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A Regulating and Watchful Law: Oil and Gas Conservation Law & the North Dakota Industrial Commission

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A REGULATING AND WATCHFUL LAW: OIL AND GAS CONSERVATION LAW & THE NORTH DAKOTA INDUSTRIAL COMMISSION

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The Oil and Gas Industry is a composite of production, transportation, refining and marketing operations. Of these four independent and interrelated operations, production—the searching for and the producing of oil and gas—is, when left unfettered, the most susceptible to wasteful practices and blustering confusion. For these reasons the production of oil and gas has not been left unfettered; it has been tied to a regulating and watchful law, the oil and gas conservation law of the several states.[1]

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1. Barth P. "Jiggs" Walker, *Discussion: A Model Oil and Gas Conservation Law*, 26 TUL. L. REV. 267 (1952). For more on Walker's life and legacy, including his 2001 receipt of the University of Oklahoma College of Law's Eugene O. Kuntz Award, *see Barth P. "Jiggs" Walker*, THE OKLAHOMAN (Jan. 2, 2006), https://legacy.newsok.com/obituaries/oklahoman/obituary.aspx?n=barth-p-walker-jiggs&pid=16200273&f hid=.

Introduction

Although the oil and gas industry that esteemed Oklahoma City oil and gas attorney Barth P. Walker knew and loved has changed dramatically in the more than fifty years since he penned the above paragraph, the same watchful regulatory law—the oil and gas conservation law of the several states—continues to govern production of oil and gas to a large extent. This Article aims to become a resource for scholars and practitioners interested in the history and application of oil and gas conservation law, especially in the State of North Dakota, one of today's most prolific oil and gas producing states.[2] Part I provides a cursory review of the history of oil and gas conservation law and the basic principles on which oil and gas conservation law stands. Part II takes a meticulous look at the North Dakota Industrial Commission ("NDIC"), the primary oil and gas regulatory body to which the State of North Dakota's Oil and Gas Conservation Act gave birth. In Part III, rubber meets road, and the Article analyzes three areas of North Dakota oil and gas law before explaining how an appraisal of likely impacts on waste prevention and correlative rights by the regulators, legislators, and judges involved in the process might generate different—and perhaps better—outcomes.

I. Oil and Gas Conservation Law & the Foundational Principles on Which It Stands

A. The Rule of Capture & Its Consequences

"The evolution of [oil and gas] conservation laws," writes Walker, "is a story unto itself."[3] This story has been told many times, but it deserves to be told again. It dates from the time of the Oklahoma Land Run[4] and begins with the oft-cited case of *Westmoreland & Cambria Natural Gas Co. v. DeWitt*.[5] In that case, the Pennsylvania Supreme Court announced the so-called rule of capture, which would be followed and adopted by many courts, eventually becoming "universally recognized as the fundamental basis for the adjudication of property rights in oil and gas."[6] The *DeWitt* court's language is familiar to all students of oil and gas law:

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2. *E.g.*, *Rankings: Crude Oil Production*, U.S. ENERGY INFO. ADMIN. (Apr. 2019), https:// www.eia.gov/state/rankings/#/series/46 (last accessed July 18, 2019).

3. Walker, *supra* note 1, at 267.

4. *See, e.g.*, KATHLYN BALDWIN, THE 89ERS: OKLAHOMA LAND RUSH OF 1889 (1981).

5. 18 A. 724 (Pa. 1889).

6. Barth P. Walker, *Recent Developments in Pooling and Unitization*, 6 INST. ON OIL & GAS L. & TAX'N 47, 48 (1955). Despite the *DeWitt* court holding's important place in the

> Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner . . . . They belong to the owner of the land and are part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone.[7]

Not long after the Pennsylvania Supreme Court's announcement in *DeWitt*, the Supreme Court of Ohio solidified the rule of capture in a case involving a landowner's attempt to enjoin the drilling of a well on his neighbor's land, just across his property line. The Supreme Court of Ohio refused to enjoin the drilling of the well, remarking:

> While it is generally supposed that oil is drained into wells for a distance of several hundred feet, this matter is somewhat uncertain, and no right of sufficient weight can be founded upon such uncertain supposition, to overcome the well[-]known right which every man has to use his property as he pleases, so long as he does not interfere with the legal rights of others. Protection of lines or adjoining lands by the drilling of wells on both sides of such lines affords an ample and sufficient remedy for the supposed grievances complained of in the petition . . . .[8]

The rule, or law, of capture remains in force today,[9] but various legal devices have been developed in order to counteract the rule's detrimental consequences, like the wasteful practices associated with racing to get oil

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history of oil and gas law, "[t]hat case cast one of the beginning links in the chain of legal precedents on which waste practitioners were nurtured." Walker, *supra* note 1, at 271.

7. *DeWitt*, 18 A. at 725.

8. Kelley v. Ohio Oil Co., 49 N.E. 399, 401 (Ohio 1897).

9. *E.g.*, Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008) ("The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation."); Atlantic Richfield Co. v. Tomlinson, 859 P.2d 1088, 1096 (Okla. 1993) ("The law of capture, under which oil and gas is owned by the one lawfully reducing it to possession, still obtains in Oklahoma.") (internal citation omitted); Halbouty v. R.R. Comm'n, 357 S.W.2d 364, 375 (Tex. 1962), cert. denied, 371 U.S. 888 (1962) ("[T]he rule of capture can mean little more than that due to their fugitive nature, the hydrocarbons when captured belong to the owner of the well to which they flowed, irrespective of where they may have been in place originally, without liability to his neighbor for drainage.").

and gas out of the ground. "The ultimate in such legal devices," writes Walker, "is the modern oil and gas conservation law which . . . seek[s] to prevent wasteful production of oil and gas and to protect the correlative rights of the various interested owners."[10] The *prevention of waste* and the *protection of the correlative rights* of owners of mineral interests in a common source of supply still stand at the center of state regulatory regimes, including North Dakota's.[11] To accomplish these twin goals, most state conservation law "provid[es] for, among other things, the establishing of drilling and spacing units, the proration of oil and gas production, and the operation of the entire oil and gas common sources of supply as a unit."[12]

B. Oil and Gas "Conservation" Law & the Creation of the Interstate Oil Compact Commission

Before diving headfirst into the details of oil and gas conservation law, it is worth noting what is meant by conservation in the context of the oil and gas industry. Modernly, the notion of "conservation"—at least in most contexts—connotes efforts to protect or prevent the loss of something, like a wildlife population. Even popular dictionaries, like *Merriam-Webster's*, defines "conservation" as a transitive verb meaning "to keep in a safe or sound state."[13] In this case, neither the connotative nor the denotative meanings of conservation are helpful because something else is meant. In the context of the oil and gas industry, "*conservation is not saving by withholding from use, but is rather, under certain methods and in certain manners, production for use*."[14] So while the goal of oil and gas conservation law is conservation, it is not the kind of conservation groups

10. Walker, *supra* note 6, at 49.

11. *E.g.*, Marathon Oil Co. v. Corp. Comm'n, 910 P.2d 966, 970 (Okla. 1994) (explaining that the Oklahoma Corporation Commission's jurisdiction empowers it to protect "public rights," including the prevention of waste and the protection of correlative rights). *See also* N.D. CENT. CODE § 38-08-01; *Slawson v. NDIC*, 339 N.W.2d 772 (N.D. 1983) ("The purposes of pooling are to prevent the physical and economic waste that accompany the drilling of unnecessary wells and to protect the correlative rights of landowners over a reservoir.") (internal citation omitted).

12. Walker, *supra* note 1, at 270.

13. *Conservation*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/conserve (last accessed July 19, 2019).

14. Walker, *supra* note 1, at 270 (emphasis added).

fighting to protect or prevent the loss of something, like a wildlife population, have in view.[15]

It was against the backdrop of this understanding of "conservation" that oil and gas conservation law, and the corresponding state regulatory bodies, first emerged. In particular, oil and gas conservation law, and the corresponding state regulatory bodies, emerged in response to the detrimental consequences of the rule of capture as explained in *DeWitt* and *Kelley*, like the wasteful practices associated with racing to get oil and gas out of the ground. In 1935, U.S. Congress got involved "in order constitutionally to pave the way so that the states cooperatively could help solve their separate problems in respect to oil and gas production."[16] Congress paved the way by passing a resolution that eventually led to the creation of the Interstate Oil Compact Commission ("IOCC"),[17] whose Legal Committee began drafting model oil and gas conservation provisions not long after the IOCC's creation.[18] Many oil and gas producing states' conservation laws, including North Dakota's, have their roots in the IOCC's 1950 Model Act,[19] so it is to that Model Act—and the principles that undergird it—that this Article now turns.

The IOCC's 1950 Model Act opened with a policy declaration that set forth the ends the Model Act sought to obtain. Although the policy declaration is long and rather technical, it appears below in full, primarily because its importance in shaping the oil and gas conservation law of the several states, including North Dakota's, *cannot be overstated*. After all, the IOCC declaration appears, in full or in part, in at least twenty-five (25) oil

15. *E.g.*, *Wildlife Conservation*, WORLD WILDLIFE FOUND., https://www.worldwildlife.org/initiatives/wildlife-conservation (last accessed July 19, 2019). *But see* David E. Pierce, *Minimizing the Environmental Impact of Oil and Gas Development by Maximizing Production Conservation*, 85 N.D. L. REV. 759, 764 n.18 (2009) ("Even the term 'conservation' regulation has a somewhat checkered past. The term 'conservation' was chosen because it sounds much better than state-sanctioned 'price-fixing.'").

16. Walker, *supra* note 1, at 267.

17. *See State Oil and Gas Regulations Designed to Protect Water Resources*, U.S. DEP'T OF ENERGY (May 2009), https://www.energyindepth.org/wp-content/uploads/2009/03/oil-and-gas-regulation-report-final-with-cover-5-27-20091.pdf ("In 1991, the organization changed its name to the Interstate Oil and Gas Compact Commission (IOGCC).").

18. Walker, *supra* note 1, at 268.

19. Kemp Wilson, *Conservation Acts and Correlative Rights: Has the Pendulum Swung Too Far?*, 35 ROCKY MTN. MIN. L. INST. 18 (1989).

and gas producing states' conservation statutes.[20] Moreover, the Model Act's policy declaration really brings to life the oil and gas industry's notion of conservation—that conservation is not so much about saving by withholding from use but rather production for use:

> It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will *prevent waste*; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that *the correlative rights of all owners be fully protected*; and to encourage, to authorize, and to provide for cycling, re-cycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the land owners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.[21]

C. Preventing Waste & Protecting Correlative Rights

Oil and gas, despite the ostensible rising tide of controversy surrounding them,[22] remain critical to our civilization.[23] This reality, in conjunction with the fact that oil and gas do not reproduce themselves, means "these valuable resources must be conserved."[24] Once again, however, conserving oil and gas does not mean *withholding from use*; instead, conserving oil and gas means *production for use* in accordance with the principles enumerated in

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20. *E.g.*, ARIZ. REV. STAT. ANN. § 27-502; ARK. CODE ANN. § 15-72-101; CAL. REV. STAT. ANN. § 34-60-102; MISS. CODE ANN. § 53-1-1; OKLA. STAT. ANN. tit. 52, § 87.7; W. VA. CODE ANN. § 22C-9-1.

21. *A Form for an Oil and Gas Conservation Statute*, INTERSTATE OIL COMPACT COMM'N (May 5, 1950), *in* Walker, *supra* note 1, at 270 (emphases original). This paragraph appears almost *verbatim* at the outset of North Dakota's oil and gas conservation law. *See* N.D. CENT. CODE § 38-08-01.

22. *E.g.*, Marco Grasso, *Oily Politics: A Critical Assessment of the Oil and Gas Industry's Contribution to Climate Change*, 50 ENERGY RES. & SOC. SCI. 106 (Apr. 2019); Christina Nunez, *How Has Fracking Changed Our Future?*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/environment/energy/great-energy-challenge/big-energy-question/how-has-fracking-changed-our-future/ (last accessed July 19, 2019).

23. *E.g.*, *What is U.S. Electricity Generation by Energy Source*, U.S. ENERGY INFO. ADMIN. (Mar. 1, 2019), https://www.eia.gov/tools/faqs/faq.php?id=427&t=3.

24. Walker, *supra* note 1, at 269.

the IOCC's declaration of policy. Chief among the principles from which states were encouraged to draw in the establishment of a regulatory framework for the responsible and efficient production of oil and gas, declared the IOCC, were (1) the prevention of waste and (2) the protection of the correlative rights of owners.

An unabated race to get oil and gas out of the ground, the natural byproduct of the rule of capture, led to overproduction and needless waste.[25] In time, "those who had been destroyed or threatened with destruction by wasteful production practices" began wondering whether there was a way to promote conservation and protect landowners' property rights simultaneously.[26] Turns out, there was: an unabashed commitment to production for use. "[P]roduction for use," argues Walker, "is the very antithesis of waste,"[27] which explains why by the late nineteenth century states began enacting laws aimed at the prevention of waste and wasteful production. Early on, state conservation laws were written so as to prevent just one kind of waste: above ground. Such a limited approach to waste prevention became the industry standard, however, because "all of the waste that was known actually to be occurring was physical and visible."[28] This limited understanding led states to pass statutes designed to "prevent fires, escape of oil and gas from the well, wasteful burning of oil and gas, and improper plugging of wells."[29]

By the early twentieth century, significant improvements in the understanding of petroleum engineering and underground reservoir conditions contributed to the emergence of a multi-faceted approach to waste prevention. The State of Oklahoma, which was in the vanguard of oil and gas conservation law—and often still is—acted first. By 1915, Oklahoma lawmakers had provided legislatively for the prevention not just of above-ground waste but also economic, underground, and surface waste, as well as "waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market

25. *E.g., id.* at 278–79 ("Over-production—production in excess of transportation or marketing facilities, necessitating expensive storage, or in excess of reasonable market demand—once threatened to destroy the very existence of the oil and gas industry."); Sidney J. Strong, *Application of the Doctrine of Correlative Rights by the State Conservation Agency in the Absence of Express Statutory Authorization*, 28 MONT. L. REV. 205, 208 (1967) ("[U]nfettered competition had no place for prudent means of production.").

26. Walker, *supra* note 1, at 271.

27. *Id.* at 270.

28. *Id.* at 272.

29. *Id.*

demand."[30] The IOCC's 1950 Model Act mirrored Oklahoma law in that it provided for a multi-faceted approach to waste prevention that began with, and subsequently built upon, the foundation which Oklahoma had laid thirty-five (35) years before. Other oil and gas producing states, including North Dakota, adopted many of the Model Act's provisions, but they "tinkered in varying degrees with both concepts and specific provisions."[31]

The oil and gas industry's understanding of petroleum engineering and underground reservoir conditions has vastly improved during the more than one hundred and fifty (150) year history of the industry. This improvement in understanding is largely attributable to the role of technology, which has—and continues—to drive the U.S. oil and gas industry forward.[32] New technologies have been deployed throughout the industry, in its upstream, midstream, and downstream sectors; however, perhaps no sector of the industry has been more effected by technological advancement than the upstream sector, which for years was hamstrung by scientific and technological limitations.[33]

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30. *Id.*

31. Wilson, *supra* note 18, no page. *See* discussion *infra* Parts II and III for more on North Dakota's oil and gas conservation law and its creation, interpretation, and application.

32. *E.g.*, *New Oil and Gas Production Technologies*, STRAUSS CTR., UNIV. OF TEX. AT AUSTIN, https://www.strausscenter.org/energy-and-security/new-oil-and-gas-production-technologies.html ("New technologies in the oil and natural gas sectors have enabled the explosion of production growth in the United States.") (last accessed July 22, 2019); David Blackmon, *Technology Is a Huge Driver of the U.S. Oil and Gas Boom*, FORBES (Mar. 25, 2019), https://www.forbes.com/sites/davidblackmon/2019/03/25/technology-is-a-huge-driver-of-the-u-s-oil-and-gas-boom/#10b77fc5ac5d ("The value of the role increasingly being played by the deployment of high technology in [the oil and gas] industry cannot be overstated.") (last accessed July 19, 2019).

33. Hindsight has revealed that scientific and technological limitations contributed to the fascination with geologist M. King Hubbert's predictions about "Peak Oil." Although Hubbert's predictions were relatively accurate regarding conventional oil reserves, he did not foresee the impacts of hydraulic fracturing and horizontal drilling, both of which are byproducts of scientific and technological innovation that have changed everything. *See, e.g.*, Michael Lynch, *What Ever Happened to Peak Oil*?, FORBES (June 29, 2018), https://www.forbes.com/sites/michaellynch/2018/06/29/what-ever-happened-to-peak-oil/#63800560731a ("The oil industry has always been in a tug-of-war between depletion and knowledge. It takes endless effort and investment to renew and expand reserves. But resource limits are a phantom . . . . Repeatedly, the forecasts are revised with a higher and later peak . . . . These estimates of declining reserves and production are incurably wrong because they treat as a quantity what is really a dynamic process driven by growing knowledge.") (internal citation omitted) (last accessed July 19, 2019); James Conca, *No Peak Oil for America or the World*, FORBES (Mar. 2, 2017), https://www.forbes.com/sites/jamesconca/2017/03/02/no-peak-oil-for-america-or-the-world/#6cb866d24220 ("Oil is

"[W]ells," as Walker put it so long ago, "man's contribution to the production enterprise, must be located, spaced, drilled, equipped, operated, and produced so as to take full advantage of the *natural* conditions encountered in the reservoir and of the reservoir fluids contained therein."[34] While man's contribution to the production enterprise necessarily must account for the natural conditions encountered in the reservoir and of the reservoir fluids contained therein, "the deployment of a raft of advancing technologies"[35] has enabled upstream companies to maximize recoveries once never dreamed of—*despite* the natural conditions encountered in the reservoir and of the reservoir fluids contained therein.[36] So while the establishing of drilling and spacing units, proration, and the operation of entire oil and gas common sources of supply as a unit remain indispensable parts of state conservation law and the regulatory frameworks to which they gave birth, technology has changed the game. State legislatures and regulatory bodies are still tasked with the prevention of waste, but doing so in today's marketplace means accounting for a host of complexities not contemplated by the IOCC's Model Act.[37]

The IOCC's Model Act sought to do more than simply provide states with a set of model provisions for the prevention of waste from which they could pick and choose; it also sought to provide states with "a better rule than self-help" for the protection of property rights."[38] This "better rule" is

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more plentiful than you can imagine. And we keep figuring out easier and more economical ways to get it out of the ground."); Monika U. Ehrman, *Lights Out in the Bakken: A Review and Analysis of Flaring Regulation and Its Potential Effect on North Dakota Shale Oil Production*, 117 W. VA. L. REV. 549, 550 (2014) ("The prolific escalation of activity in the Bakken is due to the relatively recent technological combination of horizontal drilling and hydraulic fracturing . . . ."); Larry Hughes & Jacinda Rudolph, *Future World Oil Production: Growth, Plateau, or Peak?*, 3 CURRENT OP. ENVT'L SUSTAIN. 225 (2011).

34. Walker, *supra* note 1, at 276 (emphasis added).

35. Blackmon, *supra* note 32.

36. *See, e.g.*, Carl T. Montgomery & Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, 62 J. PETROLEUM TECH. 26, 27 (2010) ("Since Stanolind Oil introduced hydraulic fracturing in 1949, close to 2.5 million fracture treatments have been performed worldwide. Some believe that approximately 60% of all wells drilled today are fractured. Fracture stimulation not only increases the production rate, but is credited with adding to reserves—9 bbl of oil and more than 700 Tscf of gas . . . which otherwise would have been uneconomical to develop.").

37. Scientific and technological advancement have contributed to the need for change at state legislatures and regulatory bodies, but a deep dive into that issue is beyond the scope of this Article—although it deserves to be explored elsewhere.

38. Walker, *supra* note 1, at 279. *See also* Barnard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907) (discussing the classic statement of the self-help rule, where an

the doctrine of correlative rights, which is part and parcel of the larger legislative and regulatory framework of conservation law, especially the parts dealing with the establishing of drilling and spacing units. Drilling and spacing units serve *three* primary purposes: they (1) prevent waste; (2) prevent the drilling of a greater number of wells than is necessary, which can impact the ultimate recovery from a reservoir, and (3) protect correlative rights.

Although the Model Act does not explicitly explain what a necessary or unnecessary well is, "it does require that 'the size and the shape of spacing units are to be such as will result in the efficient and economical development of the pool as a whole, and the size shall not be smaller than the maximum area that can be efficiently drained by one well.'"[39] What constitutes efficient and economical development of a pool is case specific, which means "the size of the spacing unit will depend upon the facts and circumstances disclosed by the evidence presented to the regulatory body."[40] Generally, however, the development plan for a pool ought to be patterned so that wells are located in units "which have enough oil or gas thereunder . . . sufficient to net a return adequate to pay at least the cost of: (1) drilling; (2) completing []; (3) producing; (4) operating; (5) finding new reserves []; and (6) a reasonable profit."[41]

Providing for the protection of correlative rights, which guarantee to "[e]ach owner [the] co-equal opportunity to produce oil or gas from [a] pool,"[42] is necessary because of the connected nature of reservoir rock: "any owner conducting operations within [a] reservoir [can] impact other owners."[43] The potential for adverse impact on a reservoir in turn gives rise to "extra-territorial rights . . . in each owner in the reservoir."[44] Washburn University School of Law Professor David E. Pierce explains the extra-territorial element of correlative rights this way:

> If A is engaging in acts totally within the boundaries of A's property, but the activity negatively impacts the reservoir in some way, B and others owning rights in the reservoir may be able to enjoin A to protect their property interests in the

owner's only protection from drainage on other lands is to "do likewise" by drilling wells on his own lands).

39. Walker, *supra* note 1, at 281.
40. *Id.*
41. *Id.* at 282 (reformatted for brevity).
42. *Id.* at 283.
43. Pierce, *supra* note 15, at 768.
44. *Id.*

> reservoir. Similarly, B may have the *affirmative right* to impact A's property to the extent it *positively impacts* the reservoir in some way. This second observation may appear to be a bit radical, but it is the logical corollary of the first principle. Parties owning property in a reservoir must be cognizant of the rights of all parties to effectively maximize their rights in the reservoir, so long as they do not injure the reservoir. This prevents parties from trying to artificially fence off their connected tract when they do not agree with what is best for the collective owners of the reservoir.[45]

In a word, no single owner has exclusive rights over a reservoir. Instead, ownership of lands overlying a reservoir create "cotenant-like relationship[s]" between and among owners, and each owner's behavior is evaluated for appropriateness in relation to the rest of the so-called reservoir community.[46]

The IOCC set forth model provisions to serve as a foundation on which states could build their own oil and gas conservation law,[47] and the IOGCC continues this important work today.[48] Although some states tinkered with the IOCC's Model Act provisions more than others, each oil and gas producing state's statutes today include provisions that provide for the prevention of waste and the protection of correlative rights, usually through the establishment of drilling and spacing units by a state regulatory body.[49] It is to the details of one set of oil and gas conservation law—and the regulatory body to which it gave birth—that this Article now turns.

II. The North Dakota Industrial Commission & Its Legislative Mandate

In North Dakota, the body tasked with the administration and enforcement of much of the state's regulatory apparatus is the NDIC. The NDIC conducts and manages an abundance of "utilities, industries, enterprises, and business projects established by state law,"[50] and it does so

45. *Id.* at 768–69 (internal citation omitted).

46. *Id.* at 771; *cf.* EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS 120 (1987).

47. *See* U.S. DEP'T OF ENERGY, *supra* note 17.

48. *See* Pierce, *supra* note 15, at 766.

49. *See* U.S. DEP'T OF ENERGY, *supra* note 17.

50. *About the Commission*, NDIC, http://www.nd.gov/ndic/ic-about.htm ("The Legislature created the Industrial Commission of North Dakota (the 'Commission') in 1919 to conduct and manage, on behalf of the State, certain utilities, industries, enterprises and business projects established by state law. The members of the Commission are the

under its own "rules and regulations."[51] One of the many industries under the NDIC's management is the oil and gas industry. The administration and enforcement of the laws governing the oil and gas industry, at least related to oil and gas conservation, falls upon the NDIC's Department of Mineral Resources and its Oil and Gas Division,[52] to which the North Dakota State Legislature granted broad and "continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of [] chapter [38-08]."[53] Chapter 38 of the North Dakota Century Code contains all of the State's oil and gas conservation law,[54] which empowers the NDIC to require, by way of illustration, a person to secure a permit before "commenc[ing] operations for the drilling of a well for oil or gas"[55] and to "conduct investigations of all matters directly or indirectly connected with . . . any of the utilities, industries, enterprises, and business projects under its management."[56]

Like the IOCC's 1950 Model Act, Chapter 38 begins with a "Declaration of Policy" that unambiguously sets forth the legislative intent behind the State's oil and gas conservation law: "It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas . . . ."[57] Not surprisingly, the basic principles on which North Dakota decided to build its oil and gas conservation law—*i.e.*, the means by which the State planned to accomplish its overarching policy objectives—were the prevention of waste and the protection of correlative rights.[58] In fact, the principles of

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Governor, the Attorney General and the Agriculture Commissioner of the State.") (last accessed July 19, 2019); *see also* N.D. CENT. CODE. § 54-17-01.

51. N.D. CENT. CODE. § 54-17-08.

52. *See* NDIC, *supra* note 50.

53. N.D. CENT. CODE § 38-08-04; *cf.* Black Hills Trucking, Inc. v. NDIC, 904 N.W.2d 326, 330 (N.D. 2017).

54. N.D. CENT. CODE §§ 38-08-01 to -23. Chapter 38 of the N.D. CENT. CODE is the codified version of the State's Oil and Gas Conservation Act, which was enacted in 1953. *See* 1953 N.D. Laws 356-72.

55. N.D. CENT. CODE § 38-08-05.

56. *Id.* § 54-17-16. For more on matters directly or indirectly connected with the NDIC's jurisdiction and authority, *see* discussion *infra* Part II.B.

57. *Id.* § 38-08-01. As alluded to already, the State of North Dakota's "Declaration of Policy" is an exact imprint of the IOCC's declaration but for three words. For that reason, it has not been reproduced in detail here. For a refresher, *see* Strong, *supra* note 25, at 214 ("Whatever the legal effect of a policy declaration, it does spell out the legislative purpose underlying the adoption of a particular law."); *cf.* discussion *supra* Part I.B.

58. *E.g.*, N.D. CENT. CODE §§ 38-08-01 (declaration of policy), 38-08-03 (prohibition of waste), 38-08-07 (enabling the NDIC to establish spacing units to, among other things,

waste prevention and the protection of correlative rights were so firmly engrained in the minds of North Dakota legislators that North Dakota adopted an earlier version of the IOCC's Model Act "nearly before the ink was dry . . ., adopting [the IOCC provisions] in toto during the 1941 legislative session and at a time when there were no producing oil wells in the state!"[59] The extent to which these foundational principles continue to shape the State's public policy in the area of oil and gas conservation law is the subject of Part III.

A. The NDIC: A Tale of Broad Jurisdiction & Authority

As has been mentioned already, the North Dakota Legislature endowed the NDIC with broad jurisdiction and authority in the area of oil and gas conservation law.[60] The NDIC's jurisdiction and authority have been repeatedly affirmed before the State's highest court—in cases involving both routine and irregular disputes. There is no doubt, for example, that the NDIC's legislative mandate includes "comprehensive power[] to regulate oil and gas development," including the right to establish spacing units or issue pooling orders.[61] Despite the NDIC's comprehensive power to issue

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protect correlative rights). *But see* Pierce, *supra* note 15, at 763-64 (arguing that despite "major strides" to mitigate the damage caused by the rule of capture, promises of oil and gas conservation remain unfulfilled); *cf.* discussion *supra* Part I.A.

59. Pierce, *supra* note 15, at 767 n.32 (citations omitted).

60. For an anecdotal explanation of just how far-reaching the NDIC's jurisdiction and authority are, s*ee, e.g.*, *EPA's Regulatory Activity During the Obama Administration: Energy and Industrial Sectors: Hearing Before the H. Subomm. On Energy and Power*, 114th Cong. 1 (2016) (statement of Lynn D. Helms, Director, North Dakota Industrial Commission, Department of Mineral Resources), https://docs.house.gov/meetings/IF/IF03/20160706/105153/HHRG-114-IF03-Wstate-HelmsL-201607 06.pdf ("The North Dakota Industrial Commission . . . [has] jurisdiction over gathering pipelines, oil and gas spill reporting, and well site construction regulation of the drilling, production and plugging of wells; the restoration of drilling and production sites; the perforating and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery and prevent waste, such as cycling of gas; the maintenance of pressure; and the introduction of gas, water, or other substances into producing formations; disposal of saltwater and oil field wastes through the North Dakota Underground Injection Control Program; restricting and reducing the flaring of natural gas associated with crude oil production; and many other operations related to the production of oil or gas and protection of the State of North Dakota's industrial interests.")

61. *E.g.*, Egeland v. Cont'l Res., Inc., 616 N.W.2d 861, 865 (N.D. 2000); Cont'l Res., Inc. v. Farrar Oil Co., 559 N.W.2d 841, 846 (N.D. 1997); Slawson v. NDIC, 339 N.W.2d 772 (N.D. 1983). For a brief articulation of the differences between pooling and spacing, *see Egeland,* 616 N.W.2d at 865 n.5:

such orders, NDIC orders are routinely challenged, especially when parties are convinced they have been uniquely wronged. North Dakota courts generally refrain from striking down NDIC orders, however, primarily because NDIC employees are treated as "qualified experts" against whose judgment courts will not substitute their own.[62]

In *Texaco, Inc. v. NDIC*, for example, the Supreme Court of North Dakota upheld an NDIC pooling order which had been issued "retroactive to the date of first operations."[63] In that case, Texaco alleged that the NDIC's issuance of a retroactive pooling order, which granted an *ex post facto* "share of the working interest in all of the oil and gas produced from Texaco's own well located on Texaco's solely owned leasehold" to an adjoining landowner, amounted to a confiscation of its property without due process of law.[64] After a district court ruling in favor of the defendant, Texaco appealed.[65] The Supreme Court was unpersuaded by Texaco's arguments.[66] The court's analysis was admittedly perfunctory; but perhaps that was because of the deferential standard which North Dakota courts apply when reviewing the decisions of state administrative agencies like the NDIC.[67] Under state law, district courts tasked with reviewing NDIC orders apply a separate and special standard of review, which limits the traditional breadth of judicial review by requiring "affirmance 'if the commission has regularly pursued its authority and its findings and conclusions are

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> Spacing and pooling are separate concepts. Amoco Production Co. v. [NDIC], 307 N.W.2d 839, 849 (N.D.1981). A pool is a reservoir, or a common source of supply, and constitutes a common accumulation of oil or gas, or both. *See* N.D. ADMIN. CODE § 43–02–03–01(12) and (49). A spacing unit "is the area in each pool which is assigned to a well for drilling, producing, and proration purposes in accordance with the commission's rules or orders." N.D. ADMIN. CODE § 43–02–03–01(52). "A spacing order standing alone without a pooling order does not operate as a de facto pooling of all fractional interests under the drillsite . . . ." Schank v. North American Royalties, Inc., 201 N.W.2d 419, 422 (N.D. 1972).

Cf. N.D. CENT. CODE §§ 38-08-04(1)(b)(3), 38-08-07, 38-08-08.

62. Texaco, Inc. v. NDIC, 448 N.W.2d 621, 624 (N.D. 1989) ("This court . . . has indicated its reluctance to substitute its own judgment for that of qualified experts in matters entrusted to administrative agencies.") (internal citation omitted).

63. *Id.*

64. *Id.* at 622.

65. *Id.*

66. *Id.* at 626.

67. *See* N.D. CENT. CODE §§ 28-32-01 to -52.

sustained by the law and by substantial and credible evidence.'"[68] Even the Supreme Court of North Dakota "applies [this separate and special] standard of review in appeals from district court involving orders of the [NDIC]."[69] This deferential standard, which turns on the court's application of the so-called substantial evidence test,

> is something less than the greater weight of the evidence and the preponderance of the evidence tests, and differs from the usual standard of review for administrative decisions under [N.D. CENT. CODE] § 28-32-46. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and we "accord greater deference to Industrial Commission findings of fact than we ordinarily accord to other administrative agencies' findings of fact[,]" [although t]he Commission's decisions on questions of law are fully reviewable on appeal.[70]

Notwithstanding the courts' aversion to overturning NDIC decisions, parties "adversely affected by an order of the commission" are nevertheless entitled to "file a petition for reconsideration with the agency" or "may appeal from such order to the district court of the county in which the land or a part thereof involved in the unit lies."[71]

North Dakota courts have defended the NDIC's jurisdiction and authority in somewhat irregular disputes, too. In *Black Hills Trucking, Inc. v. NDIC*, for example, the North Dakota Supreme Court affirmed an NDIC order imposing "a $950,000 civil penalty . . . for illegally dumping saltwater on roads."[72] In that case, the NDIC issued an administrative complaint against Black Hills Trucking after multiple parties reported seeing Black Hills trucks "dumping substantial amounts of fluids onto roads" and "on[to] the ground."[73] Commission employees were dispatched to collect soil and fluid samples from the scenes of the dumping.[74] Lab analysis indicated that the samples "contained elevated levels of electrical

68. *Texaco*, 448 N.W.2d at 625; *cf.* Amoco Production Co. v. NDIC, 307 N.W.2d 839, 841 (N.D.1981); N.D. CENT. CODE § 38-08-14(3).

69. *Black Hills*, 904 N.W.2d at 330.

70. *Id.* (internal citaton omitted).

71. N.D. CENT. CODE §§ 28-32-40, 38-08-09.16.

72. *Black Hills*, 904 N.W.2d at 328.

73. *Id.*

74. *Id.*

conductivity and chlorides consistent with saltwater."[75] During the NDIC evidentiary hearing, an administrative law judge "recommended that the complaint against Black Hills be dismissed with prejudice[, but] the Commission . . . approved an alternative decision by unanimous vote finding that Black Hills violated [] regulations."[76] On appeal, both the district and Supreme Courts affirmed the NDIC order and rejected Black Hills' claims that the NDIC lacked jurisdiction, imposed an "unconstitutionally excessive fine," and violated basic notions of "fundamental fairness."[77]

In a word, the NDIC is legislatively endowed with comprehensive jurisdiction and authority to regulate the oil and gas industry—including the right to establish spacing units, issue pooling orders, or regulate the disposal of saltwater and other oilfield wastes—and the State's courts are wont to overturn NDIC decisions or otherwise limit the scope of its jurisdiction and authority.

B. Preventing Waste & Protecting Correlative Rights in North Dakota

In North Dakota, "[w]aste of oil and gas is prohibited."[78] The State Legislature has defined "waste" broadly to include:

> a. Physical waste, as that term is generally understood in the oil and gas industry.
>
> b. The inefficient, excessive, or improper use of, or the unnecessary dissipation of reservoir energy.
>
> c. The locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes, or tends to cause, reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations, or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil or gas.

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75. *Id.* at 329.

76. *Id.* at 329-30.

77. *Id.* at 330, 333, 335. For more on the overlapping jurisdiction of the NDIC and the North Dakota Department of Health, *see id.* at 333 ("The [NDIC] acknowledges that the agencies' jurisdiction over oilfield waste may overlap to some degree, but argues this situation is not prohibited under the law. . . . We conclude the Department [of Health] does not have primary jurisdiction over this oilfield waste matter and both the Department and the Commission could exercise their regulatory jurisdiction.").

78. N.D. CENT. CODE § 38-08-03.

> d. The inefficient storing of oil.
>
> e. The production of oil or gas in excess of transportation or marketing facilities or in excess of reasonable market demand.[79]

As is true in the other oil and gas producing states, both North Dakota and the public at large have a "collective interest" in the prevention of waste which "is greater than that of any individual landowner."[80] It is on the basis of this collective interest that states like North Dakota "may make reasonable regulations designed to promote the 'greatest ultimate economic recovery of the oil and gas from the earth.'"[81] Reasonable regulations are those that "result . . . not [in] a hoarding of oil and gas in place, but rather a regulation of production."[82] In other words, North Dakota's waste prevention statutes were written not so as to quash landowners' ability to capture oil and gas but rather to ensure ultimate recovery by eliminating wasteful practices. This should not come as a surprise to readers familiar with the evolution of oil and gas conservation law because North Dakota relied upon the IOCC and the laws of other states when drafting its oil and gas conservation statutes.[83]

Whereas waste prevention statutes have as their general goal the protection of valuable public resources, correlative rights statutes aim to spell out the duties and obligations of private landowners, one to another.[84] Protection of correlative rights is accomplished in multitudinous ways: some states have chosen to make the protection of correlative rights "a matter of public policy [by providing] statutory definitions of these rights"

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79. *Id.* § 38-08-02(19).

80. Strong, *supra* note 25, at 210; *cf.* Champlin Refining Co. v. Corp. Comm'n, 286 U.S. 210 (1932).

81. Strong, *supra* note 25, at 210.

82. *Id.*; *cf. supra* Part I.B (discussing "production for use," or what is meant by conservation in the context of the oil and gas industry).

83. *See, e.g.*, *Report of the North Dakota Legislative Research Committee*, N.D. LEGIS. 39 & 43 (1953) ("This sub-committee thoroughly studied the laws of other states, model acts recommended by the Interstate Oil Compact Commission, and received advice and counsel from the state of the Interstate Oil Compact Commission and the tax and regulatory bodies of other states. . . . The Interstate Oil Compact Commission, representing the great majority of the oil producing states, under Act of Congress, has been a source of . . . the proposed conservation Act. It has been a source of great assistance in formulating the rules of the Industrial Commission and in preparing the proposed legislation. We believe it can be of great assistance in the future and we recommend that North Dakota join the compact."); *see also supra*, Part I.

84. *E.g.*, Strong, *supra* note 25, at 212.

while "[o]ther states do not explicitly define correlative rights, but do require each producer to be guaranteed his just and equitable share."[85] Discovering the specific means by which a state has provided for the protection of correlative rights often requires a detailed legislative appraisal, but it's worth the required time because "[t]he emphasis placed on and the method used in protecting correlative rights depends on whether the conservation legislation is primarily for the protection of these rights or for the preservation of oil and gas as a natural resource."[86]

North Dakota, like many oil and gas producing states, has ostensibly chosen to make the protection of correlative rights a matter of public policy, although it has not provided a specific statutory definition of these rights.[87] Even though North Dakota's State Legislature has not provided a statutory definition of correlative rights, North Dakota courts have had ample opportunity to define correlative rights and interpret the State's waste prevention statutes in the context of litigation dating back decades. It is to the treatment of these overarching policies and principles in the creation, interpretation, and application of North Dakota oil and gas law that this Article now turns.

III. Evaluating the Creation, Interpretation & Application of North Dakota Oil and Gas Law

The NDIC's legislative mandate, at least as it relates to oil and gas conservation, endows the NDIC with a broad and continuing jurisdiction rooted in the foundational principles of waste prevention and the protection of correlative rights. As the platitude, "With great power, comes great responsibility" suggests, the NDIC—as well as the legislators and judges tasked with the creation, interpretation, and application of North Dakota law—ought to wield their powers responsibly. In this context, the responsible wielding of power means analyzing cases, laws, and rules with an eye to the State's foundational oil and gas conservation principles; *i.e.*, an appraisal of an outcome's likely impacts on waste prevention and the protection of correlative rights. Somewhat surprisingly, there has been little, if any, substantive discussion or reference to these principles in the recent case law and legislative and administrative records. A brief discussion of pore space law, gas flaring regulation, and gas royalty litigation, as well as

85. *Id.* at 213.
86. *Id.*
87. *Id.* at 213 n.45; *cf.* discussion Part I.B.

some of the consequences of ignoring the State's foundational oil and gas principles, follows below.

A. Pore Space Law

"Pore space" is most easily conceived of as one of the many rights in the metaphorical "bundle of sticks" to which law students are introduced during their first-year Property course. Historically, however, debating about pore space has not been an important part of the practice or adjudication of oil and gas law. In fact, according to energy lawyer Trae Gray, "[u]ntil very recently, pore space was hardly considered a property right at all."[88] But things are different today.[89]

Interest in carbon capture and sequestration (CCS), in addition to the need to store waste products born of horizontal drilling and hydraulic fracturing, means the basic definitions of pore space—*e.g.*, "the empty space between grains of rock, fractures, and voids"[90]—no longer work.[91] In response, state legislatures have begun codifying specific definitions of pore space. In North Dakota, for example, "'pore space' means a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum."[92] Oklahoma's definition is even wordier than North Dakota's: "'pore space' means any interstitial space not occupied by soil or rock, within the solid material of the earth, and any cavity, hole, hollow or void space within the solid material of the earth."[93] This may seem like a superfluous survey of state statutes, but it is not: regulators, legislators, and

88. Trae Gray, *A 2015 Analysis and Update on U.S. Pore Space Law—The Necessity of Proceeding Cautiously with Respect to the Stick Known as Pore Space*, 1 OIL & GAS, NAT. RESOURCES & ENERGY J. 277, 280 (2015).

89. Amy Dalrymple, *North Dakota Lawmakers' Approval of 'Pore Space' Bill Might Result in Lawsuits*, BISMARCK TRIBUNE (Apr. 17, 2019), https://bismarcktribune.com/news/local/govt-and-politics/north-dakota-lawmakers-approval-of-pore-space-bill-might-result/article_663098dd-b17d-5189-a35e-6e8423a03f9e.html; *see also* Tara Righetti, *The Private Pore Space: Condemnation for Subsurface Ways of Necessity*, 16 WYO. L. REV. 77, 78 (2016) ("The question of pore space ownership has become a renewed topic of interest as technologies, such as hydraulic fracturing and horizontal drilling, have resulted in greater penetration of the pore space. These technologies increase the possibility of subsurface trespass and other torts resulting from migrating fluids, proppants, and errant wellbores that deviate from their planned paths.").

90. Gray, *supra* note 88, at 279.

91. *See generally* Blayne N. Grave, *Carbon Capture and Storage in South Dakota*, 55 S.D. L. REV. 72 (2010) (providing an overview of pore space law in many states, including North Dakota).

92. N.D. CENT. CODE § 47-31-02.

93. OKLA. STAT. ANN. tit. 60, § 6(B).

judges need to understand this emerging area of the law because it remains underdeveloped, and questions abound.[94]

Although states like North Dakota and Oklahoma have enacted statutes addressing pore space ownership, these statutes are beginning to be tested in the courts. To industry insiders, this shouldn't come as a surprise because "pore space has been recognized as having its own value for reinjection of produced substances, storage of non-native gasses, and for geologic carbon sequestration."[95] Pore space law also has the potential to undo two hundred and fifty (250) years of property law stemming from the *ad coelum* doctrine.[96] In full, the maxim states "cujus est solum, ejus est usque ad coelum et ad infernos," which means "to whomsoever the soil belongs, he owns also to the sky and to the depths."[97] This is lawyer-speak for whomever has title to a tract of land, has title to that tract from the sky above to the center of the earth.[98] If the tract of land is owned in fee simple,[99] "[d]etermining ownership of [the] pore space is very straightforward . . . because the fee owner holds title to both the surface estate and the mineral estate."[100] In mineral-rich states like North Dakota, however, the surface and mineral estates are often severed from one another, which complicates the process for determining pore space ownership.[101]

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94. For a list of largely unanswered questions in the area of pore space law, see Gray, *supra* note 88, at 280 ("Does it make sense for pore space to be a private property right? Does it make better sense for the government to own pore space? Should it be considered as part of the mineral estate? Or should it be a right of the surface estate? If it is determined that this resource is better owned by the government, is the takings clause implicated?").

95. Righetti, *supra* note 89, at 78.

96. For more on the *ad coelom doctrine*, *see* John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 980 (2008).

97. *Id.* at 980, 1007 n.182.

98. Of course, in reality, the *ad coelum* doctrine is no longer the law. The advent of airplanes, for example, altered the traditional view that an owner's title truly extends into the heavens, and today courts are wont to permit landowners to bring claims for trespass and nuisance for airplanes flying over their property. *But see* N.D. CENT. CODE § 47-01-12. The advent and growth of private drone use presents another problem, however. For more, *see generally* Hillary B. Farber, *Keep Out! The Efficacy of Trespass, Nuisance, and Privacy Torts as Applied to Drones*, 33 GA. ST. U. L. REV. 359 (2017).

99. *Fee Simple*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute.").

100. Gray, *supra* note 88, at 282.

101. *See id.* at 282-85 (discussing the two common ownership structures once the surface and mineral estates have been severed from one another). *But see* Barry Barton, *The*

In 2009, the North Dakota State Legislature enacted new pore space laws pursuant to Senate Bill 2139.[102] These laws, passed in a preemptory fashion to address (and simplify) the process for determining pore space ownership in North Dakota, reveal the State Legislature's intent to associate pore space ownership with "the overlying surface estate"[103] and prevent the severing (but not the leasing) of pore space from the surface estate.[104] Two recent cases in which North Dakota law was applied to analyze the facts provide at least *some* guidance on the present state of pore space law in North Dakota.

In *Fisher v. Continental Resources, Inc.*,[105] the federal District Court of North Dakota ruled that Continental "had the right to drill a saltwater disposal well within [its] unit to dispose of saltwater produced within the unit as it was *reasonably* associated with exploration and recovery efforts."[106] In that case, the surface owners, the Fishers, sued Continental for nuisance, trespass, fraudulent representation, and deceit, and they sought monetary damages, injection reports, and injunctive relief.[107] The court began its discussion with an analysis of North Dakota property law, explaining that the mineral estate is dominant[108] and includes "an implied right to use so much of the surface estate as is reasonably necessary to explore, develop, and transport the materials."[109]

Despite the mineral estate's "dominance," mineral developers' actions are subject to a reasonableness test under the accommodation doctrine, which "requires a consideration of all the pertinent circumstances including what are the usual, customary, and reasonable practices in the industry, and the nature, condition, location, and current use of the servient estate."[110] Ultimately, the court found that Continental "ha[d] a general right to

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Common Law of Subsurface Activity: General Principle and Current Problems, *in* THE LAW OF ENERGY UNDERGROUND: UNDERSTANDING NEW DEVELOPMENTS IN SUBSURFACE PRODUCTION, TRANSMISSION, AND STORAGE 21 (ed. 2014) (concluding there is no distinction between the two common ownership structures).

102. S.B. 2139, 61st Leg. Assemb. (N.D. 2009), https://www.legis.nd.gov/assembly/61-2009/bill-text/JQTB0100.pdf (codified at N.D. CENT. CODE §§ 47-3-01 to -09).

103. N.D. CENT. CODE § 47-31-03 to -04.

104. *Id.* § 47-31-05.

105. 49 F. Supp. 3d 637 (D.N.D. 2014).

106. Gray, *supra* note 88, at 307-08 (emphasis added).

107. *Fisher*, 49 F. Supp. 3d at 640.

108. *Id.* at 641.

109. Mark D. Christiansen, *Oil and Gas Litigation Update for the North Dakota State Courts*, 90 N.D. L. REV. 267, 286 (2014).

110. *Fisher*, 49 F. Supp. 3d at 641.

conduct salt water disposal operations within [its u]nit," but it declined to grant Continental's motion for summary judgment because too many "genuine issues of material fact . . . remain[ed] disputed."[111]

In the wake of the court's ruling, the Fishers made a motion to certify a question to the North Dakota Supreme Court: "Is pore space included within the term 'surface owner's land' such that a surface owner may be entitled to damages for use that has resulted in 'lost land value' or 'lost use of and access to the surface owner's land' within the meaning of N.D.C.C. § 38-11.1-04?"[112] The District of North Dakota court declined to certify the Fishers' proposed question and concluded that "[t]he Court is capable of answering the question regarding pore space posed in this case based upon the relevant North Dakota case law and statutes."[113] The District of North Dakota issued a third order in this dispute on October 8, 2015.[114] There, the court found not only that the term "land" as used in Section 38-11.1-04 encompasses the pore space but also "that the language . . . [is] broad enough to encompass compensation for use of the surface owner's pore

111. *Id.* at 646-49, 648 n.3. Significantly, the court also declined to rule on whether the surface damages act encompassed damages for use of pore space. ("The North Dakota Supreme Court has not addressed whether Chapter 38-11.1 may be read to encompass compensation for use of pore space. . . . The express language of Section 38-11.1-04 requires compensation for all damage to the surface owner's land. . . . Arguably, the pore space is a part of the surface owner's land. The North Dakota Legislature has irrevocably tied the pore space estate to the surface estate in Chapter 47-31. Thus, a compelling argument can be made that the language and purpose of Chapter 38-11.1 are broad enough to encompass compensation for use of the pore space.").

112. Fisher v. Cont'l Res., Inc., No. 1:13-cv-097, 2015 WL 11400078, at *2 (D.N.D. Sept. 14, 2015).

113. *Id*. Treading carefully here, there is at least an an *aura* of arrogance in the District of North Dakota's denial of the Fisher's motion to certify a question of *state law* to the North Dakota Supreme Court. After all, "[O]nly state courts can decide state law with finality; federal courts cannot bind state courts on state law. . . . [F]ederal courts must defer to state courts on their own state law." John Burritt McArthur, *Some Advice on* Bice*, North Dakota's Marketable-Product Decision*, 90 N.D. L. REV. 545, 556 (2014); *cf. Mosser v. Denbury Res.*, 898 N.W.2d 406, 410 (2017) ("[A state's high c]ourt is the final arbitrator of unsettled questions of state law."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Historically, this deferential attitude has been especially pronounced in the area of oil and gas law. *See, e.g.*, Timothy Fitzgerald, *Regulatory Obsolescence Through Technological Change in Oil and Gas Extraction*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 137, 142-43 (2018) ("Regulation of oil and gas extraction activities has historically been the domain of states. . . . [And p]rimary regulatory oversight remains with the states.").

114. Fisher v. Cont'l Res., Inc., No. 1:13-cv-097, 2015 WL 11400124 (D.N.D. Oct. 8, 2015).

space."[115] Because Continental had yet to inject anything into its disposal well, the court dismissed the Fishers' damages claim for "lost use and access to" the pore space before granting Continental's motion for summary judgment as well as the Fishers' partial motion for summary judgment.[116]

In *Mosser v. Denbury Resources, Inc.*,[117] the federal District Court of North Dakota denied defendant Denbury's motion for summary judgment in another case for subsurface trespass and nuisance in which plaintiffs sought monetary damages for the conversion of an old well into a saltwater disposal well and for "the permanent occupancy of the pore space into which the salt water has been injected."[118] In that case, plaintiffs sought compensation for the use of their pore space, but the court declined to rule on that issue during the summary judgment stage of the proceedings.[119] The court did, however, suggest that the plaintiffs "ha[d] stated plausible claims for trespass and nuisance relating to the pore space they . . . own"[120] before concluding that "[t]he law and the facts related to th[e] case [we]re in need of development."[121] The law and the facts were further analyzed and subsequently adjudged in a subsequent order from the District Court of North Dakota.[122] There, the court denied both the plaintiffs' and the defendants' motions for summary judgment, but not before concluding: (1) that mineral operator had the right to dispose of waste in the underground pore spaces of its saltwater disposal well[123]; (2) that "surface owner's land" includes pore space[124]; and (3) that surface owners may recover monetary damages for lost use of pore space beneath their lands.[125]

Ultimately, this dispute was resolved by the Supreme Court of North Dakota after the District Court for the District of North Dakota certified seven questions for review to the state's highest court.[126] In that case, the Supreme Court of North Dakota confirmed the federal magistrate judge's inklings as to pore space ownership[127] and lost land value.[128] The court then

115. *Id.* at *5.
116. *Id*. at *5-6.
117. No. 1:13-cv-148, 2014 WL 11531329 (D.N.D. Feb. 12, 2014).
118. *Id.* at *1.
119. *Id.* at *2.
120. *Id.*
121. *Id.* at *4.
122. Mosser v. Denbury Res., Inc., 112 F. Supp. 3d 906 (D.N.D. 2015).
123. *Id.* at 913.
124. *Id.* at 922-23.
125. *Id.* at 933.
126. Mosser v. Denbury Res., Inc., 898 N.W.2d 406, 408 (N.D. 2017).
127. *Id.* at 412.

went on to answer other important questions, including "whether plaintiffs can recover damages . . . based only on evidence of what others are paying surface owners for the disposal of saltwater"—they can—and "whether plaintiffs can also recover for pore space that . . . has not [been] utilized"—they can't.[129] Although each of the North Dakota Supreme Court's answers to the certified questions in this dispute is important, more important for this Article is the noticeable absence of any substantive discussion of waste prevention or the protection of correlative rights.

That said, this Article does not endorse the use of "waste prevention" and "correlative rights" as linguistic talismans to resolve (or initiate) oil and gas disputes; but in a state like North Dakota, complex oil and gas issues, like pore space law, cannot be appropriately analyzed without an honest appraisal of its impact on waste prevention and the protection of correlative rights. In the context of pore space law, both waste prevention and the protection of correlative rights are implicated. North Dakota has codified its commitment to the prevention of waste. While not dispositive, such a commitment means regulators, legislators, and judges evaluating pore space laws can—indeed should—do so with an eye towards waste prevention.

In cases like *Fisher* and *Mosser*, in other words, the courts' denial of the operators' right to use the pore space within its unit would have been tantamount to waste because the operators would have had to incur additional costs (*i.e.*, economic waste) to transport their saltwater and dispose of it elsewhere. Although correlative rights are really about protecting mineral owners' rights to produce oil and gas, there is an analogue worth exploring in the protection of surface owners' pore spaces. The courts in *Fisher* and *Mosser* resolved these disputes without explicit reference to waste prevention and correlative rights, which was their right, but next time they should integrate discussion of these principles with their other justifications.

B. Gas Flaring

Years ago," writes oil and gas professor Monika Ehrman, "there was only darkness on the North Dakota plains."[130] However, today's North Dakota plains are filled with anything but darkness.[131] Escalating oil and

128. *Id.* at 415.

129. *Id.* at 416-17.

130. Ehrman, *supra* note 33, at 550.

131. *E.g.*, Robert Krulwich, *A Mysterious Patch of Light Shows Up in the North Dakota Dark*, NPR (Jan. 16, 2013, 1:58 PM), https://www.npr.org/sections/krulwich/2013/01/16/169511949/

gas activities—born of a technological revolution[132] and (relatively) high commodity prices[133]—have led to an increase in more than oil and gas production in North Dakota. Indeed, along with the increases in production have come increased state tax and royalty revenues[134] and environmental concerns, like the emission of methane and carbon dioxide.[135] However, atop the list of "increases" associated with the escalation of oil and gas activity in North Dakota is the ongoing practice of gas flaring.

Gas flaring—or "the controlled combustion of gaseous compounds"[136]—enables operators to dispose of excess natural gas from oil and gas wells by channeling it "up through flare stacks, where [it is] then ignited and combusted."[137] Flaring is, in other words, "a means of disposal used when there is no way to transport the gas to market and the operator cannot use the gas for another purpose."[138] Although flaring often occurs at several places in the upstream, midstream, and downstream sectors of the industry, the overwhelming majority of flaring in North Dakota happens upstream, during exploration and production. Flaring in the upstream sector typically occurs for one of two reasons: either "(1) during the completion process to control pressure during the 'flowback' stage following a hydraulic fracturing operation or (2) when production begins, but before a pipeline connection exists to transport the natural gas to market."[139]

North Dakota's flaring phenomenon is attributable to: (1) the geologic composition of the Williston Basin (and the Bakken shale formation in

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a-mysterious-patch-of-light-shows-up-in-the-north-dakota-dark (documenting NASA "nighttime tour" satellite images showing "the Dakota fields blazing"). *But see* Dustin Monke, *Study: Bakken Natural Gas Flare Satellite Images Aren't Accurate*, BISMARCK TRIBUNE (June 10, 2015), https://bismarcktribune.com/bakken/study-bakken-natural-gas-flare-satellite-images-aren-t-accurate/article_8528d1ab-b876-5c7c-9f9a-3d9189873261.html (citing University of North Dakota Energy & Environmental Research Center study calling satellite images "highly processed" and "inaccurate").

132. *See supra* note 33 and accompanying text.

133. *E.g.*, *Cushing, OK WTI Spot Price FOB*, U.S. ENERGY INFO. ADMIN. (Aug. 7, 2019), https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=M.

134. *See, e.g.*, *Tax Revenues*, ENERGY OF N.D., https://energyofnorthdakota .com/home-menu/bakken-benefits/tax-revenues/ (reporting that during FY 2017 the State of North Dakota collected more than $1.63 billion in oil and gas production and extraction taxes—accounting for 45.1% of *all* collected taxes—plus an additional $192.9 million in state royalties and $8.6 million in bonuses) (last accessed Aug. 9, 2019).

135. Ehrman, *supra* note 33, at 551.

136. *Id.* at 558.

137. *Id.* at 551. For a technical explanation of flaring, *see id.* at 558-59.

138. *Id.* at 558.

139. *Id.*

particular); (2) the nature of the produced gas; and (3) the general lack of takeaway infrastructure. Unlike many shale wells, "Bakken oil wells do not release large amounts of natural gas during flowback."[140] Instead, most of the gas that contributes to the need for flaring is "associated gas," or gas produced *in association with* crude oil.[141] Like the escaping of carbon dioxide from a can of freshly opened soda, so associated gas comes out of a reservoir as the pressure decreases.[142] Associated gas, like the oil, water, and other fluids produced up the wellbore during production, requires proper management. In North Dakota, though, unlike in many of the states with histories of sustained petroleum production, there is a serious shortage of pipeline and processing infrastructure. These infrastructure shortages have contributed to North Dakota's being labeled the "exemplar of a rural resource boom distant from existing infrastructure."[143]

Nevertheless, gas flaring has fallen sharply since the shale revolution first made it economically and technologically feasible to bring Bakken oil wells online. Notwithstanding an overall downward trend, a significant amount of gas continues to be flared.[144] Other than the obvious infrastructure and economic constraints, why North Dakota operators continue to flare so much gas largely remains a mystery because the reduction of flaring is ostensibly an effort behind which industry, government, and environmentalists could get. Even so, little meaningful progress has been made, despite several stakeholders' suggestions that there is a desire to solve the problem.[145] Some observers argue that a "perfect storm," including "long delays in permitting, labor shortages, and a short construction season," has prevented any significant progress.[146]

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140. *Id.* at 563-64, 564 n.114 (suggesting that perhaps as little as one percent (1%) of North Dakota's flared gas is flowback gas.).

141. *Id.* at 564.

142. *Id.*

143. Fitzgerald, *supra* note 112, at 165.

144. *E.g.*, *North Dakota Drillers Flaring Up to 20% of Monthly Natural Gas Production*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (May 28, 2019), http://ieefa.org/north-dakota-drillers-flaring-up-to-20-of-monthly-natural-gas-production/; *Natural Gas Flaring in North Dakota Has Declined Sharply Since 2014*, U.S. ENERGY INFO. ADMIN. (June 13, 2016), https://www.eia.gov/todayinenergy/detail.php?id=26632; *Over One-Third of Natural Gas Produced in North Dakota is Flared or Otherwise Not Marketed*, U.S. ENERGY INFO. ADMIN. (Nov. 23, 2011), https://www.eia.gov/todayinenergy/detail.php?id=4030.

145. *See Associated Gas Flaring Fact Sheet*, UNIV. OF N.D. ENERGY & ENVTL. RES. CTR., (2013), https://undeerc.org/bakken/pdfs/NDIC-NDPC-Flaring-Fact-Sheet.pdf ("There is a strong desire by all stakeholders to see this resource captured and to reduce gas flaring.").

146. Ehrman, *supra* note 33, at 565.

But hope is not lost on everyone, including Bakken Midstream, a "new player" in the region. During the summer of 2019, Bakken Midstream announced plans to "reduce natural gas flaring by laying the groundwork for a new industry" in North Dakota.[147] Although Bakken claims it has the financial capacity to deliver outside investment to the tune of hundreds of millions or perhaps billions of dollars, it has already secured a verbal commitment from North Dakota's state government, which "said it would invest $200,000" with the new company. Given the amount of capital necessary to fund Bakken's projects, the State's $200,000 pledge is largely immaterial, although it does signal the state's interest in helping to fix, or at least alleviate, North Dakota's flaring problem.[148] As controversy and investment in resolving the State's flaring problem increase, gas flaring disputes inevitably will be drawn into the public spotlight via litigation before North Dakota courts.

Stakeholders should keep an eye on how the North Dakota courts resolve gas flaring disputes because to date almost all of the debates about gas flaring have taken place on the floor of the State Capitol or within state and federal administrative agencies, like the NDIC and the Bureau of Land Management.[149] Although those debates have included more talk of waste prevention and correlative rights than the cases on pore space law, there is little indication that these foundational principles are playing a leading role. If they were, North Dakota's decade-old gas flaring problem might already be resolved. This is not to deny the complexity of the problem; after all, a real and lasting solution depends on the cooperation of regulators, industry advocates, and environmentalists, not to mention the construction of hundreds of millions of dollars of takeaway and processing infrastructure. On whom agencies like the NDIC can apply pressure isn't clear either,

147. Amy Dalrymple, *Bakken Midstream Seeks 'Fundamental Change' for North Dakota Natural Gas Industry*, WILLISTON HERALD (June 4, 2019), https://www.willistonherald.com/news/oil_and_energy/bakken-midstream-seeks-fundamental-change-for-north-dakota-natural-gas/article_6b058192-8718-11e9-9871-3f93e041e0ef.html.

148. Todd Epp, *North Dakota Makes Small Bet on Natural Gas Infrastructure Company*, KELO (June 13, 2019),, https://kelo.com/news/articles/2019/jun/13/north-dakota-makes-small-bet-on-natural-gas-infrastructure-company/.

149. *E.g.*, Amy Dalrymple, *North Dakota Senate Defeats Bill to Study Natural Gas Flaring*, BISMARCK TRIBUNE (Feb. 13, 2019), https:// bismarcktribune.com/bakken/north-dakota-senate-defeats-bill-to-study-natural-gas-flaring/article_d301e841-ad9a-54fb-b4a3-daaa6c118602.html; Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 through 49,214 (Sept. 9, 2018) (codified at 43 C.F.R. pt. 3160). *But see* Langved v. Cont'l Res., Inc., 899 N.W.2d 267 (N.D. 2017); Vogel v. Marathon Oil Co., 879 N.W.2d 471 (N.D. 2016).

however. If the NDIC attempts to curb flaring by restricting oil and gas production, state coffers will lose critical tax revenues and investment dollars will move elsewhere. But the waste of oil and gas in North Dakota is nevertheless prohibited by law which, in theory, means regulatory bodies like the NDIC ought to be able to flex their administrative muscle to force stakeholders' hands. Despite its broad and continuing jurisdiction, the NDIC has been unable—or unwilling—to do so.

C. Gas Royalties & the Marketable Product Rule

A royalty interest is commonly defined as a "cost-free share of production"[150] and usually is what "the lessee . . . agrees to pay the lessor . . . on any oil or gas that the lessee may produce from the lease."[151] That definition may read rather easily, but courts have struggled to identity what exactly constitutes a royalty interest—especially lately. Of particular difficulty for courts has been "at the well" language, which is not only language common to oil and gas leases but has been historically (relatively) easy to interpret, at least until the 1960s.[152] In 1964, the tide began to turn after the State of Kansas' high court concluded in two royalty cases that the "lessee[s] improperly deducted [] compression costs."[153] As this is not an Article on gas royalties per se, suffice it say that the Supreme Court of Kansas' holdings—essentially that an oil and gas lease's "implied covenant to market required the lessee to bear all of the compression costs 'necessary to make the gas marketable'"[154]—complicated oil and gas lease interpretation and led to the adoption of the "judicially crafted" Marketable Product Rules ("MPR") in Oklahoma, Colorado, and West Virginia within a few decades' time.[155]

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150. *Royalty Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A share of production—or the value or proceeds of production, free of the costs of production—when and if there is production.").

151. Bryon C. Keeling, *In the New Era of Oil and Gas Royalty Accounting: Drafting a Royalty Clause that Actually Says What the Parties Intend It to Mean*, 69 BAYLOR L. REV. 516, 518 (2017).

152. *See* John W. Broomes, *Waste Not, Want Not: The Marketable Product Rule Violates Public Policy Against Waste of Natural Gas Resources*, 63 KAN. L. REV. 149, 150 (2014).

153. Byron C. Keeling & Karolyn King Gillespie, *The First Marketable Product Doctrine: Just What Is the "Product"?*, 37 ST. MARY'S L.J. 1, 54 (2005).

154. *Id.* at 54-55.

155. Broomes, *supra* note 152, at 149. *See* Keeling & Gillespie, *supra* note 153, at 79-80 ("The first marketable product doctrine has thrown oil and gas royalty law into chaos. Four different states have emerged with four different versions of the first marketable product doctrine . . . .").

The MPR "requires the lessee under an oil and gas lease to bear all production and post-production expenses incurred until the gas is considered 'marketable.' Often, the result is a massive shifting of post-production costs from lessors to lessees, as compared to the application of the same lease language in non-[MPR] jurisdictions."[156] Analysis of, and the justifications for, the MPR by courts can fairly be described as divergent, even contradictory.[157] As one commentator noted, "[t]here are significant differences in some of the marketable-product rules, particularly the allowance of certain deductions under the federal and some state rules."[158] Put simply, there is no unanimous voice or ruling authority on what the MPR is or what exactly it means for lessors and lessees, which probably explains why most oil and gas producing states, including North Dakota, have refused to adopt the MPR.[159]

North Dakota took its position on the MPR ten years ago, when the State's highest court decided *Bice v. Petro-Hunt, LLC*.[160] In Bice, the North Dakota Supreme Court rejected the MPR and opted instead for "the position favored by lessees, joining jurisdictions that let lessees reduce royalty payments by the cost of making oil and gas marketable."[161] Although the court's rejection of the MPR was clear, at least one commentator—John McArthur—has argued that the court's *reasoning* was flawed, writing "that the rejection of a [MPR] in *Bice* was based on understandable but nonetheless real and demonstrable mistakes."[162] There is a latent but discernible preference for lessors in McArthur's analysis which slightly impinges his credibility.[163] Even so, McArthur makes a compelling

156. Broomes, *supra* note 152, at 149.

157. For an analysis of Kansas, Oklahoma, Colorado, and West Virginia case law on the birth and growth of MPR jurisprudence, *see id.* at 153-74; *see also* McArthur, *supra* note 112, at 566-67.

158. *See* McArthur, *supra* note 113, at 561.

159. *See id.* at 545 ("The marketable-product issue remains contested in many [] states. Indeed, it has split oilfield jurisdictions into two irreconcilable camps.").

160. 768 N.W.2d 496 (N.D. 2009).

161. McArthur, *supra* note 113, at 545; *cf. Bice*, 768 N.W.2d at 502.

162. McArthur, *supra* note 113, at 545, 549-72.

163. *See, e.g.*, *id.* at 574-77 ("Lessees, of course, should minimize costs, and thus maximize profits, wherever they legally can. But taking steps to gain economies of scale for their own savings should not make formerly nondeductible costs suddenly deductible. . . . Lessees will argue that paying the royalty share imposes too many costs on them. In considering this argument, one fact to balance is that the lessee already receives the lion's share . . . . Such higher shares compensate for the lessee's added costs, including all drilling costs and other costs incurred to satisfy its cluster of duties, including the duty to market. . . . The lessee's greater revenue interest does not itself prove that it should bear all costs, but it

and balanced plea to North Dakota's high court should "deductions come around again":

> If the North Dakota Supreme Court does again face the marketable-product issue, it will be in a better position to articulate a proper rule—one way or another—when it has a record before it. The record should contain evidence about what "at the well means," how the field was developed, where gas is sold today compared to in the earlier regulated market, whether the field was developed primarily to serve distant demand or local demand, and whether prices that purportedly reflect local "markets" are true economic prices at all.[164]

As providence would have it, McArthur was right: deductions came around again. In *Newfield Exploration Co. v. State*, the North Dakota Supreme Court got its chance to revisit the MPR and its holding in *Bice*.[165] In that case, Newfield initiated litigation hoping for a court ruling that would vindicate its position—that an audit by the State's Department of Trust Lands, which had concluded Newfield underpaid royalties, was based upon faulty lease interpretation. Siding with the State-appellants, the high court reversed the district court ruling which had favored Newfield's interpretation of several lease agreements between the producer and the State. In a short opinion that has implications for stakeholders across North Dakota, the court wrote, "Gross proceeds from which royalty payments under the leases are calculated may *not* be reduced by an amount that either directly or indirectly accounts for post-production costs incurred to make the gas marketable."[166]

Of particular note here, of course, is the fact that the court's decision "is not a blanket ban prohibiting oil and gas companies from deducting for post-production costs; it's specific to the state's leases with Newfield."[167] The North Dakota Supreme Court's decision in *Newfield*, in other words, does not affect the court's holding in *Bice*; North Dakota has not adopted a

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is a reminder that lessors have given very valuable consideration in order to have the lessee produce a marketable product and, even before considering deductions, only get a small part of the resulting revenue in return.").

164. *Id.* at 572.

165. 2019 ND 193, 931 N.W.2d 478.

166. *Id.* ¶ 12, 931 N.W.2d at 481 (emphasis added).

167. Amy R. Sisk, *ND Supreme Court Sides With State in Mineral Royalty Dispute*, BISMARCK TRIBUNE (July 12, 2019), https://bismarcktribune.com/news/state-and-regional/nd-supreme-court-sides-with-state-in-mineral-royalty-dispute/article_841e9c7e-7df4-540c-92be-a6d522da11a1.html.

statewide MPR. Even so, the decision caught the attention of many stakeholders, including operator advocacy groups, many of which weighed in after the court handed down its decision. By way of example, North Dakota Petroleum Council President Ron Ness said this in response to *Newfield*: "Requiring an oil company to pay royalties on the end price of their product is like taxing a farmer on the price of bread rather than the price of wheat."[168] While the issue of gas royalties and the MPR remains unresolved in North Dakota, *Newfield* at least signals the a willingness to continue to hear gas royalty cases.

Hopefully next time, the court is ready to analyze the dispute with an eye to North Dakota oil and gas conservation law and decades of precedent. After all, in states that have adopted the MPR, which "shift[s] [] post-production costs to lessees, natural gas leases cease to produce in paying quantities earlier in their productive life, resulting in physical waste due to premature abandonment of otherwise recoverable natural gas reserves."[169] To adopt the MPR, in other words, would be to adopt a rule that explicitly contradicts the state statute prohibiting the waste of oil and gas resources. Accordingly, North Dakota "courts should be particularly reluctant to embark on journeys to craft new doctrines, like the [MPR], that conflict with the legislature's determination of public policy and frustrate the extraordinary efforts undertaken by the legislative body to achieve its policy goals."[170]

Furthermore, the MPR "essentially forces [] lessee[s] to be the guarantor of the physical properties of any natural gas discovered on the leased premises,"[171] and that does not seem right. Instead, "[j]ust as a hard-rock miner is not expected to guarantee that every mineral deposit is gold, the oil and gas lessee should not have to warrant that all gas he discovers will be pipeline quality when it comes out of the ground."[172] However, that is exactly how states treat operators under the MPR. For advocates of oil and gas conservation law and the principles on which the industry was built, this ought not be so. In a word, whenever North Dakota's high court gets a chance to revisit the MPR, it should remember that

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168. Suzanne Edwards, *North Dakota Supreme Court Sides With State in Newfield Royalties Case*, NATURAL GAS INTEL (July 17, 2019), https:// www.naturalgasintel.com/articles/118985-north-dakota-supreme-court-sides-with-state-in-newfield-royalties-case.

169. Broomes, *supra* note 152, at 149-50.

170. *Id.* at 181.

171. *Id.* at 175.

172. *Id.*

> the [MPR] reflects a paternalistic solution to a largely bygone era when landowners lacked ready access to legal expertise on oil and gas leasing. While the oil and gas industry has by no means been purged of its inherent self-interest, nor has it been immunized against sharp practices, the abundant availability of legal services to advise potential lessors . . . weighs heavily against the continued role of the courts as post-hoc advocates for the unwitting landowner.[173]

Conclusion

When regulators, lawmakers, and judges make, interpret, and apply new North Dakota oil and gas laws without an honest appraisal of their likely impacts on waste prevention and the protection of correlative rights, North Dakota oil and gas stakeholders—from surface and mineral owners to operators and the North Dakota citizenry writ large—suffer. To be sure, North Dakota's status as one of the United States' most prolific oil and gas producers is attributable to the sheer volume of sedimentary rock providentially deposited under the lands between its borders that today can be economically extracted from the ground. However, that is only part of the story. Indeed, North Dakota's status as one of the country's most prolific oil and gas producers is also attributable to its watchful conservation law and the foundational principles on which it stands. Regulators, lawmakers, and judges would be wise to remember these principles as they evaluate externalities and seek solutions to complex oil and gas law disputes.

173. *Id.* at 186.