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## Wyoming

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## WYOMING

*Jeffrey S. Pope and Deanna (Sami) Falzone<sup>†</sup>*

### I. BACKGROUND

In 2019, Wyoming ranked eighth nationally in both crude oil and natural gas production. Sales of crude oil production totaled 101.8 million barrels, up 16% from 2018, while natural gas production totaled 1.456 trillion cubic feet, which was down 8.52% from 2018.<sup>1</sup> However, as of August 1, 2020, Wyoming had zero oil and natural rigs in operation for the first time since 1884.

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1. *Oil & Gas Facts & Figures 2020*, PETROLEUM ASS'N OF WYO., <https://pawyo.org/facts-figures> [<https://perma.cc/UW64-P2A7>].

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## II. LEGISLATION

Wyoming's 2020 Budget Legislative Session convened on February 10, 2020, and adjourned on March 12, 2020, right as the COVID-19 pandemic appeared.<sup>2</sup> Wyoming legislators passed several bills pertinent to the oil and gas industry during this short time frame.

### A. *Ad Valorem Taxation of Mineral Production—Monthly Payments*

Wyoming's legislature enacted new legislation to implement monthly payment of an ad valorem tax on mineral production not later than the twenty-fifth day of the second month following production. The act further set out procedures for reporting, payment, reconciliation, and distribution of the monthly payments as well as a transition period specifying payment schedules through mineral production in 2026. The payment schedule would continue until the legislature takes additional affirmative action to complete the transition to monthly payments from the current two-payment method annually.<sup>3</sup>

### B. *Ad Valorem Taxation—Perfection of Tax Liens*

The legislature again strengthened Wyoming's tax lien laws on mineral production during the 2020 session for ad valorem and gross products tax purposes by clarifying that liens on mineral production occurring on or after January 1, 2021, are automatically perfected upon the production of the mineral. Beginning January 1, 2021, the notice requirements require a notice of intent to foreclose when foreclosing on a lien pursuant to a tax sale for mineral production.<sup>4</sup>

### C. *Ad Valorem Taxation—Release of Taxpayer Information*

The legislature created a new exception to Wyoming's ad valorem tax statutes, allowing for an itemized list of the taxpayer's

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2. *Prior Session Calendars*, WYO. LEGIS. SERVS. OFF., <https://www.wyoleg.gov/Session/2020/Archive> [<https://perma.cc/3X23-LYRT>].

3. WYO. STAT. ANN. § 39-13-113(b) (2020); 2020 Wyo. Sess. Laws 465.

4. WYO. STAT. ANN. § 39-13-108(d)(vii)(E) (2020); 2020 Wyo. Sess. Laws 462–63.

taxable tangible personal property, as provided to the assessor, to be disclosed to a new owner of that taxable property.<sup>5</sup>

*D. Oil and Gas Tax Rate Exemption—New Production*

For oil and gas wells drilled after July 1, 2020, and prior to December 31, 2025, a 4% severance tax rate will be charged for the first six months of production and 5% for the next six months, down from the previously set rate of 6%. This exemption will not apply to gas production when the twelve-month rolling average of the Henry Hub spot price for natural gas is \$2.95 or more per thousand cubic feet at the time of first production. The exemption will also not apply when crude oil production in the twelve-month rolling average of the West Texas Intermediate spot price of sweet crude oil is \$50.00 or more per barrel at the time of the first production.<sup>6</sup>

*E. Drilling Units—Risk Penalties and Mandatory Royalties*

The legislature amended the risk penalty oil and gas statutes to include nonconsenting owners who executed a lease for oil and gas development in the risk penalty. When a nonconsenting owner is not subject to a lease, the risk penalty is 200% of the drilling costs and 125% of the costs of newly acquired well equipment for the first well drilled. The risk penalty lowers to 150% of drilling costs and 125% of costs of newly acquired well equipment for every subsequent well.<sup>7</sup>

*F. Underground Disposal Wells—Regulation*

The legislature granted the Wyoming Oil and Gas Conservation Commission (“WOGCC”) regulatory authority over all underground disposal wells, both commercial and noncommercial, and required the WOGCC and Department of Environmental Quality to enact applicable rules necessary to implement this new law.<sup>8</sup>

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5. WYO. STAT. ANN. § 39-13-102(q)(ii)(E) (2020); 2020 Wyo. Sess. Laws 111.

6. WYO. STAT. ANN. § 39-14-205(n) (2020); 2020 Wyo. Sess. Laws 494.

7. WYO. STAT. ANN. § 30-5-109(g)(ii)(B)–(C) (2020); 2020 Wyo. Sess. Laws 45.

8. WYO. STAT. ANN. § 30-5-104(d)(vi)(B) (2020); 2020 Wyo. Sess. Laws 140.

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### III. ADMINISTRATIVE RULEMAKING

As of the date of publication of this chapter, the Water Quality Division of the Wyoming Department of Environmental Quality is in the process of promulgating new rules on both financial assurance (revising Chapter 14) and minimum standards for the design and construction of commercial oilfield waste disposal facilities (new Chapter 28).<sup>9</sup> The WOGCC is proposing to amend, update, and adopt its procedural rules found in chapters 1 and 3 pursuant to the Wyoming Legislature’s passage of Senate Enrolled Act 0012 (“SEA 0012”), which amends the WOGCC’s authority to regulate underground disposal by giving it the authority to regulate commercial disposal wells.<sup>10</sup>

### IV. CASE LAW

#### A. *Excara Energy III, LLC v. Wyoming Oil and Gas Conservation Commission and Jonah Energy, LLC*

Excara Energy III, LLC filed two applications, Docket Nos. 1902-2018 (“1902”) and 1903-2018 (“1903”), with the WOGCC. The applications sought approval of adjacent drilling and spacing units (“DSUs”) in the Jonah Field for the production of hydrocarbons from the Lance Pool, which were opposed by Johan Energy, LLC (“Jonah”).<sup>11</sup> The WOGCC consolidated the applications and held a contested case hearing. Both parties agreed that the only issue before the WOGCC was whether the lands underlying Exaro’s applications should be developed with north-south or east-west oriented horizontal wells.<sup>12</sup> The WOGCC ordered that the evidence presented at the hearing would apply to both applications.<sup>13</sup>

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9. *Proposed Rules & Regulations – Water Quality Rules & Regulations Ch. 14 & 28*, WYO. DEP’T OF ENVTL. QUALITY (proposed June 16, 2020), <http://deq.wyoming.gov/wqd/resources/proposed-rules-regs/> [<https://perma.cc/6UU3-HV9P>].

10. *Notice of Intent to Amend/Adopt Rules & Regulations Ch. 1 & 3*, WYO. OIL & GAS CONSERVATION COMM’N (Aug. 10, 2020), <http://wogcc.wyo.gov/notice-of-intent> [<https://perma.cc/V7JG-4FP8>].

11. *Excara Energy III, LLC v. Wyo. Oil & Gas Conservation Comm’n*, 455 P.3d 1243, 1246–47 (Wyo. 2020).

12. *Id.* at 1247.

13. *Id.*

Jonah's witnesses did not object to the drilling of a north-south oriented well along the western boundary in 1902 but did object to the drilling of a north-south oriented well along the western boundary in 1903. Jonah's concern was if the drilling of the initial well in both units proved unworkable, the remaining lands would have to be developed with less than a mile-long, east-west laterals because the well in 1903 would block drilling of longer, east-west laterals.<sup>14</sup> Jonah's engineer testified that short laterals cause hydrocarbon waste because they recover less gas per dollar spent, require shut-in sooner, disturb more surface, and leave more gas stranded due to required setbacks.<sup>15</sup> As to both 1902 and 1903, the WOGCC concluded that:

Exaro had (1) met its burden of proof; (2) satisfied the applicable legal standard; and (3) provided . . . actual, empirical data that [each DSU] . . . [was] not smaller than the maximum area that can be effectively drained by one [] horizontal well drilled to the Lance pool on the [s]subject [l]ands and that [each] unit will permit the recovery of hydrocarbons in the Lance Pool underlying the [s]subject [l]ands, will prevent waste and [] protect correlative rights.<sup>16</sup>

The WOGCC, however, only approved 1902 and denied 1903, stating it needed more data regarding horizontal development in the Jonah Field prior to approving a drilling and spacing unit on the lands. Exaro appealed the WOGCC's denial of 1903 to the Wyoming Supreme Court.<sup>17</sup>

The Court reversed WOGCC's order in Docket No. 1903-2018, finding that the WOGCC's decision to grant only one of the applications was arbitrary and capricious. The Court agreed with WOGCC's findings that Exaro's substantial evidence satisfied the statutory requirements for establishment of a DSU in both 1902 and 1903.<sup>18</sup>

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1248.

18. *Id.* at 1253.

*B. EOG Resources, Inc. v. Floyd C. Reno & Sons, Inc.*

Two parties executed a surface use agreement in 2010 (the “2010 Agreement”) involving oil and gas operations on certain ranch lands. In 2019, the plaintiff proposed an amended surface use agreement to the landowner asking for additional rights over the lands, which was rejected by the defendant.<sup>19</sup> The plaintiff responded by filing a complaint under the Wyoming Eminent Domain Act requesting condemnation for the surface use of approximately 2,100 acres, rights-of-way, and easements.<sup>20</sup> During a four-month continuation of the hearing before the Sixth Judicial District Court of Campbell County, the plaintiff amended their complaint, reducing the acreage from 2,100 to seventy acres for a pipeline easement because of certain stipulations from the defendant.<sup>21</sup>

When the hearing reconvened, the district court questioned the plaintiff about the rights it sought and if a payment amount had been offered. The plaintiff replied that it believed the 2010 Agreement gave them all the rights they needed, except the 2010 Agreement failed to give them the “on, over, and through rights” the plaintiff needed to complete a water pipeline, which was needed for the project.<sup>22</sup> The district court also asked what compensation the plaintiff had offered. The plaintiff responded that in their offer letter relating to the 2,100 acres, they offered a payment up to an amount equal to the annual payments as determined by a per rod payment and an annual per rod payment “for the full project development . . . in the event the plaintiff desired to construct such infrastructure.”<sup>23</sup> The plaintiff further asserted that the amount the defendant would receive for the seventy acres was clear in the offer’s financial summary spreadsheet proposing the initial payment of the per rod and per rod annual payments for the buried oil, water, or gas pipeline.<sup>24</sup>

The district court dismissed the plaintiff’s complaint for failing to comply with the Wyoming Eminent Domain Act’s good faith negotiation requirement to make an offer to acquire the property

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19. *EOG Res., Inc. v. Floyd C. Reno & Sons, Inc.*, 468 P.3d 667, 668 (Wyo. 2020).

20. *Id.*

21. *Id.*

22. *Id.* at 671.

23. *Id.* at 668.

24. *Id.* at 671.

sought.<sup>25</sup> The Wyoming Supreme Court affirmed, finding that the reduction in acreage from 2,100 to seventy was too large to be considered the same for purposes of negotiation.<sup>26</sup>

*C. Black Diamond Energy of Delaware, Inc. v. Wyoming Oil and Gas Conservation Commission, and Black Diamond Energy of Delaware, Inc. v. Wyoming Oil and Gas Conservation Commission and Wyoming Office of State Lands and Investments*

This case involved two oil and gas exploration companies with like names but separately owned and managed, according to both companies. Black Diamond Energy of Delaware, Inc. (“BDED”) and Black Diamond Energy, Inc. (“BDI”) both held State of Wyoming Oil & Gas Leases and posted bonds with the WOGCC and the Wyoming Office of State Lands and Investments (“WOSLI”).<sup>27</sup> BDED held and operated only one lease from the WOSLI that had a producing well, the Castle Creek Well. BDI operated numerous wells on both WOSLI and fee lands.<sup>28</sup> First Interstate Bank (the “Bank”) held all the appropriate bonds for both entities.<sup>29</sup> The problem in this case when the WOGCC, WOSLI, and the Bank allegedly treated them as the same entity.<sup>30</sup>

Through a series of events beginning in 2011, WOSLI terminated one of BDI’s leases, followed by a letter to the Bank announcing WOSLI was “calling the bonds” and asking the Bank to forward all money to the WOGCC. The Bank allegedly sent BDI’s bonds and BDED’s WOSLI bonds to the WOGCC.<sup>31</sup> In 2014, the WOGCC held a contested case hearing, of which BDED was not a party, and foreclosed BDI’s bonds.<sup>32</sup> In 2016, the WOGCC required a mechanical integrity test (“MIT”) on the Castle Creek Well held. In 2011 when WOSLI terminated BDI’s lease, WOSLI allegedly told BDI and BDED they were no longer allowed to enter WOSLI lands.

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25. *Id.* at 675.

26. *Id.*

27. *Black Diamond Energy of Del., Inc. v. Wyo. Oil & Gas Conservation Comm’n*, 460 P.3d 740, 743 (Wyo. 2020).

28. *Id.* at 743.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*



BDED was unsuccessful in its attempts to explain to the WOSLI that BDI and BDED were not related and that BDED should be allowed on WOSLI lands to conduct the MIT.<sup>33</sup>

Ultimately, the WOGCC ordered BDED to show cause why its \$75,000 blanket bond should not be forfeited for failing to satisfactorily perform the MIT. BDED requested an accounting of the WOSLI bonds. The WOGCC determined that the 2014 WOGCC order relating to BDI's bonds resulted in the forfeiture of BDED's WOSLI bonds, and the funds were used to plug BDI's wells. Following the hearing, the WOGCC ordered the forfeiture of BDED's blanket bond and authorized its staff to plug and abandon the Castle Creek Well.<sup>34</sup> BDED first filed suit against WOGCC under Section 30-5-113(a) of the Conservation Act, challenging the validity of the WOGCC's order forfeiting the blanket bond (Case No. 2017-0074). The WOGCC filed a dismissal motion arguing the district court lacked jurisdiction because the only avenue available to BDED was to file a petition for review of an administrative procedure under the Rules of Appellate Procedure 12.04(a). BDED filed a second case against the WOGCC and WOSLI under the Claims Act (Case No. 2018-0011), alleging conversion and breach of contract. The defendants moved to dismiss the second lawsuit for improper venue. The district court granted both motions to dismiss for lack of jurisdiction.<sup>35</sup>

This court affirmed the district court's dismissal of BDED's complaint in Case No. 2017-0074 because the case was outside the scope of Section 30-5-113(a) and BDED failed to timely file a petition for review, depriving the district court of jurisdiction. This court also affirmed the dismissal of BDED's complaint in Case No. 2018-0011 but remanded it for clarification because the dismissal was without prejudice.<sup>36</sup>

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33. *Id.* at 743–44.

34. *Id.* at 744.

35. *Id.*

36. *Id.* at 755.