drilling and hydraulically fracturing a well sited on a neighboring property. The issue before the Supreme Court was whether the rule of capture applied 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. At trial, the Superior Court drew a distinction between hydraulic fracturing and conventional drilling, holding the rule 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. The appellate Superior Court overturned that ruling, and the Pennsylvania Supreme Court affirmed in favor of the producer. Here, the Court held “that the rule of capture remains extant in Pennsylvania, and developers who use hydraulic fracturing may rely on pressure differentials to drain oil and gas from under another’s property, at least in the absence of a physical invasion.” Further, the Court concluded that “insofar as the panel’s decision may be construed to suggest that a natural-versus-artificially-induced-flow litmus should be employed to determine whether the rule of capture applies in a given situation, that standard rests on a false distinction and is disapproved.” [Read more.](#)

**Severed Oil and Gas Interests – Ohio.** On January 21, the Ohio Supreme Court [granted review](#) of an appeal from the Court of Appeals, Seventh District, in [West v. Bode](#) (Case No. 18-MO-0017). The issue accepted for review is whether the Ohio Dormant Mineral Act, being the specific statute, supersedes and controls over the Ohio Marketable Title Act, being the general statute, as to the termination of severed oil and gas interests. According to law firm, Vorys, Sater, Seymour and Pease LLP, “The Court’s decision should provide some clarity to operators in Ohio regarding the ownership of severed oil and gas interests.” We will keep AAPL members updated once oral argument and other case related information is provided by the court. [Read more.](#)

**Leasing – Texas.** On December 20, 2019, in *Creative Oil & Gas v. Lona Hills Ranch, LLC* (Case No. 18-0656), the Texas Supreme Court addressed the then operable Texas Citizens Participation Act (TCPA) in a dispute over an oil and gas lease and the application of the TCPA as it governs free speech rights and the protections afforded it involving matters of public concern. In this action, some of the lessee’s and the operator’s counterclaims alleged they were damaged when the Ranch communicated to third parties that the lease expired. The Court held “the Ranch’s communications to third parties about an oil and gas lease, on which some of the counterclaims are

based, did not involve matters of public concern under the TCPA.” The Court, in reversing the appellate decision, noted that “the alleged communications were made to two private parties concerning modest production at a single well. These communications, with a limited business audience concerning a private contract dispute, do not relate to a matter of public concern under the TCPA.” The Court also affirmed a portion of the appellate decision disposing of a counterclaim regarding the alleged breach of the lease’s notice-and-cure provision that fell within the TCPA because it was in response to the Ranch’s exercise of the right to petition.” [Read more.](#)

**Royalties; Deeds – Texas.** On January 8, in *WTX Fund, LLC v. Brown* (Case No. 08-17-00104-CV), the Texas Court of Appeals, Eighth District (El Paso), was “asked to interpret a 1951 mineral deed to determine whether grantors conveyed their entire mineral interest without reservation, or instead, reserved from the conveyance at least one incident of mineral ownership—the royalty interest—either in whole or in fractional share.” The Court held “we construe the 1951 deed as expressly excluding grantors’ royalty right in its entirety from the conveyance” and specifically, “the 1951 deed did not convey the royalty right, but instead, reserved grantors’ floating non-participatory royalty interest.” In sum, the Court found “the deed unambiguously reserved the royalty interest” and reversed the trial court’s judgment, rendering partial judgment in favor of WTX. [Read more.](#)

**Deeds; Strip-and-Gore Doctrine; Leasing – Texas.** On December 19, 2019, the Texas Court of Appeals, Second District (Fort Worth), addressed a case involving title and disputed ownership of mineral rights in light of the “strip-and-gore” doctrine. Here, in *Crawford v. XTO Energy, Inc.* (Case No. 02-18-00217-CV), the Court agreed with the trial court in favor of XTO Energy that the strip-and-gore presumption applied as a matter of law to the deed and construction of its oil and gas reservation, and that Crawford’s predecessor did not retain her interest in the oil and gas when conveying the

surrounding property at issue in 1984 such that XTO Energy was not obligated to pay royalties on the disputed Crawford tract. [Read more.](#)

## **INDUSTRY NEWS FLASH**

### **► Phillips 66 CEO named new API chairman.**

Last Wednesday, the American Petroleum Institute (API) named Phillips 66 CEO Greg Garland the new chairman of the trade group. He succeeds ExxonMobil CEO Darren Woods, who will remain on the Washington-based API's executive committee. "API is extremely fortunate to have Greg's expertise as the natural gas and oil industry continues to address the challenge of meeting growing energy demand while driving environmental progress," said API CEO Mike Sommers. [Read more.](#)

## **LEGISLATIVE SESSION OVERVIEW**

**Session Notes:** Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin are in regular session. The District of Columbia Council, Puerto Rico and U.S. Congress are also in regular session.

**North Carolina** convened on January 14 and adjourned later that day; with the Senate failing to override Democratic Gov. Roy Cooper's veto of a teacher pay raise bill, reports [The News & Observer](#). The legislature is in recess until April 28.

**Wisconsin** Democratic Gov. Tony Evers used his State of the State address to announce a special session of the legislature to address the state's farm crisis, reports [WXOW](#). Planned for next week, Governor Evers states that the special session will be

part of a three-pronged plan on rural and agriculture revitalization.

The following states are expected to convene their 2020 sessions on the dates provided: **Utah** (January 27), **Oklahoma** and **Oregon** (February 3), **Alabama** (February 4), **Connecticut** (February 5), **Wyoming** (February 10), **Minnesota** (February 11), **Louisiana** (March 9) and **Arkansas** (April 8).

**Signing Deadlines:** North Carolina Democratic Gov. Roy Cooper has 10 days from presentment to act on legislation or it becomes law without signature.

**Interim Committee Hearings:** The following states are currently holding 2020 interim committee hearings: [Alabama](#), [Connecticut](#), [Louisiana](#), [Montana](#), [Nevada](#), [North Dakota](#), [Oklahoma House](#) and [Senate](#), Texas [House](#), [Utah](#) and [Wyoming](#).

**Bill Pre-Files:** The following states are currently posting 2020 bill drafts, pre-files and interim studies: [Alabama](#), [Connecticut](#), [Louisiana](#), [Montana](#), [Nevada](#), [North Dakota](#), [Oklahoma House](#) and [Senate](#), Texas [House](#), [Utah](#) and [Wyoming](#). ■

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