

LETTER OPINION
2015-L-03

June 2, 2015

The Honorable Kenton Onstad
State Representative
3513 66th Ave NW
Parshall, ND 58770-9468

Dear Representative Onstad:

Thank you for your letter asking about the authority of the North Dakota Industrial Commission (Commission) over abandoned oil and gas wells. Specifically you ask whether the Commission has an affirmative duty to seize equipment or bonds and plug and reclaim a well site after it has been in abandoned well status¹ for over one year; what the Commission's legal duties are regarding well sites with wells that have been in abandoned well status for over a year; what timeline the Commission has to complete any legal duties; and finally, what recourse does a surface owner have if the Commission refuses to reclaim a well site.

It is my opinion the Commission has no affirmative statutory duty to plug, replug, or reclaim well sites that have been abandoned for over a year. Rather, the Commission has statutory authority to enter into contracts to plug, replug, or reclaim a well site and may use its discretion to exercise that authority. Further, the Commission has administrative rules that address plugging, reclamation, and recourse of the landowner in the event the surface owner is not satisfied with the plug or reclamation.

ANALYSIS

You first ask whether the Commission has an affirmative duty to seize equipment or bonds and plug or reclaim a well site after it has been placed in abandoned well status for over one year. The Legislature has delegated to the Commission the authority to regulate the "drilling, producing, and plugging of wells, the restoration of drilling and production sites, and all other operations for the production of oil or gas."² The Commission has continuing jurisdiction over all persons and property both public and private to carry out its legislative mandates.³ In addition, the Commission has authority to adopt rules and orders to carry out its responsibilities, and has done so.⁴

¹ See N.D.C.C. § 38-08-04(1)(l).

² N.D.C.C. § 38-08-04(2)(a).

³ N.D.C.C. § 38-08-04.

⁴ N.D.C.C. § 38-08-04(5).

The Commission is authorized to place wells which have not produced oil or natural gas in paying quantities for one year in abandoned-well status.⁵ Once a well has been placed in abandoned well status by the Commission, within six months the well must be returned to production in paying quantities, approved by the Commission for temporary abandoned status, or plugged and abandoned.⁶ If none of those conditions are met, the Commission may require the well to be placed on a single well bond with the bond amount equaling the estimated cost to plug the well and reclaim the well site.⁷ If a well remains in abandoned well status for one year or longer, the bond posted for the well is subject to forfeiture by the Commission.⁸

The Commission also has the authority to enter into contracts for plugging or replugging of oil and gas wells and the reclamation of abandoned well sites.⁹ The Commission may exercise this authority when:

1. The person or company drilling or operating the well or equipment cannot be found, has no assets with which to properly plug or replug the well or reclaim the well site, cannot be legally required to plug or replug the well or to reclaim the well site, pipeline, or associated pipeline facility, or damage is the result of an illegal dumping incident.
2. There is no bond covering the well to be plugged or the site to be reclaimed or there is a bond but the cost of plugging or replugging the well or reclaiming the site, pipeline, or associated pipeline facility exceeds the amount of the bond or damage is the result of an illegal dumping incident.
3. The well, equipment, pipeline, or associated pipeline facility is leaking or likely to leak oil, gas, or saltwater or is likely to cause a serious threat of pollution or injury to the public health or safety.¹⁰

The Commission is authorized to enter any land for the purpose of plugging or replugging a well or reclamation of the site.¹¹ The Commission may initiate a cause of action in district court against the operator or any working interest for the reasonable costs incurred for plugging, replugging, or reclamation¹² and can confiscate any production related equipment and salable oil at the well site to recover the costs.¹³

⁵ N.D.C.C. § 38-08-04(1)(l).

⁶ Id.

⁷ Id.

⁸ Id.

⁹ N.D.C.C. § 38-08-04.4.

¹⁰ Id.

¹¹ N.D.C.C. § 38-08-04.7.

¹² N.D.C.C. § 38-08-04.8.

¹³ N.D.C.C. § 38-08-04.9.

The use of the word “may” is permissive and indicates it is a matter of discretion.¹⁴ Since permissive language is used consistently to describe the Commission’s authority, it is my opinion the Commission has discretion in deciding when and to what extent it exercises its authority to plug an abandoned well and reclaim the well site.

You next ask what legal duties the Commission has with respect to an un-reclaimed well site with a well that has been in abandoned status for over one year. When performing discretionary acts, an agency has a range of reasonableness within which the agency may exercise its administrative power.¹⁵ The Commission has exercised this power by adopting administrative rules that address plugging and reclamation. Its legal duties, then, are found in N.D.A.C. ch. 43-02-03.¹⁶

The Commission’s rules make the owner and operator of an oil and gas well responsible for the plugging of the well, core hole, or stratigraphic test hole as well as site reclamation.¹⁷ An operator must notify the Commission of its plans to plug a well and file a report after plugging detailing the method used.¹⁸ The Commission also has established specific requirements for plugging wells.¹⁹ Reclamation of the site must occur no more than one year following the plugging of any well.²⁰ The Commission has established requirements for the reclamation work, notification to the surface owner and reporting to the Commission.²¹

Once a well has failed to produce oil and gas for one year, the Commission can classify the well as abandoned. If a well is so classified, the duty to plug and reclaim may be waived for one year and the well placed in temporary abandoned status.²² Temporary abandoned well status is granted by the director of the oil and gas division and can be extended on a year by year basis.²³ The Commission’s director of oil and gas also has the authority to waive the duty to plug and reclaim if good cause is shown.²⁴

¹⁴ N.D.A.G. 2010-L-11.

¹⁵ Kasprowicz v. Finck, 574 N.W.2d 564, 568-9

¹⁶ N.D.A.C. § 43-02-03-02. I would also note that wells for underground injection are subject to N.D.A.C. chs. 43-02-03 and 43-02-05. N.D.A.C. § 43-02-05-01.1.

¹⁷ N.D.A.C. § 43-02-03-36.

¹⁸ N.D.A.C. § 43-02-03-33.

¹⁹ N.D.A.C. § 43-02-03-34.

²⁰ N.D.A.C. § 43-02-03-34.1.

²¹ Id.

²² N.D.A.C. § 43-02-03-55(2).

²³ Id. If a well is granted temporary abandoned well status, the operator must isolate the well perforations, prove the integrity of the casing, and the well’s casing must be sealed at the surface. Id.

²⁴ N.D.A.C. § 43-02-03-55(3).

You next ask what timeframe the Commission has to complete any affirmative duties it has with respect to plugging or reclaiming an abandoned well site. As stated above, it is my opinion the Commission has no affirmative statutory duty to plug abandoned wells or reclaim sites, and thus the Commission may again use its discretion with respect to timeline.

Finally, you ask what recourse surface owners have if the Commission refuses to reclaim a well site after it has been in abandoned well status for one year. Chapter 38-08, N.D.C.C., provides no private cause of action. The Commission, however, has adopted an administrative rule that allows any surface owner, lessee, or mineral owner to request the Commission to complete an investigation for any alleged violation of any rule, order or regulation.²⁵ If a surface owner believes an operator failed to plug an abandoned well or reclaim the site in violation of the Commission rules and orders, the surface owner may request that the Commission to investigate the matter. Under this rule, the Commission's director of oil and gas is required to report his findings to the person filing the complaint and the Commission is obligated to take such further legal actions as it believes it necessary to stop further violations.²⁶ It is my opinion, therefore, that N.D.A.C. § 43-02-03-54 provides a means for a surface owner to request action by the Commission.

Sincerely,

Wayne Stenehjem
Attorney General

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.²⁷

²⁵ N.D.A.C. § 43-02-03-54. Outside the Commission's purview, a surface owner may have recourse through a civil action against a well operator; in addition, individual surface use agreements may contain relevant terms related to well reclamation that could be enforced by a court. This office, however, does not opine on such specific questions of fact, nor are such facts presented in your question.

²⁶ Id.

²⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).