

Oil and Gas, Natural Resources, and Energy Journal

Volume 5 | Number 2

The 2019 Survey on Oil & Gas


September 2019

Sovereign Lands

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Recommended Citation

Brent D. Chicken & Amanda J. Dick, *Sovereign Lands*, 5 OIL & GAS, NAT. RESOURCES & ENERGY J. 273 (2019), <https://digitalcommons.law.ou.edu/onej/vol5/iss2/21>

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ONE J

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SOVEREIGN LANDS

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I. Introduction

The most activity in the oil and gas industry impacting sovereign lands have come in two forms. First, there have been several important amendments to existing federal regulations. Consistent with those amendments, several new rules have been promulgated and codified as new federal regulations. Lastly, there have been several cases issued by circuit courts that will have an undoubtable impact on sovereign lands with regards to oil and gas development, specifically issues regarding operations on public and Indian lands.

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II. Federal Regulatory Developments

A. Amendments

There were several amendments made to existing federal regulations that impact the oil and gas industry. Most relevant to the industry was the amendment of 43 C.F.R. § 3179.3 Definitions and Acronyms. The following definitions were removed from this section in the November 27, 2018 amendment and are no longer defined in this subsection: Accessible Component, Capture Infrastructure, Compressor Station, Continuous Bleed, Development of Oil or Gas Well, High Pressure Flare, Pneumatic Controller, and Storage Vessel. Two definitions were added with the November 27, 2018 amendment: (1) Oil Well, defined as “a well for which the energy equivalent of the oil produced exceeds the energy equivalent of the gas produced, as determined at the time of well completion”¹ and (2) Waste of Oil or Gas, defined as “any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for proper development and production, where compliance costs are not greater than the monetary value of the resources they are expected to conserve, and which results in: (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations or (2) Avoidable surface loss of oil or gas.”²

Further, the legislature changed the definition of Gas Well to remove all reference to scientific measurements for the more succinct definition: “a well for which the energy equivalent of the gas produced, including its entrained liquefiable hydrocarbons, exceeds the energy equivalent of the oil produced, as determined at the time of well completion.”³

The second relevant amendment to the code of federal regulations was to 43 C.F.R. § 3179.401. The previous regulation was completely replaced, including renaming the subsection from State or tribal requests for variances from the requirements of this subpart to Deference to Tribal Regulations. The old regulation detailed a complex and involved process whereby both State (for Federal land) or a tribe (for Indian lands) could grant a variance from requirements for onshore oil and gas production for a number of reasons. The amendment, effective November 27, 2018, now states that a tribe’s request

1. 43 C.F.R. § 3179.3 (Lexis Advance through the September 16, 2019 issue of the Federal Register).

2. *Id.*

3. *Id.*

for a variance will be granted to the extent that it is consistent with the BLM's trust responsibility to minerals over which the tribe has jurisdiction.⁴

B. New Rules

The most activity in the oil and gas industry with regard to sovereign lands is evidenced in new and proposed administrative rules. Last year, one of the major updates was the Waste Prevention Rule.⁵ However, at the time of the update, the final rule was not yet published. The final rule was made effective on November 27, 2018. As codified in 43 C.F.R § 3160 and 43 C.F.R. § 3170, the final rule discourages excessive venting and flaring by placing volume and/or time limits on royalty-free venting and flaring during production testing, emergencies, and downhole well maintenance and liquids unloading.⁶

The new rule, which operators should review in its entirety, covers a number of important topics including when loss of gas or oil is avoidable or unavoidable, lost production subject to royalty, venting limitations, authorized flaring and venting of gas, well tests, emergencies, downhole well maintenance and liquids unloading, and additional deference to tribal regulations, as discussed above.⁷ This new rule coincides with the amendment of 43 C.F.R. § 3179.3, discussed above, by removing requirements for pneumatic equipment, storage tanks, and leak and detection repair, many of which were not cost effective, the final rule allows operators to customize and modify their operations to be waste reducing and cost effective for their specific operations.⁸

Two other new rules impact the oil and gas industry in a different way. Both come from the Environmental Protection Agency ("EPA"). The first new rule from the EPA is codified in 40 C.F.R. § 49 and became effective on May 14, 2019. Through this rule, the EPA finalized two amendments to the existing Oil and Natural Gas Federal Implementation Plan ("ONG Plan"). The amendments extend the ONG Plan's application to eligible, "true" minor oil and natural gas sources in the Indian country portion of the Uinta Basin

4. 43 C.F.R. § 3179.401(a)–(b) (Lexis Advance through the September 16, 2019 issue of the Federal Register).

5. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016). See Melissa Dixon, *September 2018: Sovereign Lands*, 4 OIL & GAS, NAT. RES., & ENERGY J. 3, 482-83 (2018) (giving a summary of the rule as it stood in 2018).

6. See 43 C.F.R §§ 3179.101–104.

7. *Id.*

8. *Id.*

Ozone Nonattainment Area.⁹ A subsection of the ONG Plan narrowly extends the geographic scope to include the new area described above.¹⁰ This area is now incorporated into the boundaries for purposes of regulating oil and gas for air quality planning and management on Indian lands.

The second rule promulgated by the EPA is codified in 40 C.F.R. § 60 and became effective on September 6, 2019. Within this rule are three distinct rulemakings. First, the EPA repealed the Clean Power Plan (“CPP”), which was proposed to be repealed on October 16, 2017. The EPA determined to repeal the CPP because it exceeded the EPA’s statutory authority under the Clean Air Act (“CAA”). The CPP sought to require states to submit plans specifically designed to limit CO₂ emissions from certain existing fossil fuel-fired power plants. The determination that the EPA did not have the statutory authority to promulgate this rule was made based on the broad and sweeping language used in the CPP when requiring the “best system emission reduction” to be used rather than acceptable language of set performance standards and specified equipment and practices.¹¹

Second, the EPA finalized the Affordable Clean Energy Rule (“ACE”), consisting of Emission Guidelines for Greenhouse Gas (“GHG”), Emissions from Existing Electric Utility Generating Units (“EGUs”), and plans for states to establish performance standards for “GHG emissions from certain fossil fuel-fired EGUs. This rule essentially takes the place of the repealed CPP. ACE makes it the responsibility of the states to use information and direction contained within the rule to develop standards of performance for limiting CO₂ emissions for their existing sources.¹²

Third, under ACE, the EPA finalized its determination that the heat rate improvement (“HRI”) is the best system of emission reduction for reducing GHG emissions from existing coal-fired EGUs, and is now the federal standard, but states are still allowed to develop other comparable standards to measure CO₂ emissions.

III. Judicial Developments

A. Applications to Drill on Public Lands

In *Dine Citizens Against Ruining Our Env't v. Bernhardt*, environmental groups brought suit against the Bureau of Land Management (“BLM”),

9. 40 C.F.R. § 49.101(e) (Lexis Advance through the September 16, 2019 issue of the Federal Register).

10. *Id.*

11. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1683-84 (1970).

12. 40 C.F.R. §§ 60.20a-29a.

Department of Interior, and the Secretary of the BLM alleging violations of the National Historic Preservation Act (“NHPA”) and the National Environmental Policy Act (“NEPA”) for granting more than 300 applications for permits to drill (“APDs”) hydraulically fracked wells on public lands in New Mexico.¹³ The environmental groups alleged that the BLM acted arbitrarily and capriciously when issuing the permits because the BLM did not fully consider the indirect and cumulative impacts of horizontal wells versus vertical wells on the environment or historic properties when issuing the 300 permits.¹⁴

The district court held that the BLM did not violate either NHPA or NEPA when issuing the permits.¹⁵ The environmental groups appealed that decision. The circuit court took a *de novo* review of the case applying the same arbitrary and capricious standard under the Administrative Procedure Act. The court first determined that the environmental groups had standing to bring these claims despite no identification of specific visits to each well at issue because the harms derived from the issuance of the permits rather than the wells themselves.¹⁶ However, the court agreed with the district court in its determination that the environmental assessments prepared by the BLM in connection with the applications for vertical wells permits and applied to the analysis for horizontal wells did not arbitrarily define area of potential effects in violation of the NHPA and nothing required them to consider indirect effects of the horizontal wells.¹⁷ Therefore, the court determined that the environmental groups failed to carry their burden to show the BLM acted arbitrarily or capriciously in conducting their environmental assessments.¹⁸ The court disagreed with the district court on the issue of water use analysis under NEPA, and the BLM’s failure to complete the necessary analysis with adequate support for water use was a violation of NEPA.¹⁹

13. 923 F.3d 831, 836 (10th Cir. 2019).

14. *Id.*

15. *Dine Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2018 WL 1617873 (D.N.M. Mar. 31, 2018), *amended by*, 312 F. Supp. 3d 1031 (D.N.M. 2018), *aff'd in part, rev'd in part and remanded sub nom.* *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).

16. *Dine Citizens*, 923 F.3d at 840.

17. *Id.* at 857.

18. *Id.*

19. *Id.* at 858.

The circuit court affirmed in part and reversed in part, remanding to the district court with specific instructions regarding the water analysis for the permits.²⁰

B. Inspections of Lease Sites on Private Lands

Under the Federal Oil and Gas Royalty Management Act the Bureau of Land Management is authorized to conduct warrantless, unannounced inspections of oil wells on their fee lands.²¹ However, in *Maralex Resources Inc. v. Barnhardt*, the court reaffirmed that the BLM does have authority to conduct administrative searches on privately owned lands when communitized minerals are at issue.²²

20. *Id.* at 859.

21. *Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189 (10th Cir. 2019).

22. For a full discussion of the case, see David R. Little and Diana S. Prulhiere, *September 2019: Colorado*, 5 OIL & GAS, NAT. RES. & ENERGY J. 2, 125-26 (2019).