

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

- **Comprehensive Energy Bill.** (*Update on S. 2012, the Energy Policy Modernization Act*) Last week, the Senate considered nearly 200 amendments introduced on the bill. Of particular note, the Senate rejected an amendment filed by Sen. Brian Schatz (D-HI), which would have phased out tax preferences for oil and gas production over the next four years. Sen. Jon Barrasso's (R-WY) Amendment [No. 2953](#) – adopted by the Senate on January 28 – will reduce red tape hindering greater production on Indian lands by relaxing federal statutes governing leasing, appraisals, and permitting in order to facilitate energy development by tribes. On Thursday, February 4, the Senate rejected the motion to invoke cloture (i.e., end debate and proceed with a roll call vote) to hammer out details on a Flint, Michigan water aid package introduced by amendment. If the Senate bill does pass, a conference committee tasked with reconciling the Senate version with its House-passed counterpart, H.R. 8, could be assembled in short order. The Senate bill is expected to come to a floor vote this week. [Read more.](#)

FEDERAL – Regulatory

- **Public Lands; Moratorium Petition.** On January 20, environmentalists formally submitted a [petition](#) to the Department of the Interior calling for the agency to produce its first-ever study of climate and other impacts from its public lands oil and gas leasing program in an apparent effort to shut-down federal land leasing. [Read more.](#)
- **BLM Lease Sale Protests – Wyoming, Colorado, Utah.** While the BLM was forced to postpone its February 2 Cheyenne lease sale – since [rescheduled to be offered during the BLM's May sale](#) – due to a severe winter storm, “Keep It in the Ground” activists had already been planning to protest the sale. Despite that postponement, activists have already announced planned protests for upcoming scheduled lease sales in Colorado and Utah, on February 11 and 16 respectively. [Read more.](#)
- **Bears Ears National Monument Proposal; Public Lands – Utah.** In October 2015, state Tribal leaders submitted a petition to President Obama, requesting he designate a nearly 2-million acre portion of southern Utah a national monument using his authority under the Antiquities Act. It would be called Bears Ears National Monument, after a distinctive landform rising above Cedar Mesa in the center of the region. Under the Inter-Tribal Coalition proposal, lands currently controlled mainly by the BLM, but also including some held by the Forest Service and the National Park Service, would be

jointly administered by a partnership between the tribes and the federal agencies. However, according to [the proposal](#), there will be no new mining or oil and gas development within the protected areas, though valid existing development rights will be honored. Last month, the Coalition, which had been working with congressional representatives to reach agreement for the Bear Ears area, pulled out of talks with Rep. Jason Chaffetz (R-UT) and Rep. Rob Bishop (R-UT) over disagreements in the legislators' draft public lands initiative. We will continue to monitor this proposal and report on any new developments. [Read more.](#)

- **Flaring and Venting Rule; Public Lands.** This morning, the BLM published in the Federal Register its [proposed new regulations](#) to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases. The regulations, which would update three-decades-old rules, would also clarify when produced gas lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production used on site would be royalty-free. The proposed rules, *Waste Prevention, Production Subject to Royalties, and Resource Conservation* ([81 FR 6615](#)), aim to reduce leaks gradually over the next three years by requiring oil and gas operators on Federal and Tribal lands to update faulty equipment and reduce the flaring and venting of excess gas. Industry players call the rules unnecessary. "Another duplicative rule at a time when methane emissions are falling and on top of an onslaught of other new BLM and EPA regulations could drive more energy production off federal lands," says Erik Milito of the API. For his part, Sen. John Barrasso (R-WY) called the BLM proposed rule, "yet another thinly veiled effort to drive oil and natural gas production off federal land" and added that "this rule discourages production by raising costs at a time when natural gas sells for bargain basement prices." Several states, including Colorado, North Dakota, Wyoming and Pennsylvania have already taken steps to limit the venting, flaring and leaking of methane from oil and gas facilities. The public comment period will run through April 8, 2016, with a final rule expected by year's end. [Read more.](#)
- **BLM Deputy Director Takes Temporary Leave.** Steve Ellis, the BLM's second in command, will soon take a temporary leave of absence to undergo treatment for prostate cancer. As BLM's deputy director for operations, Ellis oversees 245 million acres of public lands under the agency's control. He expects to be on leave from mid-March until the end of April, according to an internal email from BLM Director Neil Kornze. Mike Pool, who held the deputy director position until his 2012 retirement, will fill in for Ellis while he is on leave. [Read more.](#)

FEDERAL – Judicial

- **Dormant Mineral Act – 6th Circuit (Ohio).** On January 22, the Sixth Circuit Court of Appeals issued its first decision considering the Ohio Dormant Mineral Act (ODMA) in *McLaughlin v. CNX Gas Co.* (6th Cir. No. 14-3102). Relying on the Supreme Court of

Ohio's recent decision in *Chesapeake v. Buell* (see 11/16/15 AAPL Governmental Affairs Report) the court found that a severed mineral interest was not abandoned under the ODMA because an oil and gas lease covering the severed mineral interest was a "title transaction" and therefore, acted as a "savings event." [Read more.](#)

- **Sage Grouse – Federal Lawsuit (Utah).** On February 4, Utah officials filed a federal suit in *Herbert v. Jewell*, (Case No. 16-CV-101) seeking to invalidate federal land-use plan revisions aimed at conserving imperiled greater sage grouse within the state. Although this suit filed against the Department of the Interior, BLM, USDA, and U.S. Forest Service in Federal District Court focuses primarily on limitations on mining activities, ripple effects from the decision into oil and gas development may be imminent depending on how the court rules. Utah state officials argue that the guidelines announced in September 2015 impose unnecessary restrictions for activities on and near sage grouse habitat and the state plan unveiled in 2013 is sufficient for the conservation of the hen-sized bird. This case follows on the heels of similar lawsuits filed in Idaho and Nevada subsequent to the Interior Department's September announcement. Response briefs in the Idaho case are due in April, and the Nevada case is expected to go to trial in mid-summer 2016. [Read more.](#)
- **Reform Western States Circuit Court.** Western Republicans, led by Arizona's governor and Republican members of Congress, are making a renewed push to reshape a federal appeals court that has a liberal reputation, particularly on environmental cases. Three pieces of legislation were introduced yesterday that would rekindle a decade-old effort to reform the 9th U.S. Circuit Court of Appeals and possibly replace it with a new 12th Circuit that would move Arizona, Nevada, Montana, Idaho and Alaska out of the 9th Circuit and into the new 12th Circuit. [Read more.](#)

STATE – Judicial

- **Surface Damage; Administrative Remedies – Montana.** On January 26, the Montana Supreme Court issued its opinion in *Interstate Explorations, LLC v. Morgen Farm and Ranch, Inc.* ([2016 MT 20](#)). The court held that a surface owner is not required to exhaust administrative remedies prior to commencing an action for damages to the surface caused by a mineral lessee. [Read more.](#)
- **Delay Rentals; Production; Leasing – Ohio.** On January 29, the North Carolina Supreme Court in *State ex rel. McCrory v. Berger* (Case No. 113A15) ruled that state lawmakers violated the separation of powers provisions of the North Carolina Constitution in their structuring of commissions that oversee coal ash, oil and gas, and mining activities. The ruling is likely to result in the appointment of new commission members and could potentially impact production rules and future oil and gas exploration permits. [Read more.](#)

- **Delay Rentals; Production; Leasing – Ohio.** On January 7, Ohio’s Fourth District Court of Appeals issued its opinion in *Castro v. Positron Energy Res., Inc.* (2016-Ohio-285), concluding that (i) an oil and gas lease entered into in 1980 terminated pursuant to its terms when there was no production in paying quantities for more than seven years; and (ii) a demand by the lessor in 2013 that the lessee remit delay rentals, and the lessee’s remittance of such delay rentals, did not cure the forfeiture or estop the lessor from asserting it. [Read more.](#)
- **Royalties; Fractional Language; Grant Interpretation – Texas.** On January 29, the Texas Supreme Court issued its long-awaited royalty grant interpretation opinion in *Hysaw v. Dawkins* ([Case No. 14-0984](#)), in which the court passed on the opportunity to establish a bright-line standard on double-fraction language which has generated a multitude of disagreements as to whether a royalty interest should be construed as “fixed” or “floating”. The court took a more holistic approach which focuses upon the intent of the parties as determined from the four corners of the instrument. The court’s analysis recognized that issues regarding the amount of a royalty interest are increasing as today’s landowners frequently secure mineral leases offering royalties larger than the historically standard 1/8. The court expressly noted that the “historical standardization” of the 1/8 royalty will not alter clear and unambiguous language that can otherwise be harmonized. Accordingly, the court appears to indicate that the “legacy of the 1/8 royalty” will not trump a testator’s intent as expressed within the four corners of the will. [Read more.](#)
- **Sales Tax Exemption – Texas.** In a significant tax development for the Texas oil and gas industry, on January 22, the Texas Supreme Court agreed to review the appellate court decision in *Southwest Royalties v. Glenn Hegar, Comptroller of Public Accounts* ([Case No. 14-0743](#)), with oral arguments set for March 8, 2016. The action addresses the taxability of oil and gas production equipment used “below ground.” In 2009, Southwest Royalties sued the state, pointing to a provision in the Texas tax code that they believe exempts the industry from having to pay state sales tax on their equipment. The case hinges on whether certain extraction equipment — like casing, pipes, tubing and pumps — fits the definition cited in the exemption. Texas Comptroller Glenn Hegar argues that it does not and has issued a warning to the Texas Supreme Court justices who are looking at whether the oil and gas industry should be exempt from paying the tax, noting that the legislature did not intend such an outcome and it’s a move that could cost the state billions of dollars in revenue. [Read more.](#)

STATE – Regulatory

- **Interim Chief; Department of Natural Resources – Colorado.** Bob Randall, Deputy Director of the Colorado Department of Natural Resources (DNR), will serve as the department’s interim executive director, Gov. John Hickenlooper announced last week. Randall, the agency’s deputy director since 2010, steps into the lead role after former

director Mike King's decision to take a job with Denver Water as that agency's director of planning. Randall's appointment to head DNR was effective Feb. 1. [Read more.](#)

- **Well Bonds; Drilling Permits – Wyoming.** Oil and gas companies in Wyoming will pay higher amounts for well bonding and for drilling permits under new rules approved by the state Oil and Gas Conservation Commission. The changes in rules governing bonding and applications for permits to drill (APDs) took effect February 1. New blanket bonds will be \$100,000, the commission said, while individual well bonds are \$10 per foot of vertical well bores. The commission increased APD fees from \$50 to \$500, but permits will now be in effect for two years instead of just one. Also under the new rules, administrative approvals for horizontal drilling submitted with the APD no longer require a \$75 fee. However, sundry notices accompanied by a location change requiring administrative approval will incur a \$75 fee. [Read more.](#)

STATE – Legislative

- **State Land Mineral Conveyances – Alaska.** On January 22, HB 274 was introduced by Rep. Cathy Munoz (R) and referred to the House Resources Committee for consideration. The bill makes changes to provisions under which state lands and mineral estates are exchanged as well as amending lease extension periods. [Read more.](#)
- **Lease Requirements – Illinois.** Final action on a 2015 carryover bill, SB 1562, has been extended to April 28, 2016 for consideration. The bill, introduced by Sen. Sue Rezin (R), would amend the Illinois Oil and Gas Act to establish criteria that the Department of Natural Resources may consider when making a determination that the oil and gas leases submitted with an application for a permit or transfer of a permit for a well are operative and that prior oil and gas leases covering the same lands have terminated due to non-development or non-production under the current permittee. [Read more.](#)
- **Well Location – Michigan.** On January 27, HB 5258 was introduced by prime sponsor Rep. Jeremy Moss (D) and referred to the Committee on Energy Policy. The bill would amend existing well siting rules in higher population areas and subject proposed wells to local ordinances and public hearings. [Read more.](#)
- **Regulatory Division – Mississippi.** On February 1, SB 2113 was introduced by Senator W. Briggs Hopson (R) and referred to the Senate Accountability, Efficiency and Transparency Committee for consideration. The bill would authorize the creation of a regulatory division within the Oil and Gas Board to protect the rights of surface, mineral and royalty owners by investigating allegations of misconduct and empower the Board to impose administrative penalties against violators. The bill would also require oil companies to provide full disclosure of contract information when requested by the Board, as well as information concerning the computation of an owner's interest or any division order. [Read more.](#)

- **Severance Tax – New Mexico.** On February 1, SB 34, introduced by Senator Gay Kernan (R), was referred to the Corporations & Transportation Committee for consideration. The bill would make changes to severance tax rates for products severed and sold, and also establishes the taxable value based upon WTI Crude prices. The bill also sets tax rates for qualified enhanced recovery projects involving the application of carbon dioxide in the process of displacing oil and other liquid hydrocarbons from natural gas. [Read more.](#)
- **Severance Tax – New Mexico.** On January 27, HB 107, introduced by Rep. James Strickler (R), was referred to the House Ways and Means Committee for consideration. The bill provides [reduced tax rates on oil and gas](#) removed from a stripper well if the average annual taxable value of oil or gas reaches certain amounts. [Read more.](#)
- **Royalty Payments – Oklahoma.** SB 1132, introduced by Sen. A.J. Griffin (R) in January, was referred to the Finance Committee on February 2 for consideration. The bill amends existing royalty interest owner law to exempt from the 5 percent withholding a publicly-traded partnership entity. [Read more.](#)
- **Abandoned Minerals – South Dakota.** HB 1058, introduced by Rep. Timothy Johns (R) in January and subsequently passed with amendment by the Senate on February 4, amends the procedure for recovery of abandoned mineral interests. [Read more.](#)
- **Establishing Regulatory Agency – Virginia.** On January 22, Sen. Frank Wagner (R) introduced SB 743, which is currently moving through committees. The bill would establish a Division of Energy within the existing Department of Mines, Minerals and Energy to serve as the state certifying and coordinating authority on energy-related activities, including oil and gas production. [Read more.](#)
- **Shut-in Wells; Shut-in Payments – West Virginia.** SB 396, introduced by Sen. Chris Walters (R) on January 27, would prevent waste of oil and gas resources by authorizing wells to be shut-in when the well cannot produce economically. [Read more.](#)

INDUSTRY NEWS FLASH: President Barack Obama is proposing a \$10-a-barrel tax on oil to pay for clean transportation projects, the White House said last Thursday. Roundly criticized by Republican lawmakers who call the proposal a non-starter in any budget deal, the tax will be part of the Fiscal 2017 budget request Obama unveils this week. The tax, which would be paid for by oil companies and gradually phased in over five years, would add roughly 25 cents to a gallon of gasoline, at current prices. [Read more.](#)

ELECTION ALERT: Hillary Clinton appeared to endorse a plan to end fossil fuel development on federal land following last Thursday night's Democratic debate in New

Hampshire. When asked post-debate by an activist if she would support banning fossil fuel extraction on public lands, Clinton said: "Yeah, that's a done deal." But on Friday, Katie Brown of the IPAA hit back noting that "royalties, taxes and fees from oil and gas production on federal lands are among the largest contributors to the federal Treasury, and are a major reason why the United States has become a global leader in energy production...the vast majority of prominent Democrats have acknowledged these facts." [Read more.](#)

PRACTICE TIPS: This week, we offer our readers useful information on Pugh clauses and Independent Contractor classification:

- Primer on lease Pugh clauses (Oil & Gas Report; 1/29/16): [Read more.](#)
- Employee or Independent Contractor (Foster Swift law firm; 1/29/16): [Read more.](#)

UPCOMING EVENT OF INTEREST: With all the recent activity at the federal agency level, AAPL members may find the upcoming RMMLF event of interest: [Challenging & Defending Federal Natural Resource Agency Decisions](#); Westminster, Colorado; September 14-15, 2016. A detailed program brochure and online registration are available at www.rmmlf.org. This is not an AAPL-sponsored event.

State-by-State Legislative Session Overview

Following last year's record-setting 114-day legislative session, lawmakers in **Kansas** are considering several proposals that would establish a session length limit moving forward. Because only about 23 percent of bills make it to a final vote, some legislators believe tighter deadlines might help legislators focus. Several bills establishing a cap on the number of days the legislature may meet have already been proposed. The concept of holding a 60-day session in even-numbered years and a 90-day session in odd-numbered years, when the state's biennial budget is debated, has gathered momentum. Legislative sessions in Kansas begin each year in January and each day in session costs \$66,000, [The Kansas City Star](#) reports.

Alabama, Alaska, Arizona, California, Colorado, Connecticut, 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, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and **Wisconsin** are in regular session. The **District of Columbia** and the **U.S. Congress** are also in regular session.

The following states are expected to convene their 2016 legislative sessions on the dates provided: **Wyoming** (February 8), **Minnesota** (March 8) and **Louisiana** (March 14).

New Mexico is expected to adjourn its 2016 legislative session on February 18. **Ohio** Republican Gov. John Kasich has 10 days from presentment, Sundays excepted, to act on legislation or it becomes law without signature.

Louisiana is now pre-filing for the 2016 legislative session.

The following states are currently holding interim committee hearings: **Arkansas, Minnesota, Montana, Nevada and North Dakota.**

Landmen

STATUS UPDATE: Wisconsin [SB 375](#) was reported passed as amended by the Senate Insurance, Housing and Trade Committee with [Senate Amendment 1](#) and [Senate Amendment 2](#) on February 2. The bill would generally amend current law regulating the practice and licensure of real estate brokers and real estate salespersons. It would create provisions addressing independent real estate practice by brokers, which is not addressed under current law. Under these provisions, a broker who is associated with a firm would also be authorized to engage in independent real estate practice, as specified. The bill would also define an “employee” for the purposes of these provisions to specify that a licensee would not be considered an employee of a firm if:

- A written agreement has been entered into with the firm that provides that the licensee may not be treated as an employee for federal and state tax purposes.
- 75 percent or more of the annual compensation related to sales or output paid by the firm to the licensee pursuant to the agreement is directly related to the brokerage services performed by the licensee on behalf of the firm.

The majority of the bill would take effect on July 1, 2016 or on the day after publication by the Legislative Reference Bureau, whichever is later. [SB 375](#) is significantly similar to [AB 456](#), which had Assembly [Amendment 2](#) and [Amendment 3](#) offered on January 19 and 20, respectively, and has been placed on the calendar for February 9.

Lands

Alaska [HB 115](#), sponsored by Rep. Mike Chenault, R-Nikiski, passed the Senate Resources Committee on February 4. The bill would affirm the state’s sovereignty, and would declare that the state reserves the rights of the state to claim a credit or setoff for any amount or injury inequitably or unlawfully caused or claimed by the federal government. It would require the United States, subject to acceptance by the state, to relinquish title to public land or an interest in land in the state, and to transfer title to public land or an interest in land to the state, by January 1, 2017. For land not transferred to the state under this provision, the bill would require the United States to lift all public land orders and federal withdrawals subsequent to those public land orders of land in the state so that state land selections that are currently in top-filed status on that land could attach. To allow the state sufficient time to conduct mineral exploration and resource evaluation on the land subject to public land orders and federal withdrawals under this

provision, the bill would suspend [43 U.S.C. 1635\(f\)](#) of the Alaska National Interest Lands Conservation Act until either January 1, 2037; 20 years after the date the last public land order is lifted; or the date the last withdrawal subsequent to those public land orders is lifted, whichever is later. The bill would take effect immediately upon enactment. A [legal memo](#) from the last session, which was considered by the committee on February 3, expresses “serious reservations about the constitutionality” of certain sections of this bill.

Oil and Gas

General Oil and Gas

New Mexico SB 34 was declared germane by the Senate Committees’ Committee and referred to the Senate Corporations and Transportation Committee on February 1. The bill would create a tax rate differential for oil produced from a qualified enhanced recovery project that uses carbon dioxide to displace the oil from natural gas. Under the bill, all oil and other liquid hydrocarbons removed from natural gas at or near the wellhead, produced from a qualified enhanced recovery project, and processed in a way that does not involve the application of carbon dioxide to displace oil and other liquids from natural gas, would be taxed at one and seven-eighths percent of the taxable value, as specified, as long as the annual average price of west Texas intermediate crude oil is less than \$28 per barrel. Oil and other liquid hydrocarbons removed from natural gas at or near the wellhead, produced from a qualified enhanced recovery project, and processed in a way that involves the application of carbon dioxide to displace the oil and other liquids from natural gas, would be taxed at the same rate but only if the annual average price of west Texas intermediate crude oil is less than \$60 per barrel. The bill would take effect on July 1, 2016. SB 34 is identical to [HB 285](#), sponsored by Rep. Nate Gentry, R-Albuquerque, which passed the House Energy, Environment and Natural Resources Committee without recommendation and was referred to the House Ways and Means Committee on February 3. The fiscal impact report for the bill is available [here](#).

The **Pennsylvania** House Environmental Resources and Energy Committee has scheduled an informational meeting on February 8 at 11:00 a.m. to consider imposing a severance tax on natural gas production.