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SOVEREIGN LANDS

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

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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 in light of the recent emphasis on environmental protection. Second, there have been several opinions issued by federal courts that impact sovereign lands with regards to various aspects of 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, Utah, and Michigan, and he focuses his practice in the area of 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 around energy transactions.

II. Federal Regulatory Developments

A. Amendments to and Issuance of Agency Rules

Multiple federal agencies made amendments to existing regulations and rules and issued new policies to further environmental protections and aid in the fight against the climate crisis.

First, the Environmental Protection Agency ("EPA") has been active again this year in proposing and implementing rules and policies. As discussed in last years' issue, at the end of 2021, the EPA issued a proposed rule titled "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review."[1] The EPA issued a revised version of the rule in December 2022, which seeks to strengthen and expand on the proposed reductions of methane emissions and other harmful pollutants from new facilities and existing facilities that were provided in the November 2021 version.[2] The new proposed rule also seeks to establish new greenhouse gas emissions guidelines and implementation plans for states.[3] The comment period for the rule closed on January 1, 2023, and its status is still pending.[4]

Second, the EPA promulgated a Federal Implementation Plan ("FIP") under the Clean Air Act ("CAA"), establishing volatile organic compound ("VOC") emissions control requirements for existing, new, and modified oil and natural gas production and processing within the Uintah and Ouray Indian Reservation in Utah.[5] This final rule, effective February 6, 2023, applies to owners or operators of oil and natural gas sources that produce oil and natural gas or process natural gas within the Reservation and meet the applicable criteria for each set of requirements.[6] The final rule requires submission of an inventory of actual emissions to the EPA every three years that covers emissions from the previous calendar year as well as other monitoring and recordkeeping requirements.[7] Most notably, the new rule

1. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63110-0.1 (proposed Nov. 15, 2021).

2. *Id*.

3. *Id*. at 63129 – 63132.

4. *Id*.

5. Federal Implementation Plan for Managing Emissions From Oil and Natural Gas Sources on Indian Country Lands Within the Uintah and Ouray Indian Reservation in Utah, 87 Fed. Reg. 75334, 75334 (Dec. 8, 2022).

6. *Id*. at 75338.

7. *Id*.

requires any source with the potential to emit four tons of VOC per year to collect and route all VOC emissions through a closed-vent system to an operating system designed to recover 100% of the emissions and recycle them or use another method to achieve at least 95% continuous VOC emissions control efficiency.[8]

Lastly, the EPA is amending the requirements in the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") that govern the use of dispersants, other chemicals, and other spill-mitigating substances when responding to oil discharges into jurisdictional waters of the United States.[9] The final rule, set to be effective December 11, 2023, revises the text to add broader definitions of chemicals and biological agents; new listing criteria; revised efficacy and toxicity testing protocols; and enhanced reporting requirements.[10] The EPA intends these amendments to encourage the development of safer and more effective spill management and treatment.[11]

The Federal Energy Regulatory Commission ("FERC") proposes to revise its regulations governing liquefied natural gas ("LNG") facilities.[12] FERC plans to remove outdated references to seismic hazard evaluations and seismic design criteria from the regulations for LNG facilities and replace them with a codified version of FERC's existing practice for evaluation of seismic and natural hazards.[13] Because FERC intends to replace the outdated criteria with the criteria already used in practice, the amendment should provide clarity and have a small impact in practice. The comment period for this rule closed on January 27, 2023, and the status of the rule is pending.[14]

Additionally, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") made changes to its rules that impact the oil and gas industry. In August 2022, the PHMSA published a rule revising the Federal Pipeline Safety Regulations to improve the safety of gas

8. *Id*.

9. National Oil and Hazardous Substances Pollution Contingency Plan; Product Schedule Listing and Authorization of Use Requirements, 88 Fed. Reg. 38280, 3820 (Jun. 12, 2023).

10. *Id*.

11. *Id.* at 38296.

12. Updating Regulations for Engineering and Design Materials for Liquefied Natural Gas Facilities Related to Potential Impacts Caused by Natural Hazards, 87 Fed. Reg. 72906-01, 72906 (proposed Nov. 28, 2022).

13. *Id*.

14. *Id.* at 72912.

transmission pipelines.[15] This rule was promulgated in response to the 2010 pipeline incident in San Bruno, California, which resulted in the death of eight people, injuries to more than sixty other people, and the destruction or damage of over 100 homes.[16] The revisions are intended to improve the protection of the public, property, and environment; close regulatory gaps; and adopt additional safety measures to improve safety inside and outside of high-consequence areas near pipelines.[17] Specifically, PHMSA is making three major changes: (1) to clarify the integrity management requirements and assessment methods by requiring several pipeline attributes to be included in an operator's risk and threat analysis for a pipeline segment; (2) to strengthen corrosion control requirements and improve the repair criteria for pipeline anomalies by requiring operators to perform assessments to identify suspected damage promptly after backfilling and then remediate any coating damage found and incorporating criteria for additional anomaly types such as crack anomalies, certain corrosion metal loss defects, and certain mechanical damage defects; and (3) to provide parameters for inspections following extreme weather events such as requiring that operators commence inspection of their potentially affected facilities within seventy-two hours after the operator determines the affected area can be safely accessed following the cessation of an extreme weather event such as a hurricane, landslide, flood, earthquake, or other natural disaster.[18]

B. Executive Action

The development of new rules in the oil and gas sector continues to follow a consistent trajectory towards environmental health and safety. Consistent with his pledge at the United Nations Climate Change Conference in September 2021 and his prior executive orders aimed at combating the climate crisis, President Biden issued an Executive Order on April 21, 2023 titled "Revitalizing Our Nation's Commitment to Environmental Justice for All."[19] This Order updated President Clinton's Executive Order titled "Federal Actions to Address Environmental Justice

15. Pipeline Safety: Safety of Gas Transmission Pipelines: Repair Criteria, Integrity Management Improvements, Cathodic Protection, Management of Change, and Other Related Amendments: Technical Corrections; Response to Petitions for Reconsideration, 88 Fed. Reg. 24708-01, 24708 (Apr. 24, 2023).

16. *Id*.

17. *Id*.

18. *Id*.

19. Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023).

in Minority Populations and Low-Income Populations" issued in 1994.[20] The Order broadens the scope of the 1994 Order and directs agencies to conduct more comprehensive analyses that account for the unique and often disproportionate burdens faced by communities with environmental justice concerns.[21] The scope of the Order is intentionally broad and applies to all executive agencies and all agency action including rulemaking, guidance, policy, program, and permitting.[22] Additionally, the Order requires agencies to consult with impacted communities; create implementable mechanisms to capture accurate data regarding the cumulative environmental burdens in impacted communities; and consider those cumulative impacts across a broad range of federal activities.[23] Finally, the Order established the first government-wide understanding of "Environmental Justice" being driven by "entrenched disparities that are often the legacy of racial discrimination and segregation, redlining, exclusionary zoning, and other discriminatory land use decisions or patterns."[24] The Order outlines that the relevant burdens for agencies to consider when seeking environmental justice are access to clean water, clear air, nature, and other basic human health and environmental needs, with an added focus on tribes and people with disabilities.[25]

III. Judicial Developments

A. Moratorium on Federal Leases

Following the issuance of President Biden's Pledge and climate focused Executive Orders, a number of lawsuits were filed challenging actions taken pursuant to President Biden's orders and initiatives, primarily the requirement that all new oil and natural gas leases on public lands or in offshore waters be paused pending revision of the federal leasing program.[26] The states and agencies requested the court issue a preliminary injunction against agency actions implemented by this moratorium on leasing activities because it violated the Outer Continental Shelf Lands Act ("OCSLA"), the Mineral Leasing Act ("MLA"), and the Administrative

20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id.* at 25251.
25. *Id.* at 25252.
26. *See* State v. Biden, 338 F.R.D. 219 (W.D. La. 2021); Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. 2021).

Procedure Act seeking ("APA").[27] On June 15, 2021, the Louisiana federal district court granted the plaintiff's motion and issued a nationwide preliminary injunction barring the government from implementing the moratorium on federal leases.[28] On August 16, 2021, the defendants appealed the decision regarding the injunction to the Fifth Circuit, and, on August 17, 2022, the Fifth Circuit vacated and remanded the judgment, holding that the preliminary injunction failed to meet Rule 65(d) requirements.[29] The Fifth Circuit did not reach the merits of the underlying executive order pausing federal leasing because it was not ascertainable what, if any, final agency action was being enjoined.[30]

After the case was remanded back to the district court for the Western District of Louisiana, the court ruled on both parties' motions for summary judgment on August 18, 2022.[31] The court granted in part and denied in part both parties' motions.[32] The court ultimately held that the moratorium on federal leasing as provided in Executive Order 14008 was *ultra vires*, beyond the authority of the President, in violation of the OCSLA and the MLA, and in violation of the APA, because the government action was contrary to law, arbitrary and capricious, and failed to provide notice and comment.[33] Additionally, the court found in favor of the States in granting their request for a permanent injunction against the implementation of a "pause" on new oil and gas leases on public lands and in offshore waters, as set forth in Section 208 of Executive Order 14008.[34] The injunction was limited to the thirteen States party to the lawsuit—Louisiana, Alabama, Alaska, Arkansas, Georgia, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia—and the nationwide preliminary injunction was lifted.[35]

B. Royalty Calculations on Tribal Lands

In an unpublished opinion, *Merit Energy Company, LLC v. Haaland*, the Tenth Circuit reviewed a Wyoming District Court's assessment of the

27. *Id.*
28. Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. 2021).
29. Louisiana v. Biden, 45 F.4th 841, 846 (5th Cir. 2022).
30. *Id.*
31. Louisiana v. Biden, 622 F. Supp. 3d 267 (W.D. La. 2022).
32. *Id*. at 275.
33. *Id.* at 289 – 290.
34. *Id.* at 298.
35. *Id.* at 299.

appropriate method for calculating royalties on tribal lands.[36] There were two leases at issue, both containing an identical "major portion provision," which gives the Secretary of the Interior ("Secretary") discretion to calculate a "value" for royalty purposes to ensure the tribes receive royalties consistent with market prices.[37] The Office of Natural Resources Revenue ("ONRR"), acting as trustee for the tribes, collects oil and gas royalties from operators on tribal land, and, pursuant to their role as trustee, the ONRR issued a rule defining "major portion price" as "the highest price paid or offered at the time of production for the major portion of oil produced from the same designated area for the same crude oil type."[38] This rule was intended to ensure the tribes received maximum revenues under the government's trust responsibility.

Using this calculation, the ONRR determined the lessee—Merit—was liable for royalties exceeding millions of dollars concerning the leases in question.[39] Merit argued that it did not owe any additional royalties because the ONRR's rules state that the lease terms control if there is a conflict between the lease terms and the regulation.[40] Merit asserted that the ONRR had essentially substituted its valuation methodology to enhance royalty collections without substantiating the inconsistency between the lease provisions and the regulation.[41] The court evaluated the ONRR's decision made through administrative procedures, and determined that the major portion provisions of the leases were consistent with each other because the lease explicitly provided for agency discretion and the authority to calculate value at the time of production.[42]

Additionally, a case recently issued by the United States Court of Federal Claims elaborates on the Secretary's duties and obligations imposed by the statutes and regulations providing for approval and management of leases on tribal lands.[43] In *Birdbear*, members of the Three Affiliated Tribes sued the United States, claiming they were entitled to millions of dollars in losses caused by the governments' breach of its fiduciary obligations under

36. Merit Energy Co., LLC v. Haaland, No. 21-8047, 2022 WL 17844513 (10th Cir. Dec. 22, 2022).

37. *Id.* at 1.

38. *Id.* at 2.

39. *Id.* at 3.

40. *Id.*at 7.

41. *Id.*

42. *Id.*at 9.

43. Birdbear v. United States, 162 Fed. Cl. 225, 229 (2022).

the statutes and regulations.[44] The members of the Tribes argued that the government consistently failed to collect revenue from oil and gas produced on federally managed lands, failed to provide required oversight and management of oil and gas operations, failed to properly advertised their leases, failed to engage in competitive bidding for royalty rates, and failed to protect their correlative or environmental rights.[45] On summary judgment, the court held that the government had specific fiduciary duties to subject the leases on tribal land to competitive process, to protect tribal members against uncompensated drainage of oil and gas held in trust, and to ensure timely drilling of oil and gas wells on tribal members' leased land,; however, the court found the government was not in breach of these fiduciary duties in this instance.[46]

C. Extension of Tribal Immunity

Lustre Oil Co. v. Anadarko Minerals, Inc., was a quiet title action between Lustre Oil Company LLC ("Lustre") and A&S Mineral Development Company, LLC ("A&S")—a company formed by the Tribal Executive Board to protect and be responsible for developing oil and gas resources on tribal lands on behalf of the tribes. [47] Lustre sought to invalidate A&S's interests in various oil and gases leases held by A&S within the Fort Beck Indian Reservation that were rewarded as part of a settlement agreement with Anadarko following an oil spill on tribal lands.[48] Lustre procured top leases on forty-one of the fifty-seven leases and claimed that Anadarko let the leases lapse prior to assigning them to A&S, making Lustre's top leases valid.

The district court dismissed the action for lack of jurisdiction, concluding that A&S was an arm of the tribes, entitling it to immunity.[49] The Supreme Court of Montana refused to adopt a bright line rule that would bar entities incorporated under state law from enjoying tribal sovereign immunity; however, the court also held that the district court's application of the test for sovereign immunity was misapplied in this case. As such, A&S was not entitled to sovereign immunity from Lustre's quiet title claims when the factors from *White v. Univ. of California* were

44. *Id.*
45. *Id.* at 230 – 231.
46. *Id.* at 236.
47. Lustre Oil Co. v. Anadarko Minerals, Inc., 411 Mont. 349, 352 – 353 (Mont. 2023).
48. *Id.* at 353.
49. *Id.*at 352.

applied, and the court reversed and remanded the case to the district court.[50] The holding emphasized the tribes' choice to incorporate A&S under Delaware law—thereby subjecting it to state laws allowing limited liability companies to sue and be sued—and the tribes' stated intent to keep A&S a separate and distinct entity, counter to the finding of A&S being an arm of the tribes for purposes of sovereign immunity.

D. Operator Trespass on Tribal Land

In *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co.*, the United States District Court for the Western District of Wisconsin granted summary judgment in favor of the tribe on its claims for trespass, unjust enrichment, and entitlement to monetary remedy against Enbridge Energy Company, Inc. ("Enbridge").[51] Enbridge owned and operated an oil and gas pipeline that extends 645 miles across Wisconsin and Ontario, a part of which traverses the Bad River Reservation.[52] The easements, initially held by Enbridge, for the portion of the pipeline on the Bad River Reservation expired in 2013, and, due to a growing concern for environmental impacts, the tribe refused to renew the easements.[53] Enbridge refused to remove the pipeline, and, as a result, the tribe filed a lawsuit accusing Enbridge of trespass, unjust enrichment, nuisance, and ejectment.[54]

In granting the tribe's motion for summary judgment, the court held that no language in the original 1992 agreement between the parties that initially granted the twenty-year easement required the tribe to renew the easement, and there were no regulatory or statutory obligations imposed on the tribe that would require them to renew the easement.[55] Therefore, the court found that, by continuing to operate the pipeline on the reservation after the easement expired, Enbridge benefited monetarily by trespassing in violation of the tribe's legally protected rights and was found liable for unjust enrichment, including payment of restitution.[56] The tribe also sought a permanent injunction against Enbridge, but the court refused to grant it on

50. *Id.* at 365 – 366.

51. Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030, 1037 (W.D. Wis., 2022).

52. *Id*. at 1036.

53. *Id.*

54. *Id.*at 1036 – 1037.

55. *Id.*at 1042 – 1044.

56. *Id.* at 1049 – 1050.

the basis that there was insufficient proof that the dispute would be ongoing following the judgment.[57]

57. *Id.* at 1054 – 1059.