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Sovereign Lands

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SOVEREIGN LANDS

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I. Introduction

The most activity in the oil and gas industry impacting sovereign lands has come in two forms. First, there have been several important amendments to existing federal regulations, and a couple of executive orders issued impacting the industry. Second, there have been several decisions issued by federal courts that will undoubtedly have an impact on sovereign lands with regards to oil and gas development, specifically issues regarding leases issued by tribes and allottees.

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II. Federal Regulatory Developments

A. Amendments

There were only two amendments made to existing federal regulations that impact Indian-owned minerals. Most relevant to the industry was the amendment of 40 C.F.R. Parts 1206 (production valuation) and 1241 (penalties). The Office of Natural Resources Revenue (“ONRR”) amended various regulations within the aforementioned Parts regarding how the ONRR values oil and gas produced from Federal leases for royalty purposes, values coal produced from Federal and Indian leases for royalty purposes, and values for civil penalties for various violations of rules on mineral leases. The amendments to the referenced Parts are quite extensive, and an independent full review of both parts should be performed for a detailed explanation of the changes made. Particularly relevant to sovereign lands however, the ONRR made the following eight amendments to the regulations:

1. A lessee may now apply to ONRR for approval to claim an extraordinary processing allowance in situations where the gas stream, plant design, and/or unit costs were extraordinary, unusual, or unconventional relative to standard industry conditions and practice.
2. The default provision, which was introduced in 2016 to guide the ONRR on how to establish royalty value when typical valuation methods were unavailable, unreliable, or unworkable, was removed. The default provision applied to Federal oil and gas, and Federal and Indian coal, but with its removal the valuation reverts to the ONRR’s practices before the 2016 Valuation Rule was effective.
3. The definition of “misconduct” from 30 CFR §1206.20, as it applied to Federal oil and gas, and Federal and Indian coal, was completely removed, because it was contingent on the default provision.
4. The requirement that a lessee have contracts signed by all parties in order for those contracts to be recognized as valid and binding with respect to the valuation of Federal oil and gas, and Federal and Indian coal, was removed. Prior to removal of this requirement, if a contract did not have all signatures the default provision for valuation would be used instead of the contract.

5. The requirement for a lessee to cite legal precedent when seeking a valuation determination for Federal oil and gas, or a valuation decision for Federal or Indian coal, was removed.
6. The option to use index-based valuation was expanded to include arm's-length Federal gas sales; under the 2016 Valuation Rule, this was only available for non-arm's-length Federal gas sales.
7. The ONRR's civil penalty regulations now clarify that ONRR will consider the unpaid, underpaid, or late payment amounts in the severity analysis for payment violations only.
8. The ONRR's civil penalty regulations now clarify that ONRR may consider aggravating and mitigating circumstances when calculating the amount of a civil penalty.

The second amendment to several regulations relevant to the oil and gas industry is found in 40 C.F.R. Part 60. The Environmental Protection Agency ("EPA") granted reconsideration on various emission and environmental standards, which led to extensive amendments of Part 60. While a full review of Part 60 should be done, highlighting of a couple of industry-relevant amendments is helpful.

First, a subpart—40 CFR § 60.5360a—titled "Standards of Performance for Crude Oil and Natural Gas Facilities for Which Construction, Modification or Reconstruction Commenced After September 18, 2015," was added, which establishes emission standards and compliance schedules for volatile organic compounds and sulfur dioxide emissions from affected facilities. These new standards should be reviewed in full for a complete understanding of the new requirements, and what facilities they apply to.

Second: (i) 40 C.F.R § 60.5430a amended the definition of "flowback" to exclude screenouts, coil tubing cleanouts, and plug drill outs; (ii) 40 C.F.R § 60.5375a was amended to allow the separator to be nearby during flowback, but the separator must be available and ready for use as soon as it is technically feasible for the separator to function, and the separator required during the initial flowback stage may be a production separator as long as it is designed to accommodate flowback. Lastly, the recordkeeping and reporting requirements for fugitive emissions at well sites or compressor stations were amended in 40 CFR § 60.5397a. In an attempt to streamline the process, many requirements were removed.

B. New Rules

There was one major “rule” added to federal regulations last year that has impacted, and will continue to impact, the oil and gas industry. However, it was not added in the conventional rulemaking method that most federal regulations follow—it was implemented by an executive order.

In January of 2021, President Biden issued an executive order entitled “Tackling the Climate Crisis at Home and Abroad” (“Climate Crisis Order”).¹ Section 208 of the Climate Crisis Order states that “the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of . . . potential climate and other impacts associated with oil and gas activities.”² The section goes on to state that this review shall be completed with the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Energy. However, the executive order does not provide a timeframe during which this review shall be completed or when the pause on issuing new federal oil and gas leases will be lifted. Additionally, the executive order gives the Secretary of the Interior broad authority to implement “appropriate action” with regard to these leases “to account for corresponding climate costs.”³ Although there was not a strict time frame provided, the review process began in March 2021, and was still ongoing at the time this article was written, with an expected report sometime in Summer 2021.

As can be expected with halting a large source of oil and gas leases in the industry, this executive order has already been challenged multiple times in various courts across the United States, a summary of which is provided in Section III (a) below.

A second executive order was also issued that will likely impact the oil and gas industry in the near future. In this executive order, one of President Biden’s main directives is to reduce methane emissions in the oil and gas sector in response to the climate crisis.⁴ Biden explicitly directs the EPA to propose “new regulations to establish comprehensive standards of performance and emission guidelines for methane and volatile organic compound emissions from existing operations in the oil and gas sector,

1. Tackling the Climate Crisis at Home and Abroad, 86 FR 7619 (Jan. 27, 2021).

2. *Id.*

3. *Id.*

4. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 FR 7037 (Jan. 20, 2021).

including the exploration and production, transmission, processing, and storage segments, by September 2021.”⁵

III. Judicial Developments

A. Moratorium on Federal Leases

Following the issuance of President Biden’s Climate Crisis Order, thirteen states filed a lawsuit against President Biden and federal agency officials in the Western District of Louisiana challenging the actions taken pursuant to the order. Specifically, the Department of the Interior’s action to pause new oil and natural gas leasing activities on public lands and offshore waters.⁶ The states argued that actions implementing this moratorium on leasing activities violated the Outer Continental Shelf Lands Act, the Mineral Leasing Act, and the Administrative Procedure Act.⁷

The states filed a motion requesting a preliminary injunction against the government’s pause on new oil and gas leases on public lands and offshore waters.⁸ On June 15, 2021, the Western District of Louisiana granted the states’ motion, and issued a nationwide preliminary injunction, barring the government from implementing the moratorium on Federal leases.⁹ The court found that the states put forth sufficient evidence to meet all the requirements for a preliminary injunction.¹⁰ The court also made a preliminary finding that President Biden exceeded his executive powers when ordering the pause on the leases, because the Outer Continental Shelf Lands Act does not grant the President that specific authority.¹¹ The court rejected the Biden Administration’s arguments that the public notice and comment period does not apply to the “pause,” because: (i) the “pause” is not a final agency action; and (ii) the Secretary of the Interior has broad discretion in leasing decisions.¹² It is anticipated that the injunction will be appealed by the federal government, but for the time being, the Department of the Interior stated they intend to comply with the President’s executive

5. *Id.*

6. *State v. Biden*, 338 F.R.D. 219 (W.D. La. 2021).

7. *Id.*

8. *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

order, and will continue to work on issuing the comprehensive review and findings.

Additionally, a separate lawsuit was filed around the same time by Wyoming and various industry groups in the United States District Court of Wyoming, requesting a petition for review of the federal leasing moratorium.¹³ The Defendants in *State v. Biden* filed a motion to transfer, or in the alternative, to sever and transfer to Wyoming under the Fifth Circuit's first-to-file rule.¹⁴ The Defendants argued it was applicable because of the "potential significant overlap" between the Louisiana and Wyoming Federal District court cases; however, the motion to transfer was denied by the Western District of Louisiana.¹⁵ That court concluded that while there was "some overlap" between the cases, there was not "substantial overlap," because the federal agencies and statutory authority set forth by the thirteen states in the Louisiana case were much broader and not the same as Wyoming's challenge.¹⁶

B. The Waste Prevention Rule

In *Wyoming v. United States Dep't of the Interior*, Wyoming and Montana petitioned for review of the new set of regulations issued by Bureau of Land Management ("BLM") pursuant to the Mineral Leasing Act ("MLA").¹⁷ North Dakota and Texas intervened to challenge the rule's legality, but California and New Mexico intervened to defend the rule's legality.¹⁸ The regulations were intended to reduce waste of natural gas during oil and gas production activities on Federal and Tribal leases, and clarify when "lost" gas is subject to royalties.¹⁹

The rule being challenged is codified in 43 CFR §§ 3160 & 3170, and was made effective on November 27, 2018.²⁰ The rule was an addition to previous limits on venting and flaring on Federal and Tribal leases, and discouraged 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/liquids unloading.²¹ The

13. *Biden*, 338 F.R.D. 219.

14. *Id.*

15. *Id.*

16. *Id.*

17. 493 F. Supp. 3d 1046 (D. Wyo. 2020).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; see 43 C.F.R. § 3160-3170.

Plaintiffs argued that the increased restrictions on venting and flaring were really an attempt to regulate air quality, which is directly under the EPA's authority via the Clean Air Act; therefore, the BLM was not vested with the authority to promulgate such a rule, and the rule was thereby arbitrary and capricious.²²

The District Court for the District of Wyoming agreed. In review of the rules and regulations, the court came to the conclusion that the primary justification for the rules was the ancillary benefit of a reduction in air pollution.²³ Under the MLA, Congress delegated the authority to prescribe rules for the prevention of undue waste of mineral resources, but that delegation does not allow or authorize the enactment of rules for reducing air pollution, particularly given the complex and comprehensive regulatory scheme of the Clean Air Act.²⁴ The court also found that the BLM acted arbitrarily and capriciously by failing to fully assess the impacts of the new rules and regulations on marginal wells, and failing to consider the domestic costs and benefits.²⁵ Accordingly, the court vacated the Waste Prevention Rule.²⁶

C. Subject Matter Jurisdiction Under the Indian Tucker Act

In *Fletcher v. United States*, Osage tribal members brought an action against the federal government seeking monetary restitution for the federal government's allegedly gross mismanagement of tribal trust funds, which contain royalty income from oil and gas reserves.²⁷ The court ultimately dismissed the case for lack of standing, because the members of the Osage tribe "failed to demonstrate that they suffered an injury-in-fact," which was a fact-specific analysis that is not particularly illuminating on any industry updates.²⁸

However, one portion of the court's ruling is of importance to sovereign lands more generally. The court also held that individual members of the Osage Tribe were not an "identifiable group of American Indians" under the Indian Tucker Act—a jurisdictional statute providing the Court of Federal Claims subject matter jurisdiction over claims against the United States when asserted by a tribe, band, or "other identifiable group of

22. *Wyoming*, 493 F. Supp. 3d 1046.

23. *Id.* at 1086.

24. *Id.*

25. *Id.*

26. *Id.*

27. 151 Fed. Cl. 487 (2020).

28. *Id.*

American Indians.” Because the members here lacked formal organization as a recognized Indian tribe, and were instead individual members of the Osage Tribe, the court did not have subject matter jurisdiction to hear their claims.²⁹

29. *Id.*