AAPL
Powering The Profession
DECEMBER 9, 2024

GOVERNMENTAL AFFAIRS REPORT

FEDERAL – REGULATORY

National Parks Service Rights of Way Permits Final Rule. On December 5, the National Parks Service (NPS) published a final rights of way rule. According to the NPS, the rule "revises regulations governing the application, processing, and issuance of right-of-way (ROW) permits for lands and waters administered by the NPS. A ROW permit authorizes the use of such lands and waters for the operation and maintenance of infrastructure associated with utilities such as fiber, water lines, power lines, and cellular antennas. The revisions align NPS processes more closely with those of other Department of the Interior (DOI) bureaus by allowing for a pre-application meeting, identifying a common standard application form, and broadening methods the NPS can use to determine fair market value. This rule clarifies the process for permitting construction related to a ROW permit, makes updates that reflect current technology and standard practices, and integrates applicable laws that have been implemented since the regulations were first promulgated in 1980." The rule is effective January 6, 2025. Read more.

FEDERAL – Judicial

Leasing; Pooling Orders – Oklahoma. Recently, in *Cory v. Ovintiv USA, Inc.* (Case No. CIV-21-568-G), a federal court in Oklahoma ruled in favor of an oil and gas company lessee regarding a dispute over an alleged 160-acre spacing limitation contained in the lease's voluntary pooling clause and an Oklahoma Corporation Commission (OCC) order. Ovitniv argued that "the 160-acre pooling restriction was 'superseded' by the OCC's orders and creation of new units pursuant to the OCC's 'statutorily granted powers to prevent waste and protect correlative rights.'" In rejecting the plaintiff-lessor's breach-of-contract claim, the court held that prior court decisions "teach that the OCC's regulatory authority, e.g., to space wells for the conservation of oil, gas, and other natural resources, is incorporated into private oil and gas leases by operation of law." The court also rejected the plaintiff's quiet title action regarding four gas wells drilled by the lessee on the leased property that had been plugged and abandoned and that an alleged improperly drilled well failed to perpetuate the lease. On this issue, the court held that the plaintiff failed to prove that the well was improperly drilled or establish that the well was not perpetuating the lease. Read more.

STATE – Legislative

For all 650+ bills AAPL is currently monitoring and tracking for members, please see the continuously updated member-exclusive AAPL Governmental Affairs Bill Tracking Summary spreadsheet, available through the AAPLConnect LANDNEWS and Governmental Affairs Network member forums here or on the AAPL website here.

STATE – Regulatory

Class II Injection Wells – California. In October, the California regional administrator for the U.S. Environmental Protection Agency (EPA) responded to questions over California's new legislation, AB 3233, which authorizes local control "to limit or prohibit oil and gas operations or development in its jurisdiction." That law takes effect January 1, 2025. The issue, raised by California congressman Vince Fong (R), is whether AB 3233 violates EPA regulations. In an EPA letter to Fong it states that "If the EPA determines that under AB 3233 local entities are promulgating ordinances or regulations that interfere with the State's Class II UIC program," the EPA will consult with state regulators. As noted by the California Independent

Petroleum Association, "The letter also emphasizes that while California currently complies with federal standards, the state must ensure that local measures under AB 3233 do not interfere with the approved UIC program. Any such interference could lead to federal oversight, highlighting potential gaps in the state's adherence to established rules and collaboration with federal authorities." Read the EPA letter here.

Marginal Well Plugging Fee – Colorado. The Colorado Orphan Wells Mitigation Enterprise Board has voted unanimously in favor of "a new annual fee of $115 per oil and gas well in Colorado to pay for the plugging of marginal wells in the state." Read more from the Board here. As reported by *The Daily Sentinel*, the action "is expected to generate $5 million a year. There are about 47,000 active wells in the state, including about 12,000 in Garfield County alone and close to 1,200 in Mesa County. The action comes after the passage by the state Legislature earlier this year of a bill expanding the authority of the Orphan Wells Mitigation Enterprise program to include the plugging of marginal wells." That legislation, Senate Bill 24-229, "defines a marginal well as one that presents a high risk of becoming orphaned." Jeff Robbins, Chair of the Orphan Wells Mitigation Enterprise Board, said, "The new Marginal Well Mitigation Fee adds to unprecedented funding — a total of $29 million next fiscal year — to plug not only orphan wells but also marginal wells." The fee is expected to go into effect in April 2025 but no specific date has yet been released by the Board. Read more.

Air Quality Control Commission Regulatory Procedures – Colorado. On November 22, the Colorado Air Quality Control Commission (AQCC) voted in favor of overhauling its regulatory procedural rules for the first time since 1998 "[i]n an effort to create more public participation in rulemaking and to improve transparency in the process." As reported, "The new rules will extend from three months to four months the average time around most rulemakings, will restructure the way that parties to such hearings file motions and will attempt to define the scope of rulemakings more clearly from the start. They will become applicable in August, meaning that business and environmental groups that interact frequently with the AQCC will see the first changes by February or March in preparation for hearings later in the year." Additionally, "Under the new procedures, the Colorado Air Pollution Control Division will bolster its outreach process and work to unveil draft rules as early as two months before asking the AQCC to set a rulemaking hearing. That request will then set off a process in which groups affected by proposed rules file initial comments first, then responses and then a final set of statements that could include alternate proposals to the APCD's suggested rules." Read more.

Ozone Precursor Rulemaking – Colorado. On November 22, the Colorado Air Quality Control Commission (AQCC) voted unanimously to "consider a proposal early next year for stricter rules on hazardous emissions from the oil and gas industry, as the state continues to struggle to rein in its long-running ozone pollution problem." The Air Pollution Control Division, an arm of the Colorado Department of Public Health and Environment, recommended the proposal to make changes to the so-called Regulation Number 7 ozone precursor rules. As reported, "The new rules would require the use of improved equipment for preventing and detecting leaks at thousands of oil and gas facilities across the state, with a particular focus on a nine-county region known as the Denver Metro/North Front Range Nonattainment Area, which has for decades been out of compliance with Environmental Protection Agency standards for ozone, a hazardous air pollutant." The AQCC is expected to begin consideration of the proposal at its monthly hearing in February 2025. We will keep AAPL members updated once the process begins. Read more.

Crypto Mining Facility Energy Use Registration – Texas. On November 21, the Public Utility Commission and the Electric Reliability Council of Texas adopted a rule as required by 2023 state legislation, SB 1929, requiring cryptocurrency mining facilities to register with state authorities. The rule "requires crypto mining facilities that consume more than 75 megawatts of power to tell the Public Utility Commission and the Electric Reliability Council of

Texas, which oversees the state's power grid, the facility's location, ownership and electricity demand." As reported by the *Texas Tribune*, "The rule was designed to help the state see how much electricity crypto facilities will consume and protect the grid's reliability." Read more.

STATE – Judicial

Inglewood Oil Field – California. On November 25, Sentinel Peak, the owner and operator of the Inglewood Oil Field, sued the state of California over a recently enacted law requiring "all low-production wells in the Inglewood Oil Field to cease operations by March 2027 and all wells to be plugged by the end of 2030. Failure to meet those deadlines will result in a monthly $10,000 penalty for every well in violation." The lawsuit, *Sentinel Peak Resources California LLC v. State of California* (Case No. 24STCV31066), claims that "by punishing the continued operation of lawfully permitted wells, AB 2716 imposes mandatory, potentially limitless penalties that are grossly disproportional to the gravity of the offense that it is designed to punish. And by solely targeting a single operator for punishment, AB 2716 is an improper special statute and unconstitutional bill of attainder. Further, AB 2716 disregards Petitioner's vested rights to continue operation of lawfully permitted wells, and constitutes a taking of property rights without the payment of just compensation." Further, the complaint states that "The imposed penalties […] have no relationship to any actual harm incurred by neighboring uses." As reported by the *Los Angeles Times*, "The law would effectively oversee the end of fossil fuel extraction in the Inglewood Oil Field, where drilling has occurred for a century. The 1,000-acre field — located in Culver City, Los Angeles' Baldwin Hills and unincorporated Ladera Heights — has approximately 820 unplugged wells, including 420 that are actively pumping oil. Roughly 80% of these operating wells are considered low-producing, meaning they yield less than 15 barrels of oil or 60,000 cubic feet of gas per day." Read more. For further analysis of the case, Read more here and here.

Mineral Servitudes – Louisiana. Recently, in *Ganey v. Cupstid* (Case No. 55,798-CA), the Louisiana Court of Appeal, Second Circuit, addressed a dispute over whether a mineral servitude was extinguished by 10 years nonuse. The trial court found that the servitude was extinguished for 10 years of nonuse. The court noted, "When the prescription of nonuse is pleaded, the owner of the dominant estate has the burden of proving that he or some other person has made use of the servitude as appertaining to his estate during the period of time required for the accrual of the prescription." Further, the "burden of proof has been applied even when a surface owner sues to obtain the cancellation of a mineral servitude." Here, based on specific evidence, the appellate court upheld the trial court's findings, holding that the trial court did not err in finding that the servitude "had prescribed following 10 years of nonuse." Read more.

Ozone Emissions Regulations – New Mexico. On November 27, the New Mexico Court of Appeals affirmed a lower court ruling upholding the New Mexico Environmental Improvement Board's order adopting regulation of ozone precursor emissions in *Independent Petroleum Association of New Mexico v. New Mexico Environmental Improvement Board* (Case No. A-1-CA-40546). Regarding oil and gas operations, the rulemaking "added an additional quarterly monitoring requirement for emission sources within 1000 feet of an occupied area." As reported by *ABC News*, "the rule applies to eight counties — Chaves, Doña Ana, Eddy, Lea, Rio Arriba, Sandoval, San Juan and Valencia — where ozone pollutants have reached at least 95% of the federal ambient air quality standard. Some of those counties include production hot spots within the San Juan Basin in northwestern New Mexico and the Permian Basin, which straddles the New Mexico-Texas line." The Independent Petroleum Association of New Mexico brought the legal challenge arguing "in its appeal that the rule disproportionately affected independent operators." Here, the court concluded that the "added proximity requirement does not change the emission sources regulated or the way they are regulated. Instead, the change only increases the frequency with which certain sources already subject to defect

and leak monitoring are required to be monitored. Consequently, those affected by added proximity monitoring requirements could have reasonably expected that their interests could be affected. Further, the change does not alter the issues affected by the rule—the same emission sources are subject to the same monitoring. Only monitoring frequency is changed." The court further held that "the effect of the final rule does not differ from the proposed rule. Both the proposed and final version monitor emission sources to identify leaking components and reduce leaking emissions. Therefore, we conclude that adoption of 15 20.2.50.116(C)(3)(e) NMAC and the accompanying definition of 'occupied area' did not exceed the scope of the Board's noticed rulemaking or the attached proposed rule." Read more.

Post-Production Costs; Leasing – West Virginia. On November 14, the West Virginia Supreme Court addressed a dispute in *Romeo v. Antero Resources Corp.* (Case No. 23-589) over the deduction of post-production costs and how existing law applied. Here, the plaintiff/petitioner claimed, "Antero was prohibited from deducting postproduction costs from the gross sale proceeds of the gas in calculating the petitioners' royalties." In response, Antero's position was that the relevant case law prohibits "such deductions only until the oil and gas reach the first available market, not the point of sale; that royalties aren't payable on the byproducts of the gas produced from petitioners' wells, i.e., the natural gas liquids ('NGLs,') and that even if royalties are payable on the NGLs, Antero is entitled to deduct the postproduction costs incurred in marketing these byproducts." For background, "West Virginia follows the marketable product rule of cost allocation. Under the marketable product rule, the lessee impliedly warrants to bear the costs of getting gas into marketable condition and transporting it to market […] West Virginia's version of the marketable product rule, however, adopts the point of sale as opposed to the point where the gas reaches the market as the point to which the lessee is responsible for bearing post-production costs. Under the 'point of sale' approach, a lessor will not only receive a royalty valued upon the gas when the gas becomes marketable, but in addition, the lessor will receive a royalty valued upon the gas in its processed state at the point of sale after the gas had value added to it solely at the lessee's expense." Read more. Here, the court held "that energy companies cannot deduct post-production costs without explicit lease language, favoring royalty owners over producer." Writing for the majority, Justice William Wooton "took a strict view of when energy companies can deduct post-production costs" and "stressed the importance of adhering to state precedent" in reaching the majority opinion. Wooten cited precedential case law noting, "we decline to open the door to the chaos that may well ensue if we abruptly — and without any good reason — change decades of law upon which thousands of people have relied in ordering their economic affairs." However, "Dissenting justices criticized the ruling as judicial overreach and a misapplication of prior cases, warning of potential legal and economic impacts." Read more. For further legal analysis of the case, Read more here and here.

Royalties; Post-Production Costs; Leasing – West Virginia. On November 14, the West Virginia Supreme Court addressed whether there is "an implied duty to market for [oil and gas] leases containing an in-kind royalty provision" and do "the requirements for the deductions of post-production expenses [under case law] apply to leases containing an in-kind royalty provision?" In *Kaess v. BB Land LLC* (Case No. 23-522), the "West Virginia Supreme Court held that for oil and gas leases containing an in-kind royalty provision, there is an implied duty to market for oil and gas." Further, pursuant to relevant case law precedent, those requirements "for the deductions of post-production expenses apply to leases containing an in-kind royalty provision." As to the first question, the court explained, "If, for whatever reason, a royalty owner/lessor does not or cannot take physical possession of his or her share of the production under an in-kind royalty provision, then the producer/lessee may discharge its royalty obligation to the lessor in one of several ways: the lessee may deliver the lessor's share of the production to a pipeline purchaser or other third-party purchaser near the wellhead, free of cost, and to the lessor's credit, under the terms of a division order or other contract in which the purchaser

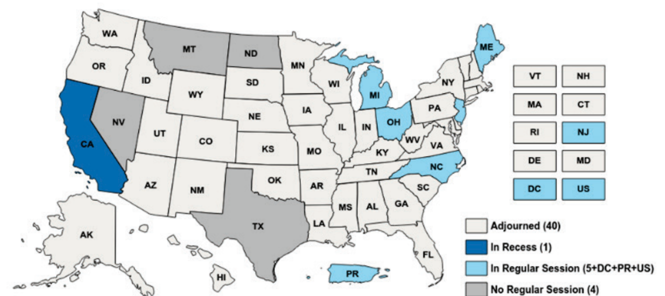
pays the lessor directly for his or her share of the production; or, the lessee may buy the lessor's share of the production from the lessor on terms negotiated by the parties; or, if the lessee elects neither of the foregoing options, then under the implied marketing covenant the lessee must market and sell the lessor's share of the production, on the lessor's behalf, along with the lessee's own share of the production." As to the second question, the court explained, "that if, for whatever reason, the mineral owner/lessor of an in-kind oil and gas lease containing an in-kind royalty provision does not take his or her percentage share of the oil and gas in kind, and the producer/lessee elects to market and sell the lessor's share of the production on the lessor's behalf, along with the lessee's own share of the production, the lessee shall tender to the lessor a royalty consisting of the lessor's percentage share of the gross proceeds, free from any deductions for postproduction expenses, received at the first point of sale to an unaffiliated third-party purchaser in an arm's length transaction for the oil or gas so extracted, produced or marketed." Read more.

INDUSTRY NEWS FLASH

▶ **OPEC+ delays oil output hikes.** On December 5, OPEC+ announced its members "will delay the start of oil output increases by another 3 months—pushing the timeline to April 2025—while also extending the full unwinding of production cuts by a year to the end of 2026." As reported by the *Oil & Gas Journal*, "The delayed phase-out also signals that OPEC+ acknowledges the weakness in Chinese oil demand and is not anticipating a surprise rebound anytime soon given President-elect Trump's possible tariffs against China, but the overall signal to the market is constructive and will likely prevent any price downsides in the short term." Read more.

LEGISLATIVE SESSION OVERVIEW

States in Session



Session Notes: Michigan, North Carolina and **Ohio** are in regular session. The U.S. Congress is in regular session.

The **California** regular session is in recess until January 3, 2025.

California began a special session on December 2 intended to prepare the state for the upcoming Trump administration, though the session is in recess. According to The Hill, Democratic Gov. Gavin Newsom is seeking $25 million for a litigation fund to prevent "unconstitutional or unlawful federal government actions." This fund would prepare the state to use legal challenges against policies from the Trump administration that the state's government found to violate the rights of its citizens.

North Carolina passed an adjournment resolution that calls for the regular session to reconvene periodically through December. The legislature convened on December 2 and is scheduled to adjourn on December 13, on which the legislature will stand adjourned.

Louisiana concluded its special session on November 22 after passing tax cut legislation. According to WAFB, the state legislature approved several tax bills, including reducing personal and corporate income taxes and doubling the standard tax deductions for seniors. The legislature also passed legislation to get rid of the corporate franchise tax. The bills will now head to the desk of Republican Gov. Jeff Landry for action.

The following states are currently holding interim committee hearings or studies: **Alabama**, **Alaska**, **Arizona**, **Arkansas**, **California** House and Senate, **Colorado**, **Connecticut**, **Georgia**, **Hawaii**, **Idaho**, **Illinois** House and Senate, **Indiana**, **Kansas**, **Kentucky**, **Louisiana**, **Maine**, **Maryland**, **Minnesota**, **Mississippi** House and Senate, **Missouri** House and Senate, **Montana**, **Nebraska**, **Nevada**, **New Hampshire** House and Senate, **New Mexico**, **New York** Assembly, **North Dakota**, **Oklahoma** House and Senate, **Oregon**, **Rhode Island**, **South Carolina**, **South Dakota**, **Tennessee**, **Texas** House, **Utah**, **Vermont**, **Virginia**, **Washington**, **West Virginia** and **Wyoming**.

The following states are currently posting 2025 bill drafts, pre-files and interim studies: **Alabama**, **Arizona**, **Arkansas**, **Florida**, **Iowa**, **Missouri** House and Senate, **Montana**, **Nebraska**, **Nevada**, **New Hampshire**, **North Dakota**, **Oklahoma**, **South Carolina**, **Tennessee**, **Texas**, **Utah** and **Virginia**. ■

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