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## North Dakota

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## NORTH DAKOTA



*William J. Black\**

### *I. Introduction*

This Article summarizes important developments in North Dakota oil and gas law that occurred between August 1, 2016 and July 31, 2017. Part II deals with legislative and regulatory developments, and Part III addresses common law developments in both State and Federal courts.

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## II. Legislative and Regulatory Developments

### A. State Legislative Developments

The 65th Session of the North Dakota Legislature adjourned on April 27, 2017.<sup>1</sup> Both the House and Senate passed several bills affecting oil and gas law.

Enacted as an amendment to North Dakota Code § 38-08-04.5, House Bill 1347 ensured the continuation of an appropriation to the abandoned oil and gas well plugins and site reclamation fund for an indefinite period.<sup>2</sup>

House Bill 1257 relaxed the threshold requirement for royalty owners seeking to dissolve an oil and gas unit once it stops producing.<sup>3</sup> Previously, a unit could be dissolved by petition to the North Dakota Industrial Commission from owners of at least 80% of the production from the unit. The amended law allows a petition to dissolve a unit to be filed by any person whose royalty interest is large enough that they were required to ratify the unit agreement when it was initially approved by the Commission.<sup>4</sup>

House Bill 1409 requires mineral developers to inventory water wells located within one-half mile of subsurface mineral exploration activities, “if such exploration activities appear reasonably likely to encounter ground water,” or within one mile of a subsurface production site, and to test each affected water well or water supply within one year prior to commencing subsurface production operations.<sup>5</sup> The results of the required water tests must be reported to the Department of Health, which will store the results.<sup>6</sup> HB 1409 gives potential plaintiffs an avenue for relief by stating that prima facie evidence for damages can be proven if a producer does not perform a required water test prior to production.<sup>7</sup>

House Bill 1151 requires well site operators to disclose on-site spills and leaks to the North Dakota Industrial Commission when the leak or spill accumulates to more than ten barrels of oil over a fifteen-day period, remains on the site, and occurred after September, 2000.<sup>8</sup>

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1. *65th Legislative Assembly*, N.D. LEG. (June 6, 2017 9:21 AM), <http://www.legis.nd.gov/assembly/65-2017>.

2. N.D. CENT. CODE § 38-08-04.5 (West 2017).

3. *Id.* § 38-08-09.4.

4. *Id.*

5. *Id.* § 38-11.2-07.1-2.

6. *Id.*

7. *Id.* § 38-11.2-07.5.

8. *Id.* § 38-08-04.2.

Senate Bill 2286 concerns guidelines for the siting of energy conversion transmission facilities.<sup>9</sup> The Bill adds a definition in the statute for the term “road use agreement,” which it defines as “permits required for extraordinary road use, road access points, approach or road crossings, public right of way setbacks, building rules, physical addressing, dust control measures, or road maintenance and any repair mitigation plans.”<sup>10</sup> Additionally, SB 2286 requires that the Industrial Commission cooperate with and exchange technical information related to the siting of conversion facilities with any directly impacted political subdivisions. The Bill requires the Commission to notify those individuals prospectively affected by the facility and host a public forum no sooner than forty-five days from the date of an application for a certificate for a gas or liquid transmission facility.<sup>11</sup>

SB 2333 was passed as an addition to Chapter 38-08 of the North Dakota Code, as it relates to land reclamation, and requires that any land disturbed by an oil and gas site be reclaimed “as close as practicable” to the original condition.<sup>12</sup> The reclamation requirement can be waived only with the written, recorded consent of the government land manager or surface owner of the property.<sup>13</sup>

### *B. State Regulatory Developments*

The oil and gas industry of North Dakota is managed by the North Dakota Industrial Commission (“NDIC”). In October of 2016, the NDIC released a supplement to the Administrative Code that includes regulation of saltwater handling facilities, portable holding tanks, underground gathering pipelines, and other site construction related information.<sup>14</sup>

Every well that is drilled in North Dakota must be backed by a surety or cash bond.<sup>15</sup> While bond requirements only previously applied to treatment plants and wells, the NDIC now requires bond collateral for saltwater handling facilities and crude oil and produced water underground gathering pipelines.<sup>16</sup> The newly-added sections to the Administrative Code also

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9. *Id.* § 49.22.03.

10. *Id.* § 49-22-03.10.

11. *Id.* §§ 49-12-14.1; 49-22-16.2(c)-(d).

12. *Id.* § 38-08-04.12.

13. *Id.*

14. *Supplement 362*, N.D. INDUS. COMM’N (June 6, 2017, 2:23 PM), <http://www.legis.nd.gov/admcode/arc201610362.pdf>.

15. N.D. ADMIN. CODE 43-02-03-15-1 (West 2017).

16. *Id.* § 43-02-03-15-(7)-(8).

contain additional requirements for reporting multiple pipelines or facilities under the same bond.<sup>17</sup>

The NDIC has modified its stance on open receptacles for waste. Although open receptacles are still prohibited for waste products, the NDIC director now has discretion to permit portable collapsible receptacles used “solely for the storage of fluids used in completion and well servicing operations.”<sup>18</sup> Permits for portable receptacles are valid for one year with the possibility of renewal, and permit holders must display signs on all sides of such containers that clearly identify the fluids inside and are visible to vehicular traffic.<sup>19</sup>

The biggest change to the Administrative Code is a full repeal and replacement of code section 43-02-03-29, which pertains to underground gathering pipelines.<sup>20</sup> The new regulations require underground gathering pipeline owners to disclose the pipeline’s location, the proposed start date for construction, and the types of fluids to be transported.<sup>21</sup> The revised regulation contains a new section of definitions and new requirements for pipeline inspection.<sup>22</sup> Additionally, the new section adds provisions for spills, corrosion control, leak protection and detection, and monitoring.<sup>23</sup> The law mandates the creation of disaster response plans and requires pipeline companies to report to the Industrial Commission the results of all tests and inspections.<sup>24</sup>

The revised law also contains a new section on the construction of saltwater handling facilities, which gives guidance on how facilities should be built and outlines how to properly abandon or reclaim a facility.<sup>25</sup>

### *III. Judicial Developments*

#### *A. North Dakota Supreme Court Cases*

##### *Environmental Driven Solutions, LLC v. Dunn County*

In March 2017 the Supreme Court of North Dakota ruled on a zoning preemption issue regarding a proposed waste oil treatment plant in Dunn

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17. *Id.* § 43-02-03-15-8(a).

18. *Id.* § 43-02-03-19.3.

19. *Id.*

20. *See supra* note 14, at 151.

21. N.D. ADMIN. CODE § 43-02-03-29.1(3)-(4) (West 2017).

22. *Id.* § 43-02-03-29.1(2), (6).

23. *Id.* § 43-02-03-29.1(4)-(6), (10)-(15).

24. *Id.* § 43-02-03-29.1(11)-(13).

25. *Id.*

County, North Dakota.<sup>26</sup> In *Environmental Driven Solutions, LLC v. Dunn County*, the North Dakota Industrial Commission gave Environmental Driven Solutions, LLC (“EDS”) a permit to construct a waste oil treatment plant in Dunn County.<sup>27</sup> Because the construction site was zoned “Rural Preservation,” county officials determined that a treatment plant did not constitute an “allowed use” of the land.<sup>28</sup> EDS disputed this, contending that the Industrial Commission’s permit—not local zoning ordinances—should control whether or not it could construct its facility.<sup>29</sup> The district court held, and the Supreme Court affirmed, that the state legislature granted the Industrial Commission the right to assign zones for oil and gas as it saw fit, and thus its grant of a permit preempted the county’s zoning laws.<sup>30</sup>

*Maragos v. Newfield Prod. Co.*

In an appeal from a McKenzie County District Court’s grant of summary judgment, the Supreme Court considered whether a production company was properly joined as a party to a suit brought by a Trust claiming a royalty interest in a property on which the company, Newfield, operated four oil and gas wells.<sup>31</sup> The Trustees sued Newfield, arguing that the Trust owned a fractional royalty interest in the property and therefore was entitled to royalties.<sup>32</sup> Relying solely on its division order-title opinion, Newfield asserted that the Trust had no interest in the property and moved for summary judgment, stating that it was not a proper party to the suit because it had no competing claim to the royalties at issue.<sup>33</sup> The District Court agreed and granted Newfield’s motion for summary judgment, explaining that the Trust’s claim was really a title action and that other competing royalty owners were the proper parties to be joined.<sup>34</sup>

The Supreme Court disagreed.<sup>35</sup> It found that the District Court had misapplied *Acoma Oil Corp. v. Wilson*,<sup>36</sup> in which the Court previously

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26. *See* *Envtl. Driven Sols., LLC v. Dunn Cty.*, 890 N.W.2d 841 (N.D. 2017).

27. *Id.* at 843.

28. *Id.*

29. *Id.*

30. *Id.* at 845.

31. *Maragos v. Newfield Prod. Co.*, No. 20160441, 2017 WL 3223751 (N.D. July 31, 2017).

32. *Id.* at \*1.

33. *Id.* at \*2.

34. *Id.*

35. *Id.*

36. 471 N.W.2d 476, 485 (N.D. 1991).

found that a party who had executed a division order with an oil and gas company could not later recover from the company, while a party who had not executed such a division order could seek redress from the company for underpayments.<sup>37</sup> Because the Trust had not executed a division order with Newfield, the Court found that Newfield was properly joined in the suit since it would need to tender the underpayments in the event the Trust's royalty interest was confirmed.<sup>38</sup> Noting that Newfield provided only a copy of its division order to the District Court and no other documentation to support its claim that the Trust's interest was invalid, the Court reversed and remanded to allow the District Court to rule on the validity of the Trust's claim.<sup>39</sup>

*B. Federal Courts*

No federal court cases were decided between August 1, 2016 and July 31, 2017 that shape or alter existing North Dakota oil and gas law.

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37. *Id.* at 485.

38. *Id.* at 486.

39. *Id.*