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Oil and Gas, Natural Resources, and Energy Journal

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NEVADA



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I. Introduction

Nevada remains one of the lowest oil and gas producing states in the country.¹ While proponents of exploration have recognized potential for oil and gas development in Nevada and have hoped for an “oil and gas transformation,”² little has happened in the past year to indicate such a transformation is underway. Oil production rates from September 2018 to June 2019 closely mirrored previous years with an average of approximately 22,107 barrels of oil and 217 MCF of gas produced each month.³ Further, during the examination period of this article, only three oil and gas permits were issued, being the same number issued in the year prior.⁴

Many believed that oil and gas operations in Nevada would increase as the United States Bureau of Land Management (“BLM”) was encouraged “to lease even more under the Trump administration’s ‘energy dominance’ agenda”⁵ on the 48 million acres that it manages in Nevada, comprising about 67% of the total lands in the state.⁶ Despite this push, there has not been a significant increase in issued BLM leases and efforts by operators to lease such lands have been met with legal challenges as explained in Section III of this article.

1. *See Rankings: Crude Oil Production, May 2019*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/?sid=NV#/series/46> (last visited August 26, 2019), and *see State Profile and Energy Estimates: Nevada*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/?sid=NV#/series/47> (last visited August 26, 2019).

2. Ellen M. Glimer, *Untapped Nevada: Oil and gas companies make their move*, E&E NEWS (Aug. 9, 2018) <https://www.eenews.net/stories/1060093085> (last visited August 27, 2019).

3. *See Nevada Oil Patch Report*, NEV. COMM’N ON MINERAL RES., DIV. MINERALS, <http://minerals.nv.gov/Programs/OG/OGForms/> (last visited August 26, 2019); *see also* Kacie M. Bevers, *The 2018 Survey on Oil & Gas: Nevada*, 4 OIL AND GAS, NATURAL RESOURCES, AND ENERGY J. 3 (2018) (“Nevada averaged approximately 22,000 barrels of oil” and “approximately 242 MCF of gas each month.”).

4. *See Oil and Gas Permits and Permit Notices*, NEV. COMM’N ON MINERAL RES., DIV. MINERALS, <http://minerals.nv.gov/Programs/OG/OGPermits/> (last visited September 2, 2019).

5. Glimer, *supra* note 2.

6. *See U.S. Dep’t of Interior, Bureau of Land Management*, BLM NEVADA, <https://www.blm.gov/nevada> (last visited September 2, 2019).

II. Legislative and Regulatory Developments

The Nevada Legislature met during the examination period of this article for its 80th session; however, it did not address any concerns relating to oil and gas operations in the state. There was no renewed attempt during this legislative session to ban hydraulic fracturing (“fracking”) on non-federal lands after prior attempts failed.⁷ Similarly, the Nevada Division of Minerals did not enact any new regulations regarding oil and gas operations during the examination period of this article.

III. Judicial Developments

During the examination period of this article, only one case was decided which notably affected oil and gas development in Nevada; however, this decision pertained to minerals managed by the BLM, and thus, may have application beyond Nevada’s state boundaries. In *Center for Biological Diversity v. U.S. Bureau of Land Management*, two environmental advocacy groups, i.e. the Center for Biological Diversity and the Sierra Club, brought suit against the BLM alleging, primarily, that the BLM failed to adequately analyze the impacts of issuing oil and gas leases that covered approximately 200,000 acres of land in Nevada as required under the National Environmental Policy Act (“NEPA”).⁸ More specifically, the environmental advocacy groups alleged that, in making its determination to issue these leases, the BLM: (1) failed to take a “hard look” at the environmental impacts of the leases in its Environmental Assessment (“EA”); (2) arbitrarily and capriciously determined that the stipulations for protecting water resources attached to some of the leases would prevent significant environmental impacts; and (3) violated NEPA by deciding not to prepare an environmental impact statement (“EIS”).⁹

Both the environmental advocacy groups and the BLM moved for summary judgment.¹⁰ The U.S. District Court for the District of Nevada

7. Assembly Bill 159 was proposed during the 2017 legislative session and sought to ban fracking on all non-federal lands within the state. The bill passed in the Assembly on a 26-15 vote but was not voted upon in the Senate before the end of the legislative session. A.B. 159, 2017 Leg., 79th Sess. (Nev. 2017). *See also Bill History*, NEV. LEGISLATURE, <https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?ID=31> (last visited August 26, 2019).

8. *Ctr. for Biological Diversity v. US Bureau of Land Mgt.*, No. 3:17-CV-553-LRH-WGC, 2019 WL 236727, at *5 (D. Nev., January 15, 2019).

9. *Id.* at *3.

10. *Id.* at *2.

ultimately found that the BLM's analysis under its EA satisfied the necessary requirements of NEPA.¹¹ Specifically, NEPA requires that administrative agencies take a "hard look" at the environmental consequences of their decisions.¹² In assessing whether agencies have complied with this "hard look" standard, courts must determine "whether the agency adequately evaluated all potential environmental impacts of the proposed action, analyzed all reasonable alternatives to the proposed action, and identified and disclosed to the public all foreseeable impacts of the proposed action."¹³

Considering whether the BLM properly analyzed the environmental consequences of issuing the subject oil and gas leases, the District Court noted that the BLM "analyzed in general terms what could happen if a lessee decides to drill for oil and gas and constructs ground disturbing infrastructure."¹⁴ Further, the District Court explained that the BLM's EA included analyses of "wetlands and riparian zones, areas with surface waters, air quality, climate change, and greenhouse gases, soils, various forms of wildlife, including mule deer and pronghorn antelope, wild horses and burros, geology and minerals, and many others."¹⁵ Ultimately, the District Court found that this analysis satisfied the "hard look" standard.¹⁶

As for the environmental advocacy groups' allegations that the BLM acted arbitrarily and capriciously in determining that wetlands would not be impacted by the oil and gas operations conducted on the leases, the District Court found that the BLM's "hard look" review supported the conclusion that there would be no significant impacts to wetlands.¹⁷ As such, the BLM did not act in an arbitrary and capricious manner in issuing the oil and gas leases.¹⁸

Additionally, the District Court disagreed with the environmental advocacy groups' supposition that the BLM violated NEPA by not preparing an EIS.¹⁹ In support of their argument, the environmental advocacy groups cited Ninth Circuit precedent which states that "unless surface-disturbing activities [are] absolutely precluded, the government must complete an EIS"

11. *Id.* at *14.

12. *Id.* at *3.

13. *Id.* at *4 (quoting 42 U.S.C. § 4332(2)(C)).

14. *Id.* at *5.

15. *Id.* (internal citations omitted).

16. *Id.* at *6.

17. *Id.* at *10.

18. *Id.*

19. *Id.* at *13.

prior to issuing leases.²⁰ Prior courts have held that in order to circumvent the EIS requirement, an agency must have the authority to completely deny or prevent drilling activities all together; having the authority to merely limit or condition drilling activities is not sufficient.²¹ Here, the District Court found that the lessees under the BLM leases did not have the authority to begin surface-disturbing activities until they submitted an application for permit to drill (“APD”) to the BLM and that APD was approved; thus, the BLM retained authority to completely deny or prevent drilling activities all together.²² Accordingly, the District Court found that the BLM did not irreversibly commit its resources and as such was not required to prepare an EIS.²³ Consequently, the District Court granted the BLM’s cross-motion for summary judgement.²⁴

Thereafter, the environmental advocacy groups filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e) on the grounds that the District Court’s decision regarding the necessity of an EIS “was premised on an incorrect reading of the BLM regulations and Ninth Circuit case law.”²⁵ The District Court granted the motion for reconsideration, finding that “Ninth Circuit caselaw mandates that the government analyze the impacts that drilling has on the environment where leases sold were non-NSO leases, regardless of any stipulations on the lease.”²⁶ Changing course from its prior order, the District Court noted that “[e]ven if BLM has the authority to deny a leaseholder’s application to mine or drill, under the non-NSO leases in this case, it cannot prohibit other manner of surface occupancy, such as constructing a building or road.”²⁷ Acknowledging that it had not previously considered these other potential surface activities, the District Court found that by issuing non-NSO leases, the BLM had irreversibly committed its resources towards oil and gas.²⁸ Thus, the question before the District Court became whether the BLM, having irreversibly committed its resources, was required to prepare an EIS.²⁹

20. *Id.* at *12 (quoting *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988)).

21. *Id.* (citing *Conner*, 848 F.2d at 1449-50; *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983)).

22. *Id.* at *13.

23. *Id.*

24. *Id.* at *14.

25. *Ctr. for Biological Diversity*, 2019 WL 3848788, at *1.

26. *Id.* (“NSO” stands for “no surface occupancy”).

27. *Id.*

28. *Id.*

29. *Id.* at *2.

Ultimately, the District Court found that “NEPA does not require that the government prepare an EIS in every single case, only those where it finds that the proposed plan will have significant impacts on the environment.”³⁰ In the case at hand, the District Court found that the BLM had adequately analyzed the potential effects of the proposed oil and gas leases and found in its EA that the planned oil and gas operations would not have significant impacts on the environment.³¹ Accordingly, the BLM was not required to prepare an EIS and the District Court upheld its prior order granting the BLM’s motion for summary judgement.³²

30. *Id.*

31. *Id.*

32. *Id.* at *3.