

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Environmental Driven Solutions,
LLC,

Plaintiff and Appellee,

v.

Dunn County, a North Dakota
Municipality,

Defendant and Appellant,

v.

North Dakota Industrial
Commission,

Intervenor and Appellee.

Supreme Court No. 20160100

Dunn County
No. 13-2013-CV-100

Appeal from Judgment
Dated March 3, 2016

District Court, Southwest Judicial District
Dunn County, North Dakota

The Honorable Judge Dann Edward Greenwood, Presiding

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

[1] The issues presented on appeal are as follows:

1. Whether the district court erred in deciding that the North Dakota Industrial Commission has exclusive jurisdiction over the location, construction, and operation of oil waste treating facilities; and
2. Whether the district court erred in declaring that Dunn County's zoning ordinance is not applicable to the plaintiff's proposed oil waste treating facility.

STATEMENT OF CASE

[2] The North Dakota Industrial Commission [hereinafter the “Industrial Commission”] is a state agency. It “has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter [38-08, N.D.C.C.]” N.D.C.C. § 38-08-04. The Industrial Commission granted a permit to Environmental Driven Solutions [hereinafter “EDS”] to operate an oil waste treating facility within Dunn County, North Dakota. (NDIC Order No. 22215 [hereinafter “NDIC Order”], p. 4, ¶ 1 [A. 43].)

[3] Dunn County is a county in western North Dakota. N.D.C.C. § 11-01-14. It is a body corporate. N.D.C.C. § 11-10-01. “For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare,” its board of county commissioners “may regulate and restrict within the county, subject to section 11-33-20 and chapter 54-21.3, the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes.” N.D.C.C. § 11-33-01. Dunn County has adopted a zoning ordinance pursuant to Ch. 11-33, N.D.C.C. (Dolezal Aff. [A. 39].) EDS applied to Dunn County for a change of zoning

designation from Rural Preservation to Rural Development, which was a prerequisite before it could apply for a conditional use permit for its oil waste treating facility, but its application was denied. (P&Z Minutes, Aug. 27, 2013, pp. 2-3 [A. 48-49].) One of the fundamental reasons for denying the zone change application was that the Dunn County comprehensive plan and zoning ordinance do not allow Rural Development zones of less than 120 acres in size, while EDS's application was limited to 118.58 acres of land and a variance had not been given. Ibid. At a later zoning hearing, while this action was pending, EDS applied for a conditional use permit for an Oilfield Waste Treatment Facility. (P&Z Minutes, Nov. 11, 2014, p. 1 [A. 50].) The application was denied. Ibid. EDS did not appeal from either of the adverse decisions of the county government.

[4] EDS brought this declaratory judgment action to determine the answer to the question of whether and to what extent the Industrial Commission's jurisdiction and Dunn County's zoning jurisdiction each apply to the oil waste treating facility that EDS proposes to operate within Dunn County. (Complaint, p. 5, ¶ 1 [A. 10].) The Industrial Commission moved to intervene in the action and was permitted to file pleadings and participate in the litigation. (Complaint

in Intervention [A. 18].) The parties filed competing motions for summary judgment. The district court ordered that judgment be entered as a matter of law, determining that “the treating plant . . . does not require a County conditional use permit to be constructed or operated at the location approved by the North Dakota Industrial Commission.” (Judgment, ¶ 2 [A. 38].) The district court’s judgment derives from its “conclusion that the North Dakota Industrial Commission has exclusive jurisdiction of the issue of the location of oil and gas waste treating plants.” Ibid.

[5] The district court noted that all parties “seem to agree that this is an issue that has not previously been addressed by the North Dakota Supreme Court” and that “[t]here is a relative dearth of North Dakota case law specifically addressing preemption of county or municipal ordinances/regulations by state law.” (Memorandum Opinion, ¶¶ 8 and 10 [A. 30-31].) The district court “conclude[d] that the North Dakota legislature intended that the North Dakota Industrial Commission would ‘occupy the field’ of the regulation of oil and gas waste treatment plants and, therefore, has exclusive jurisdiction of the issue of the location of oil and gas waste treating plants.” (Memorandum Opinion, ¶ 22 [A. 36].)

[6] Dunn County appeals from the district court's final judgment because the district court erred in reaching its legal conclusions. As argued below, the legislature created the Industrial Commission and gave it certain powers, beyond which it has none. Those powers do not include the ability to permit an oil waste treating facility that is prohibited by a county's properly-enacted zoning ordinance and land use comprehensive plan. County zoning jurisdiction is both the sensible and the statutorily appropriate means of determining where an oil waste treating facility makes sense and where it does not.

STATEMENT OF FACTS

[7] The facts of this case are simple. EDS proposes to operate a facility to process oil waste in Dunn County. (Complaint, p. 2, ¶¶ IV-V [A. 7].) The Industrial Commission granted EDS a permit to operate the facility. (NDIC Order, p. 4, ¶ 1 [A. 43].) Dunn County denied EDS's applications for a zone change and for a conditional use permit under the county zoning ordinance, which does not allow such a facility to be constructed or operated without a conditional use permit from the county. (P&Z Minutes, Aug. 27, 2013, pp. 2-3 [A. 48-49]; P&Z Minutes, Nov. 11, 2014, p. 1 [A. 50].)

[8] EDS's proposed facility will not dispose of anything at all. It will instead process one type of waste to render two other types of waste, which must be disposed of elsewhere, and salable hydrocarbons, to be brought to market. The specific type of facility that EDS proposes to operate uses gravity separation and a vacuum drum filter as its means of processing oil waste and separating it into components. First, EDS was going to "try to remove any free oil that they can." (Bohrer Dep., 42:25-43:2 [A. 69-70].) After that step, "they were going to allow for gravity separation in some tanks." (Bohrer Dep., 43:4-5 [A. 70].) Gravity separation relies on the principal that "[o]il and water do not

mix, so when you allow time for the gravity to separate them based on the densities, the oil will rise to the top and the water will go to the bottom.” (Bohrer Dep., 42:1-5 [A. 69].) After the gravity separation is done, “they were going to further process the waste by running it through this . . . drum vacuum filter.” (Bohrer Dep., 43:5-8 [A. 70].) This type of filter “is a cylindrical drum that you process waste through and through a means of a vacuum, meaning less pressure on one side than the other, you will extract the water, pull the water away from the solids, and what you are left then in theory is a water phase that you separated from the solid phase.” (Bohrer Dep., 42:14-21 [A. 69].)

[9] Up through completing the first step of the process, skimming oil from the waste material that arrives at the facility, nothing is actually disposed of. (Bohrer Dep., 44:1-12 [A. 71].) In the second step, gravity separation, nothing is actually disposed of; rather, after separating oil, the process of recovering solids would begin and those solids would then be dried out and later disposed of. (Bohrer Dep., 44:13-25 [A. 71].) In the vacuum drum filter step, nothing is disposed of. (Bohrer Dep., 46:19-47:14 [A. 73-74].)

[10] The solids must be hauled by truck and disposed of elsewhere, because EDS does not have a permit to bury the solids on

location. (Bohrer Dep., 45:16-46:6 [A. 72-73].) The saltwater must be disposed of at a proper saltwater disposal well, which is permitted separately from the oil waste treating facility, possibly requiring trucks to haul the saltwater to such a disposal well. (Bohrer Dep., 47:19-12 [A. 74].) The recovered oil is, of course, not disposed of, but rather brought to market, recovery of oil being the reason for operating the facility in the first place. Thus, if EDS operates its proposed facility according to the Industrial Commission permit, it will not dispose of anything whatsoever at the facility itself.

[11] There are in excess of 400 saltwater disposal wells currently operating in North Dakota and only 25 to 30 oil waste treating facilities of the type that EDS proposes to build. (Bohrer Dep., 15:11-18 [A. 58].) The Industrial Commission oddly has no knowledge of how many of those oil waste treating facilities are co-located with saltwater disposal wells, but agrees that there are at least several hundred disposal wells operating without a co-located treatment facility. (Bohrer Dep., 15:24-16:7 [A. 58-59].) The Industrial Commission agrees that there are means to manage solid oilfield wastes other than by EDS's proposed method. (Bohrer Dep., 16:15-22 [A. 59].)

[12] Recognizing that facilities of this type are likely to experience spills of the oil waste they are treating, the Industrial Commission considers the presence of surface and subsurface water features and the type of soil in the vicinity of a proposed treating facility. (Bohrer Dep., 17:7-18:19 [A. 60-61].) While it sometimes requires operators to test the soil in the area for compatibility with the waste treating facility, the Industrial Commission did not require any such testing for the EDS facility. (Bohrer Dep., 18:20-19:9 [A. 61-62].) The Industrial Commission does not have any requirements about where an oil waste treating facility will be located, only exclusions for places where they must not be located. (Bohrer Dep., 20:16-23 [A. 63].) The Industrial Commission has no knowledge of any of its field inspectors visiting the EDS site prior to issuing EDS a permit to operate its facility. (Bohrer Dep., 22:9-25 [A. 64].)

[13] EDS applied to the Industrial Commission for a permit to operate the proposed facility. The Industrial Commission had a hearing on EDS's application for a permit to operate its facility. The hearing took place in Bismarck, North Dakota. (Bohrer Dep., 28:8-17 [A. 65].) None of the neighboring landowners from Dunn County came to the hearing in Bismarck. (Bohrer Dep., 28:18-23 [A. 65].) The only notice

they would have been given of the hearing at the time was publication in the Bismarck Tribune. (Bohrer Dep., 28:24-29:9 [A. 65-66].) No hearings were ever held in Dunn County before the Industrial Commission decided that EDS could operate an oil waste treating facility there. (Bohrer Dep., 31:15-18 [A. 68].) Even if the Dunn County landowners drove the 130 miles from the proposed facility to Bismarck to attend the hearing, it could have been continued to a later date without prior notice. (Bohrer Dep., 29:25-30:15 [A. 66-67].)

[14] The Industrial Commission granted the permit on August 27, 2013. (NDIC Order, p. 7 [A. 46].) In the context of county zoning regulation, the Industrial Commission's permit expressly requires EDS to comply with local laws and regulations. (NDIC Order, p. 3, ¶¶ 17-19 [A. 42].) The Industrial Commission "makes no determination as to which local laws may or may not be applicable." (Bohrer Dep., 71:8-16 [A. 82].) The Industrial Commission takes no position on whether the State Building Code, county regulations on workforce housing, county regulations about building a maintenance shop, county regulations regarding truck parking, or any other local laws or regulations apply to oil waste treating facilities. (Bohrer Dep., 81:7-82:5 [A. 83-84].) The only time that the Industrial Commission does take a position on which

local laws and regulations apply to an oil waste treating facility is that “local zoning regulations do not apply.” (Bohrer Dep., 86:11-17 [A. 85].)

[15] The Industrial Commission agrees that people who own land downhill from an oil waste treating facility have an interest in what land use occurs uphill from them, as do people who own land or live near such a facility even if they are uphill from it. (Bohrer Dep., 56:15-57:5 [A. 75-76].) The Industrial Commission agrees that, at least in theory, the board of county commissioners is the representative government of the people in the county. (Bohrer Dep., 57:14-18 [A. 76].) The Industrial Commission’s purpose is “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.” (Bohrer Dep., 58:4-19 [A. 77].) See N.D.C.C. § 38-08-01. The Industrial Commission pays no attention to the land use regulations of a county, such as industrial zoning or the county’s comprehensive plan for land use, in deciding where oil waste treating facilities may be built. (Bohrer Dep., 60:18-62:5 [A. 78-80].)

[16] The Industrial Commission was not aware of EDS’s plans to house up to 20 employees on the same land where it would operate its oil waste treating facility. (Bohrer Dep., 63:7-16 [A. 81].) The Industrial

Commission does not consider whether people are going to live on-site when it makes its determination whether to issue a permit for an oil waste treating facility. (Bohrer Dep., 63:17-22 [A. 81].) Even though Mr. Bohrer was the most knowledgeable person at the Industrial Commission about oil waste treating facilities such as the type that EDS proposes to operate in Dunn County, he was not able to answer questions about whether a particular method of storing waste solids at similar sites was approved by the Industrial Commission. (Bohrer Dep., 89:8-19 [A. 86].)

[17] The director of the Industrial Commission's Department of Mineral Resources and Oil and Gas Division, Lynn D. Helms, testified that he "understand[s] that most of the oil and gas producing counties have zoning ordinances that speak to land use, and treating plants would fall under one of those use types." (Helms Dep., 5:13-14 and 12:16-19 [A. 90-91].) Mr. Helms knows of no time when an application was denied based on a county commission's objections. (Helms Dep., 13:14-19 [A. 92].) Nor does he know of any time when a permit was denied based on landowner objections. (Helms Dep., 14:24-15:4 [A. 93-94].) He did agree that the county commission would have more knowledge than the Industrial Commission about land compatibility

issues involved in mixing oil and gas development and other types of land use. (Helms Dep., 13:25-14:12 [A. 92-93].) Mr. Helms also testified that the Industrial Commission “doesn’t have any specific laws or regulations in mind” when it orders EDS and other applicants to comply with “all applicable laws and regulations, local, state and federal.” (Helms Dep., 19:22-20:7 and 20:21-22 [A. 95-96].)

LEGAL ARGUMENT

A. Standard of Review

[18] The district court's decision was made on the parties' competing motions for summary judgment under N.D.R.Civ.P. 56.

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Fleck v. Missouri River Royalty Corp., 2015 ND 287, ¶ 6, 872 N.W.2d 329 (quoting Johnson v. Shield, 2015 ND 200, ¶ 6, 868 N.W.2d 368).

[19] The facts of this case are not disputed. The law is. The district court had to interpret the statutes of North Dakota regarding the jurisdiction of the Industrial Commission and the zoning

jurisdiction of Dunn County. “The interpretation and application of a statute is a question of law, which is fully reviewable on appeal.” Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶ 7, 781 N.W.2d 200 (citing Leet v. City of Minot, 2006 ND 191, ¶ 12, 721 N.W.2d 398).

B. The Industrial Commission does not have jurisdiction over the location, construction, and operation of oil waste treating facilities

1. Statutory Language

[20] “Administrative authorities are creatures of statute and have only such powers as the statute confers on them.” State ex rel. Public Service Commission v. Montana-Dakota Utilities Co., 89 N.W.2d 94, 100 (N.D. 1958) (quoting 42 Am.Jur. Public Administrative Law § 68). The Industrial Commission has precisely the jurisdiction that the Legislature has provided for by statute, neither more nor less.

[21] As it relates to oil and gas industry activities, the Industrial Commission’s jurisdiction is explicitly spelled out by statute. In relation to this action, the statute reads as follows:

The commission has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter. The commission has authority, and it is its duty, to make such investigations as it deems proper to determine

whether waste exists or is imminent or whether other facts exist which justify action by the commission. The commission has the authority:

...

2. To regulate:

...

e. Disposal of saltwater and oilfield wastes.

...

(2) The commission may consider, in addition to other authority granted under this section, safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities.

N.D.C.C. § 38-08-04(2)(e).

[22] The Industrial Commission cannot have a greater scope of jurisdiction than provided for by the Legislature. If the Industrial Commission has jurisdiction over EDS's proposed facility, it must be found in this statute—not in the administrative code (written by the Industrial Commission); not in Attorney General opinions (whose author is a member of the Industrial Commission, see N.D.C.C. § 54-17-02); not in historical assumptions or practices; and not in vague suggestions that the Industrial Commission has exclusive jurisdiction over the entirety of the “oil and gas industry,” a term that the

Legislature chose not to use in describing the Industrial Commission's jurisdiction.

[23] The statute under which the Industrial Commission's jurisdiction is defined does not give it any jurisdiction over oil waste treating facilities such as the one that EDS proposes to operate in Dunn County. It is undisputed that the EDS facility will not dispose of anything at all. It will change one form of waste into two other forms of waste, which must be disposed of through other processes, and salable hydrocarbons. The Industrial Commission agrees that EDS's process will not actually dispose of anything. Supra, ¶¶ 8-10.

[24] The sole reference to oil waste treating plants in the Century Code is at N.D.C.C. § 38-08-04(2)(e)(2), quoted above. The Industrial Commission, when exercising its jurisdiction over "[d]isposal of saltwater and oilfield wastes . . . may consider . . . safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities." Ibid. This does not confer upon the Industrial Commission any jurisdiction to permit or otherwise regulate treating plants. It is, rather, an encouragement for the Industrial Commission to consider access to treating plants when it "regulate[s] . . . [d]isposal of saltwater and oilfield wastes." Ibid. That is, when the Industrial

Commission determines how saltwater and oilfield wastes are going to be disposed of, it may consider whether treating plants are convenient to the disposal operation over which it does have jurisdiction, such as a saltwater injection well.

[25] Because the Industrial Commission does not have jurisdiction to permit oil waste treating facilities, including the one that EDS proposes to operate in Dunn County, the district court erred by finding that it not only has that jurisdiction but has it to the exclusion of Dunn County's authority to regulate land use through its zoning ordinance. The Court should reverse the district court's decision and direct that judgment be entered in favor of Dunn County.

2. Legislative History

[26] N.D.C.C. § 38-08-04 was amended during the 2013 legislative session, in particular adding new subdivision (2)(e)(2), which contains the only reference anywhere in Ch. 38-08 to treating plants. The amendment was made by 2013 N.D. Sess. Laws ch. 277, § 2. This session law began life as H.B. 1333, which was in relevant part an act "relating to saltwater disposal wells, the abandoned oil and gas well plugging and site reclamation fund, reclamation of pipeline facilities,

and oil and gas gross production tax for reclamation.” 2013 N.D. Sess. Laws ch. 277, preamble.

[27] Subdivision (2) was introduced by the Senate Natural Resources Committee as a recommended amendment to H.B. 1333. Journal of the Senate, 63rd N.D. Legis. Sess., 847-48 (Mar. 22, 2013). “The purpose of [H.B. 1333] is to have more pipelines and fewer trucks on the roads.” Hearing on H.B. 1333 Before the Senate Natural Resources Comm., 63rd N.D. Legis. Sess. (Mar. 14, 2013) (testimony of Mike Schatz, Representative from District 36) [Hrg. on H.B. 1333]. Concerns about the bill preempting county authority to regulate activity such as placing weight restrictions on local roads were addressed. Hrg. on H.B. 1333 (Mar. 14, 2013) (testimony of Ladd Erickson, McLean County State’s Atty.). The Director of the Industrial Commission’s Department of Mineral Resources actually testified, in support of H.B. 1333, that the additional factors that subdivision (2) would “not preempt the appropriate legal jurisdictions of counties or other state agencies.” Hrg. on H.B. 1333 (Mar. 14, 2013) (testimony of Lynn D. Helms, Director of Department of Mineral Resources, North Dakota Industrial Commission).

[28] No person, in the records of the hearings on H.B. 1333, so much as mentioned oil waste treating facilities. Nothing about the history of subdivision (2) indicates a legislative intent that the Industrial Commission's jurisdiction extend to the permitting of oil waste treating facilities over the objection of local governments. The actual history of the statute shows that the Legislature intended that local land use regulations would apply to this type of facility.

[29] If the Legislature intended to give the Industrial Commission jurisdiction to impose an oil waste treating facility on Dunn County over the objection of the zoning authority that the Legislature gave to Dunn County, it had to have done so prior to the 2013 legislative session and without using any language that refers even tangentially to oil waste treating facilities. "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-04. There is nothing to be found anywhere in the Century Code that allows courts to insert new words within unambiguous statutes in order to satisfy the desires of state agencies. The district court's judgment is in error because it relies on the insertion of words that cannot be found within the Legislature's enactment.

C. Dunn County’s zoning ordinance is applicable to EDS’s proposed oil waste treating facility

[30] As explained above, the Industrial Commission does not have jurisdiction to permit EDS to construct and operate its proposed facility in Dunn County. That is the end of the inquiry in this action.

[31] However, if the Court concludes that the Industrial Commission does have some source of jurisdiction to permit oil waste treating facilities, it must then consider whether that jurisdiction is exclusive or shared with Dunn County’s zoning jurisdiction. There is no dispute that Dunn County has properly adopted a zoning ordinance pursuant to its statutory authority.

[32] When the Legislature has given a state agency the ability to preempt local land use regulation such as a county zoning ordinance, it has done so explicitly and unambiguously. For example, the Public Service Commission has the authority to issue permits for construction of transmission facilities. N.D.C.C. § 49-22-07. Its permit “may supersede and preempt any local land use, zoning, or building rules, regulations, or ordinances upon a finding by the commission that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost

or economics, or needs of consumers.” N.D.C.C. § 49-22-16. The Legislature has thereby set out the exact procedure by which conflicts between a Public Service Commission permit and county zoning regulation are to be resolved, including a standard of decision and review by the courts. See N.D.C.C. § 49-22-19.

[33] In stark contrast with the Legislature’s explicit grant of preemption authority to the Public Service Commission, it did not pass any law that says—or even implies—that the Industrial Commission can preempt county zoning ordinances. Nor did it provide a standard for deciding when that hypothetical authority can be exercised. Nor did it establish a procedure to protect the due process of law and to ensure that such decisions are made fairly and correctly under the law.

[34] When the Legislature actually intends to give a state agency the ability to preempt county zoning, it leaves no room for doubt. In the context of oil waste treating facilities, the Legislature did not give that ability to the Industrial Commission. Therefore, if the Industrial Commission has any jurisdiction to permit oil waste treating facilities, that jurisdiction is shared with the jurisdiction of a county’s government to regulate the use of land within the county.

[35] The concept of shared jurisdiction is not novel. The statute under which counties are authorized to regulate land use through zoning ordinances provides for shared jurisdiction with state agencies. N.D.C.C. § 11-33-01. Even the Industrial Commission recognizes that it has shared jurisdiction with other state agencies and its order to EDS requires that the facility comply with all local laws and regulations. Supra, ¶ 14. At least one other tribunal has concluded that the Industrial Commission's jurisdiction over the oil and gas industry is limited or shared with others: An administrative law judge recently concluded that the Industrial Commission lacks jurisdiction to levy fines against a trucking company that spills saltwater on a public road—the department of health has jurisdiction, instead. Nick Smith, Commissioners defend fines over spills, Bismarck Tribune, Mar. 29, 2016, at A1.

[36] The Industrial Commission admittedly gives no attention at all to incompatible land uses near a proposed oil waste treating facility. That is because its expertise is geological in nature. Moreover, the Industrial Commission has recently begun to limit whose input will even be heard when deciding whether to issue a permit. Nick Smith, Public lashes out, Bismarck Tribune, Apr. 12, 2016, at A1. The

Industrial Commission is a fundamentally inappropriate and unfair venue in which to make decisions about orderly development and harmonious use of the land.

[37] County zoning boards, on the other hand, have expertise in land use planning and in determining where industrial development is appropriate. There is no dispute that the Industrial Commission hearing process gives much less notice to land owners than the Dunn County zoning process (publication in the Bismarck Tribune as opposed to mailing notice to each neighboring landowner) and that appearing to speak to the decision makers about the merits of the planned facility, either for it or against it, is much easier in the zoning context than before the Industrial Commission, which requires people to travel 130 miles to Bismarck and possibly just be sent home when the hearing is continued to another date without advance notice.

[38] If the Industrial Commission has any authority to regulate oil waste treating facilities, that authority is and should be shared with county zoning so that both geological (Industrial Commission) and geographical (county zoning) considerations are evaluated before a company like EDS can begin accepting, storing, and processing waste materials generated by the oil and gas industry.

CONCLUSION

[39] The Industrial Commission has deep institutional expertise regarding the geological considerations of where an oil and gas production well or a saltwater disposal well must be located in order to prevent waste. Sometimes, a well bore's location will necessarily conflict with other uses of the land.¹ But it never has been and never will be necessary that a purely surface use of land, such as an oil waste treating facility, be located amongst incompatible land uses.

[40] The Legislature enabled county zoning so that local decision makers could regulate the use of land and implement a comprehensive plan. County governments, exercising their zoning authority, have deep institutional expertise on the geographical considerations of where within their territory a particular land use is appropriate and compatible both with other land uses and with the county's comprehensive plan. The Industrial Commission lacks that local understanding and has shown no desire to acquire it or to harmonize

¹ Due to the industry's mastery of directional drilling, the Industrial Commission's policy, recognized by this Court, is that "the crucial well location is the completion location and not the surface location." Gadeco v. Industrial Commission, 2013 ND 72, ¶ 15, 830 N.W.2d 535. Thus, it is becoming less necessary that even a well bore be located in a place that is incompatible with nearby land uses or with the local government's comprehensive plan.

oil waste treating facilities with other land uses under a county's properly adopted comprehensive plan.

[41] The district court's conclusion that the Legislature intended for the Industrial Commission to "occupy the field of the regulation of oil and gas waste treatment plants" is not supported by the Legislature's acts or the history of those acts. Because the Industrial Commission lacks exclusive jurisdiction to permit the construction of oil waste treating facilities, including the facility that EDS proposes to operate in Dunn County, the Court should reverse the district court's judgment and order that judgment be entered in favor of Dunn County.

Respectfully submitted this 28th day of June, 2016.

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CERTIFICATE OF SERVICE

[42] I hereby certify that, on today's date, I served the foregoing document on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25(c)(4)(B):

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Dated this 28th day of June, 2016.

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