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*The 2021 Survey on Oil & Gas*

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## Montana

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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## MONTANA



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### *I. Introduction*

This article provides an annual survey of the law summarizing developments in the area of oil and gas for the State of Montana. Oil and gas in the State of Montana make up a relatively small portion of the state's profile. Montana currently ranks thirteenth in crude oil production and twentieth in natural gas production in the United States.<sup>1</sup>

### *II. Legislative and Regulatory Developments*

#### *A. State Legislative Developments*

##### *1. MCA 76-2-109*

Significant amendments were made to MCA 76-2-109 Effect on Natural Resources with regard to County planning and zoning commissions. The statute was amended to exclude any lands used for development or recovery of any mineral from regulation under this part. A provision was added to explicitly state this part of the code cannot be used to construe or alter Montana law regarding the primacy of the mineral estate, to limit access to the mineral estate, or to limit development of the mineral estate. Lastly, this statute was amended to exclude all authority over oil and gas use, development, or recovery because the board of oil and gas conservation retains that exclusive authority. The statute is effective as of May 14, 2021.

##### *2. MCA 15-36-303 & 15-36-304*

Amendments were made to MCA 15-36-303 & 15-36-304, the Definitions under the Oil and Gas Production Tax Act. The amendments removed the definition of "Stripper oil" and added the definitions of "Post-1999 stripper well" and "Pre-1999 stripper well." The terms are consistently defined throughout the statutes as follows:

(15) (a) "Post-1999 stripper well" means an oil well drilled on or after January 1, 1999, that produces more than 3 barrels but fewer than 15 barrels a day for the calendar year immediately preceding the current year if the average price for a barrel of crude oil reported and received by the producer for Montana oil

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1. See U.S. Energy Information Administration, Montana State Profile and Energy Estimates, <https://www.eia.gov/state/?sid=MT> (last accessed on August 30, 2021).

marketed during a calendar quarter is less than \$30. If the price of oil is equal to or greater than \$30 a barrel in a calendar quarter, there is no stripper tax rate in that quarter.

(b) The average price for a barrel is computed by dividing the sum of the daily price for a barrel of west Texas intermediate crude oil for the calendar quarter by the number of days on which the price was reported in the quarter.

(c) Production must be determined by dividing the amount of production from a lease or unitized area for the year immediately preceding the current calendar year by the number of producing wells in the lease or unitized area and then dividing the resulting quotient by 365.

....

(17) (a) “Pre-1999 stripper well” means an oil well that was drilled before January 1, 1999, that produces more than 3 barrels a day but fewer than 10 barrels a day.

(b) Production must be determined by dividing the amount of production from a lease or unitized area for the year immediately preceding the current calendar year by the number of producing wells in the lease or unitized area and then dividing the resulting quotient by 365.<sup>2</sup>

The statute was also amended to reflect the changes to valuation of stripper well bonuses and exceptions consistent with ARM 42.25.1801, discussed below. The statute is effective as of January 1, 2022.

### *B. State Regulatory Developments*

#### *1. ARM 17.8.505*

Amendments were made to ARM 17.8.505 Air Quality Operation Fees. Specifically, ARM 17.8.505(c) has been amended to now require “a registered oil and gas facility” to submit an annual air quality operation fee by the department or owner of the facility. Oil and gas facilities were not explicitly listed but incorporated by reference to another section in the previous version of this rule. Under this amendment, oil and gas facility owners are required to pay the fee, obtain a Montana air quality permit, and pay late fees if applicable. Similarly, ARM 17.8.504 was amended to state

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2. MONT. CODE ANN. 15-36-303(15), (17) (2021) (emphasis added).

the owner or operator of an oil and gas facility shall submit a registration fee of \$500 with their permit application and registration form. These rules are effective as of December 25, 2020.

2. *ARM 42.25.1801*

Amendments were made to ARM 42.25.1801 the Definitions to Natural Resource Taxes on Oil and Gas. Specifically, ARM 42.25.1801(11) providing the definition of “Stripper well bonus” and 42.25.1801(1) providing the definition for “Stripper well exemption” have been amended. “Stripper well bonus” was amended to include in its definition a well producing the average price received by a producer in Montana for a barrel of crude oil during a calendar quarter that is greater than or equal to \$54 a barrel. This section also amended how to determine the average price for a barrel. It used to make reference to the daily price for west Texas intermediate, but it was amended to provide the computation of dividing the sum of the total revenue received for all oil sold from wells within the state of Montana. Similarly, “Stripper well exemption” was amended to reflect the same definition changes to remove all reference to west Texas intermediate for calculating barrel prices and instead using total revenue from all wells within the state of Montana. These rules are effective as of January 16, 2021.

### *III. Judicial Developments*

#### *A. Montana Supreme Court*

There were no significant judicial developments from the Montana Supreme Court in 2021.

#### *B. Federal Court*

##### *1. Western Organization of Resource Councils, et al., v. U.S. Bureau of Land Management & the State of Wyoming*

Multiple conservation groups (“Plaintiffs”) brought an action against the Bureau of Land Management (“BLM”) alleging that the BLM improperly approved resource management plans in violation of the National Environmental Policy Act (“NEPA”), the Federal Vacancies Reform Act (“FVRA”), the Administrative Procedure Act (“APA”), and the Constitution.<sup>3</sup> The substantive pleadings and claims have not yet been

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3. *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. 4:20-CV-76-BMM, 2021 WL 718857 (D. Mont. Feb. 24, 2021).

published by the district court, but the BLM filed multiple procedural arguments, one of which is pertinent to the oil and gas industry.<sup>4</sup>

In 2015, the BLM undertook a large multi-state land planning effort to protect the greater sage-grouse and its habitat in response to concerns that the U.S. Fish and Wildlife Service may need to list the sage-grouse as an endangered species under the Endangered Species Act. Pursuant to this, the BLM revised 98 land management plans.<sup>5</sup> A type of land management plan is a resource management plan (“RMP”) which designates land for limited or restricted use if applicable and determines allowable resources use and production.<sup>6</sup> Giving rise to Plaintiff’s claims was the BLM’s approval of the Miles City RMP (Montana lands) and the Buffalo RMP (Wyoming lands) through a single decision, and determining the lands were not limited to greater sage-grouse habitat management.<sup>7</sup>

The BLM was sued in 2017 for issuing the two RMPs for different lands in a single decision.<sup>8</sup> Pursuant to the outcome of that case, the BLM has since completed its reconsideration of those same RMPs and issued amended RMPs through two separate decisions.<sup>9</sup> However, Plaintiffs are alleging the BLM has failed to comply with the court’s orders and federal law regarding the Miles City RMP and the Buffalo RMP.<sup>10</sup>

The BLM filed a motion to dismiss Plaintiff’s claims for improper venue on the basis that the venue is improper for the Buffalo RMP because the lands are in Wyoming.<sup>11</sup> The court noted this was a somewhat novel argument for Montana jurisprudence: what is proper venue when there is an environmental or public land management claim that does not necessarily have real property at issue? The Plaintiffs argued that venue is proper because a substantial part of the events giving rise to the claim occurred in Montana and the Plaintiffs reside in Montana, and where there is no real property at issue that can be considered for a selection of a proper venue.<sup>12</sup>

In making its decision, the court looked to several other jurisdictions on guidance to determine if Plaintiffs’ claims involved real property.<sup>13</sup> While

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4. *Id.*

5. *Id.* at 1.

6. *Id.*

7. *Id.* at 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 3.

12. *Id.*

13. *Id.* at 3–4.

several jurisdictions reasoned “almost any dispute over public or private decisions will in some way ‘involve real property,’ taken literally,” the court was most persuaded by the body of case law that has endorsed the understanding that general environmental challenges, including those related to public land management, do not involve real property.<sup>14</sup>

Ultimately, the district court denied the BLM’s motion to dismiss the claims for the Buffalo RMP.<sup>15</sup> In doing so, the court ruled such environmental claims do not involve real property and can be brought anywhere that a substantial part of the events gave rise to the claim or where the Plaintiffs reside.<sup>16</sup> Therefore, environmental claims involving public management of land in one state can have proper venue in a different state due to the nature of the claim.

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14. *Id.* at 4.

15. *Id.*

16. *Id.*