

**LETTER OPINION
2010-L-01**

February 5, 2010

Mr. Wade Enget
Mountrail County State's Attorney
PO Box 369
Stanley, ND 587840-0369

Dear Mr. Enget:

Thank you for your letter requesting my opinion on whether Mountrail County's zoning ordinance may be applied to oil, gas, or saltwater wells that are subject to the State Industrial Commission's jurisdiction. You specifically ask about authority over determining the location of such wells. It is my opinion that Mountrail County's zoning ordinances cannot be applied to oil, gas, or saltwater wells because of the comprehensive nature of the Industrial Commission's statutory authority which preempts county regulation of oil, gas, or saltwater wells, including their location.

ANALYSIS

In your letter, you stated:

Mountrail County, if it had the jurisdiction, would require that all oil, gas or salt water wells be zoned industrial. This would require that the surface owners of all the lands upon which these wells are located to petition for change of zoning. This process would then require a public hearing at the County Planning and Zoning Board, with the recommendations of that Zoning Board being then forwarded to the Mountrail County Board of Commissioners for a separate public hearing. At that time, the Board of Commissioners have the final say as to whether or not the application will be approved or not.¹

This office has previously determined that a county may not issue oil drilling permits.² County zoning was specifically addressed in that opinion, and it was determined that the comprehensive state laws regulating oil and gas production demonstrated the North

¹ Letter from Wade G. Enget to Attorney General Wayne K. Stenehjem (Oct. 6, 2009).

² N.D.A.G. 90-23.

Dakota Legislature's intention to preempt local regulation in this area.³ However, in answering a follow-up question, this office also opined that a county could require oil production companies to apply for and receive a permit prior to beginning operations, but these permits would be "basically informational so that if emergency services were required at the site, the county would already have necessary basic information regarding the operation."⁴ This later opinion further concluded that there was no conflict between the Industrial Commission's authority and a county permit process that does not attempt to cover what the Industrial Commission specifically regulates according to statute, specifically stating that, within the conditions described in the opinion, "a county may require an oil production company to apply for and obtain a 'nonconforming use' permit to establish an oil drilling operation in a heretofore agriculturally zoned area within the county."⁵ The answer to your question requires a close analysis of the respective authority provided by the Legislature to the Industrial Commission and to counties through their zoning authority.

Under state law, the Legislature has given the Industrial Commission broad control over the production of oil and gas.⁶ The Legislature has provided these broad powers to the Industrial Commission, declaring that it is in the public interest to maximize utilization of oil and gas resources in order to prevent waste, promote a greater ultimate recovery of oil and gas, protect the rights of all owners, and provide for "the greatest possible good from these vital natural resources."⁷ The Industrial Commission has been given the authority to regulate the drilling, producing, and plugging of wells; the restoration of drilling and production sites; and authority concerning "all other operations for the production of oil or gas."⁸ These operations include the spacing of wells, the introduction of gas, water, or other substances into producing formations, and the disposal of saltwater and oilfield wastes.⁹ Specifically regarding the location of wells, state law provides that an oil or gas well may not be located within 500 feet of an occupied dwelling unless the dwelling owner agrees or the Industrial Commission "determines that the well location is reasonably necessary to prevent waste¹⁰ or to protect correlative rights. . . ."¹¹ Also, regarding the location of wells, state law provides:

³ Id.

⁴ N.D.A.G. Letter to Wild (Dec. 16, 1991).

⁵ Id.

⁶ See generally, N.D.C.C. ch. 38-08.

⁷ N.D.C.C. § 38-08-01.

⁸ N.D.C.C. § 38-08-04(2)(a).

⁹ N.D.C.C. § 38-08-04(2)(c), (d), (e).

¹⁰ "Waste" is defined to include "[t]he locating . . . of any oil or gas well . . . in a manner which causes . . . reduction in the quantity of oil or gas ultimately recoverable . . . , or which causes . . . unnecessary or excessive surface loss or destruction of oil or gas." N.D.C.C. § 38-08-02(16).

Upon application, if the [Industrial] commission finds that a well drilled at the prescribed location would not produce in paying quantities, that surface conditions would substantially add to the burden or hazard of drilling such well, or that the drilling of such well at a location other than the prescribed location is otherwise necessary either to protect correlative rights, to prevent waste, or to effect greater ultimate recovery of oil and gas, the commission is authorized to enter an order permitting the well to be drilled at a location other than that prescribed by such spacing order; however, the commission shall include in the order suitable provisions to prevent the production from the spacing unit of more than its just and equitable share of the oil and gas in the pool.¹²

Thus, the Industrial Commission has been given broad control over the location of wells, the disposal of salt water, and over many other aspects of the oil and gas field. A comprehensive regulatory scheme concerning mineral exploration and development has been promulgated by the Industrial Commission pursuant to this broad statutory authority.¹³

Counties also have broad general authority to regulate land use.¹⁴ Counties may promote public health, safety, morals, public convenience, general prosperity, and public welfare by regulating the location and use of buildings and structures, and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes via land use zoning.¹⁵ County zoning regulations are made to protect the development of nonurban areas; to provide for emergency management; to regulate and restrict buildings and structures, including the percentage of a lot that may be occupied, the size of open spaces, the density of population, and the location or use of buildings, structures and land for trade, industry, residence, or other purposes; to lessen government expenditures; and to conserve and develop natural resources.¹⁶ However, there are no specific statutes that give counties, or any other political subdivision, authority over determining the location of oil, gas, or saltwater wells.

“[C]ounties are creatures of the constitution and may speak and act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to

¹¹ N.D.C.C. § 38-08-05.

¹² N.D.C.C. § 38-08-07(3).

¹³ See N.D.A.C. art. 43-02, Mineral Exploration and Development.

¹⁴ See generally N.D.C.C. ch. 11-33.

¹⁵ N.D.C.C. § 11-33-01.

¹⁶ N.D.C.C. § 11-33-03.

constitutional authority.”¹⁷ The North Dakota Supreme Court has specifically stated that “[a]lthough counties have general authority to enact zoning ordinances, a local governing body cannot validly enact a zoning ordinance that contravenes federal or state law.”¹⁸ In a related context, this office has stated:

Municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state. The preemption doctrine is based upon the proposition that a [political subdivision], as an agent of the state, cannot act contrary to the state. In general, preemption may be either expressed or implied. Implied preemption occurs when a statute does not expressly state that its regulation is exclusive, but when nevertheless, an intent to preempt local regulatory authority is implied from the whole scope and purpose of the statutory scheme.¹⁹

The comprehensiveness of state regulation of a particular subject is an indication of the intent to preempt local regulatory authority.²⁰ For example, the comprehensiveness of the state’s regulation of hunting indicates an intent to preempt local regulatory authority,²¹ and the comprehensive nature of state regulation of pesticides preempts local regulation in the areas of distribution, storage, transportation, disposal, use, application, and sale of pesticides, though in other instances local governments may enact ordinances which may affect pesticides which must be examined on a case-by-case basis.²² Similarly, the property law of trespass “is necessarily superseded” by the Industrial Commission’s authority to force-pool oil and gas operations.²³ For counties, even home rule authority “does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency,”²⁴ by which the Supreme Court has interpreted that “the industry or activity involved was already subject to substantial state control through broad, encompassing statutes or rules.”²⁵

Mountrail County’s plan, as stated in your letter, would provide the county planning and zoning board and the Mountrail County Board of Commissioners authority to control the

¹⁷ County of Stutsman v. State Historical Soc’y, 371 N.W.2d 321, 329 (N.D. 1985).

¹⁸ Mountrail County v. Hoffman, 607 N.W.2d 901, 903 (N.D. 2000) (citations omitted).

¹⁹ N.D.A.G. 94-F-15 (internal quotation and citations omitted).

²⁰ N.D.A.G. 90-23.

²¹ N.D.A.G. 2003-L-48.

²² N.D.A.G. 91-19.

²³ Continental Res., Inc. v. Farrar Oil Co., 559 N.W.2d 841, 846 (N.D. 1997).

²⁴ N.D.C.C. § 11-09.1-05(5). See generally, State v. Brown, 771 N.W.2d 267, 271-72 (N.D. 2009).

²⁵ Brown, 771 N.W.2d at 275.

location or even to deny the right to drill an oil, gas, or saltwater well. Its practical function is little different than the county oil drilling permits that were previously determined by this office to be preempted.²⁶ The comprehensive nature of the Industrial Commission's statutory authority concerning this matter demonstrates the Legislature's intent to preempt local regulatory authority in this regard. The use of the land at the surface is inherently necessary whenever a well is drilled pursuant to the right granted by a permit from the Industrial Commission. Therefore, it is my opinion that Mountrail County may not apply its zoning ordinances to regulate land usage for the location of oil, gas, or saltwater wells.²⁷ For the reasons stated above, this office's previous opinion that a county may require an oil production company to apply for and obtain a nonconforming use permit to establish an oil drilling operation in an agriculturally zoned area is overruled.²⁸

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁹

²⁶ N.D.A.G. 90-23.

²⁷ Landowners do have access to a forum that may address these concerns about drilling because the hazard of drilling a well may be addressed by the Industrial Commission, which may then permit the wells to be drilled at another location. N.D.C.C. § 38-08-07(3).

²⁸ See N.D.A.G. Letter to Wild (Dec. 16, 1991). A county may still require an oil production company to provide to the county basic information regarding its well sites within the county in case it becomes necessary for the county to provide emergency services in relation to the well sites, but it may not do so through the issuance of "nonconforming use" or "conditional use" permits.

²⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).