

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

December 16, 1991

Mr. Steven J. Wild  
Bowman County State's Attorney  
P.O. Box 260  
Bowman, ND 58623

Dear Mr. Wild:

Thank you for your letter of August 28, 1991, regarding the authority of a county to require a permit from an oil production company before it is allowed to begin drilling operations within a county.

You indicate in your letter that Bowman County would like to require oil production companies to apply for and receive a permit prior to beginning operations. The purpose for requiring 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. In a telephone conversation with a member of my staff, you indicated that all land within the county not within a municipality is zoned for agricultural purposes with oil and gas exploration as a conditionally permitted use. You stated that the county is not interested in regulating the actual business of oil production, only that basic information be provided. You referred to Attorney General's Opinion 90-23 and inquired whether this opinion and the law would preclude the county from requiring an oil production company to obtain a "permit" from the county prior to drilling.

The board of county commissioners of any county has the power to regulate and restrict within the county the location and use of buildings and structures and the use, condition of use, or occupancy of lands for residents, recreation, and other uses. N.D.C.C. § 11-33-01. The regulations must be made in accordance with a comprehensive plan and may be designed to conserve and develop natural resources. These regulations must be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses. N.D.C.C. § 11-33-03. However, the North Dakota Legislature has granted specific authority to the State Industrial Commission to regulate the drilling, producing, and plugging of wells, the restoration of drilling and production sites, and all other operations from the production of oil and gas. N.D.C.C. § 38-08-04. Therefore, notwithstanding the county's general authority to regulate land use within the county, the board of county commissioners has no authority to regulate the development, production, or utilization of natural resources of oil and gas in the state of North Dakota.

According to your county ordinances, a "drilling" permit is required before an oil production company can drill although the ordinances do not regulate the production of oil per se. In effect, the required permit is a "nonconforming use" or "conditional use" permit rather than a "drilling permit."

Attorney General Opinion 90-23 stated that a county could not regulate the production of oil and issue drilling permits as this function was specifically delegated to the Industrial Commission. However, if the county does not attempt to intrude into the Industrial Commission's jurisdiction over the business of oil production, instead making decisions regarding use permits based upon land use considerations, the laws will be compatible. As stated in C&M Sand and Gravel v. Board of County Commissioners, 673 P.2d 1013 (Colo. App. 1983), "[t]he Act preempts only the authority of local government to set performance standards for mixed land reclamation activities [which is what the Act covered], but does not prohibit local regulation by permit of all aspects of land use [not covered by the Act]." 673 P.2d at 1017.

In my opinion, there is no conflict between the Industrial Commission's authority and a permit process that does not attempt to cover what the Industrial Commission specifically regulates according to statute. If the county regulates through permitting only the use of the property and the Industrial Commission regulates the actual production of oil, they will not conflict. Therefore, it is my opinion, that with the conditions set forth above, 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.

Sincerely,

Nicholas J. Spaeth

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