

Oil and Gas, Natural Resources, and Energy Journal

Volume 6

Number 2 *The 2020 Survey on Oil & Gas*

October 2020

Nevada

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Recommended Citation

Diana S. Prulhiere, *Nevada*, 6 OIL & GAS, NAT. RESOURCES & ENERGY J. 183 (2020), <https://digitalcommons.law.ou.edu/onej/vol6/iss2/14>

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ONE J

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I. Introduction

During the examination period of this article there was one legislative enactment and several proposed constitutional amendments affecting oil and gas, all related to the taxation of mineral interests. No regulatory actions occurred during the examination period of this article which significantly impacted the oil and gas industry, though a temporary reduction in administrative fees assessed to oil and gas purchasers and producers was contemplated. Finally, one case affecting oil and gas was decided during the relevant time period of this article; however, as it was an appeal of an underlying case which was decided during last year’s examination period, both the underlying decision and the appeal were discussed in the prior year’s article, and therefore, a detailed discussion of the same is not contained herein.

II. Legislative and Regulatory Developments

A. State Legislative Developments

The Nevada Legislature met during the examination period of this article for two special sessions: the 31st Special Session, which commenced July 8, 2020 and adjourned July 19, 2020, and the 32nd Special Session, which commenced July 31, 2020 and adjourned August 6, 2020.¹ One bill and several joint resolutions were passed during these special sessions which affect the oil and gas industry as discussed below.

1. 31st Special Session

During the 31st Special Session, one bill – Senate Bill 3 – was passed which impacted the taxation of minerals in Nevada.² Specifically, Senate Bill 3 amended Nevada Revised Statutes § 362.115 in several ways. Existing law requires each person extracting minerals in the state to file a statement with the Department of Taxation (“Department”), on or before March 1, “showing the estimated gross yield and estimated net proceeds

1. Although the 32nd Special Session adjourned after the ending of the examination period for this article, all relevant bills and resolutions introduced therein have been reported herein as said 32nd Special Session commenced within the examination period of this article.

2. Nevada Legislature, 31st Special Session, Senate Bill 3, available at <https://www.leg.state.nv.us/App/NELIS/REL/31st2020Special/Bill/7122/Text>.

from each operation for the entire current calendar year and an estimate of all royalties that will be paid during the current calendar year.”³ Senate Bill 3 temporarily requires that, on or before March 1, each such person also *pay* a portion of their estimated net proceeds and royalties.⁴ These advance payments became effective on July 20, 2020 and will remain in effect until June 30, 2023.⁵ The purpose of collecting these payments in advance is to compensate for a portion of the \$1.2 billion shortfall that Nevada has experienced in the current fiscal year: the early collection of the above described payments is projected to generate \$54.4 million to help the state survive the current downturn and create long-term stability.⁶

The precise portion of mineral taxes which must be paid in advance is “an amount equal to the estimated net proceeds and royalties multiplied by a rate equal to the rate as determined pursuant to [Nevada Revised Statutes §] 362.140 minus the combined rate of tax ad valorem for the county in which the operation is located, including any rate levied by the State of Nevada”⁷ (the portion of the aforesaid quote beginning with “a rate equal to . . .” through the end shall be hereinafter referred to as the “Advance Tax Multiplier”). If a taxpayer is entitled to a credit under Nevada Revised Statutes § 362.130 then the estimated payment may be reduced by the amount of such credit.⁸ Additionally, “[t]he amount of the tax paid on royalties must be deducted from the payment of royalties.”⁹

Senate Bill 3 also provides that each person extracting minerals in the state may file quarterly reports with the Department “stating an estimate for the year and the actual quarterly amounts of production, gross yield and net proceeds . . . and pay any additional amount due.”¹⁰ When the Department prepares its certificate of the amount of net proceeds which is provided to the mine owner or operator or recipient of a royalty, the estimated tax paid and additional payments made from filing quarterly reports, plus the balance of the tax due, must be included in the certification.¹¹ If the

3. NEV. REV. STAT. § 362.115(1).

4. NEV. REV. STAT. § 362.115(1)(a).

5. NEV. REV. STAT. § 362.115.

6. *See* <https://www.nevadacurrent.com/2020/07/16/assemblywoman-on-mining-industry-its-high-time-they-paid/>; *see also* <https://thenevadaindependent.com/article/lawmakers-to-introduce-bill-reducing-mining-tax-deductions-would-raise-about-55-million>.

7. NEV. REV. STAT. § 362.115(1)(a).

8. *Id.*

9. *Id.*

10. NEV. REV. STAT. § 362.115(1)(b).

11. NEV. REV. STAT. § 362.130(1).

estimated tax paid “is less than 90 percent of the amount certified . . . as the net proceeds of any minerals extracted and royalties paid during the prior calendar year multiplied by [the Advance Tax Multiplier, then] the amount due must include a penalty of 10 percent of the amount by which that portion of the tax was underpaid.”¹²

There are two circumstances when the 10% penalty will not apply. First, if the estimated tax paid in the prior calendar year “is equal to or greater than the liability of the operation for the preceding calendar year for the portion of the tax that is equal to the net proceeds of any minerals extracted and royalties paid during that calendar year multiplied by [the Advance Tax Multiplier].”¹³ Second, if payments made after filing quarterly reports exceeds 90% “of the amount certified as the net proceeds of any minerals extracted and royalties paid during the prior calendar year multiplied by [the Advance Tax Multiplier].”¹⁴

Any overpayments will be credited towards future payments as set out in Nevada Revised Statutes § 362.130(5), as follows: (a) overpayments made when net proceeds and royalties are “multiplied by [the Advance Tax Multiplier]” will be credited against payments due on March 1 of the following calendar year; and (b) overpayments made when net proceeds and royalties are “multiplied by the combined rate of tax ad valorem for the county in which the operation is located, including any rate levied by the State of Nevada” will be credited against payments due on May 10 of the following calendar year.¹⁵

The provisions discussed above regarding the Department’s certification, the 10% penalty and exceptions therefrom, and overpayment credits remain in effect until June 30, 2023.¹⁶ Mineral taxation will revert back to the former method of collection based on actual net proceeds for the calendar year 2024.¹⁷ “However, because a portion of the tax on the net proceeds of minerals imposed for calendar year 2023 will be paid in advance during fiscal year 2023, section 8 of [Senate Bill 3] enacts transitory provisions governing the duties of the Department of Taxation for fiscal year 2024.”¹⁸

12. NEV. REV. STAT. § 362.130(4).

13. NEV. REV. STAT. § 362.130(4)(a).

14. NEV. REV. STAT. § 362.130(4)(b).

15. NEV. REV. STAT. § 362.130(5).

16. NEV. REV. STAT. § 362.130.

17. Nevada Legislature, 31st Special Session, Legislative Digest of Senate Bill 3, available at <https://www.leg.state.nv.us/App/NELIS/REL/31st2020Special/Bill/7122/Text>.

18. *Id.*

2. 32nd Special Session

During the 32nd Special Session, three joint resolutions affecting oil and gas – Assembly Joint Resolution 1, Assembly Joint Resolution 2, and Senate Joint Resolution 1 – were approved by the Nevada Legislature. Each of these joint resolutions proposed amendments to the Nevada Constitution with respect to the taxation of minerals. Notably, after passage by the Legislature in the 32nd Special Session, each resolution “must also be passed by the next Legislature and then be approved and ratified by voters in an election before the proposed amendments to the Nevada Constitution become effective.”¹⁹ The next Legislature is the 81st Session, which will convene on February 1, 2021.²⁰

Currently, Section 5 of the Nevada Constitution provides that the Legislature shall tax the net proceeds of all minerals extracted in the state (including oil and gas), “at a rate not to exceed 5 percent of the net proceeds”; no other tax is imposed on minerals.²¹ A portion of these taxes are appropriated among counties by applying the levy rate of real property valuation in a particular district to the entire amount of net proceeds taxed in that district.²² Patented mine and mining claims are exempt from this mineral tax and are instead taxed only as other real property.²³

If approved by the next Legislature and subsequent voters, both Assembly Joint Resolution 1 and Senate Joint Resolution 1 would modify the rate of mineral tax from a 5% cap to a set 7.75% and would change the basis of taxation from net proceeds to gross proceeds.²⁴ Each would also apply the tax to patented mine and mining claims.²⁵ This tax would initially take effect for minerals extracted during the 2023 calendar year.²⁶ Both Assembly Joint Resolution 1 and Senate Joint Resolution 1 would further provide specific circumstances which must be met in order for the mineral tax to be increased or decreased or exemptions therefrom to be created.

19. *See e.g.*, Nevada Legislature, Legislative Digest of Assembly Joint Resolution 1, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7151/Text>.

20. <https://www.leg.state.nv.us/App/NELIS/REL/81st2021>.

21. NEV. CONST. § 5.1, available at <https://www.leg.state.nv.us/Const/NVConst.html>.

22. *Id.* at § 5.2.

23. *Id.* at § 5.3.

24. Nevada Legislature, 32nd Special Session, Assembly Joint Resolution 1, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7151/Text>; Nevada Legislature, 32nd Special Session, Senate Joint Resolution 1, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7152/Text>.

25. *Id.*

26. *Id.*

Specifically, they would each require an affirmative vote from the majority of House members to pass a bill that increases the tax rate and no less than two-thirds of House members to reduce the tax rate or create an exemption.²⁷

The difference in Assembly Joint Resolution 1 and Senate Joint Resolution 1 is the manner in which the collected mineral taxes may be used. Assembly Joint Resolution 1 would require that 25% of the mineral tax collected be put into appropriate accounts with the State Treasury and used exclusively for health care, education, economic assistance, or any combination thereof, in accordance with law, with the remaining 75% being unrestricted.²⁸ In contrast, Senate Joint Resolution 1 would require that 50% of the mineral tax collected be put into appropriate accounts with the State Treasury and “used exclusively to fund a program established pursuant to subsection 4” of the joint resolution, with the remaining 50% being unrestricted.²⁹ This new program would supply payments to “eligible persons domiciled in this State on a yearly basis.”³⁰ The resolution does not set forth the criteria for eligibility, but rather provides that the Legislature shall establish such criteria by law.³¹ Payments would be made from this program on a yearly basis beginning August 20, 2024, with payments in subsequent years to be made on the last Friday in August.³²

Assembly Joint Resolution 2, if passed by the next Legislature and subsequently approved by voters, would increase the mineral tax from a 5% cap to a 12% cap, providing that such mineral tax rate shall not be “less than the rate of tax levied upon the assessed valuation of real property in the taxing district in which the extractive operation is located.”³³

B. State Regulatory Developments

The Nevada Division of Minerals did not enact any new regulations affecting oil and gas operations during the examination period of this article. During the Commission on Mineral Resources’ quarterly meeting on July 9, 2020, there was a discussion about the monthly administrative

27. *Id.*

28. Nevada Legislature, 32nd Special Session, Assembly Joint Resolution 1, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7151/Text>.

29. Nevada Legislature, 32nd Special Session, Senate Joint Resolution 1, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7152/Text>.

30. *Id.*

31. *Id.*

32. *Id.*

33. Nevada Legislature, 32nd Special Session, Assembly Joint Resolution 2, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7154/Text>.

fee assessed to purchasers and producers of oil or natural gas under Nevada Administrative Code § 522.342 at “15 cents per barrel of oil or per 50,000 cubic feet of natural gas, as appropriate.”³⁴ The discussion revolved around the “significant impacts due to low oil prices in 2020” that the industry has experienced,³⁵ and a motion was unanimously approved to “proceed with rulemaking for a temporary change to [Nevada Administrative Code] 522 to give a temporar[y] relief to the oil and gas producers in the State of Nevada by reducing [the] administrative fee from .15 cents to .05 cents per barrel.”³⁶ The meeting minutes show an intent for this reduction to “mimic the [reduction in] federal fees.”³⁷ Temporary regulations in Nevada are effective for 120 days or less,³⁸ and certain notice to and input from the Legislative Counsel Bureau must be provided and sought before adoption.³⁹ At the time of writing this article, the temporary reduction in administrative fees had not been formally adopted.

III. Judicial Developments

The only judicial development affecting oil and gas which occurred during the examination period of this article was the ruling by the United States District Court for the District of Nevada in *Center for Biological Diversity v. U.S. Bureau of Land Management*.⁴⁰ In this appeal, the Center for Biological Diversity and the Sierra Club filed a motion for partial reconsideration of the court’s prior entry of summary judgment in favor of the Bureau of Land Management (“BLM”).⁴¹ Specifically, they argued that in granting summary judgment, the court misread certain BLM regulations and Ninth Circuit precedent regarding whether the BLM was required to perform an Environmental Impact Statement under the National

34. NEV. ADMIN. CODE § 522.342.

35. State of Nevada, Commission on Mineral Resources, Division of Minerals, Commission on Mineral Resources Meetings, Agendas and Minutes, July 9, 2020 Quarterly Meeting Agenda, available at http://minerals.nv.gov/uploadedFiles/mineralsnvgov/content/Commissions/20200709_1300_Agenda_July092020CarsonCity.pdf.

36. State of Nevada, Commission on Mineral Resources, Division of Minerals, Commission on Mineral Resources Meetings, Agendas and Minutes, July 9, 2020 Quarterly Meeting Minutes, available at http://minerals.nv.gov/uploadedFiles/mineralsnvgov/content/Commissions/20200709_1300_Minutes_07-09-20draft_RAG_MV.PDF.

37. *Id.*

38. NEV. REV. STAT. § 233B.0385.2.

39. *See* NEV. REV. STAT. §§ 233B.060-0.635.

40. No. 3:17-CV-553-LRH-WGC, 2019 WL 3848788 (D. Nev., August 15, 2019).

41. *Id.* at *1.

Environmental Policy Act before issuing certain oil and gas leases covering federally owned minerals in Nevada.⁴² As the underlying court's decision was issued during the examination period of last year's article, and the appeal was decided shortly thereafter, both the underlying decision and this appeal were discussed in detail in the prior Nevada update.⁴³

42. *Id.*

43. See Diana S. Prulhiere and Rachael H. Smith, "Nevada," UNIVERSITY OF OKLAHOMA OIL AND GAS, NATURAL RESOURCES AND ENERGY JOURNAL, 2018 SURVEY ON OIL AND GAS, 5 *Oil & Gas, Nat. Resources & Energy J.* 183, 185 (2019).