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The 2019 Survey on Oil & Gas

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Montana

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ONE J

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MONTANA



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I. Introduction

This article provides an annual survey of the law summarizing developments in the area of oil and gas for the State of Montana. Oil and gas in the State of Montana make up a relatively small portion of the state's

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profile; Montana currently ranks thirteenth in crude oil production and twentieth in natural gas production in the United States.¹

II. Legislative and Regulatory Developments

A. State Legislative Developments

The majority of the bills relating to oil and gas died in process or were un-introduced before Montana's 66th Legislature. However, several of the oil and gas taxation laws in the State of Montana were recently revised, including the following:

1. House Bill 213 amended Mont. Code Ann. Section 15-36-304, Production Tax Rates Imposed on Oil and Natural Gas, effective July 1, 2019, by revising the tax rate price trigger for stripper oil well bonus production.²

2. House Bill 656 amended Sections 15-36-304, 15-36-331, 15-36-332, 82-11-131, 82-11-135 and 90-6-1001 of the Montana Code and revised oil and gas taxation laws by providing a fixed tax rate for the privilege and license tax and the tax for the oil and gas natural resource distribution account, providing for the allocation of privilege and license tax revenue and revenue from the tax for the oil and gas natural resource distribution account, and providing that the tax for the oil and gas natural resource distribution account be distributed to incorporated cities and towns in which oil production occurs.³

3. Senate Bill 28 amended Section 15-36-304, Production Tax Rates Imposed on Oil and Natural Gas, effective immediately, by revising the tax rate for certain incremental oil production, removing the price trigger for new or expanded tertiary production.⁴

In addition, the laws related to sage grouse conservation were revised by Senate Bill 299, which amended Sections 76-22-105, 76-22-111 and 76-22-118, to exempt certain land uses and activities from regulation, revise and clarify the authority, duties and powers of the Montana Sage Grouse Oversight Team, and revise reporting and compensatory mitigation requirements.⁵

1. See U.S. Energy Information Administration, Montana State Profile and Energy Estimates, <https://www.eia.gov/state/?sid=MT> (last accessed on September 3, 2019).

2. H.B. 213, 66th Legis., Reg. Sess. (Mont. 2019).

3. H.B. 656, 66th Legis., Reg. Sess. (Mont. 2019).

4. S.B. 28, 66th Legis., Reg. Sess. (Mont. 2019).

5. S.B. 299, 66th Legis., Reg. Sess. (Mont. 2019).

Further, House Bill 229 was signed into law by the Governor of Montana on April 16, 2019; HB 229 declared that dinosaur fossils are not minerals and that fossils are a part of the surface estate.⁶

B. State Regulatory Developments

1. Mont. Admin. R. 36.22.1015

Amendments have been made to Mont. Admin. R. 36.22.1015 regarding Disclosure of Well Stimulation Fluids effective November 3, 2018. Specifically, Mont. Admin. R. 36.22.1015(2) has been amended to reflect that fracturing fluids must be disclosed in accordance with Mont. Code Ann. Section 82-10-603, with the actual rate or concentration of each ingredient or additive used for treatment (previous subsections (a) and (b) have been stricken).

2. Mont. Admin. R. 36.22.608

Similarly, Mont. Admin. R. 36.22.608 regarding Well Stimulation Activities Covered by Drilling Permit has been amended to require the disclosure of fracturing fluids in accordance with Mont. Code Ann. § 82-10-603.

III. Judicial Developments

A. Supreme Court Cases

1. Murray v. BEJ Minerals, LLC

A highly publicized issue concerning dinosaur fossils took the forefront of the judicial developments in Montana in 2019. In *Murray v. BEJ Minerals, LLC*, the Montana Supreme Court accepted a certified question from the Ninth Circuit Court of Appeals concerning “whether, under Montana law, dinosaur fossils constitute ‘minerals’ for the purpose of a mineral reservation.”⁷

Previously, the *Murray* case was removed based on diversity jurisdiction and, in a now famous opinion written by United States District Judge Robreno that started with, “Once upon a time, in a place now known as Montana, dinosaurs roamed the land . . . ,”⁸ the Ninth Circuit Court of

6. H.B. 229, 66th Legis., Reg. Sess. (Mont. 2019).

7. See *Murray v. BEJ Minerals, LLC*, No. OP 19-0304, 2019 WL 2383604 (Mont. June 4, 2019).

8. See *Murray v. BEJ Minerals, LLC*, 908 F.3d 437, 439 (9th Cir. 2019), *reh'g en banc granted*, 920 F.3d 583 (9th Cir. 2019).

Appeals determined that fossils were “minerals” and belong to the owners of the mineral estate.⁹

However, the question certified has stayed the underlying proceedings in the Ninth Circuit Court of Appeals, where the issue is “whether dinosaur fossils are part of the surface estate or the mineral estate under Montana law.”¹⁰ The Ninth Circuit Court of Appeals relied on public policy ramifications due to the frequency of split estates and exercised its discretion to certify the question to the Montana Supreme Court “in the spirit of comity and federalism.”¹¹

2. *Employers Mutual Casualty Company v. Estate of Buckles*

In an appeal from a declaratory judgment action to determine whether there was a duty to defend and indemnify an additional insured in a wrongful death action of a flow tester at an oil and gas well site, the Montana Supreme Court scrutinized insurance coverage in the context of oil and gas master service agreements.¹² At issue was an insurance policy issued to Black Rock Testing, Inc. (“Black Rock”) from Employers Mutual Casualty Company (“Employers Mutual”).¹³ Continental Resources, Inc. (“Continental”) owned or leased the subject well site and during the relevant time frame, “Continental had a master service contract with BH Flow Testing to perform flow testing at the site; BH Flow Testing subcontracted the work to Black Rock, which subcontracted the work to Jansen Palmer, doing business as Black Gold Testing, with which Zachary Buckles was working at the time.”¹⁴

At the outset, the court looked to the “contractual requirements to be an ‘automatic’ additional insured” and found that there was no evidence in the record that Continental was a party to a master service contract with Black Rock, or that Continental had leased a premises or equipment to Black Rock.¹⁵ The court then turned to the policy itself and determined that, “[u]nder any reasonable interpretation of the insurance contract and its endorsements, the Policy does not cover Continental as an additional insured.”¹⁶ In holding that Employers Mutual owed “no duty to defend or

9. *Id.* at 447.

10. *See* Murray v. BEJ Minerals, LLC, 924 F.3d 1070, 1074 (9th Cir. 2019), *certified question accepted*, No. OP 19-0304, 2019 WL 2383604 (Mont. June 4, 2019).

11. *Id.* at 1072.

12. *See* Employers Mut. Cas. Co. v. Estate of Buckles, 2019 MT 136, ¶ 1, 443 P.3d 534.

13. *Id.* ¶ 1, 443 P.3d at 536.

14. *Id.* ¶ 2, 443 P.3d at 536.

15. *Id.* ¶ 8, 443 P.3d at 537–538.

16. *Id.* ¶ 21, 443 P.3d at 541.

indemnify Continental under the Policy,” the court determined that Continental was not an additional insured entitled to defense in the wrongful death action of the sub-subcontractor’s employee.¹⁷

17. *Id.* ¶¶ 21, 24, 443 P.3d at 541.