WEEKLY HIGHLIGHTS AT-A-GLANCE

FEDERAL – Regulatory

- **BLM Coastal Oil and Gas Leasing Plan – Alaska.** On May 9, the Bureau of Land Management (BLM) announced that it will hold a series of public meetings "to gather relevant comments, concerns and/or issues pertaining to the development of the Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement (EIS)." The meetings, to be held in communities "in and near the program area and additional meetings in Anchorage, Fairbanks, Utqiaġvik [Barrow] and Washington D.C." will influence the scope of the EIS as part of the BLM plan to implement an oil and gas leasing program within the Arctic National Wildlife Refuge Coastal Plain. The area comprising the Coastal Plain includes approximately 1.6 million acres within the approximately 19.3 million-acre Arctic National Wildlife Refuge. Read more.

FEDERAL – Judicial

- **Royalties; Leasing – Tenth Circuit (Colorado).** On April 10, the U.S. Court of Appeals for the Tenth Circuit (Colorado), affirmed a lower court dismissal of breach of contract and tort claims against two operators. The 52-page opinion in *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC* (Case No. 17-1010) contains detailed analyses of various drilling-related contractual agreements among the parties, including leasing obligations, a Joint Operating Agreement, Assignments, and an Area of Mutual Interest Agreement regarding drilling in the Bakken. Read more.

- **BLM Leasing – Montana Federal Court.** On May 15, in *WildEarth Guardians v. U.S. Bureau of Land Management* (Case No. 4:18-cv-00073-BMM), environmental groups and three landowners filed suit against the BLM seeking to cancel 287 oil and gas leases sold off in two auctions—one on Dec. 12, 2017 for leases in the Tongue River Valley in southeastern Montana and the second on March 13 for leases near Livingston, the Beartooth Front, scenic areas north of Yellowstone National Park, and next to the Upper Missouri River Breaks National Monument. The plaintiffs "claim the BLM failed to properly study oil and gas drilling's effects on groundwater sources when it conducted an environmental analysis of leasing the lands. They also claim the agency did not address how drilling on those lands would affect the release of greenhouse gases and climate change, which is required by federal law." Read more.

- **Overriding Royalties; Assignments; Post-Production Costs – North Dakota Federal Court.** On March 14, in *El Petron Enterprises, LLC, Plaintiff, v. Whiting Resources Corp.* (Case No. 1:16-CV-090), the U.S. District Court for the District of North Dakota held that

an overriding royalty is subject to post-production costs because production royalties are subject to those costs, noting that "if post-production costs are not included, then El Petron is not receiving payment pursuant to the Production Royalty calculation." Read more.

- **Top Leases; Overriding Royalties – North Dakota Federal Court.** On March 7, in *Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC* (Case No. 1:16-CV-349), the U.S. District Court for the District of North Dakota held that overriding royalty interests only burdened the bottom leases but not any top leases since the top leases "differ in many respects from the Subject Leases" such as containing "differing primary terms and differing royalty amounts." Further, the "Top Leases were acquired for additional bonus consideration" and "also create different legal relationships." Read more.

- **Royalties; Leasing – Pennsylvania Federal Court.** On March 27, in *Lasher v. Statoil USA Onshore Properties Inc.* (Case No. CV 3:17-0914), the lessee-defendant sought to move a royalty dispute case to federal court. However, in denying the removal, the U.S. District Court for the Middle District of Pennsylvania concluded that the lessee did not meet the "amount in controversy" for removal of a royalty dispute to federal court because the current royalty dispute at issue did not exceed the $75,000 threshold and the Court rejected the lessee's estimates of future royalty exposure as too "speculative" to meet the removal threshold. Read more.

- **Habendum Clause; Arbitration; Leasing – Pennsylvania Federal Court.** On March 26, in *Jesmar Energy, Inc. v. Range Resources-Appalachia, LLC* (Case No. 2:17-cv-00928-LPL), the U.S. District Court for the Western District of Pennsylvania rejected the lessee's attempt to apply the arbitration provision in an oil and gas lease royalty dispute pursuant to an assignment of the lease. The Court held that the habendum clause of the assignment does not establish "the arbitrability of the instant dispute" and rather "the more appropriate purpose of this provision in context is to identify the transfer of Jesmar's rights, duties, and obligations under the Lease to the Assignee." Read more.

- **Class Action; Royalties; Leasing – Ohio Federal Court.** On March 23, in *Henceroth v. Chesapeake Exploration, L.L.C.* (Case No. 4:15-CV-2591), the U.S. District Court for the Northern District of Ohio (Eastern Division) allowed a royalty class action suit to proceed regarding 623 leases in which royalty owners challenge the lessee's royalty payment calculations and claim that the lessee calculated royalties based on the wrong price. The Court found that the putative plaintiff class met the tests of "numerosity, typicality, commonality, adequacy, and ascertainability" required to certify a class of plaintiffs. Read more.

- **Class Action; Royalties; Leasing – Third Circuit (Pennsylvania).** On March 13, in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC* (Case No. 17-2037), the Third Circuit Court of Appeals rejected royalty owners' claim that the leases in question permit class

arbitration instead of individual arbitration. Notably, the Court noted that the subject leases did not expressly permit class arbitration. "The dispute instead is whether, despite this silence with regard to an express agreement to permit class arbitration, the Leases can still be read to 'agree' to class arbitration." The Court found that the leases did not, noting that silence regarding class arbitration generally indicates a prohibition against class arbitration. And in a blow to the royalty owners, even if an intent to permit class arbitration could be implied, the Court found the arbitration clause "neither explicitly nor implicitly authorizes class arbitration." Read more.

- **Royalties; Production Costs; Leasing – West Virginia Federal Court.** On April 2, in *Fout v. EQT Production Company* (Case No. 1:15CV68), the U.S. District Court for the Northern District of West Virginia addressed the plaintiff lessors' claims that royalties were underpaid, that defendant failed to provide a full and truthful accounting of the production from their minerals, and the lessee incorrectly applied certain deductions to their royalty payments. While the defendant sought summary judgment on various claims, the Court granted defendant's motion for summary judgment "as to the claims for failure to properly account, breach of contract, fraud, negligent misrepresentation, and punitive damages." However, in allowing the case to move forward, the Court held that the "defendant's motion for summary judgment is denied as to the sole remaining issue of the reasonableness of the post-production expenses actually incurred by the lessee, which is a question for the fact-finder." Read more.

STATE – Legislative

- **Taxation – Kansas.** On May 4, HB 2105, introduced by the House Committee on Taxation died in committee. Under current law, any person, corporation, or association that owns oil and gas leases or is engaged in operating for oil or gas is required to file a statement of assessment to the county appraiser on or before April 1st of each year. HB 2105 would have changed the date for the annual filing deadline from April 1st to March 15th. The bill would also have changed the deadline for which penalties are calculated to coincide with the March 15th deadline. Read more.

- **Drilling and Operations – Kansas.** On May 4, HB 2189, introduced by the House Committee on Water and Environment died in committee. The bill would have amended existing law concerning requirements for intent to drill applications that must be fulfilled prior to the drilling of an oil or gas well. The bill would have required that the operator provide a map showing the location and relative distances to any surface structures or water wells. Operators would also have been required to submit proof that they have the right to enter and extract minerals from the property. Before a well is drilled or its usage changed, the bill would have required that the Kansas Corporation Commission (KCC) determine if the operator has a valid lease and examine the impact the well could have on the right to quiet enjoyment of a surface owner's property and any potential impact on the surface owner's water wells. The KCC would

also have been required to adopt rules and regulations for oil and gas wells within 1,000 feet of occupied buildings to protect the rights of affected persons and property associated with those buildings. Read more.

- **Drilling Units; Pooling Orders – Colorado.** (*Update to 5/7/18 Weekly Report*) On May 15, SB18-230 was sent to Governor John Hickenlooper (D) after passing the legislature. The bipartisan, and oil and gas industry supported, bill would clarify that a pooling order entered into by the Colorado Oil and Gas Conservation Commission could authorize more than one well. The bill would require the order specify that a non-consenting owner is immune from liability for costs arriving from spills, releases, damage or injury resulting from oil or gas operations on the drilling unit. Current law specifies that a non-consenting owner must pay the consenting owners 200 percent of their proportionate share of the costs of drilling; the bill would limit the 200 percent cost recovery to wells that are 5,000 feet or less in depth and increase the cost recovery to 300 percent for wells greater than that depth or for horizontal wells. Current law prohibits entry of a pooling order until the mineral rights owners have been given a reasonable offer to lease their rights; this bill would require that the offer be given at least 60 days before the hearing on the order and must include a copy of or link to a commission brochure that clearly and concisely explains the pooling procedures. The governor has 10 days to sign the bill. Read more.

STATE – Judicial

- **Well Plugging – Pennsylvania.** On March 15, in *B&R Resources LLC v. DEP* (Case No. 1234 C.D. 2017), the Commonwealth Court of Pennsylvania ruled on a petition for review challenging an adjudication of the Environmental Hearing Board (EHB) regarding the liability for plugging 47 abandoned oil and gas wells. The Court held that the successor well owner is liable for its predecessor's statutory obligation to plug the wells, but remanded the case back to the EHB "for additional findings of fact as to how many, if any, of the Wells could have been plugged if [successor] had caused [predecessor] to make reasonable efforts to plug the Wells and for an adjudication of [successor's] liability in accordance with those findings." Read more.

- **Retained Acreage Clauses; Leasing – Texas.** On April 13, in companion cases *XOG Operating, LLC v. Chesapeake Exploration Ltd. Partnership* (Case No. 15–0935) and *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.* (Case No. 15-0155), the Texas Supreme Court construed retained acreage clauses. First, in *XOG Operating*, the Court held that a governmental proration unit assigned to a well "refers to acreage assigned by the operator, not by field rules" and "that acreage included within the proration unit for each well prescribed by field rules refers to acreage set by the field rules, not acreage assigned by the operator." In *Endeavor Energy*, the Court held that "the retained-acreage clauses in the leases at issue permitted Endeavor to retain

the amount of acreage Endeavor 'assigned to' each well in the plats it filed" with the Texas Railroad Commission. Read more.

- **Non-Participating Royalty Interest; Rule Against Perpetuities – Texas.** On March 23, in *ConocoPhillips Co. v. Koopmann* (Case No. 16-0662), the Texas Supreme Court was tasked with determining "whether the common law rule against perpetuities (RAP) invalidates a grantee's future interest in the grantor's reserved non-participating royalty interest." The Court held that it does not, "but on grounds different from those expressed by the court of appeals." The Court also held "that the reservation's savings clause is ambiguous and affirm the court of appeals' remand on this issue." In its opinion, the Court held that where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, RAP does not invalidate the grantee's future interest. Read more.

- **Title Warranties; Leasing – Texas.** On April 5, in *Martin v. Newfield Exploration Co.* (Case No. 13-17-00104-CV), the Court of Appeals of Texas (Thirteenth District), held that a lessee did not have an offset well obligation to spud a well and prevent drainage from nearby unit operations since the unit operations took place two tracts away from the leased premises and did not qualify as "acreage adjoining" the leased premises that would trigger the obligation. Read more.

- **Title Warranties; Leasing – Texas.** On March 23, in *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.* (Case No. 15-0712), the Texas Supreme Court was tasked with determining "whether the lessee of certain mineral interests justifiably relied on extra-contractual representations by the lessor's agent despite 'red flags' and a negation-of-warranty clause in the sales documents explicitly placing the risk of title failure on the lessee." The Court held that the lessee could not so justifiably rely during oil and gas lease negotiations given the number of red flags that contradicted the agent's representations about lessor's title. Read more.

State-by-State Legislative Session Overview

California, **Delaware**, **Illinois**, **Louisiana**, **Massachusetts**, **Michigan**, **Minnesota**, **Missouri**, **New Hampshire**, **New Jersey**, **New York**, **North Carolina**, **Ohio**, **Oklahoma**, **Pennsylvania** and **Rhode Island** are in regular session. The **District of Columbia** Council, **Puerto Rico** and the **United States** Congress are also in regular session.

South Carolina is in recess until May 23. The House and Senate have agreed on a resolution allowing lawmakers to return on May 23 and 24 to deal with the state's budget and bills in conference committees. The resolution also allows lawmakers to return on June 27 and 28 to address the governor's budget vetoes, reports *The State*. **Wisconsin** is in recess to the call of the chair.

The following states are expected to adjourn on the dates provided: **Missouri** (May 18), **Minnesota** (May 21), **Oklahoma** (May 25) and **Louisiana** (June 4).

The following states adjourned on the dates provided: **Alaska** and **Vermont (**May 13).

The **Virginia** Senate reconvened on May 14 for a special session to continue working on a two-year budget, the *Richmond Times-Dispatch* reports.

Indiana convened a one-day special session on May 14 to address tax breaks for large corporations and appointing a new governing body of the public-school districts. Republican Gov. Eric Holcomb pledged to sign the bills into law following the approval of the Senate, the *Indy Star* reports.

Missouri state lawmakers called for a special session, set to begin on May 18, to consider impeaching Republican Gov. Eric Greitens, *The Washington Post* reports. **Oregon** Democrat Gov. Kate Brown released a statement announcing a one-day special session on May 21 to address the state's tax code in order to expand the list of small businesses eligible for state tax breaks, reports the *Statesman Journal*. **Vermont** Republican Gov. Phil Scott issued a letter calling for a special session, beginning May 23, to address his opposition to the state budget and tax bills that passed the legislature last week. Governor Scott hopes to use one-time money to keep tax rates level while passing a plan for future years.

Maryland Republican Gov. Larry Hogan has until May 29 to act on legislation presented by April 29 or it becomes law without signature. **Iowa** Republican Gov. Kim Reynolds has until June 4 to act on legislation or it is pocket vetoed. **Colorado** Democratic Gov. John Hickenlooper has until June 8 to act on legislation presented after April 29 or it becomes law without signature. **Hawaii** Democratic Gov. David Ige has until July 10 to act on legislation presented after April 19 or it becomes law without signature. **Alaska** Independent Gov. Bill Walker has 20 days from presentment, Sundays excepted, to act on legislation or it becomes law without signature. **Connecticut** Democratic Gov. Dannel Malloy has 15 days from presentment to act on legislation or it becomes law without signature. **Illinois** Republican Gov. Bruce Rauner has 60 days from presentment to act on all legislation passed during the veto session or it becomes law. **Kansas** Republican Gov. Jeff Coyler has 10 days, not including the day of presentment, to act on legislation or it becomes law without signature. **Louisiana** Democratic Gov. John Bel Edwards has 20 days from presentment to act on special session legislation or it becomes law. **Oklahoma** Republican Gov. Mary Fallin has five days from presentment, Sundays excepted, to act on special session legislation or it becomes law. **Vermont** Republican Gov. Phil Scott has five days from presentment to act on legislation presented after May 16 or it is pocket vetoed. **Wisconsin** Republican Gov. Scott Walker has six days, Sundays excepted, to act on special session legislation or it becomes law.

Arizona Republican Gov. Doug Ducey had a signing deadline on May 16.

The following states are currently holding 2019 interim committee hearings: **Alabama**, **Arkansas**, **Colorado**, **Idaho**, **Indiana**, **Iowa**, **Kansas**, **Kentucky**, **Maryland**, **Mississippi**

Senate, **Montana**, **Nevada**, **New Mexico**, **North Dakota**, **Oregon**, **South Dakota**, **Texas** House and Senate, **Utah**, **Virginia**, **Washington**, **West Virginia** and **Wyoming**.

The following states are currently posting 2019 bill drafts, prefiles and interim studies: **Montana**, **North Dakota** and **Utah**.

Franchise Tax

California SB 1417 has been scheduled for a hearing in the Senate Appropriations Committee on May 22 at 10:00 AM. Existing law imposes a minimum franchise tax of $800 and an annual tax equal to minimum franchise tax. The bill would reduce the minimum franchise tax for taxable years on or after January 1, 2019 to:

- $200 if the corporation has gross receipts that are less than $2.5 million.
- $400 if the corporation has gross receipts that are less than $7.5 million but equal to or greater than $2.5 million.
- $600 if the corporation has gross receipts that are less than $15 million but equal to or greater than $7.5 million.
- $800 if the corporation has gross receipts that are equal to or greater than $15 million.

The bill would take effect immediately.

Louisiana HB 341 was signed by Democratic Gov. John Bel Edwards on May 10 and took immediate effect. The law changes the due date for corporate franchise tax filings from the 15th day of the third month to the 15th day of the fourth month.

General Oil and Gas

Bundling and Pooling

Colorado SB 230 was delivered to Democratic Gov. John Hickenlooper on May 15; Governor Hickenlooper will have until June 8 to sign or veto the bill or it becomes law. The bill would clarify that a pooling order entered into by the Colorado Oil and Gas Conservation Commission could authorize more than one well. The bill would require the order specify that a non-consenting owner is immune from liability for costs arriving from spills, releases, damage or injury resulting from oil or gas operations on the drilling unit. Current law specifies that a non-consenting owner must pay the consenting owners 200 percent of their proportionate share of the costs of drilling; the bill would limit the 200 percent cost recovery to wells that are 5,000 feet or less in depth and increase the cost recovery to 300 percent for wells greater than that depth or for horizontal wells. Current law prohibits entry of a pooling order until the mineral rights owners have been given a reasonable offer to lease their rights; this bill would require that the offer be given at least 60 days before the hearing on the order and must include a copy of or link to a commission brochure that clearly and concisely explains the pooling procedures.

General

Illinois SB 3174 was heard House Agriculture and Conservation Committee on May 15. During the hearing the committee heard from numerous witness and referred the bill to the House Petroleum Regulation Subcommittee. The bill would require the following information to be included on a well permit:

- The GPS surface and bottom hole locations for all wells drilled utilizing directional or horizontal drilling techniques.
- A list of chemicals and additives intended to be used in the drilling or completion operations.

The bill would also prohibit horizontal wells or directionally drilled wells from being classified as confidential. The bill would require the Department of Natural Resources to make specified information available on its website including drilling permits issued as well as well drilling and completion reports. The bill would protect furnished trade secret information from further disclosure if the department determines that the information has not been published, disseminated or otherwise become a matter of general public knowledge and the information has competitive value. The bill would take effect January 1, 2019 if passed prior to May 31; however, if the bill is passed after May 31 then it would take effect June 1, 2019.

Ohio HB 225 was heard in the Senate Natural Resources Committee on May 16; information from the hearing was not immediately available. This bill would allow a landowner to report an idle and orphaned well and would require the Chief of the Division of Oil and Gas Resources Management to inspect the well within 30 days after the landowner report. The bill would also require the chief to establish a scoring matrix for idle and orphaned wells and to use the matrix to determine the priority of plugging wells. The bill would also require the chief to use 45 percent of the revenue credited to the oil and gas well fund to be used for plugging idle and orphaned wells rather than 14 percent. The bill would take effect 90 days after becoming law.

Ohio HB 430 was heard in the Senate Ways and Means Committee on May 16; the committee took testimony but did not vote on the bill. Current law exempts the sale or use of tangible personal property used "directly" in the production of oil and natural gas. This bill would amend current law to remove the qualification that the property be directly used in the production of oil and gas. The bill also amends the regulatory definition of what is considered a production operation to exclude:

- Operations, activities or equipment used in or associated with the exploration and production of any mineral resource other than oil and gas.
- Storing, holding or blending solutions or chemicals used in well stimulation.
- Preparing, installing or reclaiming foundations for drilling or pumping equipment or well stimulation material tanks.
- Transporting, delivering or removing equipment to or from the well site or storing such equipment.

- Gathering operations occurring off the well site, including gathering pipelines, transporting hydrocarbon gas or liquids away from a crude oil or natural gas production facility.

The bill would take effect 90 days after enactment.

Leasing

Louisiana HR 238 passed the House following a 91-0 vote on May 18 and does not require the signature of Democratic Gov. John Bel Edwards. The resolution requests the Louisiana State Law Institute to study the history, reasoning, classification and definition of a production payment. The resolution requests that the law institute provide a recommendation with regard to a possible codification of the *Adams v. Chesapeake Operating, Inc*. federal court decision no later than 60 days prior to the convening of the 2019 session.

Hydraulic Fracturing

New York AB 4134 was reported favorably from the Assembly Codes Committee on May 14 and has now been placed on the Assembly third reading calendar. The bill would prohibit the inclusion of non-disclosure agreements in settlements of hydraulic fracturing actions when there is evidence of threats to public health or safety. The bill would take effect immediately.