CROWLEY | FLECK PLLP
ATTORNEYS



ENERGY LAW UPDATE - MT, ND & WY

I. Montana Legal Update

A. Case Law Update

Estate of Harris—Exception allowing probate of a will after three years

In Estate of Harris, 2015 MT 182, the Montana Supreme Court was asked to interpret an exception to the three year statute of limitations for initiating probate proceedings under the Montana Probate Code. The Court held that § 72-3-122(1)(d), MCA, permits an informal appointment or formal testacy proceeding to be initiated more than three years after the decedent's death, so long as three conditions are met: 1) there has been no other proceeding regarding succession or estate administration during the three year period; 2) there are no claims other than for expenses of administration; and 3) the personal representative's right to possess estate assets is limited to the possession necessary to confirm title to the estate's assets in the estate's successors. The Court also expressly overruled Estate of Taylor, 207 Mont. 400, 675 P.2d 944 (1984), insofar as it held that if a will is not probated within three years of death, the assumption of intestacy is final.

In this case, the Court dealt with a widowed husband's attempt to probate his late wife's will fourteen years after her death to determine the ownership of her mineral interests. The deceased's children from a previous marriage filed objections based, in part, on the timeliness of the probate. The Court analyzed § 72-3-122(1)(d) and found this situation to fit the elements of the exception and, thus, held that it was proper to probate the will versus distributing the estate under the laws of intestacy.

Montanore Minerals Corp., v. Optima Inc., et al.—Private mining company condemns right of way through adverse claims

The United States District Court for the District of Montana recently approved a private mining company's use of eminent domain to use underground tunnels to access its mineral deposits. In doing so, the Court authorized Montanore Minerals Corp. to condemn easements and rights of way through privately claimed interests in federal lands.

Montanore held rights to mineral deposits associated with its patented claims beyond the Cabinet Mountain Wilderness boundary that could only be accessed through the subject tunnels, one of which was previously developed by Montanore's predecessor. These tunnels, however, underlaid the unpatented mining claims of the defendants, who sought to restrict Montanore's use of the tunnels based on their claimed mineral interests in the federal lands. The Court granted Montanore's request for condemnation of rights of way through these claimed interests, finding that Montanore's use of the tunnels was necessary in accordance with M.C.A. § 70-30-111. The Court also ruled that, despite their claims, the defendants had no right to the existing tunnel, either before or after the condemnation, as the tunnel was not related to any mining activities on the defendant's unpatented claims. The Court ruled that Montanore already held a right to access its patented mining claims across the public domain in accordance with the General Mining Law of 1872, and that right included use of the tunnels. Without demonstrating some interference with their own mineral rights, the defendants never had rights to restrict Montanore's access. The court also noted that there was no actual ore deposit within the defendant's unpatented mining claims. Thus, the Court concluded that the defendants were entitled to zero compensation for condemnation of the subject easements and rights of way through their claimed interests.

Montanore Minerals Corp. is a subsidiary of Mines Management, Inc. and was represented by Crowley Fleck in this matter.

TAGS Realty, LLC v. Runkle—Supreme Court Rules that Discovery on Mining Claim is a Question of Fact

In TAGS Realty v. Runkle, 2015 MT 166, the Montana Supreme Court addressed overlapping mining claims and a claim for trespass and conversion for the removal of mine tailings. Runkle had purchased a patented lode claim in 2009, adjacent to which TAGS located his unpatented lode claim in 2010. Subsequently, in 2011, Runkle located an unpatented placer claim overlapping both of the prior claims. A pile of old mine tailings overlapped the boundary between the two lode claims and sat entirely within the Runkle placer claim. These tailings contained loose gold deposits which, although not historically valuable, have value in today's market. Runkle removed and sold the old tailings and entered onto the TAGS claim to do so. TAGS sued Runkle for trespass and conversion.

The District Court originally entered summary judgment for Runkle. It stated that TAGS' unpatented lode claim was invalid because the tailings consist of a placer deposit not a lode deposit. It was later pointed out, however, that the parties never contested validity and no evidence had been presented regarding the absence of a lode deposit—only the presence of a placer deposit within the mine tailings.

The Montana Supreme Court reversed the District Court, holding that TAGS had no opportunity to even address validity or whether a lode deposit exists on its claim, therefore the District Court could not enter summary judgment based on this uncontested factual issue. The Supreme Court held that while an unpatented lode claim is only valid if it contains discovery of a lode deposit, the existence of a placer deposit within the claim boundaries does not preclude the establishment of an unpatented lode claim. The validity of an unpatented lode or placer claim is based on the appropriate discovery, but the existence of one type of deposit does not preclude the existence of the other, nor does it preclude the validity of the claim. The Supreme Court pointed out that if TAGS could establish its unpatented lode claim with a proper lode discovery, it would have the right to prevent others from entering that claim for purposes of obtaining rights to locatable minerals. Although the Supreme Court did not need to address this point, Crowley also notes that under the General Mining Law of

1872 a valid, unpatented lode claim, supported by a lode discovery, includes with it rights to all placer deposits found within its boundaries. The Supreme Court ruled that whether Runkle's unpatented lode claim actually held a lode deposit sufficient to create a valid claim was a question of fact for the Trial Court, therefore summary judgment was inappropriate. Other questions of fact highlighted by the Supreme Court in this case include issues regarding the origins of the mine tailings and whether the tailings were abandoned, necessary to determine their status as real or personal property.

B. Legislative Update

Pipeline Reporting

As an addition to Title 75-Environmental Protection of the Montana Code, the Montana Legislature passed a bill that requires the Montana Department of Environmental Quality (MDEQ) to compile and make available to the public certain information relating to oil and gas pipelines that intersect or cross any navigable river in Montana. The information to be compiled includes the size, commodity transported, navigable rivers intersected, distance between shutoff valves and intersection(s) with river(s), as well as other information to be determined by the MDEQ. The MDEQ has until January 1, 2016 to gather this information and subsequently add it to the agency's website.

Incidental Carbon Storage Certification

According to a newly enacted law, the Board of Oil and Gas Conservation (the Board) now has the ability to certify the amount of carbon dioxide incidentally stored through an enhanced oil or gas recovery project. Under this statute, when conducting enhanced recovery projects, operators can submit a plan accounting for the incidentally stored carbon dioxide to the Board for its approval and certification. Further, the law makes clear that this storage certification is distinct from geologic storage projects or carbon dioxide injection wells, and it allows for incidental storage without subjecting operators to the requirements of those types of projects. The new law will be incorporated into the Montana Code in part one of Title 82-Mineral, Oil and Gas, chapter 11.

Stripper Well Exemption and Bonus Production Taxation Triggered at $54 per barrel

The Montana Legislature has amended Montana Code Ann. § 15-36-304, concerning exemptions for production tax rates imposed on oil and natural gas stripper wells, i.e., wells producing an annual average of three or less barrels per day. As amended, stripper wells will qualify for a lower working interest production tax rate of 0.5% when WTI falls below $54 per barrel during a calender quarter. This trigger point is a significant increase from the former point of $38 dollars per barrel.

Sage Grouse Stewardship Act

At the request of the Governor, the Montana Legislature has enacted the Montana Sage Grouse Stewardship Act to provide grant funding and establish voluntary mechanisms to benefit sage grouse habitat and populations in the state. The act authorizes the creation of the Montana sage grouse oversight team, which will be responsible for implementing the conservation plans and making rules

to administer the act, including establishing criteria for grants to projects that benefit sage grouse habitat. Importantly, the act further states that it in no way alters Montana law regarding the primacy of mineral estates, and does nothing to limit access to or development of the same. The act will be codified in Title 2, chapter 15-Executive Branch Officers and Agencies, and Title 76-Land and Resources Use of the Montana Code.

Establishment of Standards for Tailings Storage Facilities

The Montana Legislature enacted new legislation establishing standards for tailings storage facilities. Pursuant to this legislation, storage facilities for the residual materials created through the milling process in mining will be subject to the standards found in Metal Mine Reclamation laws. MCA § 82-4-301 et seq. It is the stated intent of the legislature that these tailing facilities will be governed by "adaptive management using evolving best engineering practices" which will be based upon site-specific conditions. Under these laws, tailings storage facilities will now be subject to permitting, design review, monitoring and reclamation standards.

Establishing Timelines for Development of TMDLs

The Montana Department of Environmental Quality (DEQ) is charged with developing total maximum daily loads (TMDLs) for pollutants into state water bodies that are deemed threatened or impaired. A new addition to § 75-5-702 of the Montana Code sets forth requirements and deadlines for the DEQ to establish TMDLs for waters when the department receives an application for a discharge permit into waters without an established TMDL. Specifically, when the DEQ receives such an application, it must complete the TMDL for the water body within 180 days or work with the applicant on establishing a different timeframe. The law further states that the DEQ cannot declare an application for a discharge permit incomplete or deficient because a TMDL has not been prepared.

Water Quality Regulations for Natural Conditions to Conform with Federal Regulations

The Montana Legislature has passed a law stating that the state may not apply a water quality standard to a body of water that is more stringent than the water's non-anthropogenic condition. The law continues that in the event that the water quality standard is more stringent than the current condition of the water, variances from these standards will be governed by criteria and procedures consistent with comparable federal rules as long as the discharge to which the variance applies will not materially contribute to the water body being below the standard.

Property Tax Exemption for Pollution Control and Carbon Capture Equipment

Effective immediately, certain air and water pollution control equipment and carbon capture equipment are exempt from property taxes for 10 years. This exemption specifically covers equipment put into service after January 1, 2014 and for the purpose of environmental benefit or to comply with state or federal pollution regulations. The law also provides for a new 50% tax break for carbon sequestration equipment placed into service after January 1, 2014.

State Appropriation for Litigation to Aid Montana in Natural Resource Markets

The Montana Legislature has appropriated $1 million from the state general fund to the department of justice to fund litigation to improve and protect the state's interests in domestic and international markets for natural resources. The goal of the appropriation is to use the funds to aid Montana's access, participation, and growth in natural resource markets through legal actions in courts or administrative proceedings.

II. North Dakota Legal Update

A. Case Law Update

Yesel v. Brandon –Under the abandoned mineral statutes, use of the related mineral interest establishes use of the royalty interest

In Yesel v. Brandon, 2015 ND 195, the North Dakota Supreme Court was presented with the issue of whether a royalty interest is a "mineral interest" subject to the abandoned mineral statutes and further, what constitutes the "use" of a royalty interest under the act.

In Yesel, the surface owner of the subject lands sued to quiet title to certain royalty interests pursuant to the abandoned mineral statutes claiming, first, that royalty interests constituted mineral interests under the statute, and second, the interests in question were abandoned due to nonuse. The Court determined that, whether or not a royalty interest constitutes a mineral interest under the statute, the royalty interests here had in fact been used within the last 20 years, and were therefore not abandoned. The Court held that as an interest absent the right to develop, a royalty interest is dependent on the related mineral interest and cannot be abandoned if the related mineral interest has been used. For that reason, the Court reasoned that due to the use of the related mineral interest by virtue of leasing, pooling orders, and production of oil from at least two wells, the royalty interests in question was also used. Id. Because of this holding, the Court found it unnecessary to decide whether a royalty interest constitutes a mineral interest under the abandoned mineral statutes.

EOG Resources, Inc. v. Soo Line R.R. Co.— North Dakota Supreme Court Rules that deeds from private landowners to railroad conveyed fee simple title including minerals rather than easements

In EOG Resources, Inc. v. Soo Line R.R. Co., 2015 ND 187, a divided North Dakota Supreme Court held that a series of deeds from fee owners to a railroad, all titled "Warranty Deed—Right of Way," unambiguously conveyed fee interests to the railroad when the granting, habendum, and warranty clauses of the deeds employed language indicating a fee conveyance and the description of the property conveyed did not suggest that the parties intended to convey a lesser estate. The presence of the term "Right of Way" in the title was not enough, by itself, to create ambiguity regarding the nature of the interests conveyed by the deeds.

According to the Court, the granting clauses in each of the seven deeds at issue did "not limit the use of the land to railroad purposes or contain any other limitations," and the habendum and warranty clauses also used language indicating a fee conveyance. The Court also rejected the assertion that

the right of way references in the deed titles rendered the deeds ambiguous, stating that "use in the title alone is not sufficient to create ambiguity and it is of no effect when the conveyance is clear." Two of the deeds, however, contained property descriptions that referred to an existing easement and could, therefore, suggest an ambiguity as to the nature of the interest being conveyed. The "Larson deed" merely noted the existence of the prior easement, and did not except the easement from the description of the property conveyed. The Court saw this as consistent with a fee simple conveyance and held that it did not create an ambiguity. The "Faro deed," meanwhile, did except an existing easement from the description of the property conveyed, and according to the court was therefore ambiguous. The Court also distinguished its prior decision in Lalim v. Williams County, 105 N.W.2d 339 (N.D. 1960), which dealt with a deed containing language consistent with a fee grant, but granted to a public entity for highway purposes.

In the end, the Court believed that summary judgment was inappropriate for the Faro deed because of the possibility that extrinsic evidence could clarify the intent of the parties to that deed. It therefore remanded for further proceedings on the Faro deed only, while reversing the district court and entering judgment in favor of Soo Line and its mineral lessee, G-4 LLC, as to the other six deeds.

Johnson v. Shield—Reservation of an interest in a deed falling outside of the granting clause must be so clear as to leave no doubt to be given effect

The case of Johnson v. Shield, 2015 ND 200, presented the North Dakota Supreme Court with the issue of how to treat a warranty deed that contains language purporting to reserve 50% of the mineral interest associated with the property in the warranty clause rather than the granting clause of the deed. In this case, the grantors conveyed a tract of land by warranty deed that contained no reservation of minerals in the granting clause of the deed, but instead contained language purporting to reserve 50% of the minerals in the warranty clause of the deed. The Plaintiffs, successors in interest to the grantees, argued that because this language was not in the granting clause, it had the effect of merely limiting the warranty conveyed with the land and had no effect on the scope of the grant. The Court, however, held that reservations of property interests may appear outside of the granting clause and in any part of the deed if they are so clear as to leave no doubt. The Court concluded that here the use of the words "but reserving, however, to the grantor fifty percent (50%) of all of the oil, gas, hydo-carbons and minerals" was sufficiently clear evidence of the intent to reserve the mineral interest, because reserving anything to the grantor would be illogical in the context of a warranty limitation. Therefore, the court held the reservation valid and quieted title to 50% of the mineral estate in favor of the grantors' successors in interest.

Norby v. Estate of Kuykendall—Landowner not entitled to accretions where property line described by fixed boundary without reference to a body of water

In Norby v. Estate of Kuykendall, 2015 ND 232, the North Dakota Supreme Court addressed who owned land between the North Dakota and Montana border created by movement of the Yellowstone River. The Court held that although the movement of a body of water may change ownership of property when the water line defines the boundary, this is not the case when the boundary line is fixed at a specific line without reference to the water.

The issue in this case arose due to the fact that, where the real property in question is located, the Yellowstone River has been slowly moving east from Montana and into North Dakota. During this process, the river crossed the border and created 96 acres of land between the river and the border. Norby owns the land on the Montana side and the Kuykendalls own the land on the North Dakota

side, but neither's boundary of ownership is based on the Yellowstone River. Norby claimed that due to general principles of riparian law—which grant newly formed lands to the owner of the adjacent bank—he was entitled to the 96 acres on the North Dakota side. The Court, however, rejected this claim. The Court held that when a boundary is fixed at a specified line without reference to a water body, the owner cannot claim ownership beyond that line. Accordingly, because Norby's land extended only to the fixed boundary of the Montana Border, the 96 acres in question belonged to the Kuykendalls.

B. Legislative Update

New Pipeline Legislation

Effective August 1, 2015, N.D.C.C. § 38-08-27 now requires operators of underground gathering pipelines transferring crude oil or produced water to provide the North Dakota Industrial Commission (the Commission) with certain information concerning any pipeline. This information includes, upon request, construction design drawings and specifications, list of independent inspectors, and a leak protection and monitoring plan. Within sixty days of an underground pipeline being placed into service, the operator shall file an independent inspector's certificate of hydrostatic or pneumatic testing of the underground gathering pipeline. In addition, such pipelines are now subject to the bonding requirements of the Commission.

The enacting legislation also requires the funding of a special project through the Energy and Environmental Research Center of the University of North Dakota to study crude oil and produced water pipelines. From here, the Commission must contract with the center to analyze the construction and monitoring of pipelines and determine the feasibility of requiring leak detection and monitoring technology on new and existing pipelines, with the center providing a report to the Commission by December 1, 2015. The Commission is directed to then take these recommendations and adopt rules necessary to improve produced water and crude oil pipeline safety and integrity.

Oil Extraction Tax Decrease

North Dakota has amended N.D.C.C. § 57-51.1-02 to lower its baseline oil extraction tax from 6.5% to 5% of the gross value of the oil extracted at the well. This rate is subject to change, however, in that if WTI's monthly average exceeds ninety dollars for three consecutive months then the oil extraction tax is increased to 6% until the average monthly price drops below $90 for three consecutive months at which point the tax returns to 5%. This change in taxation becomes effective on January 1, 2016.

Enhanced Oil Recovery Tax Exemption

Senate Bill 2318 creates a tax exemption for both sales and use taxes for materials used in compressing, gathering, collecting, storing, transporting or injecting carbon dioxide for use in enhanced recovery of oil or natural gas. The bill also mandates a legislative management study on the oil extraction tax exemption for incremental production from a tertiary recovery project utilizing carbon dioxide, which will establish a recommended action in the next legislative session.

Exceptions from the Public Service Commission Siting Process

N.D.C.C. § 49-22-03 now excepts additional activities from the full Public Service Commission administrative siting process for energy conversion and transmission facility projects. Under the statute, certain projects conducted in the same location for which a utility had previously obtained a permit, or where a facility was constructed before April 9, 1975 do not have to go through the siting process. Of particular note, the project additions include: new energy conversion facilities; new gas, liquid or electric transmission facilities; improvements on these facilities; and activities to increase or decrease the capacity of these facilities.

III. Wyoming Legal Update

A. Regulatory Update

Wyoming Oil and Gas Conservation Commission Update

WOGCC Drilling and Spacing Units – Amendment to Chapter 3, Section 2

The Wyoming Oil and Gas Conservation Commission ("WOGCC") has amended Chapter 3, Section 2 of its rules regarding drilling and spacing units and the location of wells. Specifically, the rules as amended now have separate provisions for vertical and horizontal wells and establish a permanent default of six hundred forty (640) acre drilling and spacing unit size for horizontal wells, thus eliminating the need to apply for a permanent 640 acre drilling and spacing unit. The rules will also no longer call for a minimum eighteen degree azimuth for the horizontal portion of a well that is within 1,320 feet of a boundary line.

New WOGCC Surface Setback Rule

The Wyoming Oil and Gas Conservation Commission ("WOGCC") has adopted new rules regarding surface setbacks from water supplies and Occupied Structures. The new rule amends Chapter 3, Section 22(b) by stating that all wells, pits, wellheads, pumping units, tanks, and treaters shall be located no closer than three hundred fifty feet (350') from any water supply. The Supervisor is allowed to grant a variance to this distance for good cause.

The rule also provides new definitions for "Occupied Structure" and "Production Facilities" to Chapter 1, Section 2, and adds Section 47 to Chapter 3 of the Rules. "Occupied Structure" is defined as a building that was specifically constructed and approved for human occupancy such as a residence, school, office or other place of work, or hospital. "Occupied Structure" does not mean outbuildings such as, but not limited to, sheds, barns, or garages. "Production Facilities" is defined as any building or equipment used for the purpose of producing, treating, or separating produced fluids and gas, including but not limited to pumps, compressors, generators, gas flares, treaters, separators, storage tanks, and pits.

The new Section 47 requires a well, as measured to the center of the wellhead, and Production Facilities, as measured to the nearest edge, corner, or perimeter, to be located no closer than five hundred feet (500') to an existing Occupied Structure(s) as measured from the closest exterior wall

or corner of the Occupied Structure(s). Production Facilities should be located at a greater distance than 500' to Occupied Structures when technically feasible. The rule allows the Supervisor to approve a variance to increase or decrease the setback requirement if requested by either an owner of an Occupied Structure or an operator. A party adversely effected by the granting or denial of a variance may request a hearing before the Commission. Any approved variance expires one year from the date the variance is granted if a well is not spud within that time.

If a well or Production Facility is proposed for location within one thousand feet (1,000') of an existing Occupied Structure, the Owner or Operator must inform the owner(s) of the Occupied Structure(s), as identified on county assessor tax records, no more than one hundred and eighty (180) days nor less than thirty (30) days prior to construction of a drilling pad or site for Production Facilities, in writing, of the Owner or Operator's name and contact information; its plan to drill a new well(s) and the estimated construction, drilling and completion timeline; the legal location of the well(s), including the Quarter-Quarter, Section, Township, Range and County; the name and API number of the new well(s); and a description of the best management practices and site specific measures the Owner or Operator plans to undertake to mitigate reasonably foreseeable impacts to the owner(s) of Occupied Structure(s). The Owner or Operator must consider noise, light, dust, orientation of the drilling pad, and traffic in developing its plans. The Owner or Operator must also provide for the Supervisor's review, fifteen (15) days prior to construction of a drilling pad or site for Production Facilities, a report which details the actions taken by the Owner or Operator to communicate with the owner(s) of the Occupied Structure(s) and any comments received from the owner(s) of the Occupied Structure. This report must include the best management practices and site specific measures the Owner or Operator will undertake to mitigate reasonably foreseeable impacts. The Supervisor may require other site specific measures to mitigate impacts as well. The Supervisor may waive this requirement for an Owner or Operator if the owner(s) of all Occupied Structures in the zone waive the requirement in writing on a form approved by the WOGCC.

If an Application for Permit to Drill or Deepen a Well is approved for an Owner or Operator for a well located within one thousand feet (1,000') of an existing Occupied Structure(s) within existing corporate limits of an incorporated municipality or within the boundary of an existing platted subdivision, the owner or Operator, in consultation with the Supervisor, must schedule meetings to facilitate necessary information sharing with owners of Occupied Structures in the area. The Owner or Operator must notify the appropriate county commissioners, through the county clerk's office, of any meeting scheduled pursuant to this requirement. The Supervisor may waive this requirement if the owners of all Occupied Structures within the zone waive the requirement in writing on a form approved by the WOGCC.

If development requires an Application for Permit to Drill or Deepen a Well to be filed at an existing well location, the Owner or Operator must comply with all of the above described provisions.

Department of Environmental Quality Update

New DEQ Existing Source Rule for Upper Green River Basin

On May 19, 2015, the Wyoming Department of Environmental Quality (“DEQ”) Environmental Quality Council adopted a new existing source rule for the Upper Green River Basin nonattainment area. The new rule adds a Section 6 to Chapter 8 of the Air Quality Division Standards and Regulations titled "Upper Green River Basin permit by rule for existing sources". The section applies

to all multi-well and single-well oil and gas production facilities or sources, and all compressor stations located in the UGRB ozone nonattainment area that exist as of January 1, 2014. The regulations require compliance with standards regarding flashing emissions, dehydration units, existing pneumatic pumps, and fugitive emissions. The regulation also includes new monitoring, recordkeeping and reporting requirements. A hard compliance date of January 1, 2017 is set forth in the rules.

For a full reading of the amended and new rules discussed above, please visit the Wyoming Secretary of State's website at: http://soswy.state.wy.us/rules/.