

WEEKLY HIGHLIGHTS AT-A-GLANCE

FEDERAL – Regulatory

- **Hearing on BLM Proposed Rulemaking – Washington, DC.** On April 14, the Senate Energy and Natural Resources Committee's Public Lands, Forests and Mining Subcommittee will hold a hearing on the Bureau of Land Management's proposed rule on "[Waste Prevention, Production Subject to Royalties, and Resource Conservation.](#)" The hearing will be held at 2:30pm EST in 366 Dirksen Senate Office Building. Contact 202-224-4971 or <http://energy.senate.gov> for further information. AAPL has also invited members to submit public comments on this proposed rulemaking which makes changes to the flaring of wells on federal lands. [Click here](#) for more information and how to submit your comment.

FEDERAL – Judicial

- **AMI Agreement; Royalties; Working Interests – Colorado.** On March 24, in *Spring Creek Exploration & Production Co., LLC v. Hess Bakken Investment II, LLC* (Case No. 14-CV-00134), the Colorado U.S. District Court rejected a claim for lost opportunity damages in a dispute over an AMI agreement, concluding that the AMI agreement gave the plaintiff a right to overriding royalties but disclaimed any right to acquire working interests in the AMI so that the plaintiff couldn't present evidence of lost opportunities to acquire working interests that it had no right to acquire. [Read more.](#)
- **Production Payments – Louisiana.** On March 24, in *TDX Energy, LLC v. Chesapeake Operating, Inc.* (Case No. CV 13-1242), the U.S. District Court for the Western District of Louisiana denied a non-operator's claim to recover production payments and other relief based on the unit operator's alleged failure to provide the non-operator with well reports within statutory deadlines, concluding that the non-operator held leases for lands within the unit and the statute's penalty provisions for late well reports only inured to the benefit of owners of unleased oil and gas interests. [Read more.](#)
- **Indian Affairs; Leasing – Oklahoma.** Last Monday, the Bureau of Indian Affairs asked an Oklahoma federal judge to reject a bid by a local association of oil and gas producers seeking to compel the agency to act on drilling permit applications the organization claims have been unreasonably delayed. In the ongoing case, [Osage Producers Assoc. v. Jewell](#) (Case No. 15-CV-469-GKF-FHM), the Osage Producers Association claim Osage County's oil and gas industry could be irreparably damaged unless action is taken to revive production activities. [Read more.](#)

- **Surface Owner; Leasing – Oklahoma.** On March 23, in *Hayes v. Chaparral Energy, LLC* (Case No. 14-CV-495-GKF-PJC), the U.S. District Court of the Northern District of Oklahoma denied a motion by the Osage Minerals Council to dismiss the case for failure to join it as an indispensable party, concluding that the case could proceed without risking the Council’s rights since the lease at issue wouldn’t be subject to outright cancellation if the surface owner prevailed. [Read more.](#)
- **Local Ordinances – Pennsylvania.** A Federal Magistrate Judge in Pennsylvania has ruled in *Seneca Resources Corp. v. Highland Twp.* (C.A. No. 15-60, Mar. 29, 2016) that an oil and gas exploration company may challenge a township ordinance that makes it unlawful to deposit flowback water into underground injection wells within the township. The judge denied a township’s bid to dismiss a suit for lack of standing brought by a UIC well operator in response to the township’s ordinance prohibiting the practice within the township’s borders, concluding that the local ordinance deprived the UIC well operator of its constitutionally protected right as a “person” to engage in the activity pursuant to a permit lawfully issued by the U.S. EPA. [Read more.](#)
- **Co-Tenancy; Leasing – Pennsylvania.** On March 29, in the case *McWreath v. Range Res. – Appalachia, LLC* (Case No. 15-1371), the U.S. Court of Appeals for the Third Circuit denied a claim by oil and gas lessors that they didn’t lease their oil and gas rights to the lessee and therefore were entitled to an accounting for revenues on production as opposed to a royalty interest. The Court rejected the lessors’ curious argument that the lease only covered their oil and gas rights if the lessee produced them from drilling operations on adjacent property. [Read more.](#)
- **Royalties; Leasing – Texas.** On March 28, in *Wells v. Chesapeake Energy Corp.* (Case No. CA H-15-1856), the U.S. District Court for the Southern District of Texas denied a motion by plaintiff mineral owners to have defendant Larchmont Resources, LLC joined as a party in this royalty underpayment action on the basis that Larchmont is also a liable party as an assignee of a portion of the lessee’s interests. [Read more.](#)

STATE – Regulatory

- **Hearings; Public Comments – North Dakota.** The North Dakota Industrial Commission is proposing rule changes that would define an “interested party” in the context of appearing at hearings or submitting comments. The Democratic candidate for governor, Marvin Nelson, claims the rule would severely limit public participation in oil and gas issues. Current oil and gas statutes don’t define the term. The proposed language would State that an “Interested party means an individual or number of individuals that have a property ownership or management interest in or adjacent to the subject matter.” Nelson said the policy change would prevent North Dakotans from commenting on oil and gas proposals that affect the state’s land, water and air. The public will have the opportunity to comment on that proposed rule and others next week at four public

hearings scheduled April 11-14 in Bismarck, Dickinson, Williston and Minot. Written comments will be accepted through April 26. [Read more.](#)

STATE – Legislative

- **Development Plans – Colorado.** On April 1, HB 1430 was introduced by Rep. Steve Lebsock (D) and referred to the Transportation & Energy Committee. The bill would implement a recommendation of the Oil and Gas Task Force regarding the sharing of oil and gas operators' development plans with affected local governments. [Read more.](#)
- **Unemployment Insurance; Worker Misclassification – Colorado.** On April 1, SB 179 was introduced by Sen. Ellen Roberts (R) and referred to the Business, Labor & Technology Committee. The bill would make improvements to the processes used by the state Department of Labor regarding employee classification to better serve employers and improve the audit process, employer education, and reporting procedures. [Read more.](#)
- **Land Use; Local Authority – Colorado.** (Update to 3/21/16 Weekly Report) On April 4, [HB 1355](#) was defeated in the House. The bill intended to lay out the authority of local governments over oil and gas drilling operations. The measure, which had passed out of committee with amendments, would have granted municipalities greater control over operations, and according to Republicans, would have allowed local governments to preempt state action on siting. [Read more.](#)
- **Drilling Units – Louisiana.** On April 4, SB 388 was introduced by Sen. Patrick Cortez (R) and referred to the Committee on Natural Resources. The bill would amend current law to eliminate the notification provision to all other owners in the unit prior to the actual spudding of a unit well, a substitute unit well, an alternate unit well, or a cross-unit well on any drilling unit. The bill also makes changes to payment and unit participation time periods. [Read more.](#)
- **Mineral Rights Sales – Louisiana.** On April 5, SB 404 was introduced by Sen. Barrow Peacock (R) and referred to the Committee on the Judiciary. The bill regulates unsolicited offers for the transfer and sale of mineral rights by mail. [Read more.](#)
- **Employee Misclassification – Missouri.** On April 6, HB 1756, introduced by Rep. Kurt Bahr (R), was taken up for consideration by the Fiscal Review Committee. The bill would amend sections of employment tax law by providing that if an employer classifies an individual as an independent contractor based upon the recommendation in an opinion letter by the state Department of Labor and Industrial Relations, the department shall not impose a fine or additional employment taxes if it subsequently determines the individual is an employee. The bill also sets maximum employment tax rates under qualifying circumstances related to independent contractors. [Read more.](#)

STATE – Judicial

- **Permitting; State Preemption – Louisiana.** On April 7, the St. Tammany Parish Council voted to ask the state’s highest court to review its legal effort to block oil drilling in the parish after the state’s First Circuit Court of Appeals upheld a lower court ruling on March 9 that St. Tammany Parish government cannot use its zoning regulations to block a proposed oil drilling project northeast of Mandeville. In its decision, the Appeals court held that parish zoning ordinances are preempted by state law when it comes to the state’s regulation of oil and gas activity. It also ruled that the state Office of Conservation, which granted a drilling permit to Helis Oil Co. of New Orleans for an exploratory well on land it has under lease just north of Interstate 12 and east of Louisiana 1088, considered the provisions of St. Tammany Parish’s master plan in accordance with state law. [Read more.](#)
- **Production Revenues – Louisiana.** On March 30, in *Keystone Energy Co., LLC v. Denbury Onshore, LLC* (Case No. 2015-999), the Louisiana Court of Appeals remanded a dispute over mineral rights claimed by the property owner and its lessee from which a third party generated revenues on production in excess of one-half million, citing conflicting evidence over whether the parties to the original grant conveyed fee simple title or a mere servitude under state law. [Read more.](#)
- **Local Ordinance; Leasing – Michigan.** On March 24, in *Don’t Drill Hills, Inc. v. City of Rochester Hills* (Case No. 324717), the Michigan Court of Appeals denied a claim by an opposition group seeking to invalidate a lease arguing that the city had no right to lease the subsurface of city-owned parks or cemeteries to an oil and gas company, concluding that while the city charter prohibited the outright “sale” of public parks it did not prohibit the lease of subsurface interests. [Read more.](#)
- **Estoppel by Deed; Leasing – Pennsylvania.** On March 29, the Pennsylvania Supreme Court ruled in [Shedden v. Anadarko E&P Co. LP](#) (Slip Opinion No. J-7-2016). At issue was whether the lower court properly applied the doctrine of estoppel by deed to conclude that an oil and gas lease between the parties covered the oil and gas rights to 100 percent of the property identified in the lease notwithstanding that the lessors only owned a one-half interest at the time the lease was executed. The dispute arose during lease extension regarding the quantum of interest covered by the lease. In its opinion, the Court confirmed that the doctrine of estoppel by deed applies to oil and gas leases and does not require detrimental reliance. Thus, the mineral owners could not deny the validity of their initial conveyance of all of the oil and gas rights to the property. [Read more.](#)
- **Rule Against Perpetuities; Leasing – Texas.** On March 24, in *Allegiance Expl., LLC v. Davis* (Case No. 02-13-00349-CV), The Texas Court of Appeals issued a lengthy decision resolving disputes over the continued validity of three mineral leases, concluding in part

that one of those leases did not violate the rule against perpetuities since it contained language expressing an intent to convey a present right to future possession of a mineral estate. [Read more.](#)

- **Deeds; Royalty Reservations – Texas.** On March 30, in *Dragon v. Harrell* (Case No. 04-14-00711-CV), the Texas Court of Appeals concluded that a deed at issue reserved a floating “fraction of” royalty interest (one-half of 15/16ths royalty interests paid on any oil or gas produced from the property at issue) rather than a “fractional” royalty interest (one half of all the oil gas produced). [Read more.](#)
- **Pooled Royalties; Deeds – Texas.** On March 30, in *Aery v. Hoskins, Inc.* (Case No. 04-14-00807-CV), the Texas Court of Appeals, in a case of first impression, rejected a buyer’s claim that he should be entitled to all of the seller’s royalty interests in several properties co-owned by the seller and his siblings, concluding that the sibling’s undivided royalty interest held in other tracts in the pool did not pass with that sibling’s conveyance of his tract through a general warranty deed. [Read more.](#)

INDUSTRY NEWS FLASH:

◆ **API Report: Shale Progress Needs to Continue.** A new report compiled by the American Petroleum Institute (API) said well completions for natural gas were down 70 percent and for oil by 90 percent when compared to first quarter 2015. “[W]e must revisit current energy policy, speed up the LNG export approval process and avoid unnecessary regulations to help U.S. producers to compete effectively in the global market under the low-price environment,” said Hazem Arafa, director of statistics for the API. [Read more.](#)

State-by-State Legislative Session Overview

Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont and Wisconsin are in regular session. The **District of Columbia** and the **U.S. Congress** are also in regular session.

Arkansas is expected to convene its 2016 legislative session on April 13. **Arkansas** convened a special session on April 6 for consideration of its Medicaid expansion program.

Kansas is currently in recess and is expected to reconvene on April 27.

The following states are expected to adjourn their 2016 legislative sessions on the dates provided: **Maryland** (April 11); **Kentucky** (April 12) and **Tennessee** (April 15).

Virginia Democratic Gov. Terry McAuliffe has until April 10 to act on legislation presented to him after March 4 or it becomes law without signature. **Oregon** Democratic Gov. Kate Brown has until April 14 to act on legislation or it becomes law without signature. **Georgia** Republican Gov. Nathan Deal has until May 3 to act on legislation presented after March 18 or it becomes law without signature. **Florida** Republican Gov. Rick Scott has 15 days from presentment to act on legislation or it becomes law without signature.

Utah Republican Gov. Gary Herbert had a signing deadline on March 30. **West Virginia** Democratic Gov. Earl Ray Tomblin had a signing deadline on April 1. **Washington** Democratic Gov. Jay Inslee had a signing deadline on April 2.

The following states are currently holding interim committee hearings: **Arkansas, Montana, Nevada, North Dakota** and the **Texas** House and Senate.

Endangered Species

Vermont [HB 552](#) was heard during a non-voting session in the Senate Natural Resources and Energy Committee on April 7, and an [amendment](#) was proposed. The bill would authorize the Secretary of Natural Resources to designate critical habitat that is necessary for the conservation or recovery of a threatened or endangered species. It would clarify how threatened or endangered plants would be regulated. It would also authorize the secretary to issue a permit for the authorized or incidental taking of a threatened or endangered species. Draft No. 1.1 would amend definitions for “endangered species,” “threatened species,” and “critical habitat.” It would also allow for cooperation with Canadian officials when making the decision to list or de-list a species. Draft No. 2.1 would take into account accepted silvicultural practices, farming and forestry operations. The bill would take effect on July 1, 2016.

Franchise Tax

The House floor debate for **Louisiana** [HB 735](#) was moved from April 5 to April 11. This bill would change the date corporate franchise taxes are due from the 15th day of the third month following the month the tax is due, to the 15th day of the fourth month following the month the tax is due.

Minnesota [SF 3441](#) was introduced, read for the first time, and referred to the Senate Taxes Committee on April 4. This bill would eliminate the corporate franchise tax and replace it with the fair tax. Fair tax is defined as the sales and use tax incorporated into the gross sale price of all taxable property and taxable services. If enacted, this section of the bill would become effective after December 31, 2017.

This bill is sponsored by Sen. Dave Thompson, R-Lakeville. The House companion, [HF 3594](#), is pending in the House Taxes Committee.

Mississippi [SB 2858](#) passed the House on April 5 with [amendments](#) that removed the language phasing out franchise tax by 2025. The Senate did not concur in the amendments and requested a

conference committee on April 7. As passed by the Senate, the bill would phase out the corporation franchise tax by January 1, 2025; at that time it would be repealed. The current franchise tax rate of \$2.50 for every \$1,000 would be phased out by decreasing the tax by \$0.25 per year until the proposed repeal in 2025.

Landmen

Employee Misclassification

Colorado [SB 179](#) was introduced and referred to the Senate Business, Labor and Technology Committee on April 1. The state Department of Labor and Employment has the authority to audit businesses to gather information to determine whether individuals are independent contractors or employees for the purpose of unemployment insurance. In order to improve this process, and to better serve employers, this bill would require the department to:

- Develop specific guidance for employers to help them determine the proper classification for their employees.
- Clarify the process by which an employer or individual may submit additional information in response to a request from the department.
- Establish an individual within the department to serve as a resource for employers to provide guidance.
- Establish internal methods to improve the consistency among auditors.
- Establish an independent review of a portion of the audit and appeal results at least twice a year to monitor trends and make improvements to the audit process.

If enacted, this law would take effect on the day following the expiration of the 90-day period after the legislature adjourns in 2016. This bill is sponsored by Sen. Ellen Roberts, R-Durango, vice-chair of the Senate Agriculture, Natural Resources and Energy Committee. The Colorado legislature is scheduled to adjourn on May 11.

Louisiana [HB 665](#) was engrossed on April 4 and scheduled for a floor debate on April 11. This bill would remove the warning and increase the fine for employers that misclassify their employees as independent contractors. In place of a written warning for a first offence, employers would have to pay a penalty up to \$5,000 per misclassified employee. The proposed fee for a second offense would be up to \$10,000 per misclassified employee, a third offense penalty would be up to \$25,000 per employee. The proposed penalties for subsequent offenses would be a fine up to \$50,000 and imprisonment of not more than 90 days per misclassified employee.

Nebraska [LR 520](#) was referred to the Business and Labor Committee on April 1. This bill would require that the Business and Labor Committee conduct an interim study on employee misclassification. The goal of the study would be to review the administration and enforcement of the employee misclassification act, determine if the program has adequate resources, and examine the direct and indirect impact the act is having on certain industries. The committee

would then make recommendations to the legislature based on their findings. This bill is sponsored by Sen. Burke Harr, D-Scottsbluff.

Vermont [HB 867](#) was discussed in the House Commerce and Economic Development Committee on April 5, and testimony was given on April 6, 7 and 8. The committee has yet to vote on the bill.

Three amendments to the bill were filed on March 30:

- [Amendment draft No. 4.1](#) would shift the enforcement from the commissioner to the attorney general.
- [Amendment draft No. 1.2](#) would amend the definition of an independent contractor.
- [Amendment draft No. 3.1](#) would add additional criteria to the definition of a worker.

As it relates to workers' compensation and unemployment compensation statutes, independent contractors are not considered "employees."

The bill defines an "independent contractor" as a person who meets the following criteria:

- Is free from the direction and control of the employing unit.
- Controls the means and manner of the work performed.
- Operates a separate and distinct business from that of the person that it contracts with.
- Holds itself out as in business for itself.
- Offers its services to the general public.
- Is not treated as an employee for the purposes of income or employment taxation with regard to the work performed.

This bill also would create the Vermont Employee Classification Task Force with the goal of reducing the frequency of employee misclassification. The task force would do this through increased education, improved coordination of state resources and increased collaboration among state government, business, labor and stakeholders.

The bill would require that every employer post a document in plain sight to explain the difference between an "employee" and an "independent contractor." If enacted, this bill would take effect on July 1, 2016.

Lands

Land Permits

Louisiana [HB 313](#) is scheduled to be heard in the House Civil Law and Procedure Committee on April 11. The bill would amend current law requiring certain disclosures before exercising the right of expropriation by entities including those engaged in marketing, transportation and supply of natural gas. This bill would require the entity to provide the property owner with a notice including a statement that:

- The property owner is entitled to receive just compensation for the property to be acquired to the fullest extent allowed by law.
- The property may be acquired only by an authority authorized by law to do so.
- The property owner is entitled to receive from the expropriating authority a written appraisal or evaluation of the amount of compensation due.
- Identifies the website of the expropriating authority where the property owner can read the expropriation statutes upon which the expropriating authority relies.
- Offers to provide upon request of the property owner a copy of the expropriation statutes upon which the expropriating authority relies.
- Identifies each agency responsible for regulating the expropriating authority, including the name, website and telephone number of each agency.
- The property owner may hire an agent or attorney to negotiate with the expropriating authority and an attorney to represent the property owner in any legal proceedings involving the expropriation.

The bill is sponsored by Rep. Ray Garofalo, R-Chalmette, chair of the House Civil Law and Procedure Committee.

Public Lands

Colorado [HB 1355](#) failed to pass the second reading on April 4 in a victory for the oil and gas industry. The bill would have expanded local governments so-called “House Bill 1041” land use authority over oil and gas mineral extraction areas by not requiring the Colorado Oil and Gas Conservation Commission to identify a specific area for designation before exercising that power. The bill would have also required that an operator be subjected to the local governments’ authority to ensure that the operation complies with local regulations. The bill also specified that the commission’s authority to regulate oil and gas operations does not exempt oil and gas facilities from local governments’ siting authority.

Oil and Gas

General Oil and Gas

California [AB 1882](#) passed the Assembly Natural Resources Committee on April 5 and was re-referred to the Assembly Appropriations Committee. The bill would allow the State Water Resources Control Board and regional water quality control boards to review, comment on, and propose additional requirements for Class II underground injection well projects starting January 1, 2017. The Oil, Gas, and Geothermal Division would not be able to approve a new project suggested by the review without written concurrence from the state or regional board that the injection of fluids would not affect the quality of water.

California [AB 2756](#) passed the Assembly Natural Resources Committee as amended on April 6. The bill would give the Oil and Gas Supervisor the authorization to treat each day a violation is not cured as a separate violation, and would set the penalty at no less than \$10,000 per violation.

The bill would also authorize the supervisor to allow for a supplemental environmental project in lieu of a portion of the penalty, but not to exceed 50 percent of the amount of the fee. It would change the penalty limit to allow for an appeal from \$10,000 to \$25,000. As amended, the bill would also give the division the ability to manage the Oil and Gas Environment Remediation Account in which money can be used to plug abandoned wells, and other areas that may pose a danger to health, water quality, wildlife or natural resources.

Colorado [HB 1430](#) was introduced on April 1 and referred to the House Transportation and Energy Committee. In addition to registering development plans with the state oil and gas conservation committee, this bill would require oil and gas operators to share their development plans with local governments and municipalities where their operations will be taking place. This bill is sponsored by Rep. Steve Lebsack, D-Thorton.

On April 6, **Kentucky** [SB 188](#) became law without Republican Gov. Matt Bevin's signature. The law is awaiting a chapter number. The law, which will take effect on July 5, will require a permit for drilling a stratigraphic test well, which is defined as "an exploratory borehole drilled for the sole purpose of acquiring subsurface geological and structure test data."

Democratic Gov. Earl Ray Tomblin signed **West Virginia** [HB 4323](#) on March 30. Effective June 10, the law will require that all pipeline and well operators report incidents to the Division of Homeland Security and Emergency Management at the Mine and Industrial Accident Call Center. Under the law, it will be required that all incidents be reported within 15 minutes of occurring. The director can impose civil administrative penalties of between \$2,500 and \$50,000 if the operator fails to give a timely notice of the incident.

Mineral Rights

California [AB 2729](#) passed the Assembly Natural Resources Committee on April 4 with amendments. As amended, this bill would make changes to the definitions of active observation well, idle well and long-term idle well. An idle well would be defined as a well that had six months of not producing or being used for injection. An idle well would continue to be an idle well until the well has been properly abandoned in accordance with existing law. For active observation wells, the bill would require the user to report their data once every month, instead of every three years. The bill would define a long-term idle well as a well that has been idle for five or more years. The bill would also provide that the abandoned underground personal property of an operator becomes the property of the mineral interest owner.

Louisiana [HB 911](#) passed the House Natural Resources and Environment Committee on April 6 and is scheduled for a floor debate on April 14. This bill would authorize the transfer or lease of state property in Grant Parish from the Department of Transportation and Development to the Grant Parish Police Jury. The state would retain the mineral rights. Similar bills [HB 214](#) and [HB 323](#) are pending in the House Natural Resources and Environment Committee.

Louisiana [SB 404](#) was referred to the Senate Judiciary Committee on April 6. This bill would regulate the sale or transfer of mineral rights by mail. The bill would require a disclosure to highlight the sale of the mineral rights by mail. If the proper disclosure is provided, the transferor

may rescind the agreement within 60 days after the date on which the transferor signs it. If the instrument does not include the required disclosure, the transferor may rescind the agreement within three years after the date on which the transferor signs it. The rescission will not be effective against a party to make royalty payments until 60 days after that part is furnished with a certified copy of the notice of rescission. A transferor who exercises the right to rescind is required to return any payments, including royalties and interest, made by the transferee within 60 days. This bill is sponsored by Sen. Barrow Peacock, R-Shreveport-Bossier.

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