

WEEKLY HIGHLIGHTS AT-A-GLANCE**FEDERAL – Legislative**

- **Indian Lands Energy Development Reforms – S. 245.** After passing the Senate in late 2017, [S. 245](#), the “Indian Tribal Energy Development and Self-Determination Act Amendments of 2017”, has been referred to the House Committee on Natural Resources for further consideration. According to the law firm, Hogan Lovells, if “S. 245 passes Congress in 2018, it will be the first major piece of Indian minerals energy legislation in over a decade” and will open up economic opportunities with private stakeholders to develop tribal energy resources. “The bill aims to allow Indian tribes to exercise greater self-determination over the development of energy resources on their lands, and strives to provide them with financial and technical resources towards that end. One central purpose of the bill is to reinvigorate the previously dormant Tribal Energy Resource Agreement (TERA) program.” The TERA program “provides tribes with the authority to issue leases, business agreements, and rights-of-way for energy projects on their lands” but reportedly never functioned properly so tribes didn’t participate. This bill attempts to address those concerns by creating a more favorable environment for energy development on tribal lands. For example, the bill “allows leases and business agreements that pool, unitize, or communitize a tribe’s energy resources with other energy resources.” Additionally, an “energy-related tribal lease, business agreement, or right-of-way does not require Interior’s approval if it complies with a tribal energy resource agreement or it is a lease with a tribal energy development organization that Interior has certified, and the term does not exceed specified limits.” [Read more.](#)

FEDERAL – Regulatory

- **Greater Sage-Grouse Guidance – BLM.** The Bureau of Land Management (BLM) has just released new regulatory guidance for federal land managers, which provides them with more flexibility to apply to oil and gas permits in areas occupied by the greater sage-grouse. The BLM [Instruction Memorandum No. 2018-26, Implementation of Greater Sage-Grouse Resource Management Plan Revisions or Amendments – Oil & Gas Leasing and Development Prioritization Objective](#), tells BLM staff members explicitly that while they should try to steer oil and gas companies to areas outside sage-grouse habitat, that they do not need to do so at all times. “Flexibility is built into the system for local BLM managers, avoiding a ‘one size fits all’ approach,” said BLM spokeswoman Heather Feeney. Oil and gas companies were concerned about a perceived inflexibility in the 2016 leasing instructions implemented under the Obama administration, which are currently under

review for likely revision. Kathleen Sgamma, president of Western Energy Alliance, said “the new policies provide interim guidance while the plans are updated. She said the revision to the prioritization policy was needed because previously, proposals by companies for leases or permits in priority sage-grouse habitat always went to the bottom of BLM’s pile, never to be acted on.” [Read more.](#)

- **Offshore Drilling Plan.** (*Update to 1/8/18 Weekly Report*) After meeting with Florida’s Republican governor, Interior Secretary Ryan Zinke announced that he won’t allow offshore drilling in the waters near Florida through 2024 after the governor expressed concerns over its possible effects on tourism. In his January 9 statement, Zinke said, “President Trump has directed me to rebuild our offshore oil and gas program in a manner that supports our national energy policy and also takes into consideration the local and state voice.” According to the *Washington Examiner*, “under the Interior Department’s draft proposal for offshore drilling, spanning 2019 to 2024, more than 90 percent of the total acres on the Outer Continental Shelf would be made available for leasing. It proposes 47 potential offshore lease sales, the most ever over a five-year period, including 19 sales off the Alaska coast, 12 in the Gulf of Mexico, nine in the Atlantic Ocean and seven in the Pacific.” [Read more.](#)

STATE – Legislative

- **Sales Tax Exemption – Ohio.** On December 4, HB 430 was referred to the Government Accountability and Oversight Committee after its introduction by Rep. Tim Schaffer (R). The bill would modify the sales and use tax exemption for property used in producing oil and natural gas. Existing law exempts the sale or use of tangible personal property used “directly” in the production of crude oil or natural gas. This bill expands the exemption by removing the qualification that property be used “directly” in the production of crude oil or natural gas in order for its sale to be tax-exempt. [Read more.](#)

STATE – Regulatory

- **Tax Withholding; Leasing – Pennsylvania.** On January 1, [Act 43 of 2017](#), which amends sections of the state tax code, went into effect. Among those updates to the code is a [Department of Revenue withholding provision](#) that requires that “anyone that pays Pennsylvania-source non-employee compensation or business income to a non-resident individual or disregarded entity that has a non-resident member, and is required to file a Federal Form 1099-Misc must withhold an amount computed at the specified tax rate (currently 3.07%).” According to advisory firm Steptoe & Johnson PLLC, “Any lessee of Pennsylvania real estate who makes a lease payment to a non-resident lessor, defined to include an individual, estate or trust, must withhold Pennsylvania personal income tax on rental payments. Obviously contemplating oil and gas leases, ‘lease payments’ include but are not limited to rents, royalties, bonus payments, damage payments, delay rents and other payments made pursuant to a lease. There is an exception for residential property,

but that is property used as the tenant's residence; not for oil and gas leases on the lessor's residence." [Read more](#).

- **Hydraulic Fracturing Ban – Delaware River Basin.** (*Update to 12/4/17 Weekly Report*) On January 8 the Delaware River Basin Commission (DRBC) announced that it was extending the comment period on proposed regulations regarding hydraulic fracturing in the basin. That period has been extended from February 28 to March 30, 2018. The DRBC has also added two new hearings in February and March for those seeking to provide input on the draft rules. The draft rules seek to place a formal ban on drilling and hydraulic fracturing within the watershed area, which stretches 330 miles from the Delaware River's headwaters in New York to the mouth of the Delaware Bay. The draft also puts additional restrictions on the industry disposing wastewater within the watershed or using water from the river and its tributaries. The DRBC originally imposed a moratorium on drilling and hydraulic fracturing in 2010 and voted in September 2017 to start the process of a formal ban. To learn more about the proposed rulemaking, hearing dates and locations, and to review the public docket: [Read more](#).

STATE – Judicial

- **Implied Covenants; Leasing – Ohio.** On January 3, in [Alford v. Collins-McGregor](#) (Case No. 2018-Ohio-8) the Ohio Supreme Court held that the state does not recognize an implied covenant to explore further as a distinct implied covenant in oil and gas leases. In *Alford*, landowners alleged that while deeper formations like the Utica and Marcellus shales were being developed near their property, their lessee had not explored for oil and gas on their property from any depths below the Gordon Sand and this violated an implied covenant to explore further. The landowners were unsuccessful at both the trial and appellate levels in allowing the leases to be forfeited as to the deeper depths. Here, the Ohio Supreme Court affirmed the dismissal of the suit holding that the proposed covenant to explore further does not take into account the reasonable expectation of profit as the motivating force underlying the lease. According to the Opinion, an implied covenant to explore further, as proposed by the landowners, would have required a lessee to engage in the exploration of unproven formations and new areas after the lease was already producing, potentially without regard to cost or profit. [Read more](#).
- **Leasing – Wyoming.** On January 4, in [Berenergy Corp. v. BTU Western Resources, Inc., et al.](#) (Case No. 2018-WY-2), the Wyoming Supreme Court was asked to decide a case involving overlapping federal leases in the Powder River Basin which the Court held cannot be resolved without intervention from a federal agency. Berenergy produces oil from several sites under three oil and gas leases granted by the Bureau of Land Management (BLM). The surface area covered by those leases and wells overlaps lands that, pursuant to BLM coal leases, affiliates of Peabody Energy are planning to strip-mine. Berenergy had sought a declaratory judgment finding their leases superior to the later-acquired Peabody leases, otherwise Berenergy's wells would be forced to shut down for 15 to 20 years during

Peabody's mining operations. "The conflict between Peabody Energy, a coal company, and the Denver-based oil and gas company Berenergy is not so easy. There's no strong legal priority to decide whether one mineral over another has superior rights in a federal lease." According to oil and gas attorney Kristopher Koski, "I would tend to believe the BLM would issue [some] sort of guidance now that the BLM knows that the Wyoming courts are not going to get involved and the federal courts said it's not a federal question." [Read more.](#)

INDUSTRY NEWS FLASH:

◆ **API State of American Energy event looks to boost oil and gas industry.** At the American Petroleum Institute (API) 2018 State of American Energy event held on January 9, API President Jack Gerard called on the Trump administration and Congress to now turn their attention to regulatory reforms and infrastructure improvements to benefit domestic energy production. Gerard said "API seeks creation of an enduring regulatory environment that gives consumers access to reliable and affordable domestic energy and build on the industry's core commitment to safety." Part of that effort includes "streamlining the permitting process and reinforcing a market-based approach that puts the American people first." [Read more.](#)

State-by-State Legislative Session Overview

Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia and Wisconsin are in regular session. The **District of Columbia** Council, **Puerto Rico** and the **United States** Congress are also in regular session.

Oklahoma convened its second special session to address budget issues on December 18, [KGOU](#) reports. **North Carolina** convened a special session to address a broad range of matters on January 10, [WNCT](#) reports.

Connecticut held a special session on January 8 and passed a measure to reverse funding cuts to the Medicare Savings Program, [NBC CT](#) reports. **New Jersey** adjourned its 2017 session on January 9 and immediately convened its 2018 session.

The following states are expected to convene for the 2018 legislative session on the dates provided: **Alaska** and **New Mexico** (January 16); **Hawaii** (January 17); **Utah** (January 22); **Oklahoma** and **Oregon** (February 5); **Connecticut** (February 7) and **Arkansas** and **Wyoming** (February 12).

New Jersey Republican Gov. Chris Christie must act on legislation from the 2016-2017 biennium before January 16 or it is pocket vetoed. **Illinois** Republican Gov. Bruce Rauner has 60 days from presentment to act on all legislation passed during the veto session or it becomes law. **New York** Democratic Gov. Andrew Cuomo has 10 days from presentment, Sundays excepted, to act on legislation from the regular and special sessions or it becomes law.

The following states are currently holding interim committee hearings: [Alaska](#), [Arkansas](#), [Connecticut](#), [Florida House](#) and [Senate](#), [Hawaii](#), [Louisiana](#), [Minnesota](#), [Montana](#) (2019 interim hearings), [Nevada](#) (2019 interim hearings), [New Mexico](#), [North Carolina](#), [North Dakota](#) (2019 interim hearings), [Oklahoma House](#) and [Senate](#), [Oregon](#), [Texas House](#) and [Senate](#) (2019 interim hearings), [Utah](#) and [Wyoming](#).

The following states are currently posting bill drafts, prefiles and interim studies: [Alaska](#), [Arkansas](#), [Montana](#) (2019 interim studies), [New Mexico](#), [North Dakota](#) (2019 interim committee bills), [Oklahoma prefiles](#) and [House](#) and [Senate](#) interim studies, [South Carolina](#), [Utah](#), [Virginia](#) and [Wyoming interim studies](#) and [prefiles](#).

Hydraulic Fracturing

Florida [SB 834](#), sponsored by Sen. Gary Farmer, D-Lighthouse Point, was referred to the Senate Environmental Preservation and Conservation Committee on January 9. The bill would prohibit a person from engaging in extreme well stimulation. The bill would also prohibit the Department of Environmental Protection from authorizing an oil or gas drilling permit authorizing extreme well stimulation and would not be able to authorize a person holding an existing permit to engage in extreme well stimulation on or after July 1. The bill would take effect July 1. Senator Farmer also introduced [SJR 828](#), which would propose an amendment to the state constitution that would prohibit extreme well stimulation.

Other similar bills that were filed in Florida include [HB 237](#), sponsored by Rep. Kathleen Peters, R-Treasure Island, which would prohibit the performance of advance well stimulation treatments in the state. The bill's companion [SB 462](#), sponsored by Sen. Dana Young, D-Tampa, is currently pending in the Senate Environmental Preservation and Conservation Committee. These bills would take effect immediately.

New Jersey [AB 1328](#), sponsored by Asm. Deputy Majority Leader Reed Gusciora, D-Trenton, was introduced and referred to the Assembly Environment and Solid Waste Committee on January 9. The bill would prohibit hydraulic fracturing in the state for the purpose of natural gas exploration or production. It would take effect immediately upon enactment. A previous version of the bill [AB 2625](#), did not advance last session.

Landmen

Independent Contactors

Washington [HB 1300](#) has been scheduled for a hearing in the House Appropriations Committee on January 15 at 3:30 PM. The bill has also been scheduled for an executive session in the same

committee on January 17 at 3:30 PM. As substituted, this bill would prohibit employers from misclassifying employees as independent contractors, charge them a fee to be an independent contractor, require an employee to enter into an agreement that would result in a change of their employment classification to independent contractor or evade detection of their goal to misclassify employees. The Department of Labor would be permitted to conduct investigations into the misclassification of employees and provide penalties if companies are found to have misclassified employees. The substitute also clarifies that employees and independent contractors have the same meaning in the bill, and includes provisions regarding court orders in the final judgment for violation of the bill.

Washington [SB 5527](#) has been scheduled for a hearing in the Senate Commerce, Labor and Sports Committee on January 17 at 1:30 PM. This bill would create the employee fair classification act with the goal of simplifying and enforcing employment status to ensure fairness to employers and employees and address the underground economy. The bill would prohibit employers from charging an employee who has been misclassified as an independent contractor for violations that arise out of the employee being misclassified. It would also prohibit people from requiring employees to enter into agreements that would result in them being misclassified as well as prohibiting employees from evading enforcement or detection of this act.

Under this bill, the Department of Labor can conduct an investigation if they receive information that an employer may be in violation of this chapter and misclassifying employees, but investigations cannot date back more than three years. The bill details process and penalties for investigations and punishment. The bill would take effect 90 days after adjournment, which is tentatively scheduled for March 8.

Lands

Public Lands

Washington [SB 6103](#), sponsored by Sen. Kevin Ranker, D-Orca Island, was referred to the Senate Agriculture, Natural Resources and Parks Committee on January 8. The bill is scheduled for a hearing in that committee on January 16 at 1:30 PM. The bill would state that it is the policy of the state to discourage conveyances of federal public lands that transfer ownership from the federal government. The bill would void conveyances of federal public lands where the state natural resources board was not provided the right of first refusal. The board, in conjunction with other state agencies, would be required to undertake all feasible efforts to protect against future unauthorized land conveyance or any repeal of a federal land designation. The bill would not apply to the conveyance of lands pursuant to a conservation plan, the renewal of a lease in existence as of January 1, or the conveyance of lands to federally recognized Native American tribes. The bill would take effect 90 days after adjournment, which is tentatively scheduled for March 8.

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