AAPL Powering The Profession

JULY 27, 2020

GOVERNMENTAL AFFAIRS WEEKLY REPORT

Weekly Highlights At-A-Glance

FEDERAL – Legislative

S. 4223 – Leasing Market Efficiency Act. On July 20, Sen. Jon Tester (D-MT) introduced S. 4223, known as the *Leasing Market Efficiency Act*. The bill would amend the Mineral Leasing Act to ensure market competition in onshore oil and gas leasing by requiring the Bureau of Land Management (BLM) to issue all oil and gas leases through competitive auction, ending noncompetitive leasing. "BLM's noncompetitive leasing program is about as efficient as a steering wheel on a blindfolded mule at night, and taxpayers are left pulling the plow," said Sen. Tester. "My legislation will cut down on government waste by increasing transparency, growing revenues, and—most importantly—saving taxpayer dollars. It's time to end this broken system, which is spending critical resources on bureaucratic red tape that doesn't benefit the public or our public lands." Read more.

H.R. 7400 – Protecting American Energy Production Act. On July 1, Rep. Jeff Duncan (R-SC) introduced H.R. 7400, known as the *Protecting American Energy Production Act*. The bill would prohibit future U.S. presidents from using their executive powers to declare a moratorium on the use of hydraulic fracturing, unless authorized by an Act of Congress. The bill further expresses that states have the authority to regulate hydraulic fracturing for oil and natural gas production on state and privately-owned lands. Read more.

FEDERAL – Regulatory

BLM; New State Director – Utah. On July 21, the Bureau of Land Management (BLM) announced the appointment of Greg Sheehan as the BLM's new State Director for Utah. Sheehan served as the U.S. Fish and Wildlife Service Principal Deputy Director from 2017 to 2018. A career conservation professional, Sheehan served for 25 years in the Utah Department of Natural Resources and the Utah Division of Wildlife Resources – the last five years as the agency's director. Read more.

BLM Oil and Gas Lease Sale – Nevada. On July 20, the BLM announced the release of an Environmental Assessment for the December 2020 oil and gas lease sale covering 14 parcels within the Battle Mountain District. The public comment period runs through August 20. The lease sale will be held on December 8. Read more.

BLM; National Petroleum Reserve – Alaska. On July 13, the BLM announced the opening of a public scoping period for input on 33 parcels (6,442.36 acres) of federal minerals proposed for the January 2021 competitive oil and gas lease sale. The public scoping period runs through July 31, 2020. The lease sale is tentatively scheduled for January 14, 2021. The proposed parcels were identified as available for possible oil and gas leasing under current BLM land-use plans. The parcels in New Mexico include six in Eddy County and 26 in Lea County. There is also one parcel in Wise County, Texas. Read more.

FEDERAL – Judicial

Methane Regulations – California. On July 15, the U.S. District Court for the Northern District of California overturned the Trump administration's 2018 rescission of the 2016 Obama-era Waste Prevention Rule. This decision arises from consolidated cases, *California v. Bernhardt* and *Sierra Club v. Bernhardt* (Case No. 4:18-cv-05712-YGR), involving industry groups and the states of Wyoming and Montana, and later joined by North

Dakota and Texas. The states of California and New Mexico also intervened along with environmental activists to uphold the Obama-era rule. Calling the BLM's rulemaking process "wholly inadequate," the Court found the BLM failed to properly repeal the rule. "In its haste, BLM ignored its statutory mandate under the Mineral Leasing Act, repeatedly failed to justify numerous reversals in policy positions previously taken, and failed to consider scientific findings and institutions relied upon by both prior Republican and Democratic administrations," wrote U.S. District Court Judge Yvonne Gonzalez Rogers in her opinion. According to reports, if this case is upheld it "will effectively reinstate stricter pollution controls aimed at reducing the flaring, venting and leaking of natural gas." The Interior Department is expected to appeal the decision. Read more.

Climate Change Lawsuit – Tenth Circuit (Colorado). On July 7, the U.S. Court of Appeals for the Tenth Circuit, on appeal from the U.S. District Court for the District of Colorado, affirmed the lower court's ruling that a suit brought by the City of Boulder, and Boulder and San Miguel counties, seeking climate change-related infrastructure damages for what the local governments say are the effects of climate change will stay in state court, rather than a federal court venue preferred by the defendant companies. In the case, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.* (Case No. 19-1330), the Court denied the appeal by ExxonMobil and Suncor Energy to send the case back to federal court in this lawsuit dating back to 2018. (For background on the case, read more here) Attorneys for the defendants argued that the case belonged in federal court because under the Clean Air Act, as well as precedents set in some other climate cases, federal law preempts state law when it comes to greenhouse gas emissions. Following the ruling, an ExxonMobil spokesman said the company is reviewing the decision and "evaluating next steps." Read more.

Tribal Lands – Oklahoma. On July 9, in *McGirt v. Oklahoma* (Case No. 18–9526), the U.S. Supreme Court held that "lands reserved for the Creek Nation in northeastern Oklahoma remain a reservation for purposes of the Major Crimes Act, which gives the federal government exclusive jurisdiction to try certain enumerated offenses committed by "any Indian [. . .] against the person or property of another Indian or any other person" within "Indian country." "Although the case centered on the Oklahoma state court's conviction of a Creek tribal member for crimes committed on lands that the Supreme Court determined in *McGirt* were within the boundaries of the reservation, the Supreme Court's confirmation of the existence of the Creek reservation has significant potential consequences for oil and gas development in eastern Oklahoma." According to law firm, Haynes Boone, "prior to *McGirt*, the State of Oklahoma had maintained that the reservations of the Five Tribes had been disestablished by a variety of congressional actions or Oklahoma statehood. However, the *McGirt* decision confirms the existence of the reservations of the Five Tribes, which encompasses 19 million acres and comprises the entire eastern half of Oklahoma." As Haynes Boone attorneys note, "the *McGirt* decision will impact existing oil and gas interests in Oklahoma as it creates regulatory and jurisdictional uncertainty that likely will take years to resolve. Although the Oklahoma Corporation Commission has concurrent jurisdiction over lands of the Five Tribes for certain purposes related to oil and gas development (e.g., spacing and unitization orders), it is unclear whether the Five Tribes will exercise taxing or regulatory authority over non-tribal oil and gas interests within the exterior boundaries of their respective reservations such as private and state oil and gas leases, royalties and liens. In the coming months and years, producers, royalty owners and other stakeholders with oil and gas interests in eastern Oklahoma may encounter a patchwork of tribal, state and federal regulations, licensing and zoning requirements, and taxes." Read more.

Pipeline Permitting – Washington, DC. On July 6, the U.S. Supreme Court reinstated the use of a permit that is utilized to fast-track pipeline construction, except in the case of the Keystone XL pipeline. A lower court ruled in April that the

U.S. Army Corps of Engineers did not follow environmental requirements when it reissued the permit, known as Nationwide Permit 12, preventing it from being used across the country. But in its July 6 Order, the Supreme Court allowed the permit to go back into effect for most pipelines. However, it refused to renew the use of the permit for the Keystone XL pipeline, which was the subject of the original case, *Northern Plains Resource Council v. U.S. Army Corps of Engineers* (Case No. CV-19-44-GF-BMM). Read more.

Dakota Access Pipeline – Washington, DC. On July 6, the U.S. District Court for the District of Columbia issued a ruling ordering the Dakota Access Pipeline (DAPL) to be shut down and emptied by August 5, 2020. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Case No. 16-1534), the Court held that the U.S. Army Corps of Engineers violated the National Environmental Policy Act (NEPA) when it granted the easement to construct the pipeline under Lake Oahe (which is a large reservoir lying behind a damn on the Missouri River and stretching between North and South Dakota). The Court held that NEPA required the Army Corps of Engineers to produce an Environmental Impact Statement (EIS) for the easement application, rather than only the Environmental Assessment that was completed. Judge James Boasberg ruled that the pipeline, which has been in operation since 2017, should be turned off until the Corps completes an EIS. This process is expected to take 13 months. In sum, the Court held that "given the seriousness of the Corps' NEPA error, the impossibility of a simple fix, the fact that Dakota Access did assume much of its economic risk knowingly, and the potential harm each day the pipeline operates, the Court is forced to conclude that the flow of oil must cease. Not wishing to micromanage the shutdown, it will not prescribe the method by which DAPL must achieve this. The Court will nonetheless require the oil to stop flowing and the pipeline to be emptied within 30 days from the date of this Opinion and accompanying Order." According to Bloomberg News, "If the ruling survives appeal, it would be the first time a major pipeline in service was ordered shut because of environmental concerns." Industry players and analysts also weighed in on the decision. "This court ruling will create major obstacles for producers in North Dakota, who've been struggling to rebound," said Sandy Fielden, director of research for Morningstar Inc. The buyers of Bakken crude, he said, will simply turn elsewhere for supplies once the pipeline dries up. Phillips 66, which owns a stake in the pipeline, said it was disappointed in the court ruling. "The negative impacts resulting from this court's decision to markets, customers, and jobs up and down the energy value chain will inflict more damage on an already struggling economy and jeopardize our national security," said spokesman Dennis Nuss. Continental Resources, however, said the bulk of its oil is shipped on other pipelines. "That being said, we believe that today's DAPL court decision is harmful to royalty owners, the state of North Dakota and the American consumer," said spokeswoman Kristin Thomas. "This decision will serve to drive the price of crude higher." Following the July 6 decision, the Court declined a request from Dakota Access LLC to immediately stay the decision, but added that the Court will "set a status hearing on the matter when it receives certain documents from the company." In a filing after the decision, Dakota Access argued that the Court's order should be halted because "the Court's decision requires Dakota Access to begin shutting down a major interstate pipeline" and "As a result, Dakota Access would need to undertake a number of expensive steps before it is likely to have a ruling on the forthcoming stay motion," the company said. However, Native American tribes challenging the pipeline disagreed, stating in their own filing that the company did not do enough to show that the stay was necessary or try to work with the challengers to reach an agreement. Read more.

BLM Leasing – Washington, DC. On June 16, in *Solenex LLC v. Bernhardt* (Case Nos. 18-543; 18-5345), the U.S. Court of Appeals for the D.C. Circuit addressed a case where Solenex LLC held a federal oil and gas lease over a portion of the Badger-Two Medicine Area of Montana. In 2016, the Secretary of the Interior cancelled the lease because of the area's "multi-faceted significance and Interior's failure to

conduct the proper pre-lease analyses required" under the National Environmental Policy Act and the National Historic Preservation Act. When Solenex challenged that cancellation decision, the district court ruled in its favor. The Court held that the amount of time which had elapsed between the lease's issuance and its cancellation violated the Administrative Procedure Act and that "the Secretary failed to consider Solenex's reliance interests before cancelling the lease." According to the appellate court, however, "Each of those determinations was erroneous. First, delay by itself is not enough to render the Lease cancellation arbitrary or capricious. Second, the Secretary did consider, and in fact compensated, Solenex's identified reliance interests." For those reasons, the appellate court vacated the district court's ruling. Read more.

STATE – Legislative

Setbacks – California. (*Update to 2/10/20 Weekly Report*) On July 1, AB 345 was referred to the Senate after passing the Assembly in January. The bill, sponsored by Asm. Al Muratsuchi (D), amends current law to set 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.

Well Records – California. (*Update to 3/2/20 Weekly Report*) On July 1, AB 3214 was referred to Senate committee after passing the Assembly in June. The bill, sponsored by Asm. Monique Limón (D), would amend existing law regarding discharges of oil into waters and damage costs related to oil spills to additionally require the owner or operator to keep, or cause to be kept, a history of the maintenance and repair of the well. Because a violation of this requirement would be a crime, the bill would impose a state-mandated implementing program. Read more.

Employee Classification – California. (*Update to 2/24/20 Weekly Report*) On July 1, AB 1850 was referred to Senate committee after passing the Assembly in June. The bill, sponsored by Asm. Lorena Gonzalez (D), although not specific to landmen is one of many bills seeking to amend AB 5, which has been roundly criticized since its enactment last year for limiting Californians' ability to work as independent contractors. This bill would exempt freelance and independent contractor writers and photographers from the presumption disfavoring non-employee work relationships and the burdens imposed on one's right to work. Read more.

Corporation Franchise Tax – Louisiana. (*Update to 7/6/20 Weekly Report*) On July 13, Gov. John Bel Edwards (D) signed SB 6 into law. This special session bill, sponsored by Sen. R.L. Bret Allain II (R), provides for a suspension of the corporation franchise tax on the first $300,000 of taxable capital for small business corporations and defines a "small business corporation" as an entity that is subject to the corporation franchise tax, and that has taxable capital of $1,000,000 or less. The Act retains the present law tax rate of $3 per $1,000 of taxable capital above $300,000 and retains the first bracket of the tax for all taxpayers with taxable capital above $1,000,000. The Act suspends the initial franchise tax for small business corporations and applies only to taxable periods beginning between July 1, 2020 and June 30, 2021. The Act was effective upon signing. Read more.

Taxation – Mississippi. On July 7, HB 1729 was signed into law by Gov. Tate Reeves (R). The bill,

sponsored by Rep. John Lamar (R), revises existing statutory provisions regarding certain income tax credits, sales tax, ad valorem tax exemptions, and franchise tax credits. The Act has multiple effective dates per section. Read more.

Minerals Taxation – Nevada. On July 18, AB 4 passed the Senate after passing the Assembly. This special session Committee of the Whole sponsored bill including all members revises the formula for determining the measure of the tax on the net proceeds of minerals; eliminates the temporary requirement for the payment in advance of a portion of the tax upon the net proceeds of minerals; and eliminates the temporary requirement for persons who extract minerals to pay a portion of the tax on the net proceeds of the estimated royalties that will be paid for certain years. Read more.

Injection Wells – Ohio. On July 21, SB 336 was referred to committee following its introduction by Sen. Frank Hoagland (R) in the Senate. The bill would revise the permitting, fee structure, and penalties for brine injection wells and imposes certain notice requirements. Read more.

Limited Liability Company Act – Ohio. On July 21, SB 276 passed the Senate. The bill, sponsored by Sen. Kristina Roegner (R), revises the Ohio Limited Liability Company Act (OLLCA) and replaces it with the Ohio Revised Limited Liability Company Act (ORLLCA). According to the Ohio Legislative Service Commission bill analysis, "Under current law, a limited liability company (LLC) may be managed by its members or by managers, and the OLLCA spells out the authority members and managers have in each scenario. The ORLLCA does away with this distinction and instead provides that a person's authority to bind the LLC must be determined by referencing the operating agreement, decisions of the members in accordance with the operating agreement, or the ORLLCA's default rules. Also, under the current OLLCA, there are no statutory penalties for an LLC that fails to maintain a statutory agent, although there may be other legal consequences. The ORLLCA requires the Secretary of State to cancel an LLC that fails to maintain a statutory agent, but allows the company to be reinstated upon appointment of a new agent. Lastly, in contrast to the current OLLCA, the ORLLCA allows an LLC to establish one or more designated series of assets that are associated with at least one member and that have separate rights, powers, duties, liabilities, purposes, or investment objectives." Read more.

Natural Gas Tax Credit – Pennsylvania. On July 23, Gov. Tom Wolf (D) signed HB 732 into law. The bipartisan legislation establishes, among other unrelated provisions, a local resource manufacturing tax credit that provides Pennsylvania manufacturers using dry natural gas to make petrochemicals and fertilizers with eligibility for nearly $667 million in tax breaks over 25 years. According to Bloomberg Government, "the measure, a compromise version forged after Wolf vetoed a similar measure in March, is aimed at encouraging industries that use dry natural gas in manufacturing to locate in the state." To take advantage of the tax incentives, applicants would have to invest at least $400 million in a project facility using dry natural gas, create a minimum of 800 jobs, and make good faith efforts to hire locally. The Act is effective 60 days from signature. Read more.

Minerals Taxation – Pennsylvania. On July 17, Rep. Daniel Miller (D) pre-filed HB 2712 for introduction. The bill would require natural gas companies to disclose what chemicals are used in the hydraulic fracturing process. Specifically, the bill would amend the Oil and Gas Act to remove the current exceptions to disclosure and require disclosure of chemicals 14 days prior to use at any stage of the hydraulic fracturing process, including drilling. Read more.

STATE – Regulatory

Hydraulic Fracturing Report – Pennsylvania. On June 25, Pennsylvania Attorney General Josh Shapiro released a Grand Jury report on the hydraulic fracturing industry and regulatory oversight of the industry within the state. According

to Shapiro, "This 2 year investigation uncovered how our state agencies failed to protect the people of PA against oil and gas titans." The report included eight recommendations to better protect the public and regulate the industry in the state, including distance requirements from residences, more transparency in the chemicals used, and transportation regulation for waste created by the drilling. Shapiro said the grand jury found that state environmental regulators had failed to file violations against the industry, failed to tell the public when violations were filed and could be a risk to their health and regularly failed to refer those violations for criminal investigation. The grand jury also criticized the Department of Health for not collecting data of past issues. However, a July 9 *Forbes* magazine article (*PA's Gas Producers Become A Political Football in New AG Report*) points out the many flaws in the report. In fact, David Spigelmyer, President of the Marcellus Shale Coalition, was so taken aback by the factual errors in the Attorney General's report that in his letter addressed to every member of the state's General Assembly, he wrote that, "The sheer breadth of factual inaccuracies, misrepresentations, legal omissions and unsubstantiated allegations compel my response on behalf of the tens of thousands of Pennsylvanians – your constituents – who take great pride in working to safely and responsibly develop the Commonwealth's natural gas resources for the benefit of us all." It remains to be seen if, or how, any of the recommendations may be implemented but AAPL will continue to closely monitor the situation for any developments. Read more.

STATE – Judicial

Dormant Mineral Act; Deeds; Leasing – Ohio. On June 1, in *Fonzi v. Brown* (Case No. 2020-Ohio-3631), the Ohio Court of Appeals, Seventh District, addressed a Dormant Mineral Act (DMA) case challenging whether reasonable due diligence was exercised in locating potential heirs before serving notice of abandonment by publication. In reversing the trial court's finding of reasonable due diligence, the Court held that the surface owner's failure to search for holders outside of Ohio when the severance deed indicated the grantors' specific township and county there, *per se* did not meet the reasonable due diligence standard under the Ohio DMA. According to law firm, Frost Brown Todd LLC, "the takeaway from *Fonzi* is that Ohio courts require surface owners to take reasonable steps to provide holders with actual notice of the intent to abandon their severed mineral interest. Thus, where the severance deed provides specific information that a holder resided outside of the county in which the property is located, the surface owner *per se* violates the Ohio DMA's reasonableness standard by not searching there." Read more.

Unknown Owners; Royalties – Texas. On June 26, in *CKD Homes Direct, Ltd. v. Hegar* (Case No. 03-19-0076-CV), the Texas Court of Appeals, Third District (Austin), addressed a dispute over nearly $300,000 in unclaimed royalty payments that had been sent to the state Comptroller by Enterprise Crude Oil, Ltd., the operator of mineral producing property in Andrews County, Texas. The Court held that the property tax sale purchaser was not entitled to the mineral estate's unclaimed royalty payments. The purchaser had filed a Texas Unclaimed Property Business Owner Claim Form with the Comptroller of Public Accounts asserting a claim to the royalties that were delivered to the Comptroller after the owners were unable to be located. The purchaser filed suit in district court, which granted the Comptroller's motion for summary judgment, holding that the purchaser did not acquire ownership to the unclaimed property. The purchaser then appealed and this Court held that the unclaimed royalty payments were attributable to oil production that took place before the date the purchaser acquired its royalty interest and additionally that the tax lien did not attach to the unclaimed royalty payments. Agreeing with the lower court ruling, the appellate court affirmed the decision. Read more.

INDUSTRY NEWS FLASH

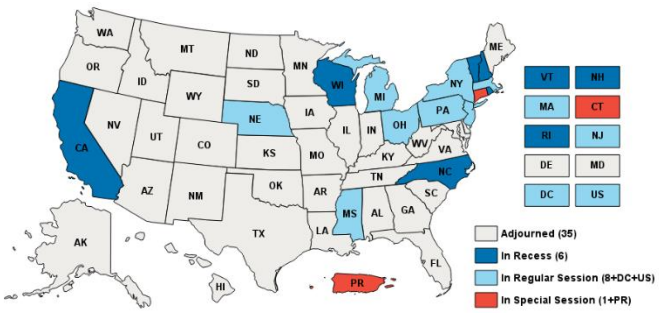
▶ **Well counts rising again in Permian.** On July 23, industry analyst Rystad Energy reported new well operations rising in July with the recovery especially

evident in the Permian Basin. "We therefore estimate that the final July [fracturing] count might surpass 400 wells, and will return to levels last seen in April 2020," said Rystad Energy's head of shale research, Artem Abramov. Read more.

▶ **U.S. EIA raises oil price forecasts.** The U.S. Energy Information Administration (EIA) has raised its West Texas Intermediate (WTI) oil price forecast as seen in the latest EIA July Short Term Energy Outlook report. The WTI spot price is expected to average $37.55 per barrel this year and $45.70 per barrel next year. "Oil prices rose in June as numerous regions worldwide began to lift stay at home orders and as global oil supply fell as a result of production cuts by the Organization of the Petroleum Exporting Countries (OPEC) and partner countries (OPEC+)," according to the EIA report. Read more.

LEGISLATIVE SESSION OVERVIEW

States in Session



Session Notes: Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, Ohio, and Pennsylvania are in regular session. The District of Columbia Council and U.S. Congress are also in regular session.

The following legislatures are postponing their 2020 legislative sessions due to COVID-19 until the dates provided: California (July 27), Vermont (August 25), North Carolina (September 2) and Rhode Island and Wisconsin (TBD).

Massachusetts is scheduled to adjourn their regular session on July 31.

Minnesota adjourned its special session in the early hours of July 21, reports MPRNews.

Missouri Republican Gov. Mike Parson announced a special session to begin July 27 to address current crime rates within the state, reports KY3.

Nevada adjourned its special session on July 19.

South Carolina is expected to meet for a two-week special session starting September 15, reports *The News & Observer*.

Virginia Democratic Gov. Ralph Northam called for a special session to begin August 18 to address police reform, reports the *Richmond Times-Dispatch*.

Signing Deadlines (by date): Nevada Democratic Gov. Steve Sisolak has until July 30 to act on legislation presented on or after July 14 or it becomes law without signature. Georgia Republican Gov. Brian Kemp has until August 5 to act on legislation or it becomes law without signature. Oregon Democratic Gov. Kate Brown has until August 7 to act on legislation or it becomes law without signature. Hawaii Democratic Gov. David Ige has until September 11 to act on legislation presented on or after June 26 or it becomes law without signature. Delaware Democratic Gov. John Carney has 30 days after the final adjournment, which typically occurs immediately prior to the beginning of the next session, to act or it is pocket vetoed. Maine Democratic Gov. Janet Mills must act on legislation presented within 10 days of adjournment or it becomes law unless returned within three days after the next meeting of the same legislature. Minnesota Democratic Gov. Tim Walz has 14 days from presentment to act on bills presented on or after July 19 or they are pocket vetoed. North Carolina Democratic Gov. Roy Cooper has 10 days from presentment to sign or veto legislation or it will become law without signature. South Carolina Republican Gov. Henry McMaster

has until two days after the next meeting of the legislature to act on legislation or it becomes law.

Alaska Republican Gov. Mike Dunleavy, **Arkansas** Republican Gov. Asa Hutchinson, **Connecticut** Democratic Gov. Ned Lamont, **Kansas** Democratic Gov. Laura Kelly, **Kentucky** Democratic Gov. Andy Beshear, **Louisiana** Democratic Gov. John Bel Edwards and **Tennessee** Republican Gov. Bill Lee have acted on all legislation as of June 10. **Florida** Republican Gov. Ron DeSantis has acted on all legislation as of July 8. **Iowa** Republican Gov. Kim Reynolds and **Missouri** Republican Gov. Mike Parson had a signing deadline on July 14. **Colorado** Democratic Gov. Jared Polis had a signing deadline on July 15.

Interim Committee Hearings: The following states are currently holding 2020 interim committee hearings: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri House and Senate, Montana, Nevada, New Mexico, New York Assembly and Senate, North Dakota, Oregon, South Carolina House and Senate, South Dakota, Tennessee, Utah, Virginia, Washington and Wyoming.

Bill Pre-Files: Alabama, Kentucky, Montana, Nevada, Oklahoma, Utah and Virginia are currently posting 2021 bill drafts, pre-files and interim studies. ■