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The 2020 Survey on Oil & Gas

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Table of Contents

I. Introduction	174
II. Legislative and Regulatory Developments	174

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A. State Legislative Developments 174
 B. State Regulatory Developments 174
 III. Judicial Developments 175
 A. Montana Supreme Court 175
 B. Federal Court Cases 177

I. Introduction

This article provides an annual survey of the law summarizing developments in 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 profile; Montana currently ranks fourteenth 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 Montana State Legislature only convenes in odd years. The State ended its 2019 Session on April 25, 2019. As such, there was no regular legislative session in 2020 and no special sessions. Therefore, there were no significant legislative developments for 2020.

B. State Regulatory Developments

1. ARM 36.22.1242

Amendments have been made to ARM 36.22.1242 regarding Reports by Producers – Tax Report – Tax Rate effective January 1, 2020. Specifically, ARM 36.22.1242(2) has been amended to reflect that the privilege and license tax on every barrel of crude petroleum and each 10,000 cubic feet of natural gas produced, saved, and marketed, or stored within the state or exported therefrom shall be 83.33 percent (previously, 100 percent) of the rate authorized in Mont. Code Ann. § 82-11-131, (3/10 of 1%) of the market value thereof. This rule effectively applies to all crude petroleum and natural gas produced on and after January 1, 2020.

1. See U.S. Energy Information Administration, Montana State Profile and Energy Estimates, <https://www.eia.gov/state/?sid=MT> (last visited August 21, 2020).

III. Judicial Developments

A. Montana Supreme Court

1. *Murray v. BEJ Minerals, LLC*

The Ninth Circuit Court of Appeals certified the following question to the Montana Supreme Court: “Whether, under Montana law, dinosaur fossils constitute ‘minerals’ for the purpose of a mineral reservation?”² The Montana Supreme Court answered, stating, “We conclude that, under Montana law, dinosaur fossils do not constitute ‘minerals’ for the purpose of a mineral reservation.”³

The certified question arose due to a dispute between owners of the surface estate (the “Murrays”) and the majority owners of the underlying mineral estate (the “Seversons”).⁴ By a 2005 deed, the Murrays acquired the Seversons’ interest in the surface estate, and the Seversons reserved a combined two-thirds of the mineral estate.⁵ Following execution of the deed, the Murrays discovered a “spike cluster” of fossils on the property.⁶ A subsequent investigation revealed the fossils were extremely rare and valuable.⁷

Procedurally, this case began in 2013 when the Seversons asserted an ownership interest in the fossils based upon their mineral title.⁸ In response, the Murrays filed suit in Montana state court seeking a judgment declaring that the Seversons did not own an interest in the fossils.⁹ The Seversons removed the case to the United States District Court for the District of Montana and counterclaimed, seeking a judgment that fossils are “minerals” and part of their mineral estate.¹⁰ The district court granted summary judgment to the Murrays, and upon appeal, the Ninth Circuit reversed.¹¹ After a rehearing *en banc*, the Ninth Circuit certified the question above and the Montana Supreme Court accepted.¹²

2. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1074 (9th Cir. 2019), *certifying questions to* 2020 MT 131, 400 Mont. 135, 464 P.3d 80.

3. *Murray v. BEJ Minerals, LLC*, 2020 MT 131, 400 Mont. 135, 464 P.3d 80, 93.

4. *Murray*, 464 P.3d at 81-82.

5. *Id.*

6. *Id.* at 82.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 83.

12. *Id.*

Rejecting the Seversons' argument that the fossils qualified as minerals under past Montana jurisprudence and a Texas two-part test, the Montana Supreme Court narrowed in on three factors.¹³ First, it acknowledged that rarity and value may be a factor in determining mineral status, but the inquiry is not determinative.¹⁴ Similarly, whether a substance is "scientifically" a mineral is not determinative unless the parties intended to use a scientific definition for minerals.¹⁵ Last, the court added to its consideration "the relation of the material in question to the surface of the land, and the method and effect of the material's removal."¹⁶ In sum, the court stated that the "best method for determining whether a substance fits within the ordinary and natural meaning of 'mineral' is to use contextual clues."¹⁷

Applying that method, the court first examined the language of "minerals" used in the subject deed.¹⁸ It highlighted that the subject deed referred to "oil, gas, hydrocarbons, and other minerals," and to the right of "mining, drilling, exploring, operating, and developing said lands."¹⁹ Secondly, the court noted that Montana statutes use the word "mineral" in several contexts, but never mention or contemplate fossils.²⁰ Thus, "in the context of a general mineral reservation deed, where the parties have not manifested a different intention in the transacting document, the language identifying 'mineral' would not ordinarily and naturally include fossils."²¹

Next, the court considered "whether the mineral content of the material in question renders it 'rare and valuable.'"²² The court concluded that "because the rarity and value of dinosaur fossils is not a circumstance of their mineral composition and consequent usefulness for refinement and economic exploitation, they are not considered to fall within the ordinary and natural meaning of 'minerals' as that term is used in a general mineral deed."²³ The last factor the court considered is "relation to the surface of the land, and the method and effect of its removal."²⁴ Analogizing dinosaur

13. *See Id.* at 84.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 84-85.

20. *Id.* at 87-89.

21. *Id.* at 90.

22. *Id.*

23. *Id.* at 92.

24. *Id.*

fossils to limestone, the court found that dinosaur fossils “bear a relationship so close to the surface as to be reasonably considered as part of the surface, rather than the mineral, estate.”²⁵

In sum, the court declined to “stretch the term ‘mineral’ so far outside its ordinary meaning as to include dinosaur fossils” and concluded “that, under Montana law, dinosaur fossils do not constitute ‘minerals’ for the purpose of a mineral reservation.”²⁶

B. Federal Court Cases

1. Northern Plains Resource Council v. U.S. Army Corps of Engineers (pending appeal to the Ninth Circuit)

The United States District Court for the District of Montana issued an initial ruling in this case on April 15, 2020²⁷ and subsequently modified it on May 11, 2020²⁸. Defendant-intervenor State of Montana appealed the decision to the Ninth Circuit, which remains pending. By its modified ruling, the district court enjoined any dredge or fill activities for new pipeline construction projects under the U.S. Army Corps of Engineers (the “Corps”) Nationwide Permit 12 (“NWP 12”) until the Corps engages in the consultation process required by Section 7 of the Endangered Species Act (“ESA”) and other environmental statutes and regulations.²⁹

The Corps has authority to regulate discharges into the navigable waterways of the United States pursuant to Section 404 of the Clean Water Act.³⁰ Pursuant to such authority, the Corps first issued NWP 12 in 1977 to regulate discharges resulting from activities associated with utility lines and related facilities.³¹ Utility lines include oil and gas pipelines and related activities such as construction, maintenance, and removal of pipelines like the Keystone XL Pipeline.³² NWP 12 allows discharges of dredged or fill material into U.S. waters.³³

25. *Id.*

26. *Id.* at 93.

27. *Northern Plains Res. Council v. U.S. Army Corps of Engineers*, No. CV-19-44-GF-BMM, 2020 WL 1875455, at *1 (D. Mont. April 15, 2020), *amended by* 2020 WL 3638125 (D. Mont.).

28. *Northern Plains Res. Council v. U.S. Army Corps of Engineers*, No. CV-19-44-GF-BMM, 2020 WL 3638125, at *14 (D. Mont. May 11, 2020).

29. *Northern Plains Res. Council*, 2020 WL 3638125 at *14.

30. *Northern Plains Res. Council*, 2020 WL 1875455 at *1.

31. *Id.*

32. *See Id.*

33. *Id.*

Plaintiffs, a collective of environmental organizations, sought review of the Corps' decision to renew NWP 12. The Corps asserted that in reissuing NWP 12, it had considered the environmental impact as required by the ESA and the National Environmental Policy Act ("NEPA") because General Condition 18 of NWP 12 prohibits activities likely to jeopardize endangered species or adversely modify critical habitats and activities under NWP 12 would have minimal impacts.³⁴ Therefore, the Corps argued, it did not need to consult the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Services prior to reissuing NWP 12.³⁵

Plaintiffs argued that the Corps' failure to undertake such consultation violated the ESA and that the Corps should have initiated programmatic consultation during reissuance of NWP 12.³⁶ Noting the low ESA threshold for consultation, the district court found that the Corps should have initiated a consultation under the ESA prior to reissuing NWP 12.³⁷ The court further stated that the Corps may not circumvent Section 7 of the ESA by allowing project-level reviews or relying on General Condition 18 of NWP 12.³⁸

Ultimately, the district court enjoined the Corps from authorizing "any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations" and then modified the initial order to apply only to new pipeline construction projects and not non-pipeline and/or routine maintenance, inspection, and repair activities on existing NWP 12 projects.³⁹

2. *Montana Wildlife Federation v. Bernhardt*

The United States District Court for the District of Montana voided acres of federal leases due to actions by the Bureau of Land Management ("BLM") in a sage-grouse habitat area.⁴⁰ In 2015, the BLM amended provisions in 98 land-management plans in an effort to protect sage-grouse.⁴¹ Specifically, the plans required that "[p]riority will be given to

34. *Id.* at *2-3.

35. *Id.* at *3.

36. *Id.*

37. *Id.* at *5.

38. *Id.* at *6.

39. *Northern Plains Res. Council*, 2020 WL 3638125 at *14.

40. *Montana Wildlife Fed'n v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 WL 2615631, at *1 (D. Mont. May 22, 2020).

41. *Montana Wildlife Fed'n*, 2020 WL 2615631 at *1.

leasing and development...outside of [sage-grouse habitat].”⁴² Here, the central question to be answered was what it meant to give something priority.⁴³

Plaintiffs brought suit seeking a review under the Administrative Procedure Act (“APA”), alleging that BLM violated the Federal Land Policy and Management Act (“FLPMA”) when it executed certain lease sales in December 2017 and March 2018 (Montana) and in June 2018 (Wyoming).⁴⁴ The tracts subject to the leases were entirely or significantly within “General” or “Priority” sage-grouse habitat.⁴⁵

Lease sales conducted by BLM are subject to the FLPMA, which requires compliance “by developing, maintaining and revising Resource Management Plans (‘RMPs’)” that “establish ‘[l]and areas for limited, restricted or exclusive use’ and determine ‘[a]llowable resource uses...and related levels of production or use to be maintained.’”⁴⁶ The applicable RMPs “directed BLM field offices to prioritize leasing outside” of the general and priority sage-grouse habitat areas.⁴⁷ Instruction Memorandum 2016-143 (“2016 IM”) provided additional guidance to the implementation of the RMPs.⁴⁸ Specifically, it required prioritization at both the leasing and development stages, setting forth “six broad sections that each contain different actions” to accomplish the conservation goals.⁴⁹ Subsequently, BLM issued “Instruction Memorandum 2018-026 (“2018 IM”), which replaced the 2016 IM and stated “[i]n effect, the BLM does not need to lease and develop outside of [sage-grouse] habitat management areas before considering any leasing and development within” them and “should implement the new prioritization policy” where “the BLM has a backlog of Expressions of Interest for leasing.”⁵⁰

As a threshold matter, the court first decided whether or not the 2018 IM was a “final agency action” such that it could be challenged and concluded that it was.⁵¹ Second, the court found that the 2018 IM violated the FLPMA because it contracted the 2015 amended land-management plans in

42. *Id.*

43. *Id.*

44. *Id.* at *4-5.

45. *Id.*

46. *Id.* at *2.

47. *Id.*

48. *Id.* at *3.

49. *Id.* at *3-4.

50. *Id.* at *4.

51. *Id.* at *5-7.

two ways: (1) “limiting the prioritization requirement only to situations when BLM faces a backlog of EOIs,” and (2) it “misconstrues the 2015 Plans and renders the prioritization requirement into a mere procedural hurdle.”⁵² Moreover, the court found the BLM violated the APA for lack of a “satisfactory explanation” as to why it reinterpreted prioritization to apply only when there was a backlog.⁵³ Finally, the court determined the lease sales violated the FLPMA because they “explicitly, or in effect, follow the same rationale as the 2018 IM.”⁵⁴

Accordingly, the lease sales were voided with the court adding “BLM’s errors undercut the very reason that the 2015 Plans created a priority requirement in the first place and prevent BLM from fulfilling that requirement’s goals and the errors here occurred at the beginning of the...lease sales process, infecting everything that followed.”⁵⁵

52. *Id.* at *8.

53. *Id.* at *9.

54. *Id.* at *10.

55. *Id.*