AAPL Powering The Profession

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# GOVERNMENTAL AFFAIRS WEEKLY REPORT

## Weekly Highlights At-A-Glance

**Please Note:** Weekly Reports will not be issued during the holidays and will resume with the January 13, 2020 issue. Wishing you a very merry holiday season and a happy new year.

### FEDERAL – Legislative

**Congressional Holiday Recess.** The U.S. Senate and House of Representatives will be in holiday recess as of December 20 and will reconvene January 7, 2020. Read more.

**H.R. 5303 – California Central Coast Conservation Act.** On December 4, Rep. Jimmy Panetta (D-CA) introduced H.R. 5303, known as the *California Central Coast Conservation Act*. The bill would establish a moratorium on all new oil and gas leasing on federal public land on the central coast of California. According to the bill sponsor, "the legislation is in direct response to the Administration's recent decision to allow for new oil and gas leasing and development on over 720,000 acres of public land in Central California, primarily in Fresno, Monterey, and San Benito counties." Read more.

### FEDERAL – Regulatory

**BLM Environmental Impact Statement; Hydraulic Fracturing – California.** On December 13, the Bureau of Land Management (BLM) published its *Notice of Availability of the Record of Decision for the Bakersfield Field Office Hydraulic Fracturing Supplemental Environmental Impact Statement, California* (84 Fed. Reg. 68187), which announces its Record of Decision (ROD) for the Final Supplemental Environmental Impact Statement (EIS) developed for the 2012 Proposed Resource Management Plan (RMP). This supplemental environmental analysis responds to a May 2017, U.S. District Court Order requiring the BLM to conduct additional environmental analysis on the potential impacts of hydraulic fracturing of oil and gas resources within the planning area. This ROD re-affirms the portions of the ROD that were initially set aside in a partial court remand. Here, the BLM announces that as a result of conducting a supplementation of its underlying EIS, it has made no changes to that existing RMP. Read more.

### FEDERAL – Judicial

**Permitting; Split Estates – California.** On November 19, in *Vacquero Energy, Inc. v. County of Kern* (Case No. F079719), the California Court of Appeals, Fifth Circuit, addressed a dispute regarding zoning ordinance requirements for new oil and gas permits. The ordinance imposed a wide range of environmental and other standards on permit applicants. It also adopted two procedural pathways for obtaining permits when the proposed activity would be conducted on split-estate land zoned for agriculture. An expedited seven-day pathway was available to permit applicants who obtained the surface owner's written consent to the site plan submitted with the application. In contrast, a more expensive 120-day pathway must be used when the applicant has not obtained the surface owner's signature. Vaquero claimed the process violates due process because it allows the county to inappropriately delegate its permitting authority to private interests — specifically, the owners of surface rights — who can arbitrarily withhold their signatures unless their demands are met. "Vaquero contends the two-pathway system gives the owners of surface rights effective control over how mineral right owners use and enjoy their property rights." The

Court disagreed, holding "the new ordinance does not violate Vaquero's right to due process because the owner of the surface rights does not have final control over how an owner of mineral rights uses those rights. The final authority over permits is retained by the County." Read more.

**BLM Leasing – Colorado.** On December 10, in *Citizens for a Healthy Community v. U.S. Bureau of Land Management* (Case No. 17-cv-02519), the U.S. District Court for the District of Colorado dealt a blow to environmental activists looking to halt 146 natural gas wells in the Bull Mountain Unit. The Court held that the BLM's failure to comply with the National Environmental Policy Act in approving natural gas drilling in Colorado's North Fork Valley does not require the plan to be vacated, because there is a "serious possibility" the agency can substantiate the decision based on new data. However, in the interim period when the BLM will be conducting further analysis of "the reasonably foreseeable indirect impacts of oil and gas" in the unit, all related Applications for Permits to Drill (APDs) will be suspended, and no other APDs will be approved pending completion of the analysis. Read more.

**Leasing; Royalties; Arbitration – Pennsylvania.** On November 18, in *Ostroski v. Chesapeake Appalachia, L.L.C.* (Case No. 2:18-cv-947), the U.S. District Court of the Western District of Pennsylvania rejected an attempt by royalty owners to vacate an arbitration award. In the case, the plaintiff-lessors brought suit claiming an underpayment of natural gas royalties under their lease. The plaintiffs contended that they were entitled to royalties based upon the gas produced and sold to third-party buyers without deduction costs. The arbitrator disagreed and entered a final award in favor of Chesapeake. On appeal, the plaintiffs argued that the arbitrator "clearly strayed from interpretation and application of the oil and gas lease at issue and effectively dispensed her own brand of industrial justice." Here, the Court disagreed and found adequate support for the arbitrator's ruling and "there was no manifest disregard of either the Lease, or the law, in the arbitrator's award." Read more.

**Floating Royalty Interest; Deeds – Texas.** On December 3, in *Verde Minerals, LLC v. Koerner* (Case No. 2:16-CV-199), the U.S. District Court for the Southern District of Texas (Corpus Christi), addressed a dispute claiming breach of covenant alleging the defendants are bound by the covenants contained in the applicable deeds to deliver and pay to the plaintiffs a portion of the proceeds for oil and gas found and sold from the property. In a prior case ruling it was deemed that the deeds conveyed a floating royalty interest. The defendants argued that "in a typical oil and gas dispute, the plaintiff alleging failure to pay royalties sues the operator-lessee, not the lessor, for breach of contract or violations" and thus the plaintiffs "are asserting the breach of covenant claim against the wrong party because it is [the operator] who is liable for any royalties owed under the terms of [the] lease." The Court disagreed and affirmed the prior ruling that the floating royalty interest created by the deeds obligated the defendants – who as grantors still possessed a royalty interest in the property – to pay the royalties, not the operator-lessee. Read more.

**Leasing; Accounting – Texas.** On November 27, in *L.B. Hailey Family Ltd. Partnership v. Encana Oil & Gas (USA) Inc.* (Case No. 5:17-cv-149-RCL), the U.S. District Court for the Western District of Texas addressed a demand for an accounting in a lease royalty dispute regarding post-production expense deductions. While the case was dismissed in favor of Encana otherwise, the Court allowed the portion of the complaint involving the alleged failure to provide an accounting to proceed. Here, the Court ruled in favor of Encana, finding the lessor was contractually entitled to an "inspection" but not an accounting. The Court noted "at no point has LBH argued that Encana refused to open its books for inspection." Read more.

## STATE – Regulatory

**Wage and Hour Regulations – Colorado.** The Colorado Department of Labor and Employment recently released proposed changes to its wage and hour regulations. The proposed order is called the

Colorado Overtime & Minimum Pay Standards Order #36 (COMPS Order #36), and according to law firm, Fisher Phillips, "will dramatically overhaul the state's wage and hour laws. This sweeping reform has the potential to impact every employer doing business in Colorado, addressing overtime, salary requirements, rest breaks, and a host of other factors." Some of those factors involve employee coverage and the salary thresholds for overtime pay. At present, "Colorado wage and hour law only applied to employees working in several specific industries: retail and service; food and beverage; commercial support service; and health and medical industries" but the proposed changes, which are expected to take effect on March 1, 2020, "will presumptively apply to all workers in all industries." The new rules may also affect independent contractors as definitions for "employer" and "employee" are being revised and will look "to the degree of control the employer exercises and the extent to which the individual performs work that is the 'primary work' of the employer in determining whether an individual is an employee or an independent contractor." Public comments will be accepted through December 31, 2019. To submit a public comment please visit: https://www.colorado.gov/pacific/cdle/news/public-comment-open-colorado-overtime-rule on the Colorado Department of Labor and Employment website. Read more.

## STATE – Legislative

**Occupational Licensing; Certifications – Ohio.** On December 4, SB 246 was referred to the Senate General Government and Agency Review Committee following its introduction. The Republican-sponsored bill would require a state occupational licensing authority to recognize and issue a license or government certification to an applicant who holds a license, government certification, or private certification or has satisfactory work experience in another state under certain circumstances. This legislation defines "Private certification" to mean "authorization from a private organization to an individual who meets qualifications determined by the organization related to the performance of a profession, occupation, or occupational activity and by which the individual may hold the individual's self out as certified by the organization." Read more.

## STATE – Judicial

**Tax Sales; Mineral Interests; Royalties – California.** On November 20, in *Leiper v. Gallegos* (Case No. 2d Civil B292905), the California Court of Appeals, Second District, addressed a quiet title dispute regarding leasehold mineral rights and a tax deed on surface rights. The trial court ruled, and the appellate court agreed, that the appellant is the surface owner but he does not now own an interest in the oil and gas under the lot. At trial, the court entered a "quiet title judgment that a tax deed for the sale of Lot 7 did not convey the right to receive royalties on a 1939 oil and gas lease." That "judgment states that appellant has no interest in the oil and gas royalties from Lot 7." Here, the Court affirmed "but modif[ied] the judgment to show that upon termination of the oil and gas lease, any remaining oil and gas rights described in the 1939 Memorandum of Oil and Gas Lease revert to the surface owner." In so doing, the Court noted that the lessee has a present possessory interest in the property, while the lessor has a future reversionary interest and fee title. Read more.

**Climate Change; Securities Fraud – New York.** On December 10, a New York court handed ExxonMobil Corp. a huge victory in only the second climate change lawsuit to reach trial in the United States. The widely-anticipated securities fraud decision in *New York v. Exxon Mobil Corporation* (Case No. 452044) was a blow for the New York Attorney General's Office, which brought the case. Justice Barry Ostrager of the New York State Supreme Court said that the attorney general failed to prove that the oil giant broke the law. "The office of the attorney general failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor," wrote Ostranger. Exxon said in a statement that the ruling affirmed that the

company gave its investors "accurate information on the risks of climate change" and said the ruling "affirms the position ExxonMobil has held throughout the New York Attorney General's baseless investigation. We provided our investors with accurate information on the risks of climate change. The court agreed that the Attorney General failed to make a case, even with the extremely low threshold of the Martin Act in its favor." The Martin Act is a New York statute that grants the state's attorney general the authority to pursue investigations and actions against those it suspects of securities fraud. The state attorney general claimed the energy company lied to investors about the costs of climate change and its public disclosures concerning how ExxonMobil accounted for past, present and future climate change risks. Judge Ostrager disagreed and said his ruling found ExxonMobil not liable on any of the counts. Read more.

**Leasing; Well Plugging – Ohio.** On November 18, in *Head v. Victor McKenzie Drilling, Inc.* (Case No. 19-CA-00002), the Ohio Court of Appeals, Fifth District, addressed a case involving the plugging of a non-producing well where the lease agreement expired under its own terms due to lack of production of oil and gas in paying quantities. The trial court ordered the defendant to remove and plug the oil and gas well associated with this lease agreement and remove any associated lines on the plaintiffs' property. The operator brought this appeal challenging the trial court claiming the sole authority to order plugging rested solely with the Division of Oil and Gas Resources Management. Here, the Court agreed holding the trial court did not have jurisdiction to order the defendant to plug the well. Read more.

**Tax Sale; Merged Estates – Pennsylvania.** On December 6, in *Keta Gas & Oil Co. v. Proctor* (Case No. 1975 MDA 2018), the Pennsylvania Superior Court addressed a case with a rich and complex factual history that hinged upon seated/unseated lands and the mineral rights affected by a 1908 tax sale. Here, the Court relied on the Pennsylvania Supreme Court's "seminal case" of *Herder Spring* that "provided comprehensive guidance regarding the sale of unseated lands for unpaid taxes [...] where a subsurface estate was not duly reported to the county commissioners prior to the sale." That case held "that a tax sale effectuates a sale of the property in its entirety, regardless of any prior severances, if taxes are unpaid on both surface and subsurface estates." Here, the lands were assessed as "unseated" and sold as such at the 1908 tax sale. Thus, the Court upheld the trial court determination "that the 1908 tax sale extinguished the subsurface rights" and recognized precedent which finds a "purchaser at a tax sale becomes the first link in a new chain of title" and the new purchaser "obtained perfect titles regardless of any deed language reserving subsurface rights to another." Read more.

**Railroad Commission; Injection Wells – Texas.** On November 27, in *NGL Water Solutions Eagle Ford, LLC v. Railroad Commission of Texas* (Case No. 03-17-00808-CV), the Texas Court of Appeals, Third District (Austin), ruled in favor of the Railroad Commission (RRC) in its grant of a permit for a saltwater disposal injection well over a competitor's objection. NGL argued that the RRC erred in denying NGL "party status" to protest its competitor's permit application because the RRC found NGL was not an "affected person" and no other person had protested the application. In reviewing the evidentiary record, the Court found NGL did not meet the requirements of an "affected person" and "NGL's right to due process or equal protection" were not violated. NGL would also have been required to show "it would suffer actual injury or economic damage other than that of the general public or as a competitor," which it had not. Read more.

**Mineral Liens; Master Service Agreement – Texas.** On November 21, in *Mesa Southern CWS Acquisition, LP v. Deep Energy Exploration Partners, LLC* (Case No. 14-18-00708-CV) the Texas Court of Appeals, Fourteenth District (Houston), addressed a dispute involving mineral liens. Mesa provided labor and materials to an oil and gas operator, Deep Operating, LLC. Claiming that it did not receive payment for the full value of its services, Mesa filed three mineral liens in Milam County encumbering certain real,

mineral, and personal property. After Deep Operating filed for bankruptcy protection, Mesa filed this suit against Deep Operating's parent company, appellee Deep Energy. Deep Energy moved for summary judgment on Mesa's claims, arguing that Mesa contractually waived its right to assert liens against Deep Operating's wells and waived its right to seek payment on the contract from any entity other than Deep Operating because by signing the Master Service Agreement (MSA), Mesa waived its statutory and common law rights to assert claims against anyone other than Deep Operating for the work Deep Operating performed under the MSA. The Court agreed and noted that "the terms of the MSA are unambiguous—Mesa agreed that it 'shall look solely and exclusively to [Deep Operating] for payment' for Mesa's work." Thus, the Court affirmed the trial court's grant of summary judgment in favor of Deep Energy and the dismissal of Mesa's claims and held, "[b]ecause we agree that the contract between Mesa and Deep Operating forecloses all of Mesa's claims against Deep Energy, we affirm the trial court's judgment." Read more.

## INDUSTRY NEWS FLASH

▶ **Continental Resources names Harold Hamm successor.** William Berry has been appointed CEO of Continental Resources Inc. Harold Hamm, founder and current CEO, will become Executive Chairman effective January 1, 2020. Since 2014, Berry has been a director of Continental Resources. Hamm has served as the company's CEO since 1967. Read more.

▶ **U.S. sets oil production and export records.** According to a November 26 *Forbes* report, "not only did the United States reach a record-breaking 12.8 million barrels per day of oil production in November – a new high watermark for the industry – the country achieved something yet more impressive: in the month of September, the United States exported more petroleum products than it imported." This "would be the first time (in a month-long period) that the United States sold more petroleum than it purchased abroad since [U.S. Energy Information Administration] EIA records began in 1949." Read more.

## LEGISLATIVE SESSION OVERVIEW

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

**Utah** convened a special session on December 12 to consider a sweeping tax reform plan. According to *The Salt Lake Tribune*, the legislature adjourned early on December 13 after passing legislation lowering the state's income tax but raising the sales tax on grocery sales, streaming media and motor fuels. Republican Gov. Gary Herbert has promised to sign the proposal.

The **West Virginia** House will meet for a special session on December 16 to consider a tax credit bill, a proposal to stop expunging DUI convictions, and a measure to allow the state to pay off a road bond, reports WOAY.

**Signing Deadlines:** **Alaska** Republican Gov. Mike Dunleavy has 20 days from delivery, Sundays excepted, to act on legislation or it becomes law without signature. **Delaware** Democratic Gov. John Carney has 10 days, Sundays excepted, to act on legislation or it becomes law. **Illinois** Democratic Gov. J.B. Pritzker has 60 days from presentment to act on legislation or it becomes law without signature. **Maine** Democratic Gov. Janet Mills has three days after the convening of the next meeting of the legislature to act on legislation presented on or after June 8 or it becomes law without signature. **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 2019 interim committee hearings: Alabama, Alaska, Arizona, California Assembly and Senate, Colorado, Connecticut, Delaware, Florida House, Georgia House and Senate, Hawaii, Idaho, Illinois Senate, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi House and Senate, Missouri House and Senate, Montana, Nebraska, Nevada, New Hampshire House and Senate, New Mexico, New York Assembly and Senate, North Carolina, North Dakota, Oklahoma House and Senate, Rhode Island, South Carolina House and Senate, South Dakota, Tennessee, Texas House, Utah, Virginia, Washington, West Virginia and Wyoming.

**Bill Pre-Files:** The following states are currently posting 2019 bill drafts, pre-files and interim studies: Alabama House, Arizona, Arkansas, Florida House and Senate, Georgia, Indiana, Iowa, Kansas House, Kentucky, Maine, Missouri House and Senate, Nebraska, New Hampshire, Oklahoma House and Senate, Oregon, South Carolina, Tennessee, Utah, Virginia, Washington and West Virginia. ■