

**Surface Rights and Legal Issues --
Selected North Dakota
Oil & Gas Development Regulations**

N.D. Reclamation Conference
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Many of the thoughts today are based on a review of North Dakota statutes & regulations, as well as surface use agreements, easements, and surface leases between landowners and mineral developers.

Please ask questions or make comments if your concerns or experiences are not being addressed. I may not have the answer, but your comment will assure that we understand the question.

Industrial Commission:

- Dept. of Mineral Resources Oil & Gas Division: oversees well sites, oil & gas facilities, deep injection wells, reclamation plans, and crude oil & produced water gathering network
- Pipeline Authority: promotes pipeline development & use; no regulatory authority

Department of Health: oversees environmental concerns, especially activities that impact the surface environment

State Water Commission: appropriates water

Public Service Commission:

- oversees common pipeline carriers
- in terms of pipeline safety, jurisdiction primarily limited to natural gas

Department of Agriculture: mediate disputes between mineral developers and land owners, farm tenants and mineral owners

Department of Trust Lands: manages state-owned land and minerals; *its practices and agreements are examples of how to think about mineral and land ownership issues*

The agreement between the mineral developer and mineral owner (usually a mineral lease) is distinct from the agreement between the mineral developer and the surface owner that allows the mineral developer to use the surface of the land.

The surface-use agreement often is

- an easement on land not above where minerals are being produced
- surface-use agreement on land above minerals being produced
- a lease to use the surface for a temporary/short-term purpose.

Even if the same person owns the mineral rights and the surface rights, it may be best to think about the mineral lease and the surface-use agreement as **two distinct transactions and agreements**.

The focus today is on surface-use agreements and easements.

Mineral rights dominate over surface rights

- The surface owner or lessee (such as a farm tenant) cannot stop the mineral owner or lessee from coming onto the surface to explore for and develop underlying minerals
- Initially, surface owners were not compensated for any damage
- Courts then began directing that surface owners be compensated for unreasonable damages
- North Dakota law now directs that surface owners be compensated for damages specified in the statute
- But there is a constitutional limit as to how far government can force mineral developers to compensate the surface owner; and the ND Legislature recognizes there is a limit even if the current limit may not be clearly stated.
 - N.D.C.C. 38-11.1-02 “... provide the maximum amount of constitutionally permissible protection to surface owners and other persons...”

- N.D.C.C. 38-11.1-04. The mineral developer shall pay the surface owner for damages sustained by the surface owner and the surface owner's tenant for **lost land value, lost use** of and access to the surface owner's land, and **lost value of improvements** caused by drilling operations.
 - N.D.C.C. 38-11.1-03 "Drilling operations" means drilling an oil and gas well and the production and completion operations AND oil and gas geophysical and seismograph exploration activities
 - The payments contemplated by this section only cover land directly affected by drilling operations – *does not help the neighbors??*
 - The surface tenant is entitled to recover from the surface owner that portion of the compensation attributable to the tenant's share of the damages.
- N.D.C.C. 38-11.1-08.1. The mineral developer shall pay the surface owner for damages sustained by the surface owner and the surface owner's tenant for **loss of agricultural production and income** caused by oil and gas production and completion operations.

- N.D.C.C. 38-11.1-04.1 ... Before the initial entry upon the land for activities that do not disturb the surface ... the mineral developer shall **provide** at least seven days' **notice**
- N.D.C.C. 38-11.1-04.1 ... the mineral developer shall give the surface owner **written notice** ... at least twenty days **before** commencement of **drilling** operations unless mutually waived by agreement of both parties...
 - Surface owners – *do not waive notice??*

Water

All water in North Dakota is owned by the state

All water users need a permit from state to use water

- Exception – domestic use (garden greater than 5 acres is irrigation); livestock use; fish, wildlife & recreation use
- Exception to exception – any use exceeding 12.5 ac/ft of water annually needs a permit from the state

The state must permit the transfer of water from irrigation or livestock use to industrial use

- This “change in use” is contrary to state law, but the State Water Commission is following an agency “policy” at this time to accommodate the expanded need for industrial water.

- N.D.C.C. 38-11.1-06 If the domestic, livestock, or irrigation water supply of any person
- who owns an interest in real property within one-half mile of where geophysical or seismograph activities are or have been conducted or within one mile of an oil or gas well site
- has been disrupted, or diminished in quality or quantity by the drilling operations
- **AND a certified water quality and quantity test has been performed by the person who owns an interest in real property within one year preceding the commencement of drilling operations,**
- the person who owns an interest in real property
- is entitled to **recover the cost of making such repairs, alterations, or construction** that will ensure the delivery to the surface owner of that quality and quantity of water available to the surface owner prior to the commencement of drilling operations.

- N.D.C.C. 38-11.1-06 (cont'd) -- Any person who
- owns an interest in real property who obtains all or a part of that person's water supply for domestic, agricultural, industrial, or other beneficial use from an underground source
- **has a claim** for relief against a mineral developer **to recover damages** for
- **disruption or diminution in quality or quantity** of that person's water supply proximately **caused from drilling operations** conducted by the mineral developer.

- N.D.C.C. 38-11.1-06 (cont'd)
- A tract of land is **not bound to receive water contaminated by drilling operations** on another tract of land, and
- the owner of a tract has a claim for relief against a mineral developer to recover the damages proximately resulting from **natural drainage of waters contaminated** by drilling operations.
- The mineral developer is also responsible for **all damages** to person or property **resulting from the lack of ordinary care** by the mineral developer or **resulting from a nuisance** caused by drilling operations.
 - *What is the breadth of this statute?*
- This section does not create a cause of action if an appropriator of water can reasonably acquire the water under the changed conditions and if the changed conditions are a result of the legal appropriation of water by the mineral developer.

- Surface-use agreement
 - In the past, mineral leases often addressed use of surface but due to horizontal drilling and separate ownership of mineral and surface rights, surface use is not addressed in most mineral leases; **surface use is addressed in a separate agreement even if the surface owner also owns the mineral rights.**
- Easement – the right to construct, use and maintain pipelines, utility/electrical lines, roadways
- Surface lease – example: a site to store pipes and assemble components during the construction of pipelines

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-15(4)

- **Bonds** shall be conditioned upon full compliance with North Dakota Century Code chapter 38-08, and all administrative rules and orders of the commission. It shall be a plugging bond, as well as a drilling bond, and is to endure up to and including approved plugging of all oil, gas, and injection wells as well as dry holes.
- Approved plugging shall also **include practical reclamation** of the well site and appurtenances thereto. If the principal does not satisfy the bond's conditions, then the surety shall satisfy the conditions or forfeit to the commission the face value of the bond.
- 2015 Legislation (N.D.C.C. 38-08-04(1)(d): bond must cover operation of any underground gathering pipeline for crude oil or produced water

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-16 Application for Permit to Drill and Recomplete

- ... For wells permitted on new pads built after July 31, 2013, permit conditions imposed by the commission may include, **upon request of the owner of a permanently occupied dwelling within one thousand feet** of the proposed well, requiring the location of all flares, tanks, and treaters utilized in connection with the permitted well be located at a greater distance from the occupied dwelling than the oil and gas well head, if the location can be reasonably accommodated within the proposed pad location ... **give any such owners written notice**
 - 3. A sketch of the area indicating the location of the owner's dwelling, the proposed well, and location of the proposed flare, tanks, and treaters.
 - 4. A statement indicating that any such owner objecting to the location of the flare, tanks, or treaters, must **notify the commission** within five business days of receiving the notice

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-19 Site Construction

- In the construction of a site, access road, and all associated facilities, the **topsoil shall be removed, stockpiled, and stabilized or otherwise reserved for use when the area is reclaimed.** "Topsoil" means the suitable plant growth material on the surface; however, in no event shall this be deemed to be more than the top eight inches [20.32 centimeters] of soil. Soil stabilization additives, liners, fabrics, and other materials to be used onsite, on access roads or associated facilities, must be reported on a sundry notice (form 4) to the director within thirty days after application. The **reclamation plan** for such materials shall also be included. When necessary to prevent pollution of the land surface and freshwaters, the director may require the site to be sloped and diked.
- Well sites and associated facilities **shall not be located in, or hazardously near, bodies of water, nor** shall they **block natural drainages.** Sites and associated facilities shall be designed to divert surface drainage from entering the site.
- Well sites and associated facilities or appropriate parts thereof **shall be fenced** if required by the director.
- Within six months after the completion of a well, the portion of the **well site** not used for well operations **shall be reclaimed,** unless waived by the director.
- Well sites and all associated facilities shall be **stabilized to prevent erosion.**

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-19.1 Fencing, Screening, and Netting of Drilling and Reserve Pits

- All open pits and ponds which contain **saltwater must be fenced**. All pits and ponds which contain oil must be fenced, screened, and netted.
- This is not to be construed as requiring the fencing, screening, or netting of a drilling pit or reserve pit used solely for drilling, completing, recompleting, or plugging **unless such pit is not reclaimed within ninety days after completion of drilling operations**.

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

- **All waste** material associated with exploration or production of oil and gas **must be properly disposed** of in an authorized facility in accord with all applicable local, state, and federal laws and regulations. All waste material recovered from spills, leaks, and other such events shall immediately be disposed of in an authorized facility, although the remediation of such material may be allowed onsite if approved by the director.
- This regulation does not require the offsite disposal of drilling mud from shallow wells or drill cuttings associated with the drilling of a well. However, **water remaining in a drilling or reserve pit used in the drilling and completion operations is to be removed from the pit and disposed of** in an authorized disposal well or used in a manner approved by the director.
- The disposition or use of the water must be included on the sundry notice (form 4) reporting the **plan of reclamation** pursuant to sections 43-02-03-19.4 and 43-02-03-19.5.

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

- **... no saltwater , drilling mud, crude oil, waste oil, or other waste shall be stored in earthen pits or open receptacles** except in an emergency and upon approval by the director.
- **A lined earthen pit or open receptacle may be temporarily used** to retain oil, water, cement, solids, or fluids generated in well completion, servicing, or plugging operations...
- The director **may permit pits or receptacles used solely for** the purpose of flaring casinghead gas...
- The director may permit **pits used solely for** storage of freshwater used in completion and well servicing operations...
- **A pit may be utilized to bury drill cuttings** and solids generated during well drilling and completion operations, providing the pit can be constructed, used, and reclaimed in a manner that will prevent pollution of the land surface and freshwaters...

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

- **Drill cuttings and solids must be stabilized** in a manner approved by the director prior to placement in a cuttings pit.
- Any **liquid accumulating in the cuttings pit shall be promptly removed**. The **pit shall be diked** in a manner to prevent surface water from running into the pit.
- A **small lined pit** can be authorized by the director for **temporary containment** of incidental fluids such as trench water and rig wash, if emptied and covered prior to the rig leaving the site.
- **Pits shall not be located in, or hazardously near, bodies of water, nor shall they block natural drainages**. No pit shall be wholly or partially constructed in fill dirt unless approved by the director.
- When required by the director, the **drilling pit or appropriate parts thereof shall be fenced**.
- Within thirty days after the drilling of a well or expiration of a drilling permit, **drilling pits shall be reclaimed**. The director may grant an extension of the thirty-day time period to no more than one year for good reason.
- Prior to reclaiming the pit, the operator or the operator's agent shall obtain verbal approval from the director of a **pit reclamation plan**. A subsequent sundry notice (form 4) shall be filed detailing the pit reclamation.

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-30 Notification of Fires, Leaks, Spills, or Blowouts

- All persons controlling or operating any well, pipeline, receiving tank, storage tank, or production facility into which oil, gas, or water is produced, received, stored, processed, or through which oil, gas, or water is injected, piped, or transported, shall verbally notify the director immediately and follow up utilizing the online initial notification report within twenty-four hours after **discovery of any fire, leak, spill, blowout, or release of fluid** ... If any such incident occurs or travels offsite of a facility, the persons ... shall **within a reasonable time also notify the surface owners** upon whose land the incident occurred or traveled.

N.D.A.C. 43-02-03-30.1 Leak and Spill Cleanup

- At no time shall any spill or leak be allowed to flow over, pool, or rest on the surface of the land or infiltrate the soil. **Discharged fluids must be properly removed** and may not be allowed to remain standing within or outside of diked areas, although the remediation of such fluids may be allowed onsite if approved by the director. Operators must respond with appropriate resources to contain and clean up spills.
 - *Landowner or tenant notify the Department of Health??*

2015 Legislation (N.D.C.C. 38-08-04(6)): Industrial Commission may release information about volume injected into saltwater injection well and a spill involving more than 10 barrels of fluid not contained on the well site.

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-33 Notice of Intention to Plug Well

- The operator or the operator's agent shall file a **notice of intention (form 4) to plug** with the director, and obtain the approval of the director, prior to the commencement of plugging or plug-back operations...

N.D.A.C. 43-02-03-34 Method of Plugging

- All **wells shall be plugged** in a manner which will confine permanently all oil, gas, and water in the separate strata originally containing them. This operation shall be accomplished by the use of mud-laden fluid, cement, and plugs, used singly or in combination...

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-34.1 Reclamation of Surface

- 1. Within a reasonable time, but not more than one year, after a well is plugged, or if a permit expires, has been canceled or revoked, or a treating plant is decommissioned, **the site, access road, and other associated facilities constructed shall be reclaimed** as closely as practicable to original condition. Prior to site reclamation, the operator or the operator's agent shall file a sundry notice (form 4) with the director and obtain approval of a **reclamation plan**. The operator or operator's agent shall **provide a copy of the proposed reclamation plan to the surface owner** at least ten days prior to commencing the work **unless waived** by the surface owner. Verbal approval to reclaim the site may be given. The notice shall include:
 - The name and address of the reclamation contractor;
 - The name and address of the surface owner and the date when a copy of the proposed reclamation plan was provided to the surface owner;
 - **A description of the proposed work, including topsoil redistribution and reclamation plans for the access road and other associated facilities; and**
 - **Reseeding plans, if applicable.**
- The commission will **mail a copy of the approved notice to the surface owner.**
- **All equipment, waste, and debris shall be removed** from the site. **Flow lines shall be purged** in a manner approved by the director. **Flow lines shall be removed if buried less than three feet [91.44 centimeters] below final contour.**

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

- 2. **Gravel or other surfacing material shall be removed, stabilized soil shall be remediated, and the well site, access road, and other associated facilities** constructed for the well **shall be reshaped** as near as practicable to original contour.
- 3. The **stockpiled topsoil shall be evenly distributed** over the disturbed area and, where applicable, the area **re-vegetated with native species** or according to the **reasonable specifications** of the appropriate government land manager or **surface owner**.
- 4. Within thirty days after completing any reclamation, the operator shall file a sundry notice with the director reporting the work performed.
- 5. The director, with the consent of the appropriate government land manager or **surface owner**, **may waive the requirement of reclamation of the site** and access road after a well is plugged and shall record documentation of the waiver with the recorder of the county in which the site or road is located.

N.D.A.C. 43-02-03-36 Liability. The owner and operator of any well, core hole, or stratigraphic test hole, whether cased or uncased, shall be **liable and responsible for the plugging and site reclamation** thereof in accordance with the rules and regulations of the commission.

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

43-02-03-51.4. Treating plant abandonment and reclamation requirements.

- 2. After abandonment, the **site must be reclaimed** pursuant to section 43-02-03-34.1.

43-02-03-01(49)

- "Treating plant" means any plant ... used for ... reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production...

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-53 Saltwater Handling Facilities

- 1. All **saltwater liquids** or brines produced with oil and natural gas shall be **processed, stored, and disposed of** without pollution of freshwater supplies.
- 2. **Underground injection** of saltwater liquids and brines **shall be in accordance** with chapter 43-02-05.
- 3. **Surface facilities [must be] ... devoid of leaks and constructed of materials** resistant to the effects of produced saltwater liquids, brines, or chemicals that may be contained therein. The above materials requirement may be waived by the director for tanks presently in service and in good condition. **Unused tanks and injection equipment must be removed** from the site or placed into service, within a reasonable time period, not to exceed one year.
- **Dikes must be erected and maintained around saltwater** tanks at any saltwater handling facility ... within thirty days after the well has been completed ... Dikes as well as the base material under the dikes and within the diked area must be constructed of sufficiently impermeable material to provide emergency containment. Dikes must be of sufficient dimension to contain the total capacity of the largest tank plus one day's fluid production ... **Discharged saltwater liquids or brines must be properly removed** and may not be allowed to remain standing within or outside of any diked areas.
- 4. The operator shall take steps to **minimize the amount of solids stored** at the facility.

Selected ND Ind. Comm. Regulations

(NDAC at www.legis.nd.gov/information/acdata/pdf/43-02-03.pdf)

N.D.A.C. 43-02-03-01(34) "Operator" is the principal on the bond covering a well and such person shall be responsible for drilling, completion, and operation of the well, including plugging and reclamation of the well site.

- 2015 Legislation (N.D.C.C. 38-08-04(1)(d): "...furnishing of a reasonable bond ... covering the operation of any underground gathering pipeline intended to transfer oil or produced water from a production facility for disposal, storage, or sale purposes..."
- Operator's agent – *what is the definition?*
- Principle of principal (operator) and agent (operator's agent)
 - In a principal-agent relationship, the agent acts on behalf of the principal
 - The principal is liable to a third party for any commitments made by the agent that were within the agent's authority
- Surface owner – *what is the definition?*

Proposed Regulations – Selected Provisions

<https://www.dmr.nd.gov/oilgas/> as of February 19, 2016

- Defines “interested party” (N.D.A.C. 43-02-03-01(25))
- Refines definition of “saltwater handling facility” (N.D.A.C. 43-02-03-01(45))
- Subjects “underground gathering pipeline operations” to regulations similar to those imposed on drilling oil or gas wells, production, storage, transportation, refining, reclaiming, marketing & processing crude oil or natural gas, disposal of produced water, operate a treating plant (N.D.A.C. 43-02-03-11)
- Authorizes regulator to access “underground gathering pipelines” and “pipeline right of ways” and inspect records (N.D.A.C. 43-02-03-14)
- Requires bond for saltwater handling facility (N.D.A.C. 43-02-03-15(7))
- Requires bond for underground gathering pipeline used for crude oil or produced water (N.D.A.C. 43-02-03-15(8)); bond must remain in affect until abandoned right of way has been reclaimed (N.D.A.C. 43-02-03-15(8)(c))

Proposed Regulations – Selected Provisions

Cont'd

- Extends the definitional depth “topsoil”; clarifies that “facility” is subject to regulations (N.D.A.C. 43-02-03-19)
- Clarifies the regulations of underground gathering pipelines (N.D.A.C. 43-02-03-29.1): requires notice to construct or extend gathering pipeline, specifies design and construction of the pipeline, specifies management of the pipeline right-of-way, leak detection plan and monitoring, addresses spill response plan, corrosion control, pipeline repair and pipeline abandonment.
- Refines regulation addressing Reclamation of Surface (N.D.A.C. 43-02-03-34.1)
- Refines regulation addressing dikes and seals around oil production equipment (N.D.A.C. 43-02-03-49)
- Mandates permit for saltwater handling facility (N.D.A.C. 43-02-03-53(1) and -53.1); addresses saltwater handling facility siting, construction & operation, abandonment and reclamation (N.D.A.C. 43-02-03-53.2, -53.3 & -53.4)

Suggestions

Include language of regulations, then refine to meet surface owner's situation

Even with the regulatory language in the agreement, where is the enforcement?

- Seek recourse from the operator

- Inform regulator if regulation is not being followed

- Pursue legal action based on agreement with operator, especially if regulatory language is included in the agreement

Specify a plan to discuss impacts, especially unanticipated impacts once the operation is initiated

- Include an expectation of regular communication to review impacts as operation is continued

Clarify that the agreement is not a one-time discussion, but the beginning of a business relationship

Include mandatory mediation or mandatory arbitration in case of a dispute

Include attorney's fees as part of future damages if agreement needs to be enforced

Require to be notified when obligation or assets are assigned; identify the assignee and their contact information

Do not waive right to receive future compensation for future damage; do not accept this initial compensation as fulfilling the amount that may be owed for all future time.

Suggestions

Specify location of area subject to the agreement

Agreement pertains to only this site; no other sites

Specify duration of agreement

State law limitation (99 years) but also what makes sense for the parties or the project

Specify use of area subject to agreement

For example, agreement specifies a corridor for the mineral developer to use

The use does not extend to the surface owner's entire tract

Negotiate/discuss before expanding the use of the area

Specify prohibited activities in the area e.g., hunting, living quarters, alcohol consumption, *others?*

Require reclamation as the area is developed, used and abandoned

Suggestions

Additional topics (examples)

- Reconstruct and maintain fences
- Install cattle crossing
- Request copy of reclamation plan or an opportunity to discuss the reclamation plan
- Reshape surface; fill excavations; refill excavations if necessary
- Reseed/re-establish cover/grass; seed more than once if necessary
- Location of facilities
- Use of water (regulated by the state)
- Discharge of water (regulated by the state)
- Use of waste pits (regulated by the state)
- Depth of pipelines

Suggestions

Liability to entrants (especially recreational entrants) injured due to mineral developer's activities, e.g., snowmobiler striking a sunken/settled pipeline

North Dakota law about recreational entrants (N.D.C.C. Chap. 53-08)

Pipeline company needs to reimburse/indemnify surface owner for damages/liabilities owed to third parties

Conflict among competing easements

Surface owner does not warrant property rights

Surface use agreement does not terminate until clean-up is completed

Suggestions

Mineral developer agrees to hold surface owner harmless (as introduced above but this language is broader, for example, this clause should shift liability for environmental cleanup to the mineral developer/pipeline company)

Keep site free of litter

Mineral developer shall maintain the roadway

- Surface owner reserves right to use a path/roadway during mineral production, for example
- Surface owner decides whether to retain a roadway after site is abandoned, for example

Maintain drainage; control soil erosion; locate culverts appropriately