

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Allen Dominek and Arlen Dominek,

Plaintiffs/Appellants,

v.

Equinor Energy L.P., f/k/a and a/k/a  
Brigham Oil & Gas L.P. and Statoil Oil and  
Gas L.P.; and Grayson Mill Williston, LLC,

Defendants/Appellees.

**Supreme Ct. No. 20220088**

**U.S. District Court No. 1:19-cv-288**

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**BRIEF OF AMICUS CURIAE  
NORTH DAKOTA INDUSTRIAL COMMISSION  
IN SUPPORT OF DEFENDANTS/APPELLEES**

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## **INTRODUCTION AND INTEREST OF AMICUS CURIAE**

[¶1] Pursuant to Rule 29 of the North Dakota Rules of Appellate Procedure, the North Dakota Industrial Commission (“Commission”) respectfully submits this brief as amicus curiae in support of the position taken by Defendants-Appellees Equinor Energy L.P., f/k/a and a/k/a Brigham Oil & Gas L.P. and Statoil Oil and Gas L.P.; and Grayson Mill Williston, LLC (“Appellees”). The Commission’s brief addresses the interpretation of N.D.C.C. § 38-08, the Commission’s policy and practice regarding pooling in overlapping spacing units, and the Commission’s authority to make an order creating such an overlapping spacing unit.

[¶2] The Commission is the regulatory agency charged with regulating oil and gas development in North Dakota. The Commission is interested in this case because Plaintiff-Appellants Allen Dominek and Arlen Dominek (“Appellants”) challenge the Commission’s statutory authority and practices regarding overlapping spacing units. Appellants’ position would adversely affect mineral interest owners across the oil and gas industry and directly contradict the Commission’s current practice. The Commission would be left without the ability to protect correlative rights in cases where it allows the drilling of lease-line wells involving overlapping spacing units.

[¶3] An amicus brief is desirable in this matter because the Commission has beneficial expertise and knowledge regarding the regulation of the oil and gas industry in North Dakota. The amicus brief is relevant because the certified question at issue pertains directly to the Commission’s authority to regulate the oil and gas industry and the practices it has employed in the state to do so.

## STATEMENT N.D. APP. R. 29(a)(D)

[¶4] This brief was authored solely by counsel for the Industrial Commission. No money has been contributed by a party, party’s counsel, or any other person intended to fund preparing or submitting of this brief.

### BACKGROUND

**A. The Commission has statutory authority to create and pool spacing units.**

[¶5] The North Dakota Supreme Court has consistently found that the Commission has “extremely broad and comprehensive powers to regulate oil and gas development in the state.” *Langved v. Cont’l Res., Inc.*, 2017 ND 179, ¶ 12, 899 N.W.2d 267. The Commission’s jurisdiction is provided under N.D.C.C. § 38-08-04, which states, in part: “The Commission’s powers are continuous . . . and are exclusive.” *Env’t. Driven Sols., LLC v. Dunn Cnty.*, 2017 N.D. 45 at ¶ 9, 890 N.W.2d 841 (quoting *Egeland v. Cont’l Res., Inc.*, 2000 ND 169, ¶ 11, 616 N.W.2d 861).

[¶6] Section 38-08-04 further gives the Commission the authority “[t]o limit and to allocate the production of oil and gas from any field, pool, or area.” N.D.C.C. § 38-08-04(c). Sections 38-08-07 and 38-08-08 of the North Dakota Century Code require the Commission to establish spacing units and pool separately-owned interests within the spacing unit when necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights. See N.D.C.C. § 38-08-07(1). Section 38-08-08(1), N.D.C.C., provides:

When two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of the spacing unit, then the owners and royalty owners thereof may pool their interests for the development and operation of the spacing unit. In the absence of voluntary pooling, the commission upon the application of any

interested person shall enter an order pooling all interests in the spacing unit for the development and operations thereof. . . . Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to each tract included in a spacing unit covered by a pooling order must, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.

**B. The Commission’s practice has been to allow lease-line wells to be drilled on common spacing unit boundaries with overlapping spacing units.**

[¶7] Courts “generally defer to an administrative agency’s reasonable interpretation of its own governing statutes and rules.” *Black Hills Trucking, Inc. v. N.D. Indus. Comm’n*, 2017 ND 284, ¶ 19, 904 N.W.2d 326. The Court has explained that it will “normally defer to a reasonable interpretation placed on a statute by the agency responsible for enforcing it, especially when that interpretation does not contradict the statutory language.” *Indus. Contractors, Inc. v. Taylor*, 2017 ND 183, ¶ 22, 899 N.W.2d 680 (citations omitted). Additionally, “[a]gency expertise is entitled to appreciable deference if the subject matter is highly technical.” *Minn-Kota Ag Prod., Inc. v. N.D. Pub. Serv. Comm’n*, 2020 ND 12, ¶ 28, 938 N.W.2d 118 (citations omitted).

[¶8] When the Commission creates or pools a spacing unit, it will establish a drilling setback prohibiting wellbores within a certain distance from the spacing unit boundary to prevent the immediate draining of mineral resources across the spacing unit boundary and allowing offset owners time to drill a well and compete for the mineral resources thus preventing unfair drainage and protecting correlative rights. The Commission is aware that prevention of drilling within the setback area results in a reduction in the ultimate recovery of minerals in spacing units throughout North Dakota.

[¶9] It is therefore the Commission’s practice to allow lease-line horizontal wells to be drilled on a common spacing unit boundary between existing spacing units, by establishing an overlapping spacing unit that contains areas of similar size on either side of the common spacing unit boundary. The Commission understands not all development on both sides of a lease-line will be symmetrical in all cases and must balance its duty to prevent waste and its duty to protect correlative rights of mineral interest owners in each case.

[¶10] Allocation of production from a horizontal well in a lease-line spacing unit is allocated to the various interest owners in tracts within the lease-line spacing unit based upon an acreage basis in the spacing unit. While production is allocated to the various tracts within the lease-line spacing unit, it may then be reallocated to tracts outside the lease-line spacing unit based upon pooling agreements that include a particular tract within the lease-line spacing unit.

[¶11] The Commission’s practice regarding overlapping spacing unit is based on its reasonable interpretation of N.D.C.C. § 38-08-08 and is consistent with the statutory language requiring production allocated to a tract to be treated as if it were produced from that tract for all purposes.

**C. The federal government has considered and approved the Commission’s practice.**

[¶12] The federal government has considered North Dakota’s statutory scheme and the Commission’s practices with overlapping spacing units and agrees with the Commission’s practice. On July 3, 2018, the United States Department of the Interior, Bureau of Land Management (“BLM”), issued Permanent Instruction Memorandum No. 2018-012 (“Federal Memorandum”) related to federal and Indian leases to establish a process for adjudication and approval of a proposed Communitization Agreement (CA) when the area

covered by the proposed CA would overlap an area covered by an existing CA or unit participating area (PA) for the same formation. Federal interests cannot be pooled by the Commission, therefore the federal government requires the execution of CAs for the development of its resources. “Communitization is synonymous with pooling where federal or Indian lands are involved.” *Horob v. Zavanna, LLC*, 2016 ND 168, ¶ 18, 883 N.W.2d 855 (citing 1 B. Kramer & P. Martin, *The Law of Pooling and Unitization* § 16, p. 16–1 (3rd ed. 2015).) The Federal Memorandum, Adjudicating Overlapping Communitization Agreements, WO PIM 2018-012 (<https://www.blm.gov/policy/wo-pim-2018-012>, last visited July 21, 2022) provides guidance regarding new overlapping CAs and provides the following:

If language in State-issued spacing and/or pooling order differs from the above policy, as may be the case in North Dakota, the Agencies will work with the appropriate State and Federal oil and gas regulatory agencies to develop an overlapping CA policy that is consistent with that State’s orders, statutes, regulations, and practice, to the extent possible, while also protecting the Federal and/or Indian fluid mineral interest.

*Id.* (emphasis added).

[¶13] On July 27, 2018, BLM provided subsequent recognition of North Dakota’s practice in Permanent Instruction Memorandum No. 2018-004 (R:26-11). The July 27<sup>th</sup> Federal Memorandum notes BLM’s concerns center on the “Daisy-Chain Effect” that could occur if production from an overlapping spacing unit is allocated to another overlapping unit. BLM found that N.D.C.C. § 38-08-08 and the language consistently used by the Commission in its orders address the federal government’s concerns with overlapping spacing units. BLM affirmed that the “Daisy Chain Effect” of pooled spacing units has been averted by the language contained in Commission orders pooling the overlapping spacing units.

[¶14] Based on both permanent instruction memoranda cited above, the federal government has considered the Commission’s practices regarding overlapping spacing units and deferred to the Commission’s policies.

**ARGUMENT**

**A. When read together, Orders No. 18082, 27791 and N.D.C.C. § 38-08-08 require production allocated to Section 13 from the lease-line well to be allocated to Section 24.**

[¶15] The certified questions from the District Court inquire into whether production allocated to Section 13 must be allocated to Section 24 if that production was the result of an overlapping spacing unit. Section 13 and 24 were pooled by Order No. 18082 in Case No. 15827. (the “Underlying Unit Order”). Section 13 was also subsequently pooled with Sections 11, 12, and 14 by Order No. 27791 in Case No. 25386. (the “Overlapping Unit Order”)

[¶16] N.D.C.C. § 38-08-08(1) provides, “[t]hat portion of the production allocated to each tract included in a spacing unit covered by a pooling order must, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.” The Commission interprets N.D.C.C. § 38-08-08(1) to require a proportionate amount of any production allocated to Section 13, to be allocated to Section 24 so long as the Underlying Unit Order has not been terminated.

[¶17] The Commission maintains the right to modify or terminate spacing units. Each Commission order includes the same or similar language used in the underlying spacing order, “[t]his order shall be effective from the date of first operations within the spacing unit, and shall remain in full force and effect until further order of the Commission.” Order of The Commission entered on November 11, 2021, in Case No. 15827, Order No. 18082

(“Order No. 18082”) (R26-4:1:¶5). There has been no order to terminate the underlying spacing unit and the obligations created by the order remain in full force and effect. Section 24 therefore receives a proportionate share of all production from Section 13, and Section 13 receives a proportionate share of all production allocated to Section 24.

[¶18] Production from the underlying spacing unit is prevented from being reallocated to the overlapping spacing unit. Order No. 27791 goes on to say it does not “...alter previous pooling orders for other spacing units or require the reallocation of production allocated to separately owned tracts within any spacing unit by any existing pooling orders or any pooling agreements.” This language is designed to prevent allocation from the underlying spacing unit being reallocated to the overlapping spacing unit. Put another way, this language states Order No. 27791 does not alter allocation based on Order No. 18082, but provides no guidance as to allocation resulting from Order No. 27791 itself.

[¶19] The Commission had established this policy regarding overlapping spacing units prior to issuing Order No. 27791. In Order No. 14978 in Case No. 12717, the Commission addressed concerns from Whiting Oil and Gas Corporation regarding the possibility of reallocation of production from an underlying spacing unit to overlapping spacing units. The Commission clarified that production from base spacing units would not be reallocated to subsequent overlapping spacing units. The Commission adopted the above language to address those concerns in subsequent orders.

[¶20] The purpose of these overlapping spacing units is to allow for the drilling of a lease-line well that otherwise would not be possible due to drilling setbacks. Concerns arose that the purpose of the overlapping spacing unit could be inverted and production from all wells in underlying spacing units could be allocated to various sections via the overlapping

spacing unit. Case No. 12717 addressed those concerns and the Commission adopted the language it now uses in its orders to ensure that production from an overlapping unit can be allocated to underlying units without introducing a daisy chain effect that would allocate production from the underlying spacing unit throughout the overlapping spacing unit.

[¶21] Reading Order No. 27791 and Order No. 18082 in conjunction with N.D.C.C. § 38-08-08, it is apparent that a proportional amount of production from the lease-line well must be allocated to Section 13 as if it were produced in Section 13, and therefore must be proportionally allocated to Section 24.

**B. Allocation of production from the Overlapping Spacing Unit across the Underlying Spacing Unit protects correlative rights and prevents waste.**

[¶22] The Commission operates within its statutorily granted authority when it establishes a spacing unit for a pool “[w]hen necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights.” N.D.C.C. § 38-08-07(1). Here, the Commission found that the overlapping spacing unit at issue should be granted to protect correlative rights and prevent waste. Order No. 27791.

[¶23] In the Overlapping Unit Order, the Commission considered the potential waste that would arise from denying the application for a lease-line horizontal well against the correlative rights of all mineral interest owners. The Commission’s findings in the Overlapping Unit Order were based on its reasonable interpretation of N.D.C.C. § 38-08-08(1) that production from the Overlapping Spacing Unit would be treated as if it had been produced in each respective Section and be allocated in accordance with the Underlying Unit Order.

[¶24] The Commission believes a lease-line horizontal well in an overlapping lease-line spacing unit will recover oil from lands within the setback area of the underlying base spacing units. Without the lease-line horizontal well, the oil would be recovered less efficiently or not at all by the horizontal wells in the base spacing units; therefore, all pooled interest owners within the base spacing units should receive their equitable share of that oil, not just the interest owners in the sections located within the overlapping lease-line spacing unit but all interest owners in horizontal wells in the base spacing units.

[¶25] The Commission also believes the lease-line horizontal well may cause positive or negative impacts to all wells in base spacing units shared by all interest owners within the base spacing units; therefore, the Commission believes all pooled owners within the base spacing units should be compensated, not just the interest owners in the sections located within the overlapping lease-line spacing unit.

[¶26] Looking at the facts in this case, it is apparent to the Commission from the position of the wells, base spacing units, and overlapping spacing unit that the lease-line well (well 33453) in the center of the 2560-acre spacing unit will affect production in well 21499 as well as other wells in Sections 13 and 24. The owners of the southern half of well 21499 (Section 24) that lies outside the overlapping spacing unit, will be affected equally to the owners of the northern half of well 21499 (Section 13). All 1280 wells drilled in sections 13 & 24 base spacing units will be affected by well 33453. In other words, since both negative and positive impacts on Section 13 are shared by Section 24 the allocation from well 33453 should be shared as well.

[¶27] The Commission granted the Overlapping Spacing Unit after finding it would prevent waste and protect correlative rights, including the rights of owners in Section 24.

If production from the lease-line well is not allocated to Section 24, Section 24's correlative rights would be harmed. Section 13 would receive all benefits of the lease-line well while Section 24 suffers all of the harm it could cause to production of adjacent wells in the underlying spacing unit.

[¶28] Based on the above, the Commission's pooling order Nos. 27791 and 18082 require the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit.

**C. The District Court's certified questions should be answered as follows:**

**Question 1: Does the relevant portion of Section 38-08-08(1) of the North Dakota Century Code require the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit? "Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to each tract included in a spacing unit covered by a pooling order must, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon."**

[¶29] The Commission believes Question 1 should be answered "Yes" with the understanding that N.D.C.C. § 38-08-08 is read in conjunction with the Commission's orders. When applied to this case, N.D.C.C. § 38-08-08 requires production allocated to Section 13 to be deemed for all purposes to have been produced from Section 13, which includes with respect to Order No. 18082. Therefore, Section 24 must receive its proportionate share of production from Section 13.

**Question 2: Does the following language from Industrial Commission pooling orders Nos. 27791 and 18082 require the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit? "All owners of interests shall recover or receive, without unnecessary expense, their just and equitable share of production from the spacing unit in the proportion as their interest may appear in the spacing unit."**

[¶30] The Commission believes Question 2 should be answered “Yes”. The language in Order No. 27791 requires that production from the Overlapping Spacing Unit be allocated to Section 13. The language in Order. No 18082 requires a proportionate share of production from Section 13 must be allocated to Section 24. The language N.D.C.C. § 38-08-08, read in conjunction with the Orders Nos. 27791 and 18082, requires the production allocated to Section 13 must be treated for all purposes as if it was produced in Section 13. Therefore, read in conjunction, the language requires allocation of production from Section 13 to Section 24.

**Question 3: Does the following language from Industrial Commission pooling orders Nos. 27791 and 18082 prohibit or prevent the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit? “All owners of interests shall recover or receive, without unnecessary expense, their just and equitable share of production from the spacing unit in the proportion as their interest may appear in the spacing unit.”**

[¶31] The Commission believes Question 3 should be answered “No”. As discussed throughout this brief, Section 24 must be allocated its proportionate amount of any production allocated to Section 13. Order No. 27791 cannot be used to prohibit or prevent Section 24 from receiving its proportionate share of production which has been allocated to Section 13.

**Question 4: Does the following language from Industrial Commission pooling order No. 27791 require the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit or other spacing units which overlap? “This order is limited to pooling the spacing unit described above for the development and operation of such spacing unit by the horizontal well(s) authorized for such spacing unit by order of the Commission. This order does not modify, amend or alter previous pooling orders for other spacing units or require the reallocation of production allocated to separately owned tracts within any spacing unit by any existing pooling orders or any pooling agreements.”**

[¶32] The Commission believes Question 4 should be answered “No”. The Commission believes the language referenced in Question 4 serves to prevent allocation of production from an underlying spacing unit throughout an overlapping spacing unit. The language also clarifies the order does not modify, amend, or alter Order No. 18082 in any way. However, the specifically referenced language standing alone does not require or alter allocation of production between Section 13 and Section 24.

**Question 5: Does the following language from Industrial Commission pooling order No. 27791 prohibit or prevent the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit or other spacing units which overlap? “This order is limited to pooling the spacing unit described above for the development and operation of such spacing unit by the horizontal well(s) authorized for such spacing unit by order of the Commission. This order does not modify, amend or alter previous pooling orders for other spacing units or require the reallocation of production allocated to separately owned tracts within any spacing unit by any existing pooling orders or any pooling agreements.”**

[¶33] The Commission believes Question 5 should be answered “No”. As noted above, this language serves to prevent reallocation of production that was already allocated at the time the overlapping spacing unit was granted. It serves to protect the proportional allocation and clarifies Order No. 27791 does not modify, amend, or alter Order No. 18082 in any way.

### **CONCLUSION**

[¶34] The Commission respectfully requests the Court answer the District Court’s certified questions Yes, Yes, No, No, and No, respectively.

Dated this 22<sup>nd</sup> day of July, 2022.

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Defendants/Appellees.

**CERTIFICATE OF COMPLIANCE**

**Supreme Ct. No. 20220088**

**U.S. District Court No. 1:19-cv-288**

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[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of **BRIEF OF AMICUS CURIAE NORTH DAKOTA INDUSTRIAL COMMISSION IN SUPPORT OF DEFENDANTS/APPELLEES** contains 18 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12 point font.

Dated this 22<sup>nd</sup> day of July, 2022.

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Defendants/Appellees.

**CERTIFICATE OF SERVICE  
BY ELECTRONIC MAIL**

**Supreme Ct. No. 20220088  
U.S. District Court No. 1:19-cv-288**

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[¶1] I hereby certify that on July 22, 2022, the following documents: **BRIEF OF AMICUS CURIAE NORTH DAKOTA INDUSTRIAL COMMISSION IN SUPPORT OF DEFENDANTS/APPELLEES and CERTIFICATE OF COMPLIANCE** were filed electronically with the Supreme Court through the E-Filing Portal which served copies by electronic mail upon all counsel of record as follows:

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