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WYOMING



By: Walter F. Eggers, III & Deanna (Sami) Falzone¹

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND	695
II. Case Law	696
A. <i>Well Site Injuries</i>	696
B. <i>State Leasing</i>	698
C. <i>Environmental Permitting</i>	699
III. LEGISLATION	699
A. <i>Environmental Quality</i>	699
B. <i>Microbial Enhancement of Hydrocarbon Substrates to Methane Gas</i>	700
C. <i>Taxation</i>	701
IV. OTHER STATE GOVERNMENT ACTION	702

I. INTRODUCTION AND BACKGROUND

Wyoming's production of natural gas ranked second in the nation in 2010, while production of crude oil ranked seventh. Sales of Wyoming crude oil totaled 53.1 million barrels, which was an increase of 3.5%

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from production year 2009.² While oil sales increased, sales of natural gas production, including carbon dioxide, in Wyoming totaled 2,517 trillion cubic feet, which was a decrease of 0.8% from 2009.³

The average monthly conventional oil and gas rig count in Wyoming for 2010 was forty. The rig count for conventional wells has been increasing over the past two years, while the rig count for coal-bed methane (“CBM”) wells has declined.⁴ Applications for permits to drill horizontal wells in Wyoming have increased significantly in recent years. During the first eight months of 2011, operators filed approximately 570 applications for wells targeting the Niobrara, Turner, Frontier, Parkman, Sussex, and Codell geologic formations.⁵

In 2010, 404 different companies produced crude oil from Wyoming, and 275 companies produced natural gas. That production yielded approximately \$1.9 billion in state taxes, as well as state and federal royalties. These taxes and royalties equate to almost \$3,448 for each person living in the state.⁶

II. CASE LAW

A. Well Site Injuries

The Wyoming Supreme Court issued two significant opinions in 2011 addressing worker injuries at oil and gas well sites. The first case, *Pennant Service Co. v. True Oil Co.*, arose from a negligence lawsuit filed by an employee of Pennant who was severely burned in an accident at an oil well owned by True Oil.⁷ The plaintiff filed suit against Pennant, True Oil, and others claiming negligence and a failure to implement proper safety precautions at the well site.⁸ True Oil filed a third-party complaint against Pennant, alleging that Pennant breached the Master Service Contract (“MSC”) between the two companies by: (1) failing to provide adequate personnel and training at the worksite; (2) failing to comply with state and federal regulations; and (3) failing to provide True Oil with insurance coverage.⁹

True Oil eventually settled with the plaintiff-employee and Pennant stipulated to the “reasonableness” of the settlement amount.¹⁰ At trial between True Oil and Pennant, the district court found that Pennant breached the MSC and ordered Pennant to pay damages equal to

2. *Oil & Gas Facts*, PETROLEUM ASS’N OF WYO. (PAW), <http://www.pawyo.org/facts.html> (last visited Dec. 21, 2011).

3. *Id.* (natural gas production figure includes carbon dioxide).

4. *Id.*; see also Thomas E. Doll, Wyo. State Oil & Gas Supervisor, Presentation at the 15th Annual Wyoming Natural Gas Fair, at *4 (Sept. 15, 2011), available at <http://www.wyogasfair.org/wngfa.htm>.

5. Doll, *supra* note 4, at *7.

6. PAW, *supra* note 2.

7. *Pennant Serv. Co. v. True Oil Co.*, 249 P.3d 698, 701–02 (Wyo. 2011).

8. *Id.* at 702.

9. *Id.*

10. *Id.* at 702–03.

the amount that True Oil had paid the plaintiff-employee in the settlement. The district court also required Pennant to pay a limited amount of attorney's fees incurred by True Oil and denied prejudgment interest.¹¹

On appeal, Pennant claimed that True Oil failed to prove that the damages were reasonably foreseeable as a result of Pennant's breach of the MSC. True Oil responded that it was not required to prove damages because Pennant stipulated to the reasonableness of the settlement amount. True Oil also argued that if the Court determined that the stipulation by Pennant was not proof of Pennant's liability, the evidence at trial demonstrated that True Oil would have been potentially liable for Pennant's negligence.¹² The appeal asked the Supreme Court to determine whether Pennant would have been in breach of the MSC absent a requirement to indemnify True Oil for its settlement with the plaintiff-employee.¹³ After a detailed analysis of the law of indemnity in Wyoming, the Supreme Court concluded Pennant was liable and that damages were proven to a reasonable degree of certainty.¹⁴

In a cross-appeal, True Oil contested the district court's rulings on attorney's fees and prejudgment interest. Ultimately, the Supreme Court affirmed the district court's limited award of attorney's fees (over the dissent of one Justice), but reversed the district court and awarded prejudgment interest to True Oil because it found that the settlement payment to the plaintiff-employee was a liquidated sum.¹⁵

In the second case involving a well site injury, *Worman v. BP America Production Co.*, the Wyoming Supreme Court considered an arbitrator's decision in a case arising out of a fight at an oil and gas well site.¹⁶ The plaintiff, Mr. Worman, was working for a drilling company on a rig in Carbon County, Wyoming. BP owned and operated the well site. According to Mr. Worman, BP's "company man" at the site grabbed Mr. Worman for no reason, put him in a headlock, and choked him. Mr. Worman sued the company man, BP, and two co-workers, alleging that he suffered permanent injury as a result of the attack.¹⁷ On BP's motion, the trial court ordered arbitration, as required by the contracts between BP and the drilling company. The arbitrator determined that BP would only be liable to Mr. Worman if the company man's actions were within the scope of his employment and authority. The arbitrator concluded that the action was "horseplay" that was "motivated by personal reasons" and "outside the

11. *Id.* at 702.

12. *Id.* at 703.

13. *Id.*

14. *Id.* at 708.

15. *Id.* at 712; *see id.* at 712 (Burke, J., dissenting).

16. *Worman v. BP Am. Prod. Co.*, 248 P.3d 644 (Wyo. 2011).

17. *Id.* at 645-46.

scope of his authority.” As such, the arbitrator ruled that BP was not liable to Worman.¹⁸

On appeal to the district court and eventually before the Wyoming Supreme Court, Mr. Worman claimed that the arbitrator’s decision constituted a “manifest mistake of law.” The Supreme Court held that a claim of manifest mistake of law is not a legitimate reason for vacating an arbitration decision under the governing Federal Arbitration Act.¹⁹ The Supreme Court also considered the merits of Mr. Worman’s claim and concluded that the arbitrator did not make a mistake because, as the district court had held, “no part of [the company man’s] engaging in horseplay was directed at any intention to serve BP . . . [and] was not, even in part, furthering BP’s interests”²⁰

B. *State Leasing*

A significant state leasing question was presented to the Wyoming Supreme Court in *Office of State Lands and Investments v. Mule Shoe Ranch, Inc.*²¹ Although the case involved a lease for grazing and other agricultural activities on state lands, as opposed to a lease for oil and gas development, the Supreme Court’s holding is potentially important to the oil and gas industry.

Mule Shoe Ranch attempted to exercise its preferential right to renew a state lease with the Wyoming State Lands Office. Another entity submitted a competing bid for the lease, which proposed a higher annual rental payment than Mule Shoe. The Office of State Lands required Mule Shoe to match the higher bid before the state would recognize Mule Shoe’s renewal of the lease. Wyoming’s Board of Land Commissioners, an administrative board, affirmed the State Lands Office’s decision, but on appeal, the district court reversed and required the Office to conduct an economic analysis to determine if the rate in the competing bid was based on fair market value.²²

The State Lands Office appealed to the Wyoming Supreme Court, which reversed the district court’s decision. The Supreme Court analyzed the preferential right to renew statute and determined that the State Lands Office was authorized to accept the higher of two competing bids, in order to meet its statutory obligation to lease state lands in a manner that provides the greatest benefit to the state land trust beneficiaries.²³

18. *Id.* at 646.

19. *Id.* at 647–48.

20. *Id.* at 650.

21. *Office of State Lands and Invs. v. Mule Shoe Ranch, Inc.*, 252 P.3d 951 (Wyo. 2011).

22. *Id.* at 954.

23. *Id.* at 954–55, 958.

C. *Environmental Permitting*

The case of *Sierra Club v. Wyoming Department of Environmental Quality* concerned an air quality permit issued for construction of a coal-to-liquids facility in Wyoming. Although not a traditional oil and gas case, the Wyoming Supreme Court's opinion is an important environmental decision to energy development in the state.²⁴ The Wyoming Department of Environmental Quality ("DEQ") issued an air quality permit to Medicine Bow Fuel and Power for the construction of a facility designed to gasify coal and convert it into gas.

The Sierra Club appealed DEQ's issuance of the permit to the Environmental Quality Council ("EQC"), which affirmed DEQ's decision. Next, the Sierra Club appealed to the Wyoming Supreme Court, contending that DEQ failed to adequately consider emissions from the facility and failed to require Best Available Control Technology ("BACT") to limit emissions from the project.²⁵ In a detailed opinion, the Supreme Court concluded that the DEQ properly applied and complied with Wyoming's environmental statutes and regulations, and did not violate federal law. The Court rejected the Sierra Club's BACT argument, concluding that DEQ and Medicine Bow provided sufficient evidence supporting the technical aspects of the project, and the Sierra Club failed to disprove DEQ's and Medicine Bow's evidence.²⁶ In conclusion, the Court determined that the EQC properly rejected all of the Sierra Club's challenges to the air quality permit.²⁷

III. LEGISLATION

The 2011 Wyoming Legislature focused primarily on health care, education, social issues, and gun rights and acted on only a small number of bills directed toward the oil and gas industry.

A. *Environmental Quality*

The Legislature acted on three environmental issues relevant to the oil and gas industry in 2011. First, the Legislature addressed the EQC's authority to designate lands in Wyoming as "very rare" or "uncommon."²⁸ For over thirty years, the EQC has had authority to apply the special status and to limit oil and gas and other development on designated lands. In 2007, the EQC designated approximately 180,000 acres in the Adobe Town area of the Red Desert in southern Wyoming. In 2010, after a long debate, the EQC denied a request to designate approximately 17,000 acres in the Sand Creek area in

24. See *Sierra Club v. Wyo. Dep't of Env'tl. Quality*, 251 P.3d 310 (Wyo. 2011).

25. *Id.* at 311–12.

26. See *id.* at 317–18.

27. *Id.* at 324–25.

28. WYO. STAT. ANN. § 35-11-112(a)(v) (2011).

northwestern Wyoming.²⁹ Those cases led to the proposal to prohibit future designations. The bill, which passed the House of Representatives on a vote of 45–13 and the Senate by 23–7, prohibited new designations and recognized the EQC’s continuing authority to remove prior designations.³⁰

The Legislature expanded an existing statute to authorize Wyoming counties to investigate potential litigation against the federal government related to “federal land, water, air, mineral and other natural resource policies which may affect the tax base of the state, wildlife management, state species, recreation, private property rights, water rights or leasehold rights.” The Legislature appropriated \$250,000 to fund these efforts.³¹

Finally, the Legislature passed a joint resolution asking the United States Congress to limit air quality regulation by the Federal Environmental Protection Agency (“EPA”).³² The resolution urges Congress to prohibit the EPA from regulating greenhouse gas emissions and to impose a moratorium of at least two years on the promulgation of any new air quality regulations by the EPA except where an imminent health or environmental emergency arises.³³

B. *Microbial Enhancement of Hydrocarbon Substrates to Methane Gas*

Recognizing the decline of CBM production from the Powder River Basin in northeastern Wyoming, advanced technology companies have proposed innovative projects for promoting bioconversion of hydrocarbon deposits like coal into methane gas. Wyoming statutes did not address this subject until 2011, when the Legislature considered a bill to authorize and regulate reservoir injections for microbial conversion. The bill passed the Senate on January 27, 2011, by a vote of 29–1, and passed the House of Representatives on February 15, by a vote of 58–2. Wyoming’s Governor signed the bill on February 18.³⁴

29. Jeremy Pelzer, *Wyoming’s ‘Very Rare or Uncommon’ Debate Lingers After Legislation Kills Practice*, CASPER STAR-TRIBUNE, March 5, 2011, available at http://trib.com/news/state-and-regional/article_94742b51-a2c0-51b2-b9c9-ad8647e306a5.html; see also *In re Bessemer Mt.*, 856 P.2d 450, 453–54 (Wyo. 1993) (discussing application of statute and requiring EQC to promulgate rules for determination of whether lands qualify as “very rare or uncommon”), *aff’d sub nom. Rissler & McMurray Co. v. State*, 917 P.2d 1157 (Wyo. 1996).

30. § 35-11-112(a)(v).

31. 2011 Wyo. Sess. Laws 141 (codified at WYO. STAT. ANN. § 9-4-218(a) (2011)).

32. S.J. Res. 1, 61st Leg., Gen. Sess. (Wyo. 2011), available at <http://legisweb.state.wy.us/2011/Enroll/SJ0006.pdf>.

33. *Id.* at §§ 1–2.

34. 2011 Wyo. Sess. Laws 50 (codified at WYO. STAT. ANN. § 30-5-128 (2011)); WYO. STAT. ANN. § 30-5-104(d)(ix) (2011); *Senate File 116 Digest*, STATE OF WYO. LEGISLATURE, <http://legisweb.state.wy.us/2011/Digest/SF0116.htm> (last visited Dec. 18, 2011).

The new statutes recognize that reservoir injections for microbial conversion will be permitted under either Underground Injection Control (“UIC”) Class II or Class V permits, and establish a permitting process before the Wyoming Oil and Gas Conservation Commission (“WOGCC”) and DEQ.³⁵ The statutes allow parties to file applications with the WOGCC requesting an order authorizing injections and establishing units for the development of microbial conversion projects.³⁶

The WOGCC issued a notice on May 12, 2011, initiating a rulemaking proceeding on the new statutes. On September 29, 2011, the WOGCC determined that the new statutes set a clear application and approval process for UIC Class V permits, and that additional administrative rules were unnecessary. The WOGCC closed the rulemaking docket and anticipates receiving applications filed pursuant to the new statutes in the near future.

C. Taxation

The Legislature made limited changes to Wyoming’s tax statutes applicable to the oil and gas industry, but did expand the sales tax on services to real or tangible personal property within oil or gas well sites.³⁷ The bill extended the sales tax, which had applied only to services, to all “tangible personal property used in rendering services” to property within a well site.³⁸

The Legislature also extended the sales and use tax exemption for manufacturing equipment until December 31, 2017.³⁹ The bill also gave the Department of Revenue authority to require taxpayers taking advantage of the exemption to file a report describing the amount of sales tax exempted and the number of jobs created or impacted by the utilization of the exemption.⁴⁰

Finally, the Legislature limited the state’s ethanol producer tax credit to production facilities built between July 1, 2003 and July 1, 2011.⁴¹

35. See § 30-5-128(b)(i).

36. *Id.* § 30-5-128(a).

37. WYO. STAT. ANN. § 39-15-103(a)(i)(K) (2011) (known as Wyoming’s “Special (K)” sales tax statute).

38. Act of Feb. 15, 2011, ch. 4, 2011 Wyo. Sess. Laws 4 (codified at § 39-15-103(a)(i)(K)).

39. WYO. STAT. ANN. § 39-15-105(a)(viii)(O) (2011).

40. Act of Mar. 2, 2011, ch. 83, 2011 Wyo. Sess. Laws 83 (codified at § 39-15-105(b)).

41. Act of Mar. 3, 2011, ch. 170, 2011 Wyo. Sess. Laws 170 (codified at WYO. STAT. ANN. § 39-17-109(d)(iv)(C), (E) (2011)).

IV. OTHER STATE GOVERNMENT ACTION

Management of greater sage-grouse populations continues to be a major issue for Wyoming and other western states. On June 2, 2011, Wyoming's Governor Matt Mead issued an Executive Order addressing "Greater Sage-Grouse Core Area Protection."⁴² In his Executive Order, Governor Mead adopted and updated the work and Executive Orders of his predecessor, former Governor Dave Freudenthal.⁴³ Governor Mead recognized that on November 10, 2010, the U.S. Fish and Wildlife Service confirmed Wyoming's "Core Population Area" strategy as a long-term, science-based vision for the conservation of Greater Sage-Grouse. The Governor also recognized that several western states have either adopted or are considering adopting the Wyoming Core Area Strategy, thus making the concept consistent across the species range.⁴⁴

These efforts are critically important to the oil and gas industry in Wyoming, because as Governor Mead noted, the Greater Sage-Grouse is a "candidate" species for listing under the Endangered Species Act, and listing would have "significant adverse effect" on the Wyoming economy, including oil and gas development in the state.⁴⁵

Governor Mead reaffirmed Governor Freudenthal's specific directions concerning oil and gas wells: well pad densities must not "exceed an average of one pad per square mile (640 acres) and suitable habitat disturbed [must] not exceed 5% of suitable habitat within" an area determined by a Density/Disturbance Calculation Tool ("DDCT").⁴⁶ For example, "the number of well pads within a two mile radius of the perimeter of an occupied sage-grouse lek should not exceed 11, distributed preferably in a clumped pattern in one general direction from the lek."⁴⁷

On September 22, 2011, Governor Mead announced that the U.S. Secretary of the Interior awarded Wyoming a "Partners in Conservation Award," recognizing the state for its leadership on sage-grouse planning issues. Wyoming was one of seventeen recipients of this award.⁴⁸

42. Wyo. Exec. Order 2011-5, at 1 (June 2, 2011), *available at* psc.state.wy.us/pscdocs/download/SageGrouseExecOrder2011-5.pdf (replacing Executive Order 2010-4).

43. *See* Wyo. Exec. Order 2010-4 (Aug. 18, 2010), *available at* psc.state.wy.us/htdocs/Dwnload/SageGrouseExecOrder2010-4.pdf (replacing Executive Order 2008-2).

44. Exec. Order 2011-5 at 2.

45. *Id.* at 1.

46. *Id.* at 12.

47. *Id.*

48. Office of Governor Matt Mead, Press Release, *State of Wyoming Receives Award for State-Led Sage Grouse Plan* (Sept. 22, 2011), *available at* <http://governor.wy.gov/media/pressReleases/Pages/WyomingreceivesAwardforSageGrousePlan.aspx>.