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I. Introduction

On March 27, 2020 Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to mitigate negative economic impacts associated with the COVID-19 pandemic.¹ North Dakota received \$1.25 billion in federal aid from the Coronavirus Relief Fund established by the CARES Act.² CARES Act monies could only be used to cover expenditures that were:

- 1) necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
- 2) not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and
- 3) incurred during the period that begins on March 1, 2020 and ends on December 30, 2020.³

The U.S. Treasury Department provided guidance clarifying these broad stipulations shortly after the release of funds to the states in April 2020.⁴ In addition to public health-related expenditures, funds could be spent on second-order pandemic-caused issues, such as economic hardship.⁵ Such expenditures were required to be “reasonably necessary for intended use in the reasonable judgement of government officials” and could not be used to cover shortfalls in government revenue.⁶ The guidance also provided that although *payment* of funds need not be made between March 1 and December 30, 2020, “[f]or a cost to be considered to have been incurred, *performance or delivery* must occur during the covered period.”⁷ On December 27, 2020, deadline was extended to December 31, 2021.⁸

After passage of the CARES Act in March, the state of North Dakota received two installments of \$625 million from the federal government in April of 2020.⁹ The North Dakota Industrial Commission (NDIC) applied for and received \$66,350,000 of CARES Act funding from the

¹ Press Release, North Dakota Office of the Governor, Emergency Commission Approves Using Over \$500m in Federal Funds for COVID-19 Response and Recovery (May 12, 2020 2:57 PM), <https://www.governor.nd.gov/news/emergency-commission-approves-using-over-500m-federal-funds-covid-19-response-and-recovery>.

² *Id.*

³ Dept. of Treas., Program Guidance on Coronavirus Relief Fund for States, Tribal Governments, and Certain Eligible Local Governments, 86 Fed. Reg. 10,4182 (Jan. 15, 2021), https://home.treasury.gov/system/files/136/CRF-Guidance-Federal-Register_2021-00827.pdf [hereinafter *Treasury Guidance*].

⁴ N.D. Emergency Comm’n, Coronavirus Relief Fund North Dakota State Plan 31–32 (May 12, 2020), https://www.legis.nd.gov/files/committees/66-2019/21_5117_03000appendixc.pdf [hereinafter *State Plan*].

⁵ See *Treasury Guidance*, *supra* note 3.

⁶ *Id.*

⁷ *Id.* (emphasis added).

⁸ *Id.*

⁹ See *State Plan*, *supra* note 4, at 31.

North Dakota legislature in the spring of 2020 to support an orphan well plugging and reclamation program.¹⁰

Plugging and reclamation of orphaned and abandoned wells has long been a concern of the landowners in North Dakota.¹¹ This report will provide a summary of the use of CARES Act funding for NDIC's plugging and reclaiming orphaned and abandoned wells in the state. The special program is not yet complete; therefore, all costs are not yet completely understood. This report is also based on a very large open records request submitted to the NDIC and the organization and analysis of thousands of pages of documents and data. Much of the work of this report was in the organization and analysis of this data, and so the spreadsheets analyzing that data, and the underlying data are included here with a flash drive for anyone's further research. It is the goal of this report to help North Dakota landowners, legislators, and others understand the processes and legal context within which officials implemented the program. The push to use taxpayer dollars to plug abandoned and orphaned wells is gaining traction worldwide as operator bankruptcies become increasingly common and the will to hold operators responsible remains low.¹² Recently, the federal government has announced a new program to use federal money to create a larger national program for reclaiming orphaned and abandoned wells.¹³ This

¹⁰ Nicholas Kusnetz, *North Dakota, Using Taxpayer Fund, Bailed Out Oil and Gas Companies by Plugging Abandoned Wells*, INSIDE CLIMATE NEWS (May 23, 2021), <https://insideclimatenews.org/news/23052021/north-dakota-orphaned-abandoned-oil-gas-wells-methane-emissions/> [hereinafter *Bailed Out*]; Brice Erickson, *How to Value Oil Companies in the Biden Era*, FORBES (June 3, 2021, 4:42 PM), <https://www.forbes.com/sites/bryceerickson1/2021/06/03/oil--gas-valuations-sailing-the-gulf-of-biden/?sh=4ecdee376f89>.

¹¹ Letter from Northwest Landowners Ass'n to NDIC Div. of Min. Res. (May 10, 2020) (available in Docket 28495).

¹² See Kusnetz, *Bailed Out*, *supra* note 10; Hiroko Tabuchi, *Fracking Firms Fail, Rewarding Executives and Raising Climate Fears*, THE NEW YORK TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/07/12/climate/oil-fracking-bankruptcy-methane-executive-pay.html>; Emma Graney, *Alberta's Energy Regulator Overhauls Liability Management for Oil and Gas Wells*, THE GLOBE & MAIL (May 28, 2021), <https://www.theglobeandmail.com/business/article-aer-overhauls-liability-management-for-oil-and-gas-wells/>; Navenna Sadasivam, *The Cost to Clean up New Mexico's Oil and Gas Industry? \$8 billion.*, GRIST (May 21, 2021), <https://grist.org/energy/new-mexico-oil-gas-fossil-fuels-abandoned-wells-cleanup> [hereinafter *The Cost to Clean Up*]; Lee Zurik and Cody Lillich, *State Could Be Out Millions After Passing Up Offer by Major Oil Company to Plug Orphaned Wells*, WVUE (May 25, 2021 10:00 PM), <https://www.fox8live.com/2021/05/25/zurik-state-could-be-out-millions-after-passing-up-offer-by-major-oil-company-plug-orphaned-wells/>; Press Release, Kevin Cramer, Sen. Cramer Leads Bipartisan Bill to Create Oil & Gas Jobs by Plugging Orphaned Wells Across America (Apr. 13, 2021), <https://www.cramer.senate.gov/news/press-releases/sen-cramer-leads-introduction-of-bipartisan-bill-to-create-oil-and-gas-sector-jobs-by-plugging-orphaned-wells-across-america>.

¹³ See United States House Committee on Natural Resources, H.R.2415 (2021), Orphaned Well Cleanup and Jobs Act.

report will offer North Dakota landowners the necessary information to remain active participants in ongoing efforts toward accountability from state and federal officials for use of taxpayer funds to reclaim wells, especially in situations where solvent operators can be held responsible for these wells.

A comprehensive discussion of the program follows, but a short timeline of events will help to orient the reader:

Timeline of NDIC CARES Act Plugging and Reclamation program

2020

- March
 - March 27 – Congress signs CARES Act into Law with expenditure deadline of December 30, 2020
- April
 - NDIC discusses options to revive oil industry, including plugging program
- May
 - May 12 – Emergency Commission approves \$33 million for well plugging
 - May 15 – Legislative Budget Section approves Emergency Commission’s \$33 million approval for well-plugging
 - May 18-19 – NDIC gives Notice of Hearing to operators with wells on 28495 Docket
 - May 20-21 – NDIC publishes Notice of Hearing for Docket 28495 in newspapers for the public
- June
 - June 10 - Confiscation Hearing for Docket 28495
 - June 18 – Emergency Commission approves \$33 million for reclamation of wells
 - June 19 – Confiscation orders issued for Docket 28495; commencement of appeals period for wells confiscated and notice period for operators given additional time to comply
 - June 25 – Budget Section approves \$33 million for reclamation of wells
 - June 26 – NDIC gives Notice of Hearing to operators with wells on 28530 Docket
- July
 - July 1–10 – NDIC publishes Notice of Hearing for Docket 28530 in newspapers for the public
 - July 9 – Deadline for First Round Plugging Bids on Docket 28495
 - July 29 – Reconsideration Hearing for Docket 28495 Confiscation Appeals
 - July 30 – Plugging Companies notified of winning and losing bids for plugging packages
 - July 31 – Confiscation Hearing for Docket 28495
- August
 - August 20 – Confiscation orders issued for Docket 28530; commencement of appeals period for wells confiscated and notice period for operators given additional time to comply

- o August 25 – Reclamation companies notified of winning and losing bids for reclamation packages 1–7
- September
 - o September 1 – Deadline for compliance for operators given extension on Docket 28495
- October
 - o October 1 – Deadline for compliance for operators given extension on Dockets 28495 and 28530
 - o October 2 – Reclamation companies notified of winning and losing bids for reclamation packages 8–16
 - o October 22 – Reclamation companies notified of winning and losing bids for Alturas (Mondak) gathering pipeline system; Confiscation Hearing for Docket 28583 (Daryl Peterson case)
 - o October 22 – Request to Budget Section by Lynn Helms for use of \$16 million CARES reclamation funds for DUC grant program
- November
 - o November 5 – Reclamation companies notified of winning and losing bids for Madison Treating Plant
- December
 - o December 27 – Spending deadline for CARES Act expenditures extended to December 31, 2021

2021

- February
 - o Bidding resumes for plugging confiscated wells
- March
 - o Industrial Commission lobbies North Dakota legislature for additional CARES Act funds to finish reclamation of confiscated wells
 - o Bidding resumes for reclamation of confiscated wells
- April
 - o April 29 – 67th Legislative Session approved \$6 million reallocation of unspent CARES Act funds for reclamation of wells

II. Spring Crisis: January–May 2020

A. Background

The origins of North Dakota’s CARES Act plugging and reclamation program appear to be rooted in underfunding of the state’s plugging and reclamation fund and under-bonding of wells.

¹⁴ In the early months of 2020, the NDIC was already engaged in the process of requiring

¹⁴ See Kusnetz, *Bailed Out*, *supra* note 10; Jason Mikulka, *U.S. Public Facing Huge Bill to Clean Up After Oil and Gas Industry*, DESMOG (Oct. 4, 2020 8:00 PM),

operators to move wells identified as “abandoned” under North Dakota law from blanket bonds to single-well bonds.¹⁵ With the pandemic-related collapse of oil prices, many wells that were previously borderline uneconomical to return to production became firmly so, and many operators became unable to acquire increased bonding for these abandoned wells.¹⁶

The execution of the special plugging and reclamation program enabled the NDIC to mitigate impending environmental and financial crises in the face of industry financial hardship. However, public record shows that North Dakota officials saw spending CARES Act monies in this way not only as an appropriate means to alleviate a bonding crisis exacerbated by the pandemic, but also as a necessary temporary jobs program to alleviate unemployment resulting from the pandemic. While these perspectives are not inaccurate in and of themselves, they fail to appreciate or acknowledge the basic problems that led North Dakota into a situation in which it needs to use taxpayer funds to reclaim abandoned wells.

1. Legal Basis for Confiscation and Well Status Designations in North Dakota Law

The NDIC possesses authority to confiscate wells that fail to meet statutory performance and bonding requirements as they decline from active status. The NDIC defines an abandoned well as one where the operator removes production equipment or the well fails to produce for one year.¹⁷ If the well falls into abandoned status, it must be plugged and the site reclaimed within six months, returned to production in paying quantities, or the operator must seek “temporary abandoned” status for the well from the NDIC.¹⁸ If those conditions are not met, the Commission may require the well to be placed on a single-well bond in the amount of the cost of plugging and reclamation.¹⁹ If an operator fails to comply with those requirements, the NDIC may confiscate the well, any production-related equipment, and salable oil at the site through a formal confiscation hearing process.²⁰

Although the “orphan” designation is not a legal designation under North Dakota law, it is generally understood in the industry to apply to wells which have fallen into abandoned status,

<https://www.desmog.com/2020/10/04/us-public-facing-huge-bill-cleanup-after-oil-and-gas-industry/> [hereinafter *U.S. Public Facing Huge Bill*]. See also Sadasivam, *The Cost to Clean Up*, *supra* note 12.

¹⁵ See e.g. N.D. Indus. Comm’n Docket 28495, Order No. 30988 at 12 (June 19, 2020) [hereinafter *Cobra June Confiscation Order*].

¹⁶ See e.g. N.D. Indus. Comm’n Docket 28495, Order No. 31033 Confiscation at 6 (June 19, 2020) [hereinafter *White Rock June Confiscation Order*].

¹⁷ N.D. ADMIN. CODE 43-02-03-55(1). See also N.D. Indus. Comm’n, Well Status Designations Guide, https://www.dmr.nd.gov/oilgas/Well_Status_Designations.pdf (last visited June 10, 2020).

¹⁸ *Id.*; N.D. CENT. CODE § 38-08-04(12).

¹⁹ *Id.*

²⁰ N.D. CENT. CODE § 38-08-04.9. See e.g. N.D. Indus. Comm’n, *White Rock June Confiscation Order*, *supra* note 15, at 7.

but where the well’s owner cannot be found or has gone bankrupt.²¹ Since the North Dakota program’s inception, however, the term “orphaned” has also been used to refer to wells with solvent owners who remain in business today (which is not how the term is generally understood in the industry).²² Because most operators were able to be located and were not yet bankrupt at the time of the proceedings, the wells were not actually “orphaned” as that term is usually understood in this context. Rather, the wells actually confiscated by the NDIC are wells that were both 1) unlikely to return to economic production (determined based on whether the well is producing in paying quantities)²³, and 2) under-capitalized with blanket- or unit- rather than single-well bonds in an amount sufficient to pay for plugging and reclamation.²⁴

2. NDIC Acquisition of CARES Act Funding for Plugging

Like other oil and gas producing states, North Dakota suffered significant negative economic impacts from the pandemic as a result of reduced demand for refined oil.²⁵ In April 2020, North Dakota had not yet dispersed federal relief from the passage of the CARES Act and was grappling with oil prices in the negative values.²⁶ At a special meeting in April, the NDIC considered a suite of possible responses to extreme price volatility.²⁷ Among these was the establishment of a special program to plug and reclaim orphan and abandoned wells as a means to “assure the oil service industry remains viable in North Dakota.”²⁸ At that meeting, Director Lynn Helms of the Department of Mineral Resources stated that North Dakota had zero orphaned wells, but had 800 wells in abandoned status.²⁹

The NDIC requested funds for the program from the North Dakota Emergency Commission and Legislative Budget Section in two requests of \$33 million.³⁰ In its May request, the NDIC stated:

²¹ See Kusnetz, *Bailed Out*, *supra* note 10; Mikulka, *U.S. Public Facing Huge Bill*, *supra* note 13.

²² See Kusnetz, *Bailed Out*, *supra* note 10; see e.g. N.D. Indus. Comm’n, *Cobra June Confiscation Order*, *supra* note 14.

²³ See Hearing Audio for Docket 28583, N.D. Indus. Comm’n (Oct. 22, 2020), <https://www.dmr.nd.gov/oilgas/feeservices/dlogs/audio/c28/20201022c28583.mp3>.

²⁴ See spreadsheets contained with documents produced in conjunction with this report for reports of bonds and changes in bonding status for each well in the program.

²⁵ Mike Hughlett, *North Dakota Oil Production Not Likely to Improve for Months*, STAR TRIBUNE (Dec. 14, 2020), <https://www.startribune.com/north-dakota-oil-production-not-likely-to-improve-for-months/573391771/>.

²⁶ Meeting Minutes, Ind. Comm’n N.D. at 1 (Apr. 21, 2020), <http://www.nd.gov/ndic/minutes/200421%20final.pdf> [hereinafter *Apr. 21 NDIC Minutes*]. See also Amy R. Sisk, *More than 10K Jobs Lost in North Dakota’s Oil Patch Last Year*, INS. J. (Mar. 16, 2021), <https://www.insurancejournal.com/news/midwest/2021/03/16/605610.htm>.

²⁷ See Ind. Comm’n N.D., *Apr. 21 NDIC Minutes*, *supra* note 24.

²⁸ *Id.* at 6.

²⁹ *Id.*

³⁰ See *State Plan*, *supra* note 4, at 31 (detailing request for plugging funds); North Dakota Legislative Management Meeting Minutes, Budget Section, Appendix F p. 23, June 25, 2020, https://www.legis.nd.gov/files/committees/66-2019/21_5136_03000appendixf.pdf.

“A total of 549 wells have been identified as abandoned and at risk of becoming orphaned. The COVID-19 oil demand destruction and price shock results in no foreseeable oil price at which the identified wells can economically be returned to production. North Dakota oil and gas unemployment is now more than 7,000 and growing due to the COVID-19 pandemic. This program is expected to maintain 350-550 oil and gas service sector jobs for six months. Owners are primarily small operators who are not expected to survive the COVID-19 demand shock and will declare bankruptcy, at which point the well plugging and reclamation liability will fall to the state. Assuming average reclamation costs of \$75,000 per well and average well plugging costs of \$75,000 per well, the total estimated state liability could be \$82.35 million. Offsetting this cost with \$10 million from the abandoned well fund and \$6 million in existing reclamation bonds would leave a net state cost of \$66.35 million. Plugging the orphaned wells is the priority. This request is for \$33,175,000 for the estimated well plugging costs. A subsequent Emergency Commission request is likely for the related site reclamation costs.”³¹

Although Emergency Commission meeting minutes reflect little debate over the NDIC’s request,³² the Legislative Budget Section Meeting records indicate some confusion by legislators about a) the NDIC’s selection of particular wells, b) the NDIC’s use of the terms “orphaned” and “abandoned,” c) how companies whose wells would become confiscated may continue to operate in the state, and d) the appropriateness of using CARES funds for the program. The excerpts below depict confusion and concerns which would resurface over the course of the program’s life:

Sen. Bekkedahl:

My question is, the 549 wells that have been identified as abandoned and . . . and being orphaned, first of all, are those all wells that have just been abandoned since the COVID-19 or do some of those relate back to the oil wells of the '60s and '70s? . . . [T]he reason I ask that question is because earlier you stated that these had to have been issues that have occurred between March 1st of this year and December 30th of this year. . .

Lynn Helms:

. . . About 10% of these wells are brand new abandoned wells since the COVID crisis. The remaining sets of wells . . . where we have sent out letters because the

³¹ See *State Plan*, *supra* note 4, at 29.

³² Press Release, N.D. Off. of the Governor, Emergency Commission Approves Using Over \$500m in Federal Funds for COVID-19 Response and Recovery (May 12, 2020 02:57pm), <https://www.governor.nd.gov/news/emergency-commission-approves-using-over-500m-federal-funds-covid-19-response-and-recovery>; Meeting Minutes, Special Meeting of the Emergency Comm’n (May 12, 2020), http://sos.nd.gov/files/uploaded_documents/ecmn-20200512-revised.pdf.

wells were in abandoned status, and we have received a response since the COVID crisis began, stating that it's impossible for the company to get a bond, they're unsure of their financial status, they are contemplating bankruptcy. So we have documentation that the situation has changed dramatically. None of these are wells from the '60s and '70s, but there are some here that their abandoned status would date back to probably 20 years ago. There were plans by the operators to do something with the wells, but they've abandoned those plans in the last two months.

...

Sen. Bekkedahl:

Lynn, the other question is, these companies that there are these wells that will be affected, will they not be allowed to do business in North Dakota going forward because the state's picking up these costs for them? In other words, are they going to continue to give up the wells in the state, even though the state's picking up the cost to take care of this process for them?

Lynn Helms:

Mr. Chairman and Senator Bekkedahl, for the most part, these are companies that this is all the wells that they have. So, their inventory will be gone. But there are a few companies who will have some remaining assets, and under the statute that the Industrial Commission does this confiscation and plugging, we have the opportunity to file a lien against any future production that they have for any costs over and above the bonds that they have posted. Just to remind you, in this request, we are planning on confiscating the plugging and reclamation bonds associated with a large number of these wells.

...

Sen. Heckaman:

Thank you. I think as a state, we're fortunate to be able to sit here today and talk about how these federal funds can be used in our different agencies. I don't know what's going to happen. Is there an audit that has to take place following this to the fed that says, "This is how we use the funds?" And if they don't prove that through the audit, do we have to pay anything back?

Joe Morrisette:

Mr. Chairman and Senator Heckaman. There will be a reporting process that is still being defined. I mentioned the call that I had yesterday with the representative from treasury. They received several questions about the reporting requirements and the response was pretty much, "We're still working on that." And so as that reporting becomes clearer, we'll know exactly what we have to report and when, and we'll certainly share that with all of you as we provide those reports to treasury. If I'm understanding your question, Senator, they have

provided some guidance and some response to questions, and will continue to clarify the guidance through those questions that get developed over the next few weeks, but they are not approving anything upfront specifically. A state can't submit a plan and get it approved. So it will be more of a look back and follow up through the reporting process to make sure that as states spend the money that it does meet the guidelines and it will be that look back or audit process. That's about all the information I have on that right now.

Sen. Heckaman:

. . . So what happens if we look back and two years down the road, they say, "Well, you spent so much, or whatever, and it wasn't needed for the COVID related, it's related to another expense?" Are we going to [inaudible] for having to pay that back or are these our funds to use, and then we've got them now and let's use them?

Joe Morrisette:

Mr. Chairman and Senator Heckaman. The discussion yesterday that I was part of with treasury, it made it clear that they want to stress flexibility, and allow these funds to be used . . . to stimulate the economy and meet the needs in each state. The guidance is very flexible in terms of what is determined necessary. It basically, through the guidance, says that whatever is determined necessary, based on the reasonable determination of the state and local officials, is going to be deemed to be a necessary expense and meet that criteria. So, there's definitely a focus on flexibility in use from treasury. And so if it was determined that something didn't follow the guidelines through some additional clarification, we'd have to address that as that clarification came forward from treasury, but it seems that everything that's in front of you today meets those criteria, and there's been nothing at all issued in the guidance that would indicate anything that's on the list today would be excluded in any way.

Sen. Heckaman:

Thank you.³³

3. NDIC Initiates Confiscation Process

The Emergency Commission approved the NDIC's request for \$33 million on May 12, the Legislative Budget Section approved funding on May 15, and the NDIC began issuing notices to appear at confiscation hearings to operators on May 18 and 19, as well as publish notice in North

³³ Meeting Livestream, N.D. Legis. Mgmt. Budget Section (May 15, 2020 10:45–10:53 AM) <http://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20200515/-/1/15207#handoutFile>. See also Meeting Minutes, N.D. Legis. Mgmt. Budget Section at 5 (May 15, 2020), <https://www.legis.nd.gov/assembly/66-2019/interim/21-5117-03000-meeting-minutes.pdf>.

Dakota newspapers.³⁴ Lynn Helms reported at the May 29 NDIC meeting that the confiscation hearing would be for consideration of 368 wells in “orphan” status, that plugging was likely to proceed in early July, and reclamation would be in August after harvest.³⁵ Helms also commented that the timing would work well as the federal PPP program would cease to support people in July and one of the goals of the program would be to employ 600 workers.³⁶

III. Summer of Action: June–September 2020

A. Summary

June, July, and August arguably constituted the NDIC’s busiest months administering the program. The Commission acquired additional funding for reclamation, confiscated non-compliant wells and treatment facilities, and assigned those wells to plugging and reclamation companies.

The NDIC held hearings to consider wells for confiscation through NDIC Dockets 28495 and 28530. The dockets are related: 28495 constituted the original list of 368 wells considered noncompliant by performance or bonding requirements, or both. Docket 28530 contained a handful of treatment plants, however, with the exception of Eagle Operating, all wells considered on this docket were suggested by the companies themselves at the 28495 hearing or in written testimony for Docket 28495.³⁷ Between the two Dockets, 375 wells were confiscated, and 368 sites slated for reclamation by the end of 2020.³⁸

B. Hearing for Docket 28495

The Hearing for Docket 28495 was held on June 10, 2020. The NDIC gave companies the opportunity to submit written testimony in the weeks leading up to the hearing. As a result of these proceedings, 239 wells were confiscated immediately. The operators of 93 were given additional time to comply with the law by September 1, and the remaining 36 dismissed because they were compliant with North Dakota law. Orders associated with the hearings were released on June 19.³⁹

³⁴ See N.D. Indus. Comm’n Docket 28495, Reconsideration Order No. 31069 at 1–3 (July 29, 2020) [hereinafter *Cobra July Reconsideration Order*].

³⁵ Meeting Minutes, Ind. Comm’n N.D. at 22 (May 29, 2020), <http://www.nd.gov/ndic/minutes/200529%20final.pdf>.

³⁶ *Id.*

³⁷ Meeting Minutes, Ind. Comm’n N.D. at 2–3 (June 19, 2020), <http://www.nd.gov/ndic/minutes/200619%20final.pdf> [hereinafter *June 19 NDIC Minutes*].

³⁸ Bakken Restart Task Force/Cares Act Update Report, N.D. Indus. Comm’n at 18 (May 26, 2021), https://www.dmr.nd.gov/oilgas/CARES_Act.Task_Force_Report_5.26.21.pdf (last visited June 10, 2021) [hereinafter *Bakken Restart Update Report*].

³⁹ See Ind. Comm’n N.D., *June 19 NDIC Minutes*, supra note 35, at 2–3.

Both the hearing recording⁴⁰ and confiscation orders reveal operator confusion as to why certain wells were selected for confiscation as well as concern over the Commission's threat to confiscate bonds.⁴¹ The Commission did not answer questions about the well selection process during the hearing, but the orders listed several criteria which were likely to have influenced the decision: date of last injection or production, the amount and type of the bond covering the well, whether the company had previously responded to any requests by the Commission to increase bonding, and whether the company reasonably believed that compliance with the law was achievable by the September 1 deadline.⁴² Most of the wells confiscated were not only unprofitable at pre-pandemic oil prices, but severely under-capitalized.⁴³

Orders also contain other information of note, such as requests by operators not to seek additional damages through litigation, or requests not to confiscate bonds. In the first round of orders from June 19, the NDIC did not indicate whether it intended to confiscate bonds, only that it planned to confiscate equipment and salable oil to compensate the commission and royalty owners.⁴⁴ This differs from subsequent orders where the NDIC explicitly stated that it intended to spend the CARES Act funds on plugging and reclamation before pursuing bonds or litigation.⁴⁵

In addition to what appears to be, in retrospect, a chaotic process for operators given the number of appeals sought after the hearing and legally compliant wells mistakenly called in to testify,⁴⁶ the surface owners of the affected wells received no notice of the confiscations. The speed of the process meant that many landowners did not realize a well on their land was being plugged and reclaimed until the plugging or reclamation company approached them and after the matter had been settled at the NDIC.⁴⁷ Notices sent to landowners were also highly problematic because in some cases, they contained language indicating the landowner was consenting to a reclamation procedure. Most contractors were willing to work out language, but only if this was requested

⁴⁰ Hearing Audio for Docket 28495, N.D. Indus. Comm'n (June 10, 2020), <https://www.dmr.nd.gov/oilgas/feeservices/dlogs/audio/c28/20200610c28495.mp3>.

⁴¹ See e.g. N.D. Indus. Comm'n, *Cobra June Confiscation Order*, supra note 14, at 11.

⁴² *Id.*

⁴³ See supra note 22.

⁴⁴ See Ind. Comm'n N.D., *June 19 NDIC Minutes*, supra note 35, at 4. See also Hearing Audio for Docket 28583, N.D. Indus. Comm'n (Oct. 22, 2020 at 00:58), <https://www.dmr.nd.gov/oilgas/feeservices/dlogs/audio/c28/20201022c28583.mp3> [hereinafter *Peterson Confiscation Hearing Audio*].

⁴⁵ See e.g. N.D. Indus. Comm'n Docket 28583, Order No. 31126 at 4 (Nov. 23, 2020); <https://www.dmr.nd.gov/oilgas/feeservices/ord/comm/31/or31126.pdf#search=%2228583%22> [hereinafter *Peterson Confiscation Order*]; N.D. Indus. Comm'n Docket 28530, Order No. 31057 at 6 (Aug. 20, 2020) [hereinafter *Eagle Confiscation Order*].

⁴⁶ See Ind. Comm'n N.D., *June 19 NDIC Minutes*, supra note 35; Meeting Minutes, Ind. Comm'n N.D., at 17–19 (July 29, 2020), <http://www.nd.gov/ndic/minutes/200729%20final.pdf> [hereinafter *July 29 NDIC Minutes*]; Meeting Minutes, Ind. Comm'n N.D., at 1–4 (Aug. 20, 2020), <http://www.nd.gov/ndic/minutes/200820%20final.pdf> [hereinafter *Aug. 20 NDIC Minutes*].

⁴⁷ Documents and information on file with Braaten Law Firm. See, e.g., E.g. landowner notice revised by BLF included in files contained with this report.

and the landowner was aware of the problems with signing the document.⁴⁸ Other landowners had written surface agreements with operators that are not being paid since the NDIC confiscated the wells.⁴⁹

C. NDIC Acquisition of CARES Act Funding for Reclamation

On June 25, 2020, the NDIC Oil and Gas Division requested \$33,176,513 of CARES Act funding for reclamation of abandoned wells, which was approved through the same processes as the plugging funds.⁵⁰ Although the language of the second request was similar to the first, legislators more aggressively questioned Department of Mineral Resources Director Lynn Helms about the program.⁵¹

Explaining the NDIC's methodology, Helms stated that of the 419 wells singled out by the NDIC, none were orphaned at the beginning of the year. Helms continued that they had 749 abandoned wells, and after the NDIC began sending out bond requests in mid-March, 41 bonds were posted, but many companies responded that they were bankrupt or could not get a bond because of the pandemic or because the bonding companies were either closed, unresponsive, or would respond in the negative for a request because they couldn't see a future for the wells in question.⁵²

Rep. Kempenich asked for additional clarification about how many of the wells in question would have been active if oil was selling at pre-pandemic levels of fifty to sixty dollars per barrel. Helms replied that for the initial potential orphaned well list, the NDIC looked to the 750 abandoned wells in the state and evaluated them if at less than fifty dollars per barrel they could pay for operating costs, return to production costs, and ultimate plugging costs. The ones that would not be economically feasible by that analysis went onto Docket 28495.

Helms then described what had occurred as a result of the 28495 hearing: 239 of the wells were "absolutely orphaned," and the Commission issued an order confiscating them. 93 could possibly come off the abandoned list by September 1, so the Commission authorized additional time for those operators to find acquire bonding or otherwise take action to avoid bankruptcy.

Helms then referenced the wells which would constitute the wells on Docket 28530. According to Helms, another 90 were operational, but the owners and operators appeared at the hearing and told the committee that the NDIC "missed" wells that would never be able to meet operating costs, so requested to add those wells to the list instead. In summary, Helms stated, the 419 wells singled out by the Commission were potentially viable at January crude oil prices, could not pay for plugging and reclamation at less than fifty dollars a barrel, the NDIC found those by first

⁴⁸ Documents and information on file with Braaten Law Firm. *See, e.g.*, E.g. landowner notice revised by BLF included in files contained with this report.

⁴⁹ *Id.*

⁵⁰ Meeting Minutes, Special Meeting of the Emergency Comm'n (June 18, 2020), http://sos.nd.gov/files/uploaded_documents/ecmn-20200618.pdf; N.D. Legis. Mgmt. Budget Section, Coronavirus Relief Fund Allocations Approved by the Emergency Comm'n at 23 (June 25, 2020), https://www.legis.nd.gov/files/committees/66-2019/21_5136_03000appendixf.pdf.

⁵¹ Meeting Livestream, N.D. Legis. Mgmt. Budget Section (June 25, 2020 10:19–10:50 AM), <http://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20200625/-1/16227>.

⁵² *Id.* at 10:45–10:53 AM.

looking to the abandoned well list since January, and determined during through the hearing for Docket 28495 which of the wells were abandoned or orphaned.⁵³

The NDIC gave legislators a full appraisal of the scale of the CARES Act program, not only for the hundreds of wells being confiscated at once, but also the pressure that the NDIC was under by both large developers and legislators themselves. The hearing recording also shows how legislators struggle to understand why certain wells were selected for confiscation. Helms continued using the term of “orphaned” in place of “abandoned, uneconomic, and underbonded,” to describe the confiscated wells, speaking primarily of the wells selected in terms of economic feasibility rather than under-capitalization. Although economic feasibility was a large consideration in the process, the Commission clearly considered the under-bonding issue to be of great concern, since of the 239 wells confiscated, the vast majority were on blanket or unit bonds.⁵⁴

D. Hearing for Docket 28530

The day after acquiring the second \$33 million from the Budget Section, the NDIC sent notices to companies with wells on Docket 28530 for a confiscation hearing on July 29. While seeking reconsideration for wells confiscated by the NDIC in Docket 28495, operators also pressured the NDIC to confiscate wells on Docket 28530 in addition to or in place of some of the wells previously confiscated through Docket 28495.⁵⁵

Fewer operators were present for Docket 28530, and because most of the wells were made at the suggestion of the operators, the atmosphere was less contentious than the Hearing for Docket 28495.⁵⁶ Six treating plants on the docket were granted additional time to comply with the law, and 80 wells were confiscated as part of this docket.⁵⁷ The wells on this docket had more recent dates of last injection or production than Docket 28495, but were as under-capitalized as the first docket. The Docket’s confiscation orders also show that although the operators sought assurances from the NDIC that no bonds would be confiscated along with the wells, the Commission was unwilling to grant such assurances.⁵⁸

⁵³ *Id.*

⁵⁴ See *supra* note 22.

⁵⁵ See Ind. Comm’n N.D., *July 29 NDIC Minutes*, *supra* note 44. See also, e.g. N.D. Indus. Comm’n Docket 28530, Order No. 31064 at 4–5 (Aug. 20, 2020) (showing operator Samson suggesting confiscation of certain wells at the Hearing for Docket 28495, appealing well confiscation at the Reconsideration Hearing on July 29, and testifying at Hearing for Docket 28530 on July 31 for confiscation of certain wells).

⁵⁶ Hearing Audio for Docket 28530, N.D. Indus. Comm’n (July 31, 2020), <https://www.dmr.nd.gov/oilgas/feeservices/dlogs/audio/c28/20200731c28530.mp3>.

⁵⁷ See Ind. Comm’n N.D., *Aug. 20 NDIC Minutes*, *supra* note 44 at 2.

⁵⁸ *Id.*

E. Plugging and Reclamation Bids

In July of 2020, the NDIC began accepting bids for plugging of the wells confiscated in Docket 28495. These bids were opened and the winners notified in late July. The winning companies won on a per-day bid basis, with five companies winning those bids.⁵⁹

Reclamation bidding began in mid-August, and companies bid on packages of wells, rather than a bid price-per-day. Some companies submitted bids with individualized prices per site,⁶⁰ with others submitting a lump amount for the whole package with an average amount per well.⁶¹ Reclamation packages 1–7 were offered and awarded in August,⁶² while packages 8–16 were offered in late September and granted in early October.⁶³ The NDIC provided guidelines for reclamation aiming to replicate what the NDIC considered to be ideal work, but also anticipated encountering sites where the contamination would need to be remediated the following year.⁶⁴

Helms had previously stated a goal of beginning plugging on July 16 and reclamation on August 1.⁶⁵ As of December 15, 2020, 234 out of 275 wells on the 2021 workplan were plugged, and 57 out of 144 sites from the 2020 workplan were reportedly reclaimed.⁶⁶ The NDIC anticipated plugging an additional 96 wells and reclaiming 233 sites as part of a 2021 workplan. Helms acknowledged the work was being accomplished slower than planned due to weather and unexpectedly difficult wells, which ranged in costs from \$250,000–\$525,000, and a couple of difficult reclamation sites, one of which would cost \$1.2 million. He added that addressing more expensive plugging and reclamation sites helped ensure that the most difficult cases would be addressed first using CARES money.⁶⁷

⁵⁹ See e.g. Letter from Cory VanderBusch, Reclamation Specialist, N.D. Dept. Mineral Res., to Ben Tohm, ND&T Services, Notification of Winning Plugging Bid at \$15,740 per Day (July 30, 2020) (available in Docket 28495). See also Letter from Cory VanderBusch, Reclamation Specialist, N.D. Dept. Mineral Res., to Kelly “Scott” Clark, WISCO Inc., Notification of Failed Plugging Bid (July 30, 2020) (available in Docket 28495) (listing the winning companies as ND&T Services, Tiger Well Service, Neset Consulting, North Plains Consulting, and Petroleum Experience).

⁶⁰ See e.g. Letter from Cory VanderBusch, Reclamation Specialist, N.D. Dept. Mineral Res., to Keith Norbeck, Badlands Contracting, Notification of Winning Reclamation Bid Package 2 (Aug. 25, 2020) (available in Docket 28495) [hereinafter *Badlands Winning Bid Letter*]

⁶¹ See e.g. Letter from Cory VanderBusch, Reclamation Specialist, N.D. Dept. Mineral Res., to Zachary Brown, Teraflex Group, Notification of Winning Reclamation Bid Package 11 (Oct. 2, 2020) (available in Docket 28495) [hereinafter *Teraflex Winning Reclamation Bid Letter*].

⁶² See VanderBusch, *Badlands Winning Plugging Bid Letter*, *supra* note 56.

⁶³ See VanderBusch, *Teraflex Winning Reclamation Bid Letter*, *supra* note 57.

⁶⁴ Meeting Minutes, Ind. Comm’n N.D., at 5 (July 7, 2020), <http://www.nd.gov/ndic/minutes/200707%20final.pdf>.

⁶⁵ See Ind. Comm’n N.D., *June 19 NDIC Minutes*, *supra* note 35, at 3.

⁶⁶ See Meeting Minutes, Ind. Comm’n N.D. at 8–14 (Dec. 15, 2020), <http://www.nd.gov/ndic/minutes/201215%20final.pdf> [hereinafter *Dec. 15 NDIC Minutes*].

⁶⁷ *Id.* at 8–10.

IV. Fall Pivot: October–December 2020

By the early fall, confiscations and appeals subsided, and the actual work of plugging and reclamation was in full swing. With Winter weather and the December 30 deadline for spending approaching, the NDIC also had to decide what to do with any funds that could not be expended in that time.

A. Daryl Peterson Case

One of NWLA’s members, Daryl Peterson, approached the NDIC with a case in late September 2020 seeking an order to confiscate a well on his land, as well as gain more information about the NDIC’s methods for selecting other wells but not the requested well. The NDIC granted Peterson his own hearing on October 22, 2020 in order to consider confiscation of the well, which had not produced in paying quantities for five years.⁶⁸

Peterson’s hearing differed in several ways from those of Dockets 28495 and 29530. First, Peterson more aggressively sought information about the NDIC’s procedures for handling requests for confiscation from operators like Eagle Operating who appeared to have advance notice of the program; namely, how operators with wells not initially selected for confiscation were able to have wells considered on Docket 28530.⁶⁹ The NDIC explained that no companies had access to such information earlier than others, surmising that publicity about the program in May and notification on the website likely resulted in the unsolicited communications from such operators.⁷⁰

Peterson also sought to clarify for the record why 1) the NDIC confiscated “orphaned” wells that were actually “abandoned” since their operators were solvent, and 2) if the well on his land was also “abandoned,” it had not been selected for use of CARES Act funds. Assistant Director Bruce Hicks explained that the NDIC interprets the term “abandoned” to mean wells that are not producing in paying quantities.⁷¹ Although Peterson’s well arguably met this definition, it had a single-well bond in the amount of \$75,000.⁷² As previously discussed, most of the wells confiscated by the NDIC were on blanket or unit bonds at the time of confiscation.⁷³ Peterson’s well was likely not targeted for use of CARES Act funds because even though it was not producing in paying quantities, it was on its own single-well bond. Most of the discussion from Peterson’s hearing regarding use of CARES funds addressed the economic production component of the confiscation analysis. In other words, the NDIC has made it clear that the test

⁶⁸ See N.D. Indus. Comm’n, *Peterson Confiscation Hearing Audio*, *supra* note 42; N.D. Indus. Comm’n, *Peterson Confiscation Order*, *supra* note 43, at 1–2.

⁶⁹ *Id.*

⁷⁰ N.D. Indus. Comm’n, *Peterson Confiscation Order*, *supra* note 43, at 3–4; N.D. Indus. Comm’n, *Peterson Confiscation Hearing Audio*, *supra* note 42, at 1:08:00.

⁷¹ N.D. Indus. Comm’n, *Peterson Confiscation Hearing Audio*, *supra* note 42, at 51:00.

⁷² *Id.*

⁷³ See *supra* note 22.

for abandonment and subsequent confiscation is whether or not the well is producing in paying quantities.

Statements made during Peterson’s hearing show that the NDIC’s program in mid-October was running into problems because the Commission needed to spend the CARES Act money quickly and keep workers employed, but the fact that the wells selected were more difficult and expensive to plug than previously thought meant the work was going slower than anticipated. In effect, the NDIC had both too much and too little money. Ultimately, it appears that the NDIC decided that there was no time to consider including additional wells like Peterson’s in the program because of the time constraints.⁷⁴ Furthermore, since the window to spend money was shorter than needed to properly plug and reclaim all the wells that had been confiscated, the NDIC was anticipating needing to confiscate bonds from the operators themselves for future reclamation work.⁷⁵ In other words, even in the early stages, it seems it was apparent that the wells slated for P&A operations were almost certainly going to be in the midst of plugging and reclamation operations when the program ended. This is a critical concern from landowners like Daryl Peterson, because even in the last session in 2021, SB 2070 was proposed by the North Dakota Department of Environmental Quality, and imposes liability on landowners for oil, produced water, and other spills when the operator is insolvent or bankrupt.⁷⁶ Indeed, the law in North Dakota now allows the DEQ to hold the landowner liable for produced water spills he had no hand in: “If no other viable responsible party can be located after the department's reasonable investigation, the department shall consider a person that became an owner of the property after the release to be a responsible party.”⁷⁷ Daryl Peterson’s concerns are very real, and were dismissed.⁷⁸

B. Asking the Commission to use reclaim money for frac grants.

Less than a week after Peterson’s hearing, the NDIC sought reallocation of CARES Act monies to incentivize completion of DUC wells⁷⁹ from the Emergency Commission and legislative Budget section. This money previously allocated for reclamation had been “turned back” because it could not be spent before the December 30 deadline.⁸⁰

⁷⁴ See N.D. Indus. Comm’n, *Peterson Confiscation Hearing Audio*, *supra* note 42, at 55:00.

⁷⁵ *Id.*

⁷⁶ See SB 2070, <https://www.legis.nd.gov/assembly/67-2021/documents/21-8041-03000.pdf> (“If no other viable responsible party can be located after the department's reasonable investigation, **the department shall consider a person that became an owner of the property after the release to be a responsible party....**”).

⁷⁷ See *supra* note 76.

⁷⁸ See NDIC Order No. 31126 (contained in Misc. Report Sources in folder published with report).

⁷⁹ See N.D. Indus. Comm’n, *Bakken Restart Update Report*, *supra* note 36, at 8.

⁸⁰ *Id.* at 5; N.D. Off. Mgmt. & Budget, Request to Emergency Comm’n at 5 (Oct. 16, 2020), https://www.legis.nd.gov/files/committees/66-2019/21_5182_02000_815presentation_2026.pdf.

This hearing demonstrates the frankest debate among lawmakers of the competing interests and viewpoints regarding appropriate uses of CARES Funds.⁸¹ The NDIC’s position was consistent with supporters of the reallocation: the DUC grants would provide opportunities for workers and increase tax revenue from both the workers’ and wells’ income in the short- and long-term.⁸² Legislators opposing the reallocation believed that the price of oil at the end of October was not high enough to justify subsidizing operator completion of the wells, and the worsening state of the pandemic compelled the legislature to re-direct funds to more direct relief efforts.⁸³

Concerns with the levels of unemployment and loss of tax revenue appear to be the primary basis for the Legislature’s decision to approve reallocation of CARES funds from reclamation to DUC grants.⁸⁴ Helms testified that only 9 wells would need to be completed for the legislature to re-coup the \$16 million of taxes over the course of the following year, and he conveyed that the program’s goal was employment for 200 permanent and up to 1000 temporary workers before the end of the year.⁸⁵

To concerns that the program might add to a glut resulting in downward pressure on the price of oil, Helms testified that although completion of wells would add pressure in the short term, the glut resulting from completion of wells would be a “drop in the bucket” compared to the large amount surplus oil worldwide. The frac grants, according to proponents, would offer the state substantial benefits as a result of stabilized production, increased employment and taxes that would outweigh the relatively minor negative consequences.⁸⁶ Furthermore, Helms testified that the incentive was intended to be a temporary fix that would not be continued in the form of tax breaks in the following year.⁸⁷

As a result of the reallocation, 80 wells were approved for funds. More than \$11 million had been reimbursed to companies in conjunction with the completion of 71 wells by the end of May 2021.⁸⁸ Whether these “frac grants” were given to companies to complete wells that would not otherwise have been completed, or simply given to companies that were replanning to complete wells anyway, is yet to be seen. To date, it is unclear whether any wells for which grants were received were actually moved up on a completion schedule. One company, for example, indicated that it would “prepay” for its water in order to comply with regulations, but that it had already scheduled the wells for fracs in late January and intended to continue with its existing

⁸¹ Meeting Livestream, N.D. Legis. Mgmt. Budget Section (Oct. 28, 2020 8:44:30-9:21:00 AM), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20201015/1033/18326> [hereinafter *October Budget Section Livestream*].

⁸² *Id.* at 8:48–9:05 AM; Meeting Minutes, Ind. Comm’n N.D. at 24–28 (Dec. 15, 2020), <http://www.nd.gov/ndic/minutes/201022%20final.pdf>.

⁸³ See N.D. Legis. Mgmt. Budget Section, *October Budget Section Livestream*, *supra* note 73 at 8:48 AM.

⁸⁴ *Id.* at 8:55 AM.

⁸⁵ *Id.* at 9:05 AM.

⁸⁶ *Id.* at 9:10 AM.

⁸⁷ *Id.* at 9:12 AM.

⁸⁸ See N.D. Indus. Comm’n, *Bakken Restart Update Report*, *supra* note 36, at 9.

schedule (which means there would be no benefit in additional taxes from these wells since they were not even moved up on the company's own completion schedule).⁸⁹

V. Original Plan 2.0: January–March 2021

Before Congress extended the CARES Act spending deadline in later December of 2020, North Dakota officials raced to spend the money on projects that maximized employment, environmental, and tax benefits. After the deadline extension, the NDIC focused on completing the unfinished plugging and reclamation work begun the previous year. This included trying to acquire any additional CARES Act money that was turned back by other state agencies to replace the \$16 million now reallocated to DUC grants. The NDIC once again engaged in competitive bidding for well plugging packages and equipment removal bids, while simultaneously seeking additional funding from the legislature. As a result of lobbying by NDIC at the March Appropriations meetings, the NDIC acquired an additional \$6 million of CARES Act turnback money from House Bill 1395 for plugging and reclamation.⁹⁰

A. Appropriations Meetings

1. March 8 Meeting

The NDIC sought additional CARES funding during the 2021 legislative session in a trio of appropriations meetings on March 8, 18, and 26. During the first, Helms confirmed that the NDIC was seeking \$16-40 million essentially to replace the money that was redirected to the DUC wells. Congress's amendment of the spending timeline meant that unspent CARES Act money could be "clawed back" from other agencies and repurposed back to this original goal. Helms also confirmed that a federal audit could be expected in two years.⁹¹

2. March 18 Meeting

The second House Appropriations meeting largely covered much of the same information as the first. Helms acknowledged that the NDIC was seeking more than the original reallocated \$16

⁸⁹ See Email from Bob Sandbo with Continental Resources, Inc. to NDIC dated Nov. 16, 2020, contained in attached filed received from open records request to NDIC, and saved in folder labeled Continental Frac Grant docs.

⁹⁰ Morgan Benth, *Unfinished Abandoned Well Project to Start Back Up*, KFYR (May 18, 2021), <https://www.kfyrtv.com/2021/05/18/unfinished-abandoned-well-project-to-start-back-up/>; N.D. Indus. Comm'n, *Bakken Restart Update Report*, *supra* note 36, at 7.

⁹¹ House Appropriations Meeting Livestream, N.D. Government Operations Division (Mar. 8, 2021 11:42–11:47 AM), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210404/-1/19480?startposition=20210308090000#info_ (considering SB 2014 request).

million because a large developer had gone bankrupt, thereby prompting a need for additional funds to accommodate an influx of even more newly “orphaned” wells.⁹² Helms also addressed other sources of funding for the special program. The NDIC was required to spend \$10 million from the Reclamation Fund as required by the Emergency Commission’s original allocation of CARES money.⁹³ The Commission intended to spend an additional \$6 million of confiscated bonds in addition to seeking out additional federal aid, but confiscation of equipment and salable oil from the confiscated wells had thus far resulted in additional funds of \$1.5 million.⁹⁴ Helms also stated that the NDIC would be pursuing civil actions against certain operators.⁹⁵ A limit on the use of confiscated bonds was that the NDIC could only collect up to the amount on a bond used to plug or reclaim the well, rather than use the difference to reclaim another operator’s well.⁹⁶

3. March 26 Meeting

The NDIC’s final presentation before the close of the legislative session occurred on March 26.⁹⁷ This presentation largely covered the same information in the same fashion as was seen at the House Appropriations meetings. But Helms added that the plugging and reclamation work had been more costly than anticipated, based on historic data, and as a result all previous appropriations of funds had been spent.⁹⁸

VI. Conclusion

Reclamation efforts associated with the CARES Act program are ongoing, but this report reveals several action items that can be addressed as those efforts continue:

- **Better communication with landowners.** The NDIC took on significant obligations in the midst of a pandemic and it is understandable that many aspects of the plugging and reclamation program were rushed. That said, communication with the landowners on whose property these plugging and reclamation operations are being conducted must improve. Landowners must have a seat at the table when deciding what wells should be plugged and reclaimed. Landowners in North Dakota reported to NWLA and its representatives several specific items of significant concern:

⁹² House Appropriations Meeting Livestream, N.D. Government Operations Division (Mar. 18, 2021 08:54–9:05 AM), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210402/-1/19617?startposition=20210318083000#agenda> (considering SB 2014 request).

⁹³ *Id.* at 8:56 AM.

⁹⁴ *Id.* at 8:50 AM.

⁹⁵ *Id.* at 8:59 AM.

⁹⁶ *Id.* at 9:01–9:04 AM.

⁹⁷ Senate Appropriations Meeting Livestream, N.D. Senate Apparitions Comm. (Mar. 26, 2021), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210404/-1/19795?startposition=20210326083000> (considering HB 1394 request).

⁹⁸ *Id.* at 11:03-11:06 AM.

- o **Many wells are being partially reclaimed with no plan for future reclamation communicated to the landowner.** Landowners have been told that companies conducting reclamation operations are not there to clean up the contamination. Landowners with significant contamination of their land have wells partially reclaimed and significant contamination remains. There is a very serious concern that this kind of partial reclamation will allow operators to declare reclamation complete **when it is not complete in many cases.**
 - o Many landowners have surface agreements that require annual payments. The NDIC has now confiscated these wells, leaving these landowners with half-reclaimed wells and the NDIC refuses to make these annual payments.
 - o Landowners have had been asked to sign documents related to plugging and reclamation operations that would constitute a release of claims and liability. Whether this was intentional or not, the NDIC should be providing clearer guidance to operators.

- **The NDIC should implement uniform standards for selection of wells for plugging and reclamation and make these standards public and allow public comment.** The NDIC's actions through the program appear to achieve certain goals like decreased unemployment and gave the state a head-start on the impending oil and gas bankruptcy crisis.⁹⁹ But all this was accomplished with a haste that subsidized poorly-behaved operators, many of whom could afford to foot the bill. If North Dakota is lucky enough to benefit from subsequent federal dollars, the NDIC should implement a program that does not simply subsidize operators who happened to be in the right place at the right time.

- **Continued confiscation of bonds from operators.** The NDIC estimates that \$32.7 million in reclamation work remains. This is likely underestimated. Only \$6 million of the remaining CARES Act money was appropriated at the end of April.¹⁰⁰ That leaves a \$26.7 million gap that will be filled by forfeiture of single-well bonds, North Dakota's Abandoned Well Plugging Site Restoration Fund, the sale of confiscated equipment and salable oil, and civil litigation. The NDIC's progress on these items should continue to be communicated so that the landowners might monitor work that affects their land and taxpayers can know that the companies are being held accountable for their actions.

- **Continued enforcement of higher bonding standards for operators.** The NDIC's demand that operators comply with higher single-well bonds since the beginning of 2020 is a hopeful sign that officials are aware of the true costs of plugging and reclamation in the state. These standards should continue to be enforced so that every well in the state is bonded at an amount that reflects the true costs of cleanup, which are much higher than previously believed. Indeed, it appears that the federal government will incentivize

⁹⁹ See Sadasivam, *The Cost to Clean Up*, *supra* note 12.

¹⁰⁰ See N.D. Indus. Comm'n, *Bakken Restart Update Report*, *supra* note 36, at 7.

states to adopt reforms to bonding programs in order to obtain additional federal funding.
¹⁰¹

- **Further funding of the abandoned well fund.** While it appears that significant federal funding is being released for plugging and reclamation operations, this should not be the sole source of security for North Dakota’s future liability for abandoned and orphaned wells.

Much retrospective work remains as the NDIC finishes implementing the CARES Act program. Additional contractor invoices and bids will be collected. The NDIC’s litigation, confiscation of bonds, oil, and equipment will continue in order to fund reclamation. Within the next year, North Dakotans will have a clearer picture of the scope of not only the program itself, but the true price of oil and gas development in the state. These activities affect every North Dakotan. It is critical that landowners and taxpayers be given greater opportunities to participate in future programs of the same nature.

¹⁰¹ See H.R. 3684, p.1763, available at <https://s3.documentcloud.org/documents/21031186/edw21a09.pdf> (“The State has made improvements to State programs designed to reduce future orphaned well burdens, such as financial assurance reform, alternative funding mechanisms for orphaned well programs, and reforms to programs relating to well transfer or temporary abandonment.”).