

Public Land and Resources Committee Newsletter

Vol. 11 No. 1

August 2014

BIRD TAKES AT WIND ENERGY FACILITIES: LESSONS LEARNED FROM RECENT REGULATORY AND ENFORCEMENT ACTIONS

Raya Treiser

The U.S. wind energy sector has grown exponentially over the past decade. In fact, in just the past five years, the power generated from wind has more than doubled, growing from 25,000 megawatts (MW) at the end of 2008 to more than 61,000 MW at the end of 2013. With this growth have come increasingly vocal concerns about the negative impacts of wind projects on various species of birds, including the iconic bald eagle.

While the estimated number of bird deaths caused by wind projects pales in comparison with that resulting from other man-made causes, such as collision with buildings or automobiles, a number of recent events signal that the wind industry will be subject to growing regulatory scrutiny for its compliance with avian protection laws.

In November 2013, the Department of Justice (DOJ) announced the first criminal enforcement action against a wind energy company under the Migratory Bird Treaty Act, charging Duke Energy Renewables with two Class B misdemeanors for 14 golden eagle mortalities at two of the company's facilities. The U.S. Fish and Wildlife Service (the "Service") is currently investigating 17 additional cases of avian mortalities from wind power facilities, of which seven have been referred to DOJ for potential prosecution. Congress

and the press are also putting pressure on the federal government to enforce avian protection laws against wind energy projects, accusing the Service and DOJ of selectively enforcing avian protection laws only against oil and gas companies.

These developments have very real and significant implications for wind operators and developers. For operational projects, the specter of future criminal enforcement actions comes with a heavy price tag in the millions of dollars and the potential of suspended or curtailed operations. For projects in the planning stages, the ability to raise capital is on the line. In an industry where the initial capital outlay for developing a utility-scale wind project can be in the hundreds of millions of dollars, demonstrating the level of risk of criminal enforcement with a degree of certainty and showing how the proposed project will mitigate this risk are essential to the ability to secure project financing.

The Department of the Interior is taking a number of steps to respond to this reality. The Service developed regulations for eagle take permits in 2009 and, on June 26, 2014, announced the issuance of the first programmatic eagle take permit to the Shiloh IV Wind Project LLC. The Service is also taking steps to improve the eagle take rule, including by redefining its management objective, policies for compensatory mitigation, and criteria for programmatic permits. In addition, the Service has issued two important guidance documents for compliance with avian

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Committee Newsletter
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Jennifer Biever and Ana Gutierrez, Editors

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protection laws at all stages of wind energy development: (1) the voluntary Land-Based Wind Energy Guidelines and (2) the Eagle Conservation Plan Guidance. For wind projects sited on federal lands, the Bureau of Land Management (BLM) also recently issued guidance for working with renewable energy and transmission right-of-way applicants and the Fish and Wildlife Service to ensure compliance with the Bald and Golden Eagle Protection Act (BGEPA) on BLM-managed public lands in California. These regulatory developments raise the bar for demonstrating compliance with avian protection laws, especially in light of the recent increase in public scrutiny.

This article reviews the state of the law for avian takes and provides practical advice for wind project developers and operators who wish to minimize the risk of prosecution and penalties and facilitate compliance with avian protection laws.

I. Overview of Legal Risks: Criminal and Civil Penalties for Avian Takes

The take of certain bird species can give rise to criminal and civil penalties under two statutes: the Migratory Bird Treaty Act (MBTA), which protects over 1,000 species of migratory birds, and the Bald and BGEPA, which affords additional protections for bald and golden eagles. The Service Office of Law Enforcement is responsible for investigating violations of both statutes and, where it deems appropriate, refers cases to DOJ for prosecution. This section provides an overview of the penalties arising under each statute, as well as lessons learned from the federal government's enforcement to date.

1. Migratory Bird Treaty Act

Enacted in 1918, the MBTA imposes both civil and criminal penalties for the take, killing, or possession of any migratory bird or any part, nest, or eggs of such a bird. 16 U.S.C. § 703(a) (1918); 50 C.F.R. § 21.11 (2009). The regulations define "take" under the MBTA as "to pursue, hunt, shoot, wound, kill, trap, capture or collect" or to attempt to do so. 50 C.F.R. at § 10.12. Any corporation found in violation of the

MBTA is subject to Class B misdemeanor charges and a maximum penalty of \$15,000 or twice the gross gain derived from the offense, as well as five years of probation. *See* 18 U.S.C. § 3571(d) (2010); 16 U.S.C. § 703; *see also* Robert S. Anderson and Jill Birchell, *Prosecuting Industrial Takings of Protected Avian Wildlife*, United States Attorney's Bulletin Vol. 59, No. 4 (July 2011) (USA Bulletin) at 68.

Application of the MBTA to Incidental Takes

Given the broad reach of the MBTA and the significant consequences for violators, an important threshold question is whether the MBTA applies to "incidental" takes that occur as a result of, but are not the purpose of, otherwise lawful commercial activities. This is especially important since neither the MBTA nor applicable regulations allow for a permit for incidental takes in the course of regular commercial activities.

Courts are divided on this issue. Some courts have held that the definition of "take" under the MBTA is limited to "physical conduct of the sort engaged in by hunters and poachers" and does not extend to indirect takes from otherwise lawful commercial activities. *See e.g.*, *Seattle Audubon Society (SAS) v. Evans*, 952 F.2d 297, 302–03 (9th Cir. 1991); *see also Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997) (holding that the loss of migratory birds as a result of timber sales did not constitute a "taking" or "killing" within the meaning of the MBTA); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1579, 1583 (S.D. Ind. 1996) ("The MBTA does not apply to other activities that result in unintended deaths of migratory birds.... The better reading of the statute is to find that the prohibitions apply only to activity that is intended to kill or capture birds or to traffic in their bodies or parts."); *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D. N.D. 2012); *Newton County Wildlife Ass'n v. U.S. Dep't of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997) (holding that "take" and "kill" under the MBTA refer to "physical conduct engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.")

Other courts have held defendants liable for avian fatalities even where they were unintentional results of lawful commercial activities. Incidental takes through

such activities as failing to take measures to prevent electrocution of birds on power lines, misapplying pesticides, or dumping toxic wastewater have all been held to violate the MBTA. *See e.g., United States v. Moon Lake Elec. Ass'n*, 45 F.Supp.2d 1070, 1073–74 (D. Colo. 1999) (finding a utility liable for violations under the MBTA where it failed to install inexpensive equipment on its power lines, resulting in the death or injury of 38 MBTA-protected species, including golden eagles; holding that MBTA violation occurs when the take of a protected bird is a probable consequence of an activity, regardless of intent); *see also United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978) (bird deaths caused by misapplication of pesticides constituted a violation of the MBTA). Note that in at least some cases, the rationale for imposing MBTA liability is based on an analogy to strict tort liability arising from dangerous conditions or substances. *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978) (indirect poisoning of birds resulting from wastewater pond contaminated with toxic substances created strict liability and was a violation of the MBTA).

DOJ, which prosecutes offenses under the MBTA, has adopted the latter line of reasoning and concluded that the MBTA “clearly establish[es] federal criminal penalties for the unpermitted take of protected avian wildlife by companies aware of the risk posed to such wildlife by their facilities that fail to adequately ameliorate the risk.” *See* USA Bulletin at 65. In light of this guidance and the substantial legal uncertainty surrounding the scope of “take” under the MBTA, the risk of MBTA enforcement against a wind developer is very real—and this is especially true following the Duke enforcement action.

Enforcement of the MBTA against Wind Energy Companies

Until recently, no wind energy operator had been prosecuted under the MBTA. This changed in 2013 when DOJ brought the first criminal case under the MBTA against a wind energy company, charging Duke Energy Renewables, Inc. (Duke) for the take of 14 golden eagles at the company’s Top of the World and Campbell Hill wind power projects. In November 2013, Duke pled guilty to the charges and was

sentenced to \$1 million in fines and a five-year probation, during which it must implement a Migratory Bird Compliance Plan (MBCP) to minimize or avoid avian mortalities at its four wind facilities, estimated to cost up to an additional \$600,000 per year. The plea agreement also required Duke Energy Renewables to develop an Eagle Conservation Plan and apply for a programmatic eagle take permit.

We can expect to see similar enforcement actions in the future. As noted above, the Service is investigating 17 additional cases of avian mortalities from wind power facilities, of which seven have been referred to DOJ for potential prosecution. *See* Testimony of Dan Ashe, House Committee on Natural Resources (Mar. 26, 2014).

Factors Considered in MBTA Enforcement

Given the broad reach of the MBTA, the Service and DOJ exercise broad discretion in determining whether to enforce the Act and prosecute any particular violation. The Service Office of Law Enforcement considers whether the company has employed best practices to avoid and minimize bird takes and generally refers for prosecution “those takes that occur after the responsible party becomes aware of the condition or practice causing the take and fails to remediate it.” *See* Fish and Wildlife Service Office of Law Enforcement, Chief’s Directive: Enforcement of the Migratory Bird Treaty Act as It Relates to Industry and Agriculture, CD-B53 (Chief’s Directive). For any project after March 23, 2013, the Service considers “a developer’s or operator’s adherence to the Wind Energy Guidelines, including communication with the Service, as appropriate means of identifying reasonable and effective measures to avoid the take of species protected under the MBTA and BGEPA.” *See* U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines at 6.

When the Service refers a case against a corporate entity to DOJ, prosecutors use the Principles of Federal Prosecution of Business Organizations in deciding whether to prosecute and in determining the appropriate extent of the charges and penalties. *See* Letter from Elliott Williams, Deputy Assistant Attorney General, to Doc Hastings, Chairman of the Committee

on Natural Resources (Nov. 22, 2013) (Williams Letter to Hastings). Importantly, DOJ considers the corporation's history of takes and its adoption of meaningful remedial measures to prevent future violations and, based on these factors, may decline criminal prosecution in favor of civil or administrative remedies. *See id.*; *see also* U.S. Attorney's Manual 9-28.600, 9-28.900.

While the standards are still evolving, agency guidance and the recent Duke settlement provide some insight into the factors that the Service and DOJ consider in determining whether to prosecute a bird take from the operations of a wind facility. The following factors would increase the likelihood of federal enforcement of the MBTA:

- multiple takes of several species of protected birds over a long period of time
- failure on the part of the project developer to identify and implement reasonable and effective measures to avoid, minimize, or mitigate the harm to avian species
- evidence that the project developer had notice of the potential for high mortality and/or a recommendation from the Service to select another project site
- evidence that the project developer has ignored, denied, or refused to adhere to best practices for avian protection. (After March 23, 2013, this means failure to follow the Wind Energy Guidelines.)
- evidence of communications from the Service indicating that avian surveys were inadequate to determine how best to site turbines
- failure to take remedial actions to address violations
- evidence that corporate management was complicit in, or condoned, violations
- failure to disclose violations in a timely manner and unwillingness to cooperate in the investigation

Of these factors, perhaps the most important is whether the company can demonstrate a record of compliance with the Land-Based Wind Energy Guidelines and the Eagle Conservation Plan Guidance.

These documents establish a national framework for assessing and mitigating risk to birds from the construction and operation of wind energy facilities. While compliance is voluntary, it is an important factor considered by the Service in determining whether to investigate a take. As provided in the Wind Energy Guidelines,

The Service will regard a developer's or operator's adherence to these Guidelines, including communication with the Service, as appropriate means of identifying and implementing reasonable and effective measures to avoid the take of species protected under the MBTA and BGEPA. The Chief of Law Enforcement or more senior official of the Service will make any decision whether to refer for prosecution any alleged take of such species, and will take such adherence and communication fully into account when exercising discretion with respect to such potential referral.

See Wind Energy Guidelines at 6.

To minimize the risk of prosecution, wind energy developers should not only take steps to comply with these guidance documents and communicate with the Service throughout the course of the project, but they should also build a record documenting such compliance and communication.

Section II below provides additional concrete steps that wind project developers and operators can take to minimize the risk of prosecution or the resulting penalties.

2. Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act (BGEPA) prohibits the take of bald or golden eagles or their nests or eggs, unless allowed by permit. 16 U.S.C. § 668(a); 50 C.F.R. § 22.3 (2012). A "take" is defined broadly to include the pursuit, shooting, poisoning, wounding, killing, capturing, trapping, collecting, molesting, or disturbing of a bald or golden eagle or their nests or eggs. 16 U.S.C. § 668. Actions giving rise to BGEPA liability are not limited to physical injury or death of eagles; the term "disturb" has been defined broadly to include agitating or bothering a bald or

golden eagle to a degree that causes or is likely to cause injury or a decrease in productivity or that results in nest abandonment. 50 C.F.R. § 22.3.

Programmatic Eagle Take Permits

In 2009, the Service finalized regulations for programmatic permits authorizing the limited take of bald and golden eagles that result from otherwise lawful activities. 50 C.F.R. § 22.26. The duration of an eagle take permit was initially limited to five years, far shorter than the typical life of a wind energy project. In an effort to strike a more effective balance between industry's need for certainty and BGEPA's goal of maintaining or increasing the bald and golden eagle population, the Service recently revised its regulations to extend the eagle take permit term to 30 years, effective in January 2014.

The revised eagle permit rule establishes an adaptive management framework that requires "intensive monitoring" of bald and golden eagles at energy facilities with 30-year programmatic take permits and includes the development of advanced conservation practices to reduce eagle disturbances and mortality.

In addition, under the new rule, the Service must evaluate each 30-year permit at five-year intervals. If the Service determines that the authorized level of take is exceeded, or if new scientific information demonstrates that additional mitigation measures are necessary for the preservation of eagles, the Service will amend the 30-year permit. If needed, the Service can revoke the programmatic permit altogether. While intended to strike a balance between conservation and industry interests, this provision re-introduces a considerable degree of uncertainty into the eagle permit process.

Further adding to this uncertainty is a recent lawsuit challenging the validity of the Service decision to extend the permit term to 30 years. On June 16, 2014, the American Bird Conservancy (ABC) filed suit in the Northern District of California, alleging that the Service violated the National Environmental Policy Act (NEPA) by failing to analyze the environmental impacts of the rule change. *See* Complaint for Declaration and Injunctive Relief, *Shearwater v. Ashe* (No. 14-cv-

02830) (2014). In addition, the Complaint claims the Service violated BGEPA and the Administrative Procedure Act because the revised rule subverts BGEPA's eagle protection purpose without adequate explanation. *Id.*

The regulatory framework for eagle take permits continues to evolve. The Service is currently reviewing and revising other aspects of the 2009 rule, including the definition of management objectives for eagle populations, which currently establishes a goal of "stable or increasing breeding populations;" the circumstances, degree, and types of compensatory mitigation to offset impacts to eagles; and the criteria for issuing programmatic permits. *See* Advance Notice of Proposed Rulemaking: Eagle Permits; Revisions to Regulations Governing Take Necessary to Protect Interests in Particular Localities, 77 FR 22278 (Apr. 13, 2012). The Service announced a series of public meetings on June 20, 2014, which will inform the development of an Environmental Impact Statement for the rule revision. A new draft proposed rule is expected in late 2014, with a final rule targeted for late 2015.

Eagle Take Permits for Wind Energy Projects

While wind energy operators are not legally required to obtain an eagle take permit, any take of an eagle in the absence of a permit could expose the company to liability under BGEPA and could result in significant monetary penalties, probation, and even suspension of operations. An initial BGEPA violation by a company is a Class A misdemeanor with a maximum punishment of five years of probation and a \$250,000 fine. 16 U.S.C. § 668(a), modified by 18 U.S.C. § 3571(c)(5) (2011). Subsequent violations are Class E felonies, punishable by five years of probation and a fine of up to \$500,000. 18 U.S.C. § 3571(c)(3). Importantly, multiple counts charged within a single indictment may subject a defendant to the felony penalty enhancement. *See* USA Bulletin at 76, *citing* Deal v. United States, 508 U.S. 129 (1993). In addition to criminal penalties, BGEPA also provides for a maximum civil penalty of \$5,000 per violation. 16 U.S.C. § 668. An eagle take permit could provide a shield against these penalties for

companies that agree to implement measures to avoid, minimize, and mitigate project impacts to eagles.

On June 26, 2014, the Service released the Final Environmental Assessment and Finding of No Significant Impact for the first five-year programmatic eagle take permit, authorizing Shiloh IV Wind Project LLC to take up to five eagles within the permit's five-year term. To mitigate for the project's adverse impacts to eagle populations, the company committed to retrofit 133 power lines within one year to reduce eagle deaths from electrocutions. If actual mortality numbers prove to be higher than estimated, the company will be required to pursue "experimental advanced conservation practices," including the potential installation of audio-visual deterrents.

Additional permit applications are expected in the future. In the past several months, the Service has also published notices of intent to prepare NEPA documents for two other projects. First, on December 4, 2013, the Service published a notice to prepare an environmental impact statement (EIS) for an eagle take permit for the Chokecherry-Sierra Madre wind energy project. *See* 78 Fed. Reg. 72,926 (Dec. 4, 2013). The Service prepared a Final Scoping Report in April 2014 and is currently developing a draft EIS (DEIS). U.S. Fish and Wildlife Service, Final Scoping Report for the Environmental Impact Statement for an Eagle Take Permit for Phase I of the Chokecherry and Sierra Madre Wind Energy Project (Apr. 2014). In addition, on January 1, 2014, the Service published a notice to prepare an Environmental Assessment (EA) for an eagle take permit for the Great Bay Wind Energy project. *See* 79 Fed. Reg. 143 (Jan. 1, 2014). As mentioned above, Duke Energy Renewables is also required to apply for an eagle take permit.

Criteria for Issuing a Programmatic Eagle Take Permit

While FWS practice is still evolving, available guidance and the Shiloh IV DEIS suggest that the Service will consider a number of factors in making its determination whether to issue a programmatic eagle take permit, including whether

- (1) authorizing the incidental take is necessary to protect legitimate interests;

- (2) eagle takes have been avoided and minimized to the degree achievable through implementation of Advanced Compensation Practices (ACPs), and any remaining takes are unavoidable;
- (3) the applicant has developed compensatory mitigation measures for any remaining take; and
- (4) the take is compatible with BGEPA's goal of ensuring stable or increasing breeding populations.

Golden Eagles; Programmatic Take Permit Application; Draft Environmental Assessment; Shiloh IV Wind Project, Solano County, California, 78 Fed. Reg. 59,710 (Sept. 27, 2013).

Under the Eagle Conservation Plan Guidance, which was finalized in April 2013, a wind developer applying for a programmatic eagle take permit is encouraged to develop an Eagle Conservation Plan that addresses data collection and analysis processes for siting, construction, operation, and monitoring of wind energy projects. U.S. Fish and Wildlife Serv., Eagle Conservation Plan Guidance: Module 1 – Land Based Wind Energy, Version 2 at 5 (Apr. 2013). While this is a voluntary measure and not a prerequisite for obtaining an eagle take permit, it may expedite the process of obtaining a permit.

II. Recommendations for Wind Energy Proponents

In light of the new regulations and guidance for compliance with the MBTA and BGEPA, coupled with increased pressure from Congress and the public, it is reasonable to expect that wind developers and operators' efforts to avoid bird takes will be subject to increased scrutiny. This section outlines a number of steps wind developers and operators can take to limit the risk of enforcement.

1. Communicate with the Service Early and Often

Perhaps the most important step a developer can take to reduce the risk of prosecution is to communicate with the Service as early as possible in the project siting and development phase and maintain regular communication throughout the life of the project. Early

communication will help identify high-impact areas that should be avoided in project siting, as well as measures and project design elements to minimize impacts on birds. *See* Wind Energy Guidelines at vii. In addition, ongoing communication with the Service can help develop effective and successful conservation measures, refine the modeling process for predicting fatalities, and develop effective postconstruction monitoring practices.

Not only will this communication help reduce the risk of a take, but a record of the developer's communications with the Service and a demonstrated attempt to take the Service's recommendations into account can reduce the risk of prosecution or the size of a potential take penalty. The Wind Energy Guidelines provide that the Service will consider a developer's documented efforts to communicate with the Service in its decision whether to refer a case for prosecution. *See* Wind Energy Guidelines at vii, 6. In fact, the first step the Service Office of Law Enforcement takes after identifying a take is to determine what contacts the company may have had with the Service and other regulatory entities with regard to the location or activity at issue. *See* Wind Energy Guidelines at vii. In the Duke settlement, the company's failure to incorporate Service recommendations into its project design was one of the factors that led to prosecution. However, the company's prompt and effective communication with the Service following the takes reduced the ultimate penalty.

2. Develop a Record of Adherence to Voluntary Guidelines in Project Siting, Construction, and Operation

In conducting avian studies and monitoring programs and in evaluating project impacts and appropriate avoidance and minimization measures for projects, wind developers should use the 5-tiered approach outlined in the Land-Based Wind Energy Guidelines. Promulgated by the Service in March 2012, these guidelines represent the state-of-the-art best management practices for addressing avian conservation concerns at all stages of wind development.

If the application of the 5-tiered approach suggests that the project is likely to result in eagle takes, developers should follow the measures outlined in the April 2013 Eagle Conservation Plan (ECP) Guidance, which describes specific actions for assessing and mitigating risk to eagles through the development of ECPs and, if appropriate, issuance of programmatic eagle take permits for wind facilities.

Wind developers or operators should maintain internal records to demonstrate adherence with these guidance documents, including records of studies, internal or external review or audit records, bird and bat conservation strategies, as well as relevant communications with the Service.

While a record demonstrating adherence to these voluntary guidelines will not shield a company from enforcement of the MBTA or BGEPA, adherence to the guidelines is one of the key factors that the Service and DOJ consider in evaluating whether to prosecute and in determining the extent of the penalty. The Service focuses its investigation and prosecution efforts on operators that fail to adhere to the Wind Energy Guidelines and the ECP Guidance, and it takes such adherence into account in exercising its discretion with respect to referring cases for prosecution to DOJ. *See* Wind Energy Guidelines, *supra* note 41 at 6. Once a case is referred to DOJ, documented adherence to voluntary guidelines becomes one of the factors DOJ considers in determining whether to prosecute and the extent of the appropriate charge and penalties. Thus, Duke Energy's adherence to the interim wind energy guidelines was a factor that the Service and DOJ considered in evaluating the company's compliance with the MBTA and the resulting penalty.

3. In Coordination with Service, Evaluate the Need to Prepare an Eagle Conservation Plan and Seek Programmatic Eagle Take Permit

Wind operators are not legally required to seek or obtain an eagle permit. However, any eagle take that occurs in the absence of a permit is a violation of BGEPA. Moreover, as discussed above, both the Service and DOJ take into account a company's efforts to adhere to existing guidance to minimize the risk of take in determining whether to prosecute a

particular violation. The recent regulatory reforms and new ECP Guidance have created additional pressure on developers to secure a take permit—although a permit is certainly not necessary in every case.

What does this mean for wind project proponents? If the analysis in Tiers 1 and 2 of the Wind Energy Guidelines indicates that a project is likely to result in eagle takes, the project proponent should conduct additional surveys and modeling according to the ECP Guidance and prepare an Eagle Conservation Plan. The applicant should communicate with the Service in conducting the study and preparing the plan and should obtain written communication from the Service about the adequacy of the studies and Eagle Conservation Plan. The precise requirements will vary by project and by region. For example, some regions require the project proponent to develop a Bird and Bat Conservation Strategy to accompany the Eagle Conservation Plan.

In addition to working with Service to develop adequate studies and conservation plans, wind developers should obtain written communication from the Service about whether an eagle take permit is necessary. Generally, if the Service risk model indicates the project is likely to result in eagle takes, the Service will recommend submitting an application for an eagle take permit. *See* Wind Energy Training Series: The Tiered Approach, Roundtable Responses to Additional Audience Questions (May 22, 2013).

While obtaining an eagle take permit can provide a shield from BGEPA enforcement, a permit is not appropriate in every case and the project proponent should analyze the risk of take versus the costs of obtaining a take permit. As part of this analysis, the project proponent should consider the fact that an eagle take permit does not guarantee complete protection from prosecution under BGEPA. Importantly, the eagle permit regulations do not contain a “no surprises” provision similar to incidental take permits under the Endangered Species Act. Therefore, even after a permit is issued, the operator could be responsible for additional mitigation costs or even suspension of the permit if conditions change or if the project results in more takes than are authorized under the permit.

4. Develop Project Schedules and Budgets That Take into Account Compliance with Avian Protection Laws and Adherence to Applicable Guidance

Wind developers should allow ample time at the beginning phases of project planning to communicate with the Service, accommodate any necessary adjustments, conduct Tier 1 and 2 studies, develop Eagle Conservation Plans or Bird and Bat Conservation Strategies as appropriate, and seek an eagle permit if necessary.

Since the decision to issue a programmatic eagle take permit is a federal action that requires compliance with NEPA, project schedules and budgets should account for the potential need to prepare an EA or an EIS if an eagle take permit is needed. The new guidance provides little instruction on the appropriate level of NEPA analysis for eagle take permits, so the decision whether to prepare an EA (as with the Great Bay Wind Energy Project) or an EIS (as with the Shiloh IV project) is ultimately left up to the field office issuing the take permit.

Project budgets should also account for implementation of advance conservation practices, monitoring, and mitigation measures during construction and once the project becomes operational. Importantly, project developers need to be aware of, and plan for, the possibility that additional mitigation measures may be required later in the project’s life. The revised eagle permit rule establishes an adaptive management framework that requires annual monitoring and a comprehensive assessment of eagle permits by the Service every five years after permit issuance. This leaves the door open for the Service to require additional mitigation measures or even suspend a permit if the level of take exceeds that anticipated in the permit or if new scientific information becomes available. While the rule provides a cost cap for future advance conservation practices, the same does not apply to compensatory mitigation measures. Therefore, project operators could incur substantial additional mitigation costs even after obtaining an eagle take permit.

It is important that these and other costs and associated schedule impacts are considered at the

outset and incorporated in the project budget, schedule, and risk analysis.

5. Facilitate Coordination of Eagle Take Permit Analysis with Other Federal, State, and Local Reviews

Wind project developers on public lands have to comply with additional federal permit and review requirements, such as obtaining a right of way through BLM land or a special use permit for use of National Forest System lands. To avoid schedule delays and litigation, it is essential to coordinate the Service review and other federal agency reviews at the outset.

In cases where an eagle permit is sought in addition to a BLM right-of-way or Forest Service special use permit, the agencies should ideally prepare a joint NEPA document incorporating the analysis needed for both agencies to make a decision on their respective permit applications. The NEPA analysis includes developing a purpose and need statement and range of alternatives that cover each agency's decision and jointly developing required project mitigation. However, the Service has in the past elected to prepare its own separate NEPA document. At the very least, the project proponent should engage the Service as early as possible in the development of the project NEPA analysis, long before formal cooperation is required.

While this coordination is the responsibility of the lead federal NEPA agency, the project proponent can play an important role to facilitate effective coordination by contacting all relevant agencies early in the process, providing dedicated resources for project review through cost-sharing agreements, and communicating regularly to ensure that each stage of project analysis addresses the information needs of all relevant agencies.

In addition to federal agencies, state and local wildlife and land management agencies, as well as American Indians, can have important interests and relevant knowledge. Therefore, early communication with these parties will also help ensure a smooth and coordinated project review process and eliminate unnecessary delays.

III. Conclusion

Migratory birds and bald and golden eagles receive special protection under U.S. laws, subjecting any commercial activity that results in a "take" to significant potential criminal and civil penalties. While federal regulators had not enforced these laws against wind energy projects until very recently, future enforcement appears increasingly likely. From the first criminal enforcement action against a wind company last November, to the spotlight by Congress and the press on federal enforcement of avian protection laws against wind energy companies, wind operators have good reason to be concerned about the potential for increased scrutiny and additional prosecutions.

While enforcement standards are still evolving, recent guidance and the experience from the Duke prosecution offer valuable lessons for how project developers and operators can minimize the risk of prosecution and any resulting penalties. Going forward, comprehensive, documented efforts to comply with avian protection laws will be more important than ever. This includes effective communication with the Service; documented adherence to voluntary guidelines; and project schedules and budgets that accommodate the necessary avian studies, environmental analysis, monitoring, and conservation measures. For projects with potential impacts on eagles, the bar is even higher after the new eagle permit regulations and guidance. Developing an Eagle Conservation Plan in coordination with the Service and, as appropriate, obtaining an eagle take permit can go a long way to ward off potential future criminal enforcement. And for projects sited on federal lands, effective coordination of this additional federal review with project NEPA analysis can help eliminate unnecessary duplication and delays.

Raya Treiser recently joined Hogan Lovells' Environment practice, following appointments at the White House Office of Management and Budget and the Department of the Interior, where she worked on energy and infrastructure policy. Ms. Treiser provides strategic counsel to clients on environmental regulatory, public lands, and land use matters. She may be reached at raya.treiser@hoganlovells.com.

SPLIT ESTATES: A REVIEW OF COMMON ISSUES IN DEVELOPING FEDERAL MINERALS UNDER PRIVATE SURFACE LANDS

Ben Kass

The development of federally owned minerals underlying privately owned surface lands presents complex issues and requires a keen review of overlapping legal requirements, diligent title research, and an understanding of U.S. history. Known as “split estates,” millions of acres of these divided properties exist across the United States, largely in the American West. This article provides a brief overview of the legal and regulatory framework governing the development of “private surface/federal mineral” split estates, the balance of rights and obligations between the two estates, and the way newer drilling technologies fit into this legal landscape.

1. Background

a. What Is A Split Estate?

Under common law, an owner of a parcel of land held title to it from the center of the earth to the sky, including all minerals at or below the surface. *See United States v. Causby*, 328 U.S. 256, 260–61 (1946) (explaining that under the common law “ownership of the land extends to the periphery of the universe”). Deviating from this common law principle, split estates occur where the ownership of the surface and subsurface minerals of a parcel of land are severed, such that each are owned by different parties. Following this severance, the mineral estate is generally the dominant estate; however, as described below, state law and recent federal regulations have shifted the balance of rights and obligations to better favor the surface estate.

b. How Are Split Estates Created?

In general, a split estate is created where the surface and mineral estates are severed by a conveyance of one estate along with a reservation of the other. There are several different types of split estates. This article focuses solely on the split estate situation where the surface estate is privately owned while the subsurface minerals are owned by the federal government.

In the western United States, split estates are common and largely the result of the federal government reserving mineral interests when it conveyed surface ownership to settlers under early homesteading acts, including the Coal Lands Acts of 1909 and 1910, the Agricultural Entry Act of 1914, and the Stock Raising Homestead Act of 1916 (SRHA), among others (the “Federal Homesteading Acts”). *See* 30 U.S.C. §§ 81–85 (reserving coal); 30 U.S.C. §§ 121–123 (reserving oil, gas, and other minerals); 43 U.S.C. §§ 291–301 (reserving coal and other minerals). These acts conveyed land to western homesteaders for nonmineral purposes while reserving certain mineral rights to the United States. Each of the Federal Homestead Acts contains unique terms and conditions and reserved different types of minerals. *Id.*; *see also Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868–870 (1999) (interpreting the specific types of minerals reserved under homesteading acts, determining that the Coal Lands Act reserved coal to the federal government but did not reserve coal bed methane).

c. Why Do Split Estates Matter?

There are approximately 58 million acres of private surface overlying federal minerals in the United States, much of which is located in the West. *See* Mineral and Surface Acreage Managed by the BLM, www.blm.gov/wo/st/en/info/About_BLM/subsurface.print.html (last visited May 29, 2014). The population of the West is growing rapidly and sprawling towards rural areas and federal public lands. New landowners are often unaware that they do not own the minerals under their property and do not understand the respective property rights of mineral and surface owners.

Careful title review and due diligence is important both for the mineral developer and the surface owner. As explained below, the nature and scope of the surface and mineral owners’ rights and obligations can vary dramatically and are determined by the instrument whereby it obtained those rights. Both surface owners and developers of federal minerals should carefully review a property’s title history and conduct thorough diligence to determine whether a split estate exists and what rights and obligations apply.

II. Rights and Obligations of the Mineral Developer and Surface Owner

The long-standing general rule is that the mineral estate dominates over the surface estate, and the mineral estate owner holds an implied right to enter onto the surface property to use and occupy so much of the surface as may be reasonably necessary for all purposes incident to the mining or removal of minerals. *See, e.g.*, 43 U.S.C. § 299; *Holbrook v. Continental Oil Co.*, 278 P.2d 798, 802 (Wy. 1955). Mineral developers have traditionally held an implied right to access, occupy, and even destroy the surface estate, usually without permission from, and only providing limited compensation to, the surface owner. *See, e.g.*, 1-3 Kuntz, *Law of Oil and Gas* § 3.2. Courts have noted that a mineral estate would be “wholly worthless” if the mineral estate owner could not enter upon the surface in order to explore for and extract minerals. *See, e.g.*, *Tarrant Cnty. Water Control & Improvement Dist. No. 1 v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993).

Over the last 40 years, state judicial decisions, state surface owner protection laws, new federal regulations and policies, and enhanced surface use agreements have shifted the relative burdens of the surface and mineral estates to provide greater rights to the surface owner. *See* Charles L. Kaiser and Charles A. Breer, *Legal Issues Presented by Checkerboard, Inholding and Split Estates Lands*, MINERAL DEVELOPMENT & LAND USE 9-1 (Rocky Mt. Min. L. Found. 1995) (noting “[over] the past two decades the traditional mineral owner’s dominance has slowly eroded to the point where the relationship in many states is now one of accommodation, or may even favor the surface owner”).

a. Rights and Obligations Derived from the Federal Homesteading Acts

The Federal Homesteading Acts define the rights and obligations of the surface owner and mineral developer, and these rights and obligations are usually incorporated into the surface owner’s deed and are found within the chain of title. These statutes include similar but distinct provisions requiring notification and

bonding and provide surface owners with a right to compensation for surface damage in some circumstances. For example, the Coal Lands Acts of 1909 and 1910 reserved all coal to the federal government, while providing that the mineral developer must post a bond for damages to crops and improvements. 30 U.S.C. § 85. The SRHA allows mineral developers to occupy the surface to develop coal and other minerals, but only so much of the lands that are necessary for the development of the federal minerals. 43 U.S.C. §§ 291-301; *see also* *Kinney Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505 (1928). The SRHA also requires mineral developers to compensate surface owners for damages to certain limited types of crops and improvements. *Kinney-Coastal Oil Co.*, 277 U.S. at 505 (“if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor.”). The Agricultural Entry Act of 1914 reserved oil, gas, and other minerals, and requires mineral rights holders to post a bond prior to entering the surface estate in order to protect against damage to crops and improvements resulting from prospecting activities. 30 U.S.C. § 122.

Determining the application of each of these provisions depends on which Federal Homesteading Act conveyed the surface into private ownership, thereby severing the two estates, and which minerals were reserved in the severance. Properly determining this information requires a diligent title review possibly dating back a century or more. The rights and obligations of each estate owner are outlined in the deed and derive from the specific Federal Homestead Act that severed the estates and conveyed the surface. It is critical for both the surface owner and the mineral developer to review the property title records to determine which Federal Homesteading Act applies.

b. Oil and Gas Development—BLM Onshore Order No. 1

Updated in 2007, the federal Bureau of Land Management’s (BLM) Onshore Oil and Gas Order No. 1 (Onshore Order No. 1) sets out the requirements for all onshore federal oil and gas leases, including those under private lands. *See* Onshore Oil and Gas Operations; Federal and Indian Oil and Gas

Leases; Onshore Oil and Gas Order Number 1, Approval and Operations; Final Rule, 72 Fed. Reg. 10,308 (Mar. 7, 2007).

Prior to receiving approval to undertake surface disturbing activities, a federal oil and gas lessee must certify that it made a “good faith” effort to (1) notify the surface owner prior to entry; (2) negotiate a surface access agreement with the surface owner; and (3) provide the surface owner with a copy of the lessee’s surface use plan of operations. 72 Fed. Reg. at 10,310. The surface owner may participate in the development of the reclamation plan and participate in onsite inspections and is entitled to the same level of surface protection that the BLM provides on federal surface lands. *See, e.g.,* U.S. Dep’t of Interior, Bureau of Land Management, *Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development: The Gold Book* (4th ed. 2007).

In addition to any requirements in a surface use agreement, the lessee must post a bond for the benefit of the surface owner, to compensate for “reasonable and foreseeable loss of crops and damages to tangible improvements.” 72 Fed. Reg. at 10,336; Bureau of Land Management, *Split Estates: Rights, Responsibilities, and Opportunities* (2007) available at www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/split_estate.html (last visited May 29, 2014).

At the completion of mineral extraction activities, the surface owner may provide input on reclamation activities, but the mineral lessee must complete reclamation to the satisfaction of the BLM (only) and not necessarily to the surface owner’s satisfaction.

c. Coal Development—Surface Mining Control and Reclamation Act

Surface owners on split estates overlying coal deposits enjoy greater protections under the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA). *See* 30 U.S.C. §§ 1201–1328. SMCRA uniquely requires the Secretary of the Interior to obtain consent from the surface owner prior to allowing developers to access and commence surface mining operations. 30 U.S.C. § 1304(c). The Secretary must

seek the owner’s “preference” for or against the offering of the coal deposit under its land for lease and must refrain from leasing lands for surface mining where “a significant number” of surface owners have stated a preference against offering the deposits for lease. *Id.*

d. General State Law Affecting Private Surface/Federal Mineral Split Estates

As mentioned above, the rights and obligations of each estate owner derive from the specific Federal Homesteading Act that severed the estates, and these specific requirements are usually incorporated into the deed and found within the chain of title. Where the deed and title history are ambiguous as to certain rights and obligations, state law fills the gaps and further defines the relationship between the surface owner and mineral developer.

It is also important to recognize that developers of federal minerals are generally subject to both federal and state law restrictions on surface use, despite the federal preemption doctrine. A complete discussion of the application of the federal preemption doctrine to split estate mineral development is beyond the scope of this article; however, the general rule is that state law restrictions on federal mineral development are preempted where the law results in the prohibition of otherwise lawful federal actions. *Compare, e.g., Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff’d without opinion*, 445 U.S. 947 (1980) (state law that prohibits federally sanctioned activities on federal land is preempted), *with California Coastal Commission v. Granite Rock*, 480 U.S. 572, 587 (1987) (local environmental regulation of federal activities not preempted so long as it does not prohibit federal activities). All other state law requirements for surface access are evaluated on a case-by-case basis and may not be preempted, depending on the intent of the law, whether a conflict exists with federal law, and the unique circumstances of the requirement. *Id.*

e. The Reasonable Accommodation Doctrine

State court decisions have softened the general rule of mineral estate dominance, and most states now

recognize that the mineral owner's right to use the surface is not unlimited and must be balanced against a reasonable accommodation of the surface owner's rights. Known as the "reasonable accommodation doctrine," this concept was first articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*, 470 S.W. 2d 618, 621–22 (Tex. 1971). In this case, the Texas Supreme Court held that the surface owner is entitled to an accommodation from the mineral estate but bears the burden to prove that the mineral developer's surface use is unreasonable and that reasonable alternatives exist. *Id.*

Other state courts have furthered this doctrine. The Utah Supreme Court, for example, required a mineral developer to use alternative means to access a property, reasoning that the alternative access was reasonable and to do otherwise would render the surface owner's land unusable for agricultural purposes. *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1979). The Court held that "wherever there exists separate ownerships of interest in the same land, each should have the right to the use and enjoyment of his interest in the property to the highest degree possible, not inconsistent with the rights of the other." *Id.* The court cautioned, however, that the mineral owner is only required to use alternatives that are reasonable and practical under the circumstances. *Id.*

The Colorado Supreme Court has taken this doctrine even further, holding that "when the operations of the lessee or other holder of mineral rights would preclude or impair uses by the surface owner and when reasonable alternatives are available to the lessee, the doctrine of reasonable surface use *requires* the lessee to adopt an alternative means." *Gerrity v. Magness*, 946 P.2d 913, 927 (Colo. 1997) (emphasis added). In Colorado, the reasonable accommodation doctrine is codified in statute. *See* Colo. Rev. Stat. § 34-60-127. In fact, state legislatures have also built on the judicially created accommodation doctrine by passing statutes designed to create greater rights for the surface owner. States with surface owner protection laws includes North Dakota, Oklahoma, Montana, South Dakota, West Virginia, Tennessee, Illinois, Indiana, Kentucky, Wyoming, Colorado, and New Mexico. *See, e.g.,*

Rebecca W. Watson, *State Surface Owner Protection Laws: Tales of Preemption, Federalism, and a Changing West*, Special Inst. on Surface Use for Mineral Development in the New West Chapter 13A, at 13A-17 (Rocky Mtn. Min. L. Found. 2008). These statutes usually require a mineral developer to execute a surface use agreement or post a bond for any damage caused to the surface estate. *Id.* Other common elements include requirements to provide notice and consult with the surface owner prior to commencing operations, requiring negotiations to determine compensation for surface damage, and appraisal and judicial mechanisms for resolving disputes on damage issues. *Id.*

f. Surface Use Agreements

Mineral developers and surface owners will often enter into a contractual agreement to solidify the rights and obligations of both parties without resorting to litigation. As mentioned above, a developer of federal minerals must at least attempt to negotiate a surface use agreement with the surface owner under federal regulations, and a surface use agreement may be required in certain circumstances under various state laws. Surface use agreements benefit the surface owner by allowing for the negotiation of mitigation measures and best practices and setting a fixed amount of compensation for surface damage. Similarly, surface use agreements benefit mineral owners by providing certainty regarding the scope of compensation, access rights, and potential liabilities.

III. Unique Issues Involving Horizontal and Directional Access

In recent years, new drilling technologies have allowed oil and gas operators to unlock minerals that were previously inaccessible or uneconomic to produce. The use of hydraulic fracturing and horizontal and directional drilling now allows mineral developers to use one surface property to access minerals underlying many other surface properties. As discussed above, the owner or lessee of a mineral estate has a legal right to use the overlying surface estate as reasonably necessary to produce the minerals underlying the same surface estate; however, these same rights do not usually extend to allow a mineral owner to occupy the

surface of one tract of land in order to access the minerals underlying another tract of land.

Courts consistently hold that a mineral lessee has absolute right of entry so long as the leasehold boundaries are coterminous with the patent that reserved the right. *See, e.g. Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594, 596 (10th Cir. 1973) (“The authorities clearly hold that a surface owner of a tract of land on which minerals were reserved to the Government when patented . . . may object to surface use of his lands by an oil and gas lessee for operations conducted upon other lands under different ownership.”); *Stone & Wolf, LLC v. Three Forks Ranch Corp.*, 2004 WL 5615898 at *8 (D. Colo. Jan. 8, 2004) (“The plaintiffs do not have the right to cross the defendant’s [fee] surface . . . to access the plaintiffs’ [leased federal] minerals which are subjacent to the surface owned by the United States.”) As the Ninth Circuit wrote, “[i]t is a well established principal of property law that the right to use the surface of land as an incident of ownership of mineral rights in the land, does not carry with it the right to use the surface in aid of mining or drilling operations on other lands.” *Russell v. Texas Co.*, 238 F.2d 636, 642 (9th Cir. 1956); *see also* 1 Williams & Meyers Oil and Gas Law § 218.4 at 220.6 (2012). A surface owner may also sue to enjoin or recover damages for excessive surface use against a mineral lessee who uses the surface owner’s property to develop minerals off lease or off premises. *See, e.g., Mountain Fuel Supply Co.*, 471 F.2d at 596; *Stone & Wolf, LLC*, 2004 WL 5615898 at *8, *supra*.

In the context of pooled oil and gas leases, however, courts have held that a unit operator “has the right to use any surface within the unit for the purpose of efficiently carrying out the approved unit plan, so long as such use is reasonable and not unduly burdensome to any particular surface area.” *Nelson v. Texaco Inc.*, 525 P.2d 1263, 1266 (Okla. Civ. App. 1974).

As such, the issues involved in horizontal or directional development of minerals are often best resolved in a comprehensive surface use agreement. Savvy mineral developers will ensure that the surface use agreement expressly provides for use of the surface to develop

minerals off-premises. This provision offers significant value to the operator because it reduces the risk that the surface owner may assert that surface facilities for horizontal wells that produce off-premises are not reasonable and exceed the use authorized by law or the surface agreement. Similarly, this provision is valuable to the surface owner because it ensures the owner is appropriately compensated if the mineral developer will use its surface to develop off-premises minerals.

IV. Conclusion

The legal framework governing the development of federal minerals underlying private surface lands varies greatly depending on how the split estate was created, applicable state law requirements, and the type of mineral being developed. Surface owners and mineral developers should take care to conduct thorough title review and due diligence to determine whether a split estate exists and what rights and obligations apply.

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HYDRAULIC FRACTURING ON PUBLIC LAND: STATES REGULATE WHILE FEDS CONTEMPLATE

James P. Allen and Denise A. Dragoo

While federal regulators digest a flood of public comments aimed at their second attempt to write rules governing operators who employ hydraulic fracturing to enhance oil and gas production from federal public lands, some states and municipalities are pressing forward with measures aimed at monitoring or even preventing hydraulic fracturing within their jurisdictions. See Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Manual of Oil & Gas Terms 15th ed.* (LexisNexis 2012) (Hydraulic fracturing is “[a] mechanical method of increasing the permeability of rock, and thus increasing the amount of oil or gas produced from it. The method employs [water] pressure to fracture the rock.”). After twice publishing draft rules governing hydraulic fracturing on federal land, the federal government, acting through the Bureau of Land Management (BLM), is now sifting through well over a million comments submitted by the public before finalizing or again revising the rules. Interior Secretary Sally Jewell recently advised a congressional budget committee that a final rule would likely appear before 2015.

Of the western public-land states, California, Colorado, Utah, and Wyoming have adopted statewide regulations affecting hydraulic fracturing. These state regulations broadly affect public disclosure of fracking chemicals and measures to detect and prevent migration of those chemicals into water supplies.

California adopted legislation in 2013 to create what will arguably become the country’s most comprehensive hydraulic fracturing regulatory regime. Any type of well-stimulation will require a second permit (in addition to what is now required of all wells) and more or less full disclosure of the chemical makeup of its hydraulic fracturing fluid. The legislation also calls on California’s Division of Oil, Gas and Geothermal Resources to create a groundwater monitoring program with priority given to sources of drinking water but encompassing all waters that are beneficially used. The California law likely applies to both federal

and state public land and is intended to impose requirements in duplication of or in addition to any federal requirement.

California’s chemical-disclosure statute, when implemented through rulemaking, will provide few opportunities to protect hydraulic fracturing-fluid “recipes” from public disclosure. While the law purports to protect hydraulic fracturing trade secrets from disclosure, it specifically prohibits withholding the names and concentrations of chemical additives in any well-stimulation treatment fluid, even under circumstances where that data would be a trade secret under California’s Public Records Act, Evidence Code, or Uniform Trade Secrets Act. Full implementation of the new requirements will occur in 2015 following preparation of a report on the use and effects on well-stimulation in California.

Wyoming was among the early adopters of fracking regulation, requiring some degree of disclosure for hydraulic fracturing chemicals since 2010. The disclosure rules provided exceptions for trade secrets, however, which operators employed to withhold the names and concentrations of hydraulic fracturing chemicals. In March 2014, the Wyoming Supreme Court revived a public-records lawsuit aimed at compelling disclosure, remanding for the lower court to determine whether the recipes at issue were truly trade secrets warranting protection.

Wyoming followed its disclosure rules in 2013 with groundwater protection rules that the New York Times proclaimed to be among the Nation’s strongest. Wyoming regulators hope the new monitoring rules will repair public confidence following a controversial U.S. Environmental Protection Agency (EPA) draft report purported to trace contaminants in culinary water wells near Pavilion, Wyoming, to hydraulic fracturing activity in the area. Both Wyoming’s disclosure and monitoring rules apply throughout the state on public and private land alike. In 2013, Utah adopted a disclosure rule very similar to Wyoming’s, again applicable to all public and private land within the state’s regulatory power.

Colorado adopted statewide groundwater monitoring in early 2013. The plan calls for collection of pre-drilling baseline data and post-hydraulic fracturing monitoring data from four wells within a half-mile

radius of each wellhead. In the Greater Wattenburg area, currently experiencing an active shale-gas play, however, baseline monitoring can be limited to one well in each quarter-section. The groundwater plan has critics from both sides: operators worry that field development can be frustrated by uncooperative water-well owners who refuse access for sampling, while environmentalists complain that the monitoring-well spacing, especially in the Wattenburg Field, is too sparse to detect water contamination caused by hydraulic fracturing. The regulations apply to both private and public land wherever Colorado can assert jurisdiction.

Four Colorado municipalities attracted national attention in 2013 when they voted to entirely ban hydraulic fracturing within their boundaries for up to five years. In Lafayette, Colorado, the ban purports to prohibit transportation of fracking chemicals, fluids, or wastes through the town by land, sea, or air. The Colorado Oil and Gas Association has initiated litigation targeting the bans as an infringement of state regulatory authority, and the resulting litigation will test the strength of the town's home-rule status under Colorado's constitution.

In addition to these regulatory measures, the Colorado Court of Appeals likely gave a boost to private litigants alleging hydraulic fracturing-related harms when it held in 2013 that so-called "*Lone Pine* orders" were unavailable as a tool to limit discovery. A *Lone Pine* order requires a plaintiff to set forth a prima facie case for liability prior to further discovery. These orders have been a useful tool for defendants in certain mass-tort actions wherein plaintiffs allege widespread but mostly undetected harm, such as groundwater pollution. In the hydraulic fracturing context, a plaintiff would be required to plead more specific facts than that certain harmful chemicals were used, and the bare possibility of contamination exists, before subjecting an operator to extensive discovery of its chemicals, data, and practices. The Colorado Court determined that such orders were not contemplated within Colorado's rules of civil procedure and that a hydraulic fracturing-related suit alleging water contamination could proceed under typical, more liberal, discovery standards. Although BLM is again rethinking its hydraulic fracturing regulations, EPA has announced several regulatory initiatives affecting oil and gas production,

though not specifically aimed at hydraulic fracturing. It has tightened rules relating to emissions of Volatile Organic Carbon compounds (VOCs) in oil and gas production operations at or near the wellhead, including sources on Indian lands. By 2016 the Obama administration expects EPA to expand regulation under the Clean Air Act to include fugitive methane emissions at or near the wellhead. The administration also expects that BLM will tighten its regulations covering venting and flaring of methane from wells on public lands.

In the face of a regulatory agenda that surely threatens to slow the process for permitting oil and gas drilling on public and Indian lands, the Department of the Interior's Inspector General issued a June 26, 2014, report concluding that the BLM's approval process for well drilling, including hydraulically fractured wells, was already unreasonably long. While the Energy Policy Act of 2005 and BLM's own Onshore Order No. 1 require approval of an Application for Permit to Drill (APD) within 30 days of receipt, BLM meets this deadline only 1 percent of the time. BLM reports that, on average, it requires 228 calendar days (seven-and-a-half months) to process an APD to final decision. State governments, on the other hand, report a turnaround time of only 80 days (less than three months). The Inspector General offered a number of suggestions to improve efficiency and speed, and BLM has promised to implement most of these suggestions.

When the federal government eventually promulgates its rules governing many of the same issues as states, most observers will likely view them as an anticlimax to already comprehensive state scheme for permitting and monitoring hydraulic fracturing on public lands.

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