

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

300 EAST 18TH STREET • POST OFFICE BOX 346

CHEYENNE, WYOMING 82003-0346

TELEPHONE: 307/632-5105

TELEFAX: 307/637-3891

WWW.BUDDFALEN.COM

KAREN BUDD-FALEN³

FRANKLIN J. FALEN²

BRANDON L. JENSEN¹

¹ ALSO LICENSED IN CO

² ALSO LICENSED IN NE, SD & ND

³ ALSO LICENSED IN NM & ID

BETHANY A. GROSS⁵

TERESA SLATTERY⁴

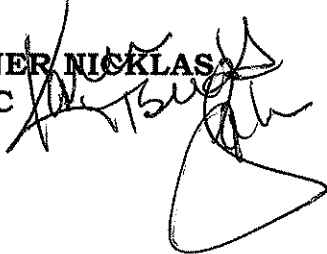
⁵ ALSO LICENSED IN MT

⁴ ONLY LICENSED IN IL

MEMORANDUM

TO: BOWMAN-SLOPE SOIL AND WATER CONSERVATION
DISTRICT LAND USE PLAN STEERING COMMITTEE

VIA: E-MAIL
bowsloscd@ndsupernet.com

FROM: KAREN BUDD-FALEN AND CONNER NICKLAS
BUDD-FALEN LAW OFFICES, LLC 

THROUGH: BRENDA YOUNKIN
Y-2 CONSULTANTS

DATE: SEPTEMBER 12, 2017

RE: NORTH DAKOTA AND FEDERAL REGULATIONS FOR OIL
AND GAS WELL DRILLING

I. FEDERAL REQUIREMENTS FOR OIL AND GAS LEASING

The Bureau of Land Management ("BLM") leases minerals and manages oil and gas development activities on over 570 million acres of BLM and other federal lands, as well as private lands where mineral rights have been retained by the federal government. Likewise, the Forest Service identifies areas on national forest system lands where leases can be sold and will determine the appropriate lease stipulations necessary to protect surface resources.

On federal leaseholds, an operator may not begin operations until it has filed an Application for a Permit to Drill ("APD") with the BLM and received approval from the BLM to commence operations. Concerns and other issues identified in the permit process, or during site examinations, may result in conditions of approval ("COA") on the operator's drilling permit that require, forbid, or control specified activities or disturbances. Examples of COAs include providing for road improvements and erosion control measures, or applying seasonal restrictions on some activities.

BLM regulations that govern BLM's oil and gas drilling approval are found in 43 C.F.R. § 3162.3-1 (entitled "Drilling Applications and Plans"). Each well must be drilled at a surveyed well location approved by the BLM after appropriate environmental and technical review. 43 C.F.R. § 3162.3-1(a). Like the state requirements, a mineral operator must submit an Application for Permit to Drill ("BLM Application") for each well. *Id.* at § 3162.3-1(c). No drilling operations or surface disturbance may be commenced prior to the BLM's approval of the permit. *Id.*

The Application must include: (1) a drilling plan, (2) a surface use plan of operations, and (3) evidence of bond coverage. *Id.* at § 3162.3-1(d). A drilling plan must contain a description of the drilling program, the surface and projected completion zone location, pertinent geologic data, expected hazards and proposed mitigation measures. *Id.* at § 3162.3-1(e). The surface use plan must include road and drillpad locations, details of pad construction, methods for containment and disposal of waste material, and plans for reclamation of the surface. *Id.* at § 3162.3-1(f).

In addition, new (2015) BLM rules on hydraulic fracturing are available in the Federal Register publication Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16128 (March 26, 2015) (to be codified at 43 C.F.R. pt. 3160), effective as of June 24, 2015. Application and approval for hydraulic fracturing operations will require additional information and documentation including wellbore geology, location of nearby faults, estimated depths of usable water and the confining zone, source and location of water supplies, and a proposed "master hydraulic fracturing plan" ("MHFP") as well as a plan for managing and disposing of flowback and produced water. *Id.* at 16218-19 (to be codified at 43 C.F.R. § 3162.3-3(d)). The MHFP may be submitted for one or more wells provided the geologic characteristics of the wells are substantially similar, and must include direction and length of hydraulic fracture propagation, estimated vertical distances to the nearest usable groundwater, and maximum anticipated surface pressure. *Id.* at 16219 (to be codified at 43 C.F.R. § 3162.3-3(d)(5)). Overall, this rule adds to existing requirements by providing information to the BLM and the public on the location, geology, water resources, location of other wells or fracture zones in the area, and fracturing plans for the operation before the well is permitted.

Although the BLM promulgated hydraulic fracturing rules, those rules will likely cease to exist in the near future. A district court in Wyoming

suspended the rule in 2016. *Wyoming v. Department of the Interior*, 136 F.Supp.3d 1317 (D. Wyo. 2016). On March 28, 2017, President Trump issued Executive Order 13783, which directed the Secretary of the Interior to review four specific rules and ensure that each rule promoted clean and safe development of the nation's energy resources, while at the same time avoid regulatory burden.¹ In response, on July 25, 2017, the BLM proposed a rule to entirely rescind the 2015 Rule. *Id.* The new rule will instead only require that an operator submit a proposal to the authorized officer for approval, and the proposal must include a surface use plan of operations. *Id.* Thus, the new rule will scale back the requirements for hydraulic fracturing to requirements similar to other oil and gas operations. *Id.*

Finally, a mineral operator must comply with the National Environmental Policy Act ("NEPA") before initiating any drilling with a federal lease or on federal lands. Under NEPA, federal agencies must assess the effects of major federal actions—those they propose to fund, carry out, or permit—that affect the environment. See 42 U.S.C. § 4332(2)(C). The BLM's approval of drilling a well into the federal minerals is considered a federal action that requires NEPA. BLM Instruction Memorandum No. 2009-078 (February 20, 2009).

II. NORTH DAKOTA REQUIREMENTS FOR OIL AND GAS LEASING

Oil and gas development in North Dakota is governed primarily by statutory provisions set forth in its oil and gas statutes (N.D.C.C. § 38-08-01, *et seq.*) and rules promulgated by the North Dakota Industrial Commission ("Commission") (N.D.A.C. § 43-02-03, *et seq.*). As the state agency charged with promoting exploration, development and conservation of North Dakota's oil and gas resources, the Commission also handles the drilling permit process and ensures industry compliance with state-wide oil and gas statutes and regulations.

Prior to commencement of operations, all persons must submit an application for permit to drill. N.D.A.C. § 43-02-03-16. The application requires that the person identify the longitude and latitude of the proposed well to the nearest tenth of a second, the ground elevation, and the proposed road access

¹ Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 34464-01 (July 25, 2017) (to be codified at 43 C.F.R. § 3160).

to the nearest existing road. *Id.* Other information required in the application include the proposed depth of the well, the proposed pad layout, and the proposed amount of cement to be used on the site. *Id.* For wells permitted on new pads built after July 31, 2013, the Commission may include a condition requiring all flares, tanks, and treaters utilized in connection with the permitted well be located at a greater distance than the well head from a permanent occupied dwelling that is located within one thousand feet. *Id.* The director is also obligated to deny any permit if the proposal would cause, or tend to cause, waste or violate correlative rights. *Id.* Finally, the director of the Commission may request any other information and impose any other conditions the director deems necessary. *Id.*

Also prior to drilling, the North Dakota regulations require that a person submit a surety bond or a cash bond, N.D.A.C. § 43-02-03-15, a comment period for surface owners and interested parties to participate in the application approval process, N.D.A.C. § 43-02-03-16. After the application is granted, the general rules promulgated by the Commission govern drilling rules. These rules include, but are not limited to requirements on blowout prevention, bottom hole location, casing, cementing, flaring, resistivity logs, water protection, and setbacks. N.D.A.C. § 43-02-03-15 through 43-02-03-32.

III. ISSUES FOR BOWMAN-SLOPE LAND USE PLAN

With regard to your land use plan, some policies you may want to consider are:

- A.** Use of access roads for other purposes;
- B.** Economic impacts from oil and gas development; and
- C.** Mitigation issues.

Should you have any questions, please do not hesitate to contact us