Oil and Gas, Natural Resources, and Energy Journal

Volume 6
Number 2 *The 2020 Survey on Oil & Gas*

October 2020

Sovereign Lands

Brent D. Chicken

Amanda J. Dick

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 6 NUMBER 2

SOVEREIGN LANDS

Brent D. Chicken & Amanda J. Dick[*]

Table of Contents

I. Introduction

Recently, there has been a fair amount of activity in the oil and gas industry that impacts sovereign lands. There has been one important amendment to existing federal regulations and two minor amendments. In addition to the amendments, there has been several new decisions issued by federal circuit and appellate courts regarding operations on tribal lands that will undoubtably have an impact regarding oil and gas development.

* Brent D. Chicken is a member in the Denver, Colorado, office of Steptoe & Johnson PLLC. He is licensed in Colorado, Montana, Wyoming, North Dakota, and Utah, and focuses his practice in oil and gas law. Amanda J. Dick is an associate in the Denver, Colorado, office of Steptoe & Johnson PLLC. She is licensed in Colorado and focuses her practice in energy transactions and litigation.

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 sovereign lands is the amendment to 25 C.F.R. § 224.30 "What Definitions Apply to This Part?" The following substantial changes were made to the Indian Tribal Energy Development and Self-Determination Act ("Act") in the December 18, 2019, amendment.

The term "Qualified Tribe" was added and defined as: "a Tribe with Tribal lands that has - (1) For a period of not less than 3 consecutive years ending on the date on which the Tribe submits the application, carried out a contract or compact relating to the management of Tribal land or natural resources under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) without material audit exception (or without any material audit exceptions that were not corrected within the 3-year period); or (2) Substantial experience in the administration, review, or evaluation of energy resource leases or agreements or has otherwise substantially participated in the administration, management, or development of energy resources located on the Tribal land of the Indian Tribe."[1]

Further, the definition of "Tribal energy development organization" or "TEDO" was added and defined as: "(1) Any enterprise, partnership, consortium, corporation, or other type of business organization that is engaged in the development of energy resources and is wholly owned by a Tribe, including but not limited to an organization incorporated under section 17 of the Indian Reorganization Act, 25 U.S.C. § 5124 or section 3 of the Oklahoma Indian Welfare Act, 49 Stat, 1967, chapter 831; and (2) Any organization of two or more entities, at least one of which is a Tribe, that has the written consent of the governing bodies of all Tribes participating in the organization, to apply for a grant, loan, or other assistance under 25 U.S.C. § 3502 or to enter into a lease or business agreement with, or acquire a right-of-way from, a Tribe under 25 U.S.C. § 3504(a) (2)(A)(ii) or (b)(2)(b)."[2] Throughout the section, "Tribe" and "Tribal" were edited to be capitalized and distinguished as defined terms. The definition of "Tribe" now includes a reference to a list of federally-recognized Tribes—published by the Secretary of the United States

1. 25 C.F.R. § 224.30.
2. *Id.*

Department of the Interior, Bureau of Indian Affairs—as evidence of Tribal status.[3]

There were also two additional regulations updated as of February 19, 2020, which increased penalty amounts for violations when leasing on Tribal lands. Under 25 C.F.R. § 211.55, the penalty for violations of the terms and conditions of any lease or regulations in Part 211 was raised from $1,597 per day to $1,626 per day, for each violation. Similarly, under 25 C.F.R. § 226.42, the penalty amount for violations of the terms and conditions of any lease or regulation dealing with Osage Reservation lands was increased from $948 to $965 per day, for each violation.

B. New Rules

New rules and guidance have also been issued by the United States Department of the Interior, Bureau of Land Management ("BLM"), specifically regarding lease suspension and royalty rate reductions, in response to the COVID-19 pandemic. As of the date of this update, BLM's revised policy currently provides for 60-day temporary royalty rate relief and 60-day lease suspension under specific situations. However, these rules and guidance are continually changing as the COVID-19 pandemic evolves. Operators and other industry professionals should continue to stay up to date on industry impacts associated with the COVID-19 pandemic.

III. Judicial Developments

A. Process and Procedure Under the APA

1. Western Watersheds Project v. Zinke

The first impactful decision was *Western Watersheds Project v. Zinke*.[4] The beginning of this case traces back a few years to 2018, when BLM altered its procedures for leasing oil and gas rights on certain federal lands.[5] BLM implemented these changes through an Instruction Memorandum ("IM"), which supplied new instructions to the agency's offices about how to handle oil and gas leases.[6] The changes made in the IM limited public

3. *Id.*

4. 441 F. Supp. 3d 1042 (D. Idaho 2020), reconsideration denied, stay granted, No. 1:18-CV-00187-REB, 2020 WL 2462817 (D. Idaho May 12, 2020).

5. *Id.* at 1049.

6. *Id.*

participation in BLM oil and gas lease decisions, to promote and expedite the process on public lands.[7]

Plaintiffs, Western Watersheds Project and Center for Biological Diversity, sued the Secretary of the Interior, alleging that the changes in the IM limited public participation in oil and gas lease decisions that affect and threaten sage-grouse populations and other habitats.[8] In 2018, the court issued a preliminary injunction against the implementation of the IM in regards to oil and gas lease sales in areas designated sage-grouse habitat management areas.[9] The Plaintiffs argued that the IM was both procedurally and substantively invalid under the federal Administrative Procedure Act ("APA") and the Federal Land Policy and Management Act ("FLPMA").[10] Plaintiffs also argued that the issuance of the IM was arbitrary and capricious under the APA.[11]

In the court's analysis of the IM, they determined that the same was a final agency action under the APA and the FLPMA, because it was much more than a general statement of policy, but rather it implemented a required template for BLM's leasing process.[12] It contained significant substantive and procedural changes in BLM practices that directly impacted the rights and abilities of citizens and conservation organizations to participate in or challenge leasing practices and decisions.[13] Rooted in their finding that the IM constituted final agency action, the court held that the IM was procedurally invalid because it had not been made subject to a public notice-and-comment period.[14] The court also found the IM to be substantively invalid because it removed the public involvement element, required under both the APA and the FLPMA for implementing plans and programs.[15]

With the determination that the IM was both procedurally and substantively invalid, the court's subsequent conclusion that BLM's issuance of the IM was arbitrary and capricious was not a surprise. Specifically, the court held that in implementing changes to jettison the leasing of oil and gas rights on federal and tribal lands—in favor of

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1050.
11. *Id.*
12. *Id.* at 1060.
13. *Id.*
14. *Id.* at 1067.
15. *Id*. at 1069.

economic maximization, and to the detriment of public input, all without the proper procedure—was arbitrary and capricious.[16] The court vacated the provisions of the IM with respect to the leases that affected sage-grouse populations and habitats, and it vacated prior lease sales conducted pursuant to the IM with respect to leases that affected sage-grouse populations and habitats.[17] The provisions of the IM that were vacated by the court and replaced with the previous 2010 version; sales and procedures were to continue under the 2010 standards until BLM issued a new IM in compliance with all processes and procedures under the APA and FLPMA.[18]

2. California v. Bernhardt

The procedural posture and outcome in *California v. Bernhardt*[19] are very similar to those seen in *Western Watersheds*.[20] In *Bernhardt*, California, New Mexico, and several environmental advocacy organizations sued BLM regarding a rulemaking process that altered oil and gas operations.[21] Specifically, BLM's regulatory scheme governing the minimization of resource waste had not been updated in over 30 years. In 2016, BLM issued a proposed rule to update the regulations and the proposed rule received over 330,000 public comments.[22] The final rule was issued seven months later, in 2017, after several meetings, revisions, and significant public input.[23] The 2016 rule was designed to attain considerable reductions in waste from flaring, venting, and equipment malfunctions. These reductions were aimed at increasing federal and tribal royalties and protecting the environment, with significant consideration for global climate change impacts.[24] Several lawsuits ensued shortly after issuance of the rule by various states and industry groups, each attempting to get the new rule "dropped."[25]

In 2018, while those lawsuits were proceeding, BLM issued a new rule rescinding the highly litigated and contested waste prevention rule that went

16. *Id.* at 1088.
17. *Id.* at 1089.
18. *Id.*
19. *California v. Bernhardt*, No. 4:18-CV-05712-YGR, 2020 WL 4001480 (N.D. Cal. July 15, 2020).
20. *See supra* section i.
21. *Bernhardt*, No. 4:18-CV-05712-YGR, 2020 WL 4001480.
22. *Id*. at 3.
23. *Id*.
24. *Id.*
25. *Id*. at 4.

into effect in 2017, *i.e.,* the 2016 rule version.[26] The September 2018 rule was discussed at length in last year's publication, including the changes made from the previous 2016 rule version.[27] The issuance of the 2018 rule was accompanied by its fair share of controversy, triggering the *Bernhardt* case.[28]

The court held, for several reasons, that the process of promulgating the 2018 rule was "wholly inadequate," and warranted rescission of the subject rule.[29] First, the court found that BLM ignored the federal Mineral Leasing Act's statutory mandate by adding an "economic limitation" to the interpretation of "waste" and through a "blanket delegation" of state and tribal authority.[30]

Second, the court found that BLM did not comply with the APA, finding fault with all of BLM's grounds: no adequate justification for reversing its position that the requirements of the 2016 were "economical, cost-effective, and reasonable"; impermissible reliance on President Trump's Executive Order 13783, in a manner that was inconsistent with statutory mandates; arbitrary and capricious use of a new "interim domestic" social cost of methane to analyze costs and benefits; arbitrary ignorance of the rule's benefits; arbitrary overstatement of the administrative burden, and failure to explain the "dramatic recalculation" of administrative costs; and arbitrary and capricious calculation of compliance costs.[31]

Third, the court found that BLM did not satisfy its "hard look" obligation under the National Environmental Policy Act ("NEPA") with respect to impacts on public health (including impacts on tribal communities), impacts on climate, and cumulative climate impacts of BLM's fossil fuel program.[32]

Lastly, the court found that BLM erred by not preparing an environmental impact statement. Accordingly, the court stayed its vacatur of the 2018 rule, and re-implemented the 2017 rule for 90 days to allow the parties to determine next steps.[33]

---

26. *Id.* at 6.

27. *See* Brent D. Chicken, Amanda J. Dick, *Sovereign Lands*, 5 Oil & Gas, Nat. Resources & Energy J. 273, 275 (2019).

28. No. 4:18-CV-05712-YGR, 2020 WL 4001480.

29. *California v. Bernhardt*, 2020 WL 4001480.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* At the time of the update the 90 days has not expired, and it is undetermined what the next steps will be regarding the waste prevention rule.

3. Solenex LLC v. Bernhardt

A third case—also involving the procedural process under the APA for oil and gas leases on federal land—is *Solenex LLC v. Bernhardt*.[34] Plaintiff Solenex LLC ("Solenex"), instituted an action against the Secretary of the Interior concerning a decision cancelling an oil and gas lease Solenex held covering a portion of the Badger-Two Medicine Area ("Area").[35] In 2016, the lease was cancelled because the Area's unique cultural, religious, spiritual, historical, and environmental significance were not properly analyzed as required by NEPA and the National Historic Preservation Act ("NHPA") when the lease was initially issued 33 years earlier.[36]

The district court ruled in favor of Solenex, holding that the amount of time that had elapsed between the lease's issuance and the cancellation of the same violated the APA, and the agency failed to consider Solenex's reliance on the lease before the cancellation.[37] The decision was appealed, and the appellate court agreed with the federal agency, ultimately vacating the district court's judgment.[38]

The appellate court reasoned that delay by the Secretary of the Interior in cancelling the oil and gas lease—33 years of delay to be exact—did not alone render the decision arbitrary and capricious and in violation of the APA, and there were no harmful consequences emanating from the delay that were not reasonably taken into account by the agency.[39] The violations of NEPA and NHPA during the initial issuance of the lease were discovered by environmental studies done on the land prior to surface-disturbing activity and issuance of drilling permits. Such environmental studies are standard practice, Solenex was notified of the studies, advised that drilling permit issuance was not guaranteed, and offered compensation for the harmful consequences considered by the Secretary of the Interior. Therefore, all harm was considered before cancelling the lease, the cancellation was valid under the APA, and required by NEPA and NHPA.[40]

The court reversed the lower decision, and held that a delay in cancelling a federal lease does not alone render it in violation of the APA.[41] The court

34. 962 F.3d 520 (D.C. Cir. 2020).
35. *Id.* at 522.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 529.
40. *Id.*at 530.
41. *Id*.

also noted that this decision did not preclude the Plaintiff from raising a breach of contract claim in federal claims court.

B. Pipelines on Tribal Lands

Two cases issued this year dealt with pipelines on or across tribal lands—the Dakota Access Pipeline and the Keystone XL Pipeline.

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*,[42] the Standing Rock Sioux Tribe ("SRS Tribe") filed suit against the United States Army Corps of Engineers ("Corps"), to block their actions related to the Dakota Access Pipeline. The SRS Tribe sought injunctive and declaratory relief under NEPA, NHPA, the Clean Water Act ("CWA"), and the Rivers and Harbors Act ("RHA"). Specifically, the SRS Tribe challenged federal permits and authorizations issued to construct segments of the Dakota Access Pipeline to carry crude oil under the Missouri River, which was a federally regulated waterway bordering the SRS Tribe's reservation.[43]This case has been ongoing since 2016, but several important rulings were made in 2020.

In March, the court granted partial summary judgment to the SRS Tribe, ruling that the Corps had violated NEPA by determining that an environmental impact statement was unnecessary, and it ordered the Corps to complete such statement.[44] Additionally, the court granted summary judgment in favor of the Corps on the SRS Tribes' claims under NHPA.[45] In July, the court vacated the original easement granted to the Corps that had initially authorized construction of the pipeline under the Missouri River near the reservation.[46] The court ordered the pipeline be closed and emptied by August 5, 2020 and remain empty until the Corps completes the environmental impact statement.[47]

In *Rosebud Sioux Tribe v. Trump*,[48] the Rosebud Sioux Tribe ("RS Tribe") brought suit against President Trump, in his official capacity, and several governmental agencies ("Defendants") seeking declaratory and injunctive relief against the permit issued for the cross-border Keystone XL

42. 440 F. Supp. 3d 1 (D.D.C. 2020).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2020 WL 3634426 (D.D.C. July 6, 2020). This decision has been appealed, but as of the update there had not been an decision issued on the appeal.

47. *Id*.

48. 428 F. Supp. 3d 282 (D. Mont. 2019).

Pipeline. The RS Tribe argued that Defendants violated various treaties, the Foreign Commerce Clause of the United States Constitution, and several federal statutes and regulations. The RS Tribes' also argued they inherented sovereign powers when President Trump issued a presidential permit to an energy company for the pipeline.[49]

This case is still in its procedural beginnings. In December 2019, the court denied Defendants' motion to dismiss for lack of standing and failure to state a claim and held that the RS Tribe had standing and sufficiently alleged all claims.[50] Oral argument occurred in April 2020, though no ruling has yet been issued.

49. *Id*.
50. *Id*.