Oil and Gas, Natural Resources, and Energy Journal

Volume 7 | Number 2
The 2021 Survey on Oil & Gas

December 2021

Wyoming

John R. Chadd

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 7 NUMBER 2

WYOMING

John R. Chadd[*]

Table of Contents

I. Introduction 488
II. Legislation 488
A. Amendment to Severance Tax 488
B. Changes to County Ad Valorem Taxes 489
III. State Regulation 490
A. Policy for Regulation of Commercial Disposal Wells 490

* John R. Chadd is a Member with Steptoe & Johnson PLLC in the Denver, Colorado office, where he focuses his practice in oil and gas transactions and corporate and securities law. He is licensed in Colorado, Massachusetts, and Wyoming.

IV. Judicial Developments 491
A. Supreme Court of Wyoming 491
1. Use of Eminent Domain Act 491
2. Estoppel by Warranty Deed 493
B. United States District Court 495
1. Arbitrary and Capricious Agency Action 495

I. Introduction

This article summarizes and discusses significant developments in Wyoming's oil and gas law between August 1, 2020, and July 31, 2021. During this period, the Wyoming legislature passed bills into law providing changes to the state's mineral severance tax and the county mineral ad valorem taxes. The Wyoming Oil and Gas Conservation Commission ("WOGCC") promulgated a new policy concerning its regulatory oversight of commercial Class II Injection Wells.

Also, during this applicable period, there were cases of note which dealt with the use of the Wyoming Eminent Domain Act, the applicability of estoppel by deed to a purported mineral reservation, and arbitrary and capricious action by the United States Department of the Interior Bureau of Land Management (the "BLM").

II. Legislation

A. Amendment to Severance Tax

House Bill 0189, signed into law on April 14, 2021, with an effective date of January 1, 2022 (except rulemaking authority to the Department of Revenue was effective immediately), amended Wyoming Statutes to clarify and refine what certain natural gas produced but consumed on-site is exempt from the Wyoming severance tax.[1]

The bill amended the definition of "natural gas" that is subject to severance tax to include natural gas that is consumed on the site where the natural gas is produced for any purpose, subject to certain existing statutory exceptions. Previously, the definition did not expressly reference natural gas consumed on-site.[2]

A new exemption from the severance tax was made for natural gas that is consumed on the production site, and that would have otherwise been

1. H. Bill 0189, 66th Gen. Sess., (Wyo. 2021).
2. *Id.*

vented or flared under the authority of the WOGCC if the natural gas is certified by the WOGCC was to have originated from a "qualifying well."[3]

A "qualifying well" is defined as one where either (1) a well site is already connected to a pipeline, but the pipeline lacks takeaway capacity; (2) a producer's well is not connected to an existing pipeline but the producer's lands are dedicated to a pipeline operator; or (3) a producer's well is not connected to an existing pipeline and is not contractually dedicated, and the producer files an attestation to that fact.[4]

B. Changes to County Ad Valorem Taxes

In the 2020 legislative session, the Wyoming legislature changed several statutes governing the county-level ad valorem taxes applied to mineral production (including oil and gas production). Additionally, in the 2021 session, the Wyoming legislature passed two bills that changed the ad valorem tax statutes.

Senate File 0041, signed into law on February 8, 2021, with an effective date of July 1, 2021, amended Wyoming Statutes to change certain provisions concerning acquirers of minerals subject to an existing county ad valorem tax lien and regarding required lien foreclosure procedures.[5]

Previously, for ad valorem tax liens on mineral production on or after January 1, 2021, a new owner of minerals could avoid being subject to a prior ad valorem tax lien that arose before the new owner acquired the minerals if that new owner could furnish certification from the county taxing authority to the previous owner that, at the time of sale to the new owner, the ad valorem taxes were current or had been released, settled, or other payment arrangement had been agreed to by the county taxing authority.[6] Senate File 0041 removes the possibility of prior lien avoidance for a new owner; now for ad valorem tax liens on mineral production on or after January 1, 2021, any new owner of minerals will take ownership subject to any existing prior ad valorem tax liens.[7]

Also previously, if a county treasurer wanted to foreclose an ad valorem tax lien, it had to be through the statutory tax sale procedure.[8] Senate File

3. *Id.*
4. *Id.*
5. S. File 0041, 66th Gen. Sess., (Wyo. 2021).
6. Wyo. Stat. § 39-13-108(d)(vii)(C) (2020).
7. S. File 0041, 66th Gen. Sess., (Wyo. 2021).
8. Wyo. Stat. § 39-13-108(d)(vii)(E) (2020).

0041 removed the tax sale requirement; a county treasurer may conduct a tax sale but is not required to do so.[9]

Senate File 0060, signed into law and immediately effective on February 9, 2021, amended Wyoming Statutes to change specific provisions concerning the transition to a monthly collection of ad valorem taxes on mineral production.

Monthly payment of ad valorem taxes applies to mineral production occurring on or after January 1, 2022.[10] The new law implements an extended payment schedule for ad valorem taxes due on 2020 and 2021 production. For 2020 mineral production, 50% of the annual ad valorem taxes are due September 1, 2021, and the second 50% of ad valorem taxes are added to the total amount of 2021 ad valorem taxes due and paid as follows: 8% of the total amount is due on December 1st of each year for twelve calendar years beginning December 1, 2023, with the final 4% due by December 1, 2036.[11]

III. State Regulation

A. Policy for Regulation of Commercial Disposal Wells

In 2020, the WOGCC was granted regulatory authority over both commercial and noncommercial underground disposal of saltwater, nonpotable water, and oilfield wastes into Class II Injection Wells (as defined under the federal Safe Drinking Water Act).[12] Previously, the WOGCC regulated only noncommercial Class II Injection Wells (the WOGCC refers to injection wells as disposal wells).

Noncommercial operation is when an oil and gas well operator injects its oilfield wastes into Class II Injection Wells that such operator owns; commercial operation is when an oil and gas well operator pays a third party to inject the operator's oilfield wastes into Class II Injection Wells owned by that third party.[13]

On April 28, 2021, the WOGCC released a policy concerning the permitting of Commercial Class II Disposal Wells.[14] The policy explains how operators may convert a current noncommercial Class II Disposal Well to a Commercial Class II Disposal Well, a Class I Disposal Well (a well for

9. S. File 0041, 66th Gen. Sess., (Wyo. 2021).
10. S. File 0060, 66th Gen. Sess., (Wyo. 2021).
11. *Id.*
12. H. Bill 0045, 65th Budg. Sess., (Wyo. 2020).
13. H. Bill 0045, Official Summary, 65th Budg. Sess., (Wyo. 2020).
14. *Commercial Class II Permitting Policy*, WOGCC, April 26, 2021.

the injection of hazardous and non-hazardous wastes into deep, confined rock formations) to a Commercial Class II Disposal Well and may permit a new Commercial Class II Disposal Well.[15]

To convert a current noncommercial Class II Disposal Well to a Commercial Class II Disposal Well, the operator files a simplified application in letter form that includes identification of any new sources of water to be disposed of along with laboratory analysis for such new sources, and the required bond must be posted.[16] This simplified application will be an administrative matter.[17] If new sources of water are added at a later date, the operator shall submit the required information for the new sources via sundry notice.[18]

To convert a Class I Disposal Well to a Commercial Class II Disposal Well, the operator files a full application for a Commercial Class II Disposal Well, which must include the previous permit from the Department of Environmental Quality, and the required bond must be posted.[19] This application is considered administrative unless contested.[20]

To permit a new Commercial Class II Disposal Well, the operator files a complete application for a Commercial Class II Disposal Well, and the application is set for hearing.[21]

All Class II Disposal Wells require the filing of monthly production reports.[22]

IV. Judicial Developments

A. Supreme Court of Wyoming

1. Use of Eminent Domain Act

The issue in *EME Wyoming, LLC v. BRW East, LLC* arose from an attempt by oil and gas company EME Wyoming, LLC ("EME") to utilize the Wyoming Eminent Domain Act to access surface lands of BRW East, LLC and related parties ("BRW East"), for the claimed purpose of

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

surveying and gathering data for condemnation but more likely to be used in submitting applications for permit to drill ("APDs") to the WOGCC.[23]

EME sought access to roughly 52,000 acres of land located primarily in Goshen County, Wyoming, for the stated purpose of gathering data to evaluate the property's suitability for condemnation under the Wyoming Eminent Domain Act (the "Act").[24] The surface owner BRW East believed that EME sought access to the lands, not for a proper purpose under the Act, but solely to collect data with which to file APDs, and it denied EME's request.[25] In response, EME sued under the Act to obtain access.[26]

The district court issued two orders.[27] In its first order, the court allowed EME access to the 52,000 acres to survey and gather data but restricted it from using the survey information or filing APDs with the WOGCC, pending further order of the district court.[28] In its second order, the court permanently barred EME from using the information it collected to file APDs."[29]

BRW East then appealed the district court's ruling that allowed EME access, and EME appealed the district court ruling that barred it from using the information collected to file APDs.[30]

The Supreme Court stated the dispositive issue of the appeals as: "Did EME establish that it was a condemnor as that term is defined by statute, and that it was thus entitled to an order allowing access to the BRW Group's 52,000 acres of land?"[31]

The Court noted that the Act does extend the right of eminent domain to oil and gas interest holders.[32]

The Court went on to say that it must harmonize statutes that apply to the same subject matter, and it noted that similar to the Act, the Wyoming Split Estate Act also provides surface access for oil and gas companies to access their oil and gas interests, but that such companies must hold an oil and gas interest under the surface they seek to access.[33] The Court then determined that a similar restriction must apply to oil and gas companies acting under

23. *EME Wyoming, LLC v. BRW East, LLC*, 2021 WY 64, 486 P.3d 980 (Wyo. 2021).
24. *Id.* At ¶ 2, 486 P.3d at 982.
25. *Id.*
26. *Id.*
27. *Id.* At ¶ 3, 486 P.3d at 982.
28. *Id.*
29. *Id.*
30. *Id.* At ¶ 4, 486 P.3d at 982.
31. *Id.* At ¶ 5, 486 P.3d at 982.
32. *Id.* At ¶ 19, 486 P.3d at 987.
33. *Id.* At ¶ 30, 486 P.3d at 989.

the Act; consistent with precedent, "only those entities with landlocked mineral ownership would have the power to condemn under the Eminent Domain Act."[34]

The Court then stated that the crux of the case was that "[b]ecause a condemnor must be one that owns development rights to landlocked minerals, the access permitted under Section 506 of the Eminent Domain Act is not intended to be a device by which an entity may obtain access to determine if it wants to acquire mineral ownership in the area. A party seeking access must show that it owns development rights and that the data it seeks to collect relates to that interest and will be used for its development."[35]

The Court noted that EME never made a showing at the district court level of the exact location of its oil and gas interests, and relatedly did not show the necessity of gaining access and crossing BRW East's surface lands to get to its oil and gas interests to develop them (so EME never made a showing it held "landlocked minerals").[36]

The Court held that since EME never made a showing that it had landlocked minerals, it was not a "condemnor" under the Act and could not receive access to the desired surface lands, and therefore the Court reversed the district court's decision on that point.[37]

The Court upheld in part and reversed in part the district court's second ruling, which barred EME from using any data collected to submit APDs.[38] The Court upheld the district court ruling to the extent it prohibited the use of the data collected for submitting APDs.[39] It stated "Because EME should not have been permitted access to the property, the data is not lawfully in its possession, and it may not use it for any purpose. We therefore reverse the second order to the extent that it allows EME to use the data to support a condemnation action."[40]

2. Estoppel by Warranty Deed

The issue in *Smith v. B&G Royalties* arose from a warranty deed executed in May 1989 (the "1989 Deed") by predecessors to Roy Charles Smith and the Estate of Curt Allen Smith (the "Smiths"), wherein an

34. *Id.* At ¶ 31, 486 P.3d at 989.
35. *Id.* At ¶ 32, 486 P.3d at 989-90.
36. *Id.* At ¶ 33, 486 P.3d at 990.
37. *Id.* At ¶ 34, 486 P.3d at 990.
38. *Id.* At ¶ 35, 486 P.3d at 990.
39. *Id.*
40. *Id.*

"undivided one-eighth (1/8th) interest in and to all of the oil, gas and other minerals in and under and that may be produced from" certain lands was conveyed to Roy G. Barton, Jr., the predecessor to B&G Royalties and other parties (collectively, "B&G Royalties").[41] The predecessors to the Smiths had also owned a certain 1.0417% landowner royalty covering the same lands as stated in the 1989 Deed (the "Royalty Interest"). The Smiths filed a declaratory action seeking to quiet title to the Royalty Interest in their names, and B&G Royalties counterclaimed, seeking ownership of the full 1/8 mineral interest.[42]

The district court decided to quiet title to B&G Royalties for the full 1/8 mineral interest, therefore not carving out the Royalty Interest for the Smiths from the full 1/8 mineral interest.[43]

The Smiths appealed the decision. The Smiths argued that the 1989 Deed conveyed less than a 1/8 mineral interest to its grantee because the Royalty Interest was an "unbundled" royalty interest on the same property that had been treated as separate from the grantors' other mineral ownership in the described property, and therefore the Royalty Interest had not been conveyed by the 1989 Deed.[44]

The Court disagreed with the Smiths because the Royalty Interest was not expressly reserved from the conveyance in the 1989 Deed. The Court stated, citing precedent, "[n]otably, Charles and Marion [the predecessors to the Smiths] did not reserve any separately identifiable interests. The 1989 Deed conveyed "an undivided one-eighth (1/8th) interest in and to all of the oil, gas and other minerals in and under and that may be produced from" the land described in the deed to B&G. The terms "in and under" and "produced from," absent any qualifying or limiting language, create a mineral fee interest."[45]

The Court noted that the full 1/8 mineral interest would include the Royalty Interest; citing precedent, the Court said that "when an undivided mineral interest is conveyed ..., it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed. … Absent limiting language, that interest necessarily includes the right to receive royalties."[46]

Further, the 1989 Deed had a warranty of title contained in it; citing precedent, the Court stated that if a "grant is made with a warranty deed, the

41. *Smith v. B&G Royalties*, 2020 WY 106, 469 P.3d 1206 (Wyo. 2020).
42. *Id.* At ¶ 5, 469 P.3d at 1210.
43. *Id.* At ¶ 6, 469 P.3d at 1210.
44. *Id.* At ¶ 15, 469 P.3d at 1212-13.
45. *Id.* At ¶ 12, 469 P.3d at 1212.
46. *Id.* At ¶ 14, 469 P.3d at 1212.

grantor is warranting, or promising, that he owns what the deed purports to convey and if he does not, he is liable for a breach of warranty."[47]

Therefore, the Court affirmed the district court ruling and held that B&G Royalty owned the full 1/8 mineral interest, which included the Royalty Interest.[48] The Court stated "the owners granted an unrestricted mineral interest without reserving what is argued to be an unbundled, or separate, royalty interest. The warranty language in the mineral deed estops them and their successors (the Sons) from claiming anything less than an unrestricted 1/8 mineral interest was transferred. Accordingly, we affirm the judgments recognizing title to an unrestricted 1/8 mineral interest in B&G."[49]

B. United States District Court

1. Arbitrary and Capricious Agency Action

The issues in *Wyoming v. Department of the Interior* arose from the BLM's 2016 issuance of new regulations with the stated intent of reducing waste of natural gas during oil and gas production activities on Federal and Indian leases and clarifying when "lost" gas is subject to royalties.[50]

In November of 2016, the BLM issued its final rule that promulgated new regulations to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian (other than Osage Tribe) leases and clarified when produced gas lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production may be used royalty-free on-site (the "Waste Prevention Rule").[51]

The State of Wyoming quickly filed suit against the BLM, claiming the BLM exceeded its authority when it promulgated the Waste Prevention Rule, and the action was arbitrary and capricious. Afterwards, several other states and organizations filed similar suits, and all the actions were eventually consolidated into this case (consolidated plaintiffs are the "Petitioners").[52] Thereafter, during the following three and one-half years there were several stays and extensions to the lawsuit proceedings, due to

47. *Id.* At ¶ 17, 469 P.3d at 1213.
48. *Id.* At ¶ 18, 469 P.3d at 1213.
49. *Id.*
50. *Wyoming v. Dept. of Interior*, 493 F.Supp.3d 1046 (D. Wyo. 2020)
51. *Id.* At 1052.
52. *Id.*

the federal legislature's and/or the BLM's actions to revise, amend, delay effectiveness of, or replace the Waste Prevention Rule.[53]

In 2020, the Court heard the Petitioners' challenge to the Rule under to the Administrative Procedure Act ("APA"), claiming the Rule should be set aside as arbitrary and capricious and in excess of the BLM's statutory authority.[54]

The Court summarizes the Petitioners' argument as "Petitioners contend the [Waste Prevention] Rule is an attempt by BLM, under the pretense of regulating mineral waste, to regulate air pollution associated with oil and gas production, a problem squarely within the [Environmental Protection Agency]'s scope of authority and expertise."[55]

The Court first notes that two federal acts, the Mineral Leasing Act of 1920 and the Federal Oil and Gas Royalty Management Act, each give the Secretary of the Interior (and through the Secretary, the BLM) some broad regulatory authority over oil and gas production on federal and Tribal lands, to minimize waste of the mineral resource.[56]

The Court then concludes that "[t]he question here, then, is not whether the MLA and FOGRMA specifically grant BLM the authority to regulate venting, flaring, and equipment leaks, but rather whether these statutes unambiguously grant BLM authority to regulate oil and gas production activities *for the prevention of waste.* The answer to that question, largely undisputed by Petitioners, is 'yes.'"[57]

But specifically, as to the Waste Prevention Rule, the Court stated "[t]he rub here, however, is whether the Rule, or at least certain provisions of the Rule, was promulgated *for the prevention of waste* or instead for the *protection of air quality*, which is expressly within the "substantive field" of the EPA and States pursuant to the Clean Air Act."[58]

The Court then reviewed the EPA's Clean Air Act and its basic operational structure and analyzed the Waste Prevention Rule's components considering the Clean Air Act.[59] The Court concluded "[t]hough the Rule contains some arguably waste-specific components, the Rule overall is transparently driven by air quality requirements."[60]

---

53. *Id.* At 1052-57.
54. *Id.* At 1060.
55. *Id.*
56. *Id.* At 1062-63.
57. *Id.* At 1063.
58. *Id.*
59. *Id.* At 1064-70.
60. *Id.* At 1070.

Therefore, the Court determined the BLM exceeded its regulatory authority when it promulgated the Waste Prevention Rule.[61]

The Court then turned to the issue of whether the BLM action was arbitrary and capricious; it begins by stating the rule that agency action must be logical and rational. Agency action may be arbitrary and capricious where it "has relied on factors which *Congress* had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[62]

The Court decides "[f]or the same reasons the Waste Prevention Rule exceeds BLM's statutory authority, including the agency's failure to consider the longstanding prudent operator standard and the agency's reliance on ancillary air quality benefits to justify extensive costs, the Rule is also arbitrary and capricious."[63]

Due to the BLM exceeding its authority and acting arbitrarily and capriciously in promulgating the Waste Prevention Rule, the Court vacated the Waste Prevention Rule, except for certain sections that the parties agreed were not in controversy.[64]

61. *Id.* At 1074.
62. *Id.* At 1075.
63. *Id.*
64. *Id.* At 1087.