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ONE J

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I. Introduction

This article summarizes and discusses important developments in Wyoming’s oil and gas law between August 1, 2017 and July 31, 2018. During this time period, the Wyoming legislature passed bills into law concerning financial assurance for the plugging of underground injection wells, and the funding of orphan site remediation. The Wyoming Oil and Gas Conservation Commission (“WOGCC”) established an online filing system for applications for permit to drill, issued new policies concerning protested spacing related applications and the prioritization of certain applications for permit to drill, increased certain filing fees, and amended certain rules concerning protests.

Also during this applicable time period, there were cases of note which dealt with deed and will interpretation, the conflict between oil and gas operations and coal development under Bureau of Land Management (“BLM”) leases, and the scope of authority of the BLM involving hydraulic fracturing (“fracking”).

II. Legislation

A. Financial Assurance for Plugging of Underground Injection Wells

Senate File 0016, signed into law on March 12, 2018, amended Wyoming Statute 35-11-302(a)(viii) to require that the Department of Environmental Quality (“DEQ”) promulgate rules setting financial assurance requirements for plugging, abandonment, post-closure monitoring, corrective actions and site reclamation for class I hazardous

and nonhazardous underground injection facilities and class V coalbed methane underground injection facilities.¹ Before July 1, 2018, the DEQ must initiate the rulemaking process to prescribe the financial assurance requirements required by this statute.²

B. Orphan Site Remediation Funding

Senate File 0018, signed into law on March 12, 2018, amended Wyoming Statutes 16-1-206(b) and (c); 35-11-1424(a), (p), and (q); and 35-11-1701(a).³ This act provides funding mechanisms for orphan site remediation, amends a report requirement, and creates an orphan site remediation account.⁴ From 2019 through 2028, the director shall distribute up to one million dollars (\$1,000,000.00) to the orphan site remediation account.⁵ Monies distributed to the orphan site remediation account decrease the amount of monies that the DEQ director can distribute to the solid waste landfill remediation account.⁶

III. State Regulation

A. New Wyoming eForm

On July 5, 2018, the new Wyoming eForm application system went active encouraging oil and gas operators “to use this new web application to electronically file Applications for Permit to Drill (APDs), spud and BOP notices, and baseline water quality plans and sample reports.”⁷ Adoption of this new eForm system will accelerate the APD review time. Recorded training sessions showing how to use this new system are available on the Wyoming Oil and Gas Conservation Commission (“WOGCC”) website.⁸

B. New Policy on Spacing Related Hearings

A new WOGCC policy regarding spacing related hearings comes in response to the increasing amount of protested spacing-related applications submitted to the WOGCC that are continued on a monthly basis and can

1. 2018 Wyo. Sess. Laws SF0016.

2. *Id.*

3. 2018 Wyo. Sess. Laws SF0018.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Attention Operators: Wyoming eForm to Start July 5, 2018*, WOGCC, <http://wogcc.wyo.gov/news-announcements/attentionoperatorswyomingeformtostartjuly52018> (last visited July 23, 2018).

8. *Id.*

take up to year to achieve resolution.⁹ The extended continuation of applications led to inefficiencies as well as burdens on WOGCC staff.¹⁰ Consequently, effective July 2018, “any protested spacing related application (spacing, additional wells, pooling, etc.) that is continued for a second time will be placed on an inactive docket (“B” docket).”¹¹ The matter will sit on the “B” docket for up to the one year unless either earlier resolved between the parties or set for contested hearing before the WOGCC commissioners at the request of either party.¹² WOGCC staff will request to dismiss the protest and the matter will be set for hearing by examiner if the matter remains unresolved within a year.¹³

C. New Policy on Applications for Permit to Drill Processing

A second policy that was initiated this past year pertains to APDs.¹⁴ Similar to the policy just mentioned above, this comes in response to the high volume of APDs submitted to the WOGCC.¹⁵ The monthly average for number of APDs submitted increased 83% between 2015 and 2017.¹⁶ The new policy implements a system to prioritize the APD approval process.¹⁷ APD applicants must submit a drilling schedule to the WOGCC every six months, listing the wells that are planned to be drilled; the drilling schedule will be treated as confidential information by the WOGCC.¹⁸ The WOGCC staff will give priority APD processing for final approval to those APDs whose corresponding wells are on the applicant’s drilling schedule.¹⁹ The new policy also establishes that the “issuance date” of an APD is the date that the WOGCC assigns to the APD.²⁰ For all APDs received on June 1,

9. *Protest Policy for Spacing Related Hearings*, WYOMING OIL & GAS CONSERVATION COMMISSION, <http://wogcc.wyo.gov/news-announcements/protestpolicyforspacingrelatedhearings> (last visited July 27, 2018).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Application for Permit to Drill Processing Policy*, WYOMING OIL & GAS CONSERVATION COMMISSION, <http://wogcc.wyo.gov/news-announcements/newpolicynotice> (last visited July 27, 2018).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See id.*

20. *Id.*

2017 or later, the APD (whether approved or unapproved) will expire two years from the issuance date.²¹

D. New WOGCC Fees

Effective February 1, 2018, new fees for applications set for hearing went into effect, with the fees set at \$250 for new applications and \$125 for continuances of those applications.²²

E. New WOGCC Rules on Protests

Effective January 22, 2018, previously proposed amendments to Chapters 1 (Authority and Definitions), 5 (Rules of Practice & Procedure before the WOGCC), and 6 (Procedure, Fees, Costs, and Charges for Inspecting, Copying, and Producing Public Records) were adopted. Of significance among the amended rules is a clarification to the time by which a protestant to an application for hearing must file the protest. A valid protest must be filed at least three days prior to the date set for the hearing, provided that if the protest is filed less than ten days prior to the hearing, the applicant is entitled to a continuance of the matter.²³

IV. Judicial Developments

A. 10th Circuit Court of Appeals

1. Bureau of Land Management (“BLM”): Authorized to Promulgate a Regulation Governing Hydraulic Fracturing on U.S.-Owned Lands?

On March 26, 2015, the BLM published the final version of a new fracking regulation (“the Fracking Regulation”) that would regulate fracking in four ways, impacting approximately 2,800–3,800 fracking operations per year.²⁴ This move, once in effect, would expand the scope of federal regulation of fracking, which typically occurs at the state level.²⁵ It would do so by imposing “new well construction and testing requirements, new flowback storage requirements (tanks, not pits), new chemical disclosure requirements, and also generally increases BLM’s oversight of

21. *Id.*

22. *News & Announcements: Previously Proposed Rules Adopted*, Wyoming Oil & Gas Conservation Commission, <http://wogcc.wyo.gov/news-announcements/untitledpost-1> (last visited July 27, 2018).

23. 055-0001-5 WYO. CODE R. § 11 (LexisNexis 2018).

24. *Wyoming v. Zinke*, 871 F.3d 1133, 1138 (10th Cir. 2017).

25. *See id.*

fracking.”²⁶ Three months before the regulation was to take effect, the Independent Petroleum Association of America (“IPAA”) and the Western Energy Alliance (“WEA”) (together: “Industry Petitioners”) filed a Petition for Review of Final Agency Action under the Administrative Procedure Act (“APA”).²⁷

Multiple parties filed separate petitions and intervened, including the States of Wyoming, Colorado, North Dakota, Utah, and the Ute Indian Tribe, who all opposed the regulation.²⁸ Multiple citizen groups intervened on the other side, defending the regulation (“Citizen Group Intervenors”).²⁹ Petitioners in opposition to the regulation filed preliminary injunction motions, which resulted in the district court postponing the effective date of the Fracking Regulation on June 24, 2015.³⁰ The district court eventually granted the preliminary injunction on September 30, 2015.³¹ Both the BLM and Citizen Group Intervenors appealed the court’s decision.³²

On June 21, 2016, the court entered a judgment setting aside the Fracking Regulation, invalidating it under § 706(2)(C) of the APA and “concluding the BLM had acted beyond its statutory authority.”³³ Among its findings, and through applying the *Chevron* standard, the court concluded that the Secretary of the Interior was permitted to regulate activities dealing with the surface of federal lands, but its authority did not exceed surface activities; as such, it was not authorized to regulate fracking activity.³⁴ Both the BLM and Citizen Group Intervenors again appealed the court’s decision.³⁵

Before reaching the merits, the Tenth Circuit Court of Appeals determined that the case was not fit for review, as the appeals “present an ‘unusual circumstance.’”³⁶ Although the appeals did present a clear legal issue and there was no dispute that the Fracking Regulation was final, the BLM had issued notice on July 25, 2017 of plans to entirely rescind the controversial Fracking Regulation.³⁷ Because the matter was thus unripe,

26. *Id.*

27. *Id.* at 1138–39.

28. *Id.* at 1139.

29. *Id.* at 1138–39.

30. *Id.* at 1139.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1140.

36. *Id.* at 1142.

37. *Id.*

the court dismissed the appeals and vacated the district court's judgment invalidating the Fracking Regulation.³⁸

B. Supreme Court of Wyoming

1. Right of Way v. Fee Conveyance

The dispute in this case is based on two deeds drafted by BNSF in 1913.³⁹ A mineral partnership—Box Creek Mineral Limited Partnership (“Box Creek”)—filed suit against a railway company for declaratory judgment and to quiet title on the mineral rights in lands conveyed by the two deeds.⁴⁰ At issue was whether the right of way deeds fully conveyed the underlying mineral estates or if they were only an easement-like conveyance.⁴¹ This issue arose from ambiguities in both deeds.⁴² After the state district court found that the parties to the deeds intended an easement-like conveyance, the court quieted title into Box Creek, and BNSF appealed.⁴³ The Supreme Court of Wyoming affirmed the district court's ruling.⁴⁴

In reaching its conclusion, the court evaluated both general Wyoming property law and the terms of the deeds.⁴⁵ It established that, in Wyoming, “[w]hen the surface is granted without reference to the mineral estate, it is presumed the mineral estate is included.”⁴⁶ But easements are different in that they are a limited grant in which the grantor is typically conveying only part of the estate.⁴⁷ In its analysis, the court looked at how the term “right of way” was used in Wyoming in 1913 (the time of execution of the deeds in question), and found that it was used to convey a limited interest, i.e. an easement, namely the right of passage over the surface of the land described.⁴⁸ The court noted that the term “right of way” was used in different places in the deeds.⁴⁹ The court also relied on the fact that the

38. *Id.* at 1146.

39. *BNSF Ry. Co. v. Box Creek Mineral Ltd. P'ship*, 2018 WY 67, ¶ 1, 420 P.3d 161, 163 (Wyo. 2018).

40. *Id.*

41. *See id.* at ¶¶ 1–3, 420 P.3d at 163–64.

42. *See id.* at ¶ 9, 420 P.3d at 165.

43. *Id.* at ¶ 8, 420 P.3d at 164–65.

44. *Id.* at ¶ 51, 420 P.3d at 171–72.

45. *Id.* at ¶¶ 17–22, P.3d at 166–67.

46. *Id.* at ¶ 17, 420 P.3d at 166. (citing *Gilstrap v. June Eisele Warren Tr.*, 2005 WY 21, ¶ 15, 106 P.3d 858, 863 (Wyo. 2005)).

47. *Id.* at ¶ 18, 420 P.3d at 166.

48. *Id.* at ¶¶ 33–34, 420 P.3d at 168–69.

49. *Id.* at ¶ 32, 420 P.3d at 168.

railway was granted the right to erect a snow fence for four months of the year, located at some places inside the right of way grant and at other places outside of the boundary of the right of way—the court found it more consistent to hold that the parties intended to convey a right of way (easement) along with the right to erect the snow fence (another easement), rather than a full fee estate conveyance along with the right to erect the snow fence.⁵⁰

2. Whether the Courts are a Forum When the Federal Government Will Not Regulate or Act on the Conflict

What started as a dispute between mineral developers over a conflict between future oil and gas development versus coal development under BLM leases, eventually led to the court addressing the key issue of whether the courts are a forum when the federal government will not regulate or act on the conflict.⁵¹ In other words, does this case “present a justiciable issue when this Court cannot render a decision binding on a federal agency?”⁵²

The plaintiff, Berenergy Corporation (“Berenergy”), produced oil from several sites under three oil and gas leases granted by the BLM.⁵³ The surface area covered by those oil and gas leases overlapped lands covered under other BLM coal leases, for which affiliates of Peabody Energy Corporation (collectively “Peabody”)⁵⁴ had plans to strip-mine.⁵⁵ Consequently, Berenergy brought suit in May 2014, filing a complaint for a declaratory judgment that the terms granted in its BLM oil leases provided superior rights to Berenergy as compared to those obtained by Peabody through the later-dated coal leases.⁵⁶ In its complaint, Berenergy also asked that the court prevent Peabody from forcing Berenergy to shut down and from allowing Peabody to conduct its mining operations in a manner that would interfere with Berenergy’s operations.⁵⁷

Over the next five months, the case was removed to the U.S. District Court for the District of Wyoming, the federal court dismissed the case for

50. *Id.* at ¶¶ 38–39, 420 P.3d at 169–70.

51. *Berenergy Corp. v. BTU W. Res., Inc.*, 2018 WY 2, ¶ 1, 408 P.3d 396, 397 (Wyo. 2018), *reh'g granted* (Feb. 6, 2018).

52. *Id.* at ¶ 4, 408 P.3d at 397.

53. *Id.* at ¶ 1, 408 P.3d at 397.

54. *Peabody Energy Corp: BTU Overview*, U.S. NEWS MONEY & INVESTING, <https://money.usnews.com/investing/stocks/btu-peabody-energy-corp>. (last visited August 2, 2018) (Peabody Energy trades on the NYSE under the ticker symbol of BTU).

55. *Berenergy* at ¶ 1, 408 P.3d at 397.

56. *Id.* at ¶ 5, 408 P.3d at 397.

57. *Id.*

lack of a federal question, the case was then remanded to state district court, and the parties filed cross-motions for partial summary judgments.⁵⁸ The state district court denied portions of both parties' motions for summary judgments because the decision would involve a determination on the question of reasonableness, and such questions require factual development: Peabody could block Berenergy from producing oil (or vice versa), so long as the restriction was reasonable.⁵⁹

Following trial, the court deliberated over two alternatives to resolve the reasonableness question, concluding that concurrent production by both parties was not economically feasible, because it would add more than \$300 million to Peabody's costs to mine the coal.⁶⁰ Further, because the value of the coal mined exceeded that of the oil, the court also determined that Berenergy's wells should be shut down in return for fair compensation from Peabody.⁶¹ In addition to these findings, the court also opined that it believed the issue of this case was largely a political one, which should be answered by the BLM.⁶² The Supreme Court of Wyoming, in accord with this latter, "presciently expressed concern" of the district court, agreed that the BLM was probably the decider in this matter, not Wyoming courts.⁶³ Accordingly, the court remanded the case for an evaluation of whether a federal agency could participate in the suit.⁶⁴ If, on remand, it was found that a federal agency could not be made a party or opted out, the case should be dismissed.⁶⁵ After this case was decided in January 2018, a rehearing was subsequently granted in February 2018; additional details are still pending.

3. *Will vs. Probate Order: Which Governs*

Whether a decedent's will or admittedly incorrect probate orders controlled distribution of testator's overriding royalty interest in oil and gas properties was the heart of the issue in *Lon V. Smith Found. v. Devon Energy Corp.*⁶⁶ In 1973, Mr. Smith (Plaintiff) obtained a federal BLM oil

58. *Id.* at ¶¶ 6–9, 408 P.3d at 397–98.

59. *Id.* at ¶ 9, 408 P.3d at 398.

60. *Id.* at ¶¶ 10–12, 408 P.3d at 398.

61. *Id.* at ¶¶ 10–12, 408 P.3d at 398–99.

62. *Id.* at ¶ 13, 408 P.3d at 399.

63. *See id.* at ¶¶ 13, 42, 408 P.3d at 399, 404.

64. *Id.* at ¶ 43, 408 P.3d at 405.

65. *Id.*

66. *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, 403 P.3d 997 (Wyo. 2017), *reh'g denied* (Nov. 7, 2017).

and gas lease in Carbon County, Wyoming, which he in turn assigned to J.D. Simmons in 1974, reserving a 5% overriding royalty interest (“ORRI”) for himself.⁶⁷ Smith passed away in June 1979.⁶⁸ Within his will, Smith transferred all of his oil and gas interests, including the ORRI, to his wife as a life estate, stipulating that upon her death, the interests and ORRI would then be transferred to the Lon V. Smith Foundation (the “Foundation”).⁶⁹

Probated in California, the California court entered its orders and other related documents pertaining to Smith’s estate in April 1983.⁷⁰ However, those documents did not include Smith’s Wyoming ORRI.⁷¹ Consequently, the subsequent Wyoming probate order—based on the California order—omitted any specific reference to the Wyoming ORRI.⁷² In July 2014, Devon Energy Corporation (Defendant) sent a letter to the Marguerite Brown Smith Trust (the “Trust”) and the Foundation, explaining its position and that neither the Trust nor the Foundation was entitled to royalty payments on certain wells.⁷³

Both the Trust and the Foundation responded. The Foundation brought action against both Devon Energy and the Trust, claiming ownership of the ORRI in the properties, and that, under the terms of Smith’s will over thirty years prior, the Foundation was entitled to payments from interest.⁷⁴ The Trust refused to repay Devon Energy the allegedly erroneous royalty payments.⁷⁵ “Both the Foundation and Devon filed motions for summary judgment;” the Foundation’s arguments failed.⁷⁶ The district court held that the 1983 California probate order and the 1985 Wyoming ancillary probate order govern, resulting in the Trust being the owner of the ORRI at issue.⁷⁷ The Supreme Court of Wyoming affirmed the district court’s ruling.⁷⁸

67. *Id.* at ¶ 7, 403 P.3d at 1001.

68. *Id.*

69. *Id.* at ¶ 8, 403 P.3d at 1001.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at ¶ 11, 403 P.3d at 1002.

74. *See id.* at ¶ 12, 403 P.3d at 1002.

75. *Id.* at ¶ 11, 403 P.3d at 1002.

76. *Id.* at ¶ 13, 403 P.3d at 1002.

77. *Id.*

78. *Id.* at ¶ 23, 403 P.3d at 1004.