

An oil pumpjack stands in a field under a clear blue sky with some light clouds. The pumpjack is a large metal structure with a long horizontal arm and a vertical rod extending down into the ground.

RMLUI
ROCKY MOUNTAIN
LAND USE INSTITUTE

THE WILDERNESS CITY:
Nature, Culture and Economy in the Next West

21st Annual RMLUI Conference | March 1 & 2, 2012

*Mitigating Oil and Gas Impacts on
Urban and Rural Landscapes*
**Local Government Regulation and Private
Surface Use Agreements**

March 2, 2012



Polly B. Jessen

KAPLAN KIRSCH ROCKWELL

Presentation Objective

- Explain authority for local government regulations and its limits
- Outline common types of local government regulations
- Explain the purpose and typical scope of private surface use agreements

What motivates local governments to regulate oil and gas operations?

- Social and economic concerns
- Environmental and health concerns
- Infrastructure concerns

Local Government Authority

- Common law police powers
- State enabling statutes
 - Land use and building code enabling statutes
 - Environmental and natural resource enabling statutes
 - Other

What limits exist on this authority?

- Constitutional limits generally
- Preemption by federal or state statute
- Manner of preemption:
 - Expressly
 - Impliedly
 - Operationally
- What about a ban?

Colorado Preemption Law

- Oil and Gas Conservation Act and the COGCC Regulations do not entirely preempt local regulation of oil and gas
- Do local laws “materially impede[] or destroy[]” the interest of the state legislature?
- Local governments cannot:
 - Totally ban oil and gas drilling
 - Impose technical or financial requirements that “go beyond” state requirements

How do disputes over local government regulations play out procedurally?

West's Landlord and Tenant (1982)

Ryo Field v. City of Greeley
Supreme Court of Colorado, En Banc.

Gede Voss, City Clerk of the City of Greeley, a municipal corporation, Eliza Timpane, City Clerk of the City of Greeley Fire Department, the Election Board of the City of Greeley, a municipal corporation, the City Council of the City of Greeley, a body politic, and the City of Greeley, a municipal corporation, Petitioners.

LUNDYALL BROTHERS, INC., a Colorado corporation, **Alyx Landwell Oil and Gas, Inc.**, **Bullseye Exploration Company, Herald Brothers**, a partnership, **Compass Oil Company, Colorado Oil and Gas Conservation Commission**, and **Lanfield Resources**, a Colorado general partnership, Respondents.

No. 08CC01, / June 8, 2009.

Action was brought challenging some-rule city's ordinance which, by land use regulation, prohibited drilling of oil, gas, or hydrocarbon wells within its corporate limits. The District Court, Weld County, Defendant-Appellee. The Court of Appeals, Plaintiff-Appellant. The Court of Appeals, 312 P.3d 695, affirmed. Certiorari was granted. The Supreme Court, En Banc, held that Oil and Gas Conservation Act preempted some-rule city from imposing land-use ordinance that imposed total ban on drilling of any oil, gas, or hydrocarbon wells within city.

Allowed.

West's Statutes (1)

1 Municipal Corporations
Consent and Coexisting Exercise of Power by State and Municipality

Effect of Some Rule Ordinance is to grant to some-rule city every power possessed by General Assembly as to land and municipal matters, unless restricted by letter of city's charter. West's C.R.S.A., Civ. Act. 26, § 6.

1 Case that cite this headnote

2 Municipal Corporations
Consent and Coexisting Exercise of Power by State and Municipality

Factor to consider in determining whether statute preempts municipal regulation, whether there is need for state-wide uniformity of regulation, whether municipal regulation administrative in nature, whether subject matter one traditionally governed by state or local government, and whether the Constitution specifically concerns particular matter to state, local regulation.

1 Case that cite this headnote

3 Zoning and Planning
Mining and Extractive, Land and Gravel

State's interest in efficient development and production of oil and gas in a manner protective of waste and protecting of environmental rights of non-producing owners and producers of their share of production profits preempts home-rule

West's Landlord and Tenant (2012)

Town of Frederick v. North American Resources Co.
157 CO & Gas Reg. 714

No P.2A 726
Colorado Court of Appeals, Div. IV.

TOWN OF FREDERICK, Plaintiff-Appellant and Cross-Appellee,
v.
NORTH AMERICAN RESOURCES COMPANY,
Defendant-Appellee and Cross-Appellant.

No. 09CA0012, / Aug. 1, 2009.

Municipality brought action to enforce oil and gas operator from operating its well and to pay fines associated with its non-compliance with its ordinance which prohibited drilling of oil and gas wells within town, but its ordinance applied one permit was first obtained, and operator non-compliance, seeking declaratory judgment that ordinance was unenforceable. The District Court, Weld County, No. 08CV1082, Defendant-Appellee. The Court of Appeals, Plaintiff-Appellant, affirmed. The Court of Appeals, 157 CO & Gas Reg. 714, affirmed. Certiorari was granted. The Supreme Court, En Banc, held that: (1) municipality's ordinance was not preempted by state law, and (2) ordinance, never abrogated, and stated intent provisions of municipal ordinance were preempted on basis of operational conflict.

Allowed.

West's Statutes (1)

1 Municipal Corporation
Consent and Coexisting Exercise of Power by State and Municipality

State preemption by reason of operational conflict not arise where enforcement of a local ordinance would materially impede or destroy a state interest, unless such enforcement, local regulation may be partially or totally preempted to the extent that they conflict with substantial of state interest.

2 Mines and Minerals
Oil and Gas in General

Under *Brewer/Brewer*, which addresses local government's authority over land use issues within their boundaries and state's authority to regulate oil and gas production throughout state,

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Consent and Coexisting Exercise of Power by State and Municipality

Appointment to the Oil and Gas Conservation Act did not establish that state law implicitly preempted all local regulation of oil and gas drilling. Legislative declaration included statement that nothing in Act was intended to affect existing local law authority of local governmental entities, and provision of Act which addressed powers of the Colorado Oil and Gas Conservation Commission (COGCC) indicated that the General Assembly anticipated that local governments could issue land use permits that included conditions affecting oil and gas operations. West's C.R.S.A., §§ 26-20-101 et seq., §§ 26-20-103, 24-60-101 et seq.

1 Case that cite this headnote

3 Mines and Minerals
Oil and Gas in General

Municipal Corporations
Consent and Coexisting Exercise of Power by State and Municipality

Municipal ordinance that prohibited drilling of oil and gas wells within municipal limits unless special use permit was first obtained was not wholly preempted by state law on grounds that it regulated technical areas of oil and gas drilling and operations, provisions of ordinance, such as those governing access roads and fire protection plans, did not regulate technical aspects of oil and gas operations, even though they may have given rise to operational conflicts with state regulations addressing same subject, and thus, could be preempted by that reason. West's C.R.S.A., §§ 26-20-101 et seq., §§ 26-20-103, 24-60-101 et seq.

2 Cases that cite this headnote

4 Mines and Minerals
Oil and Gas in General

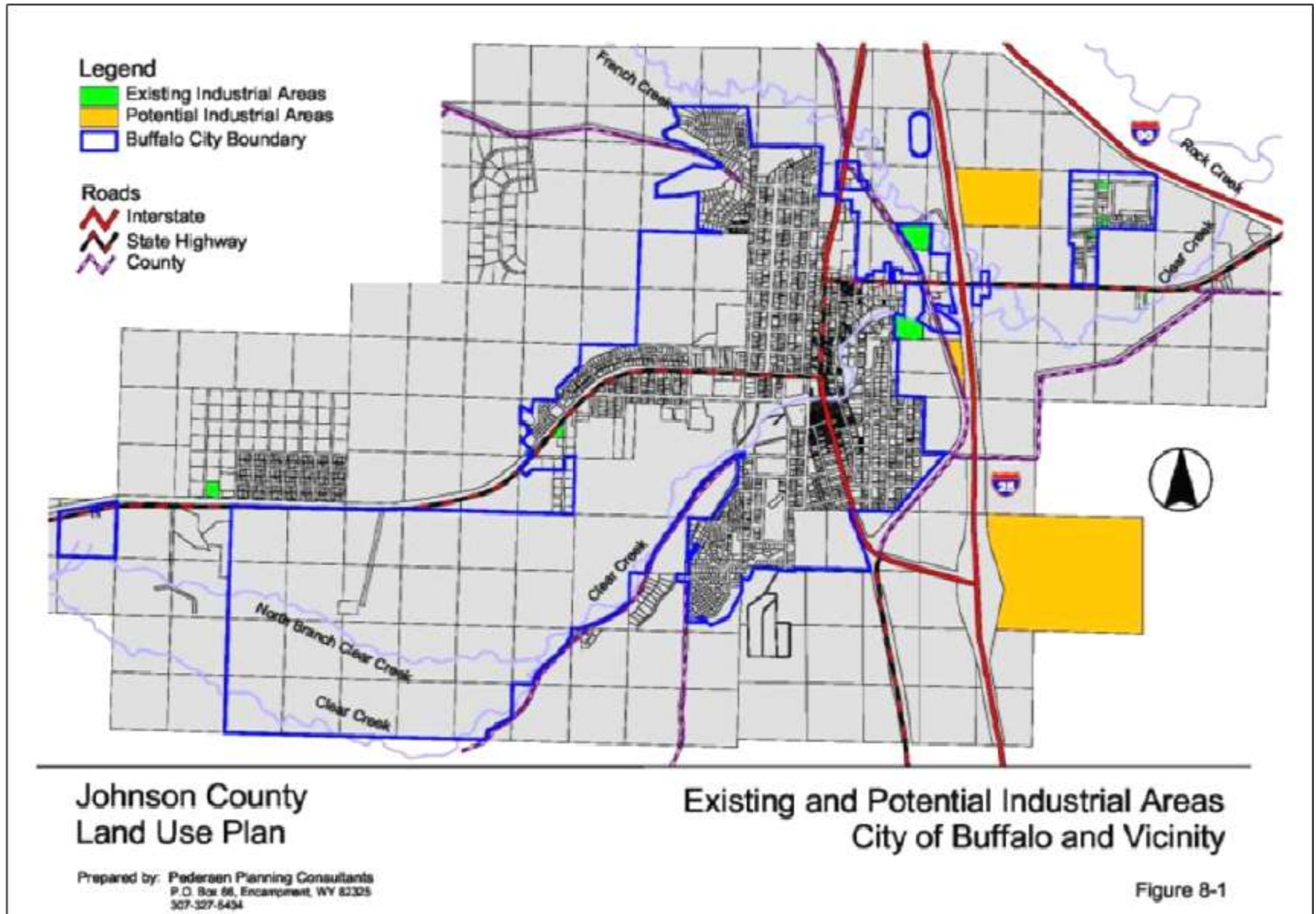
Municipal Corporations
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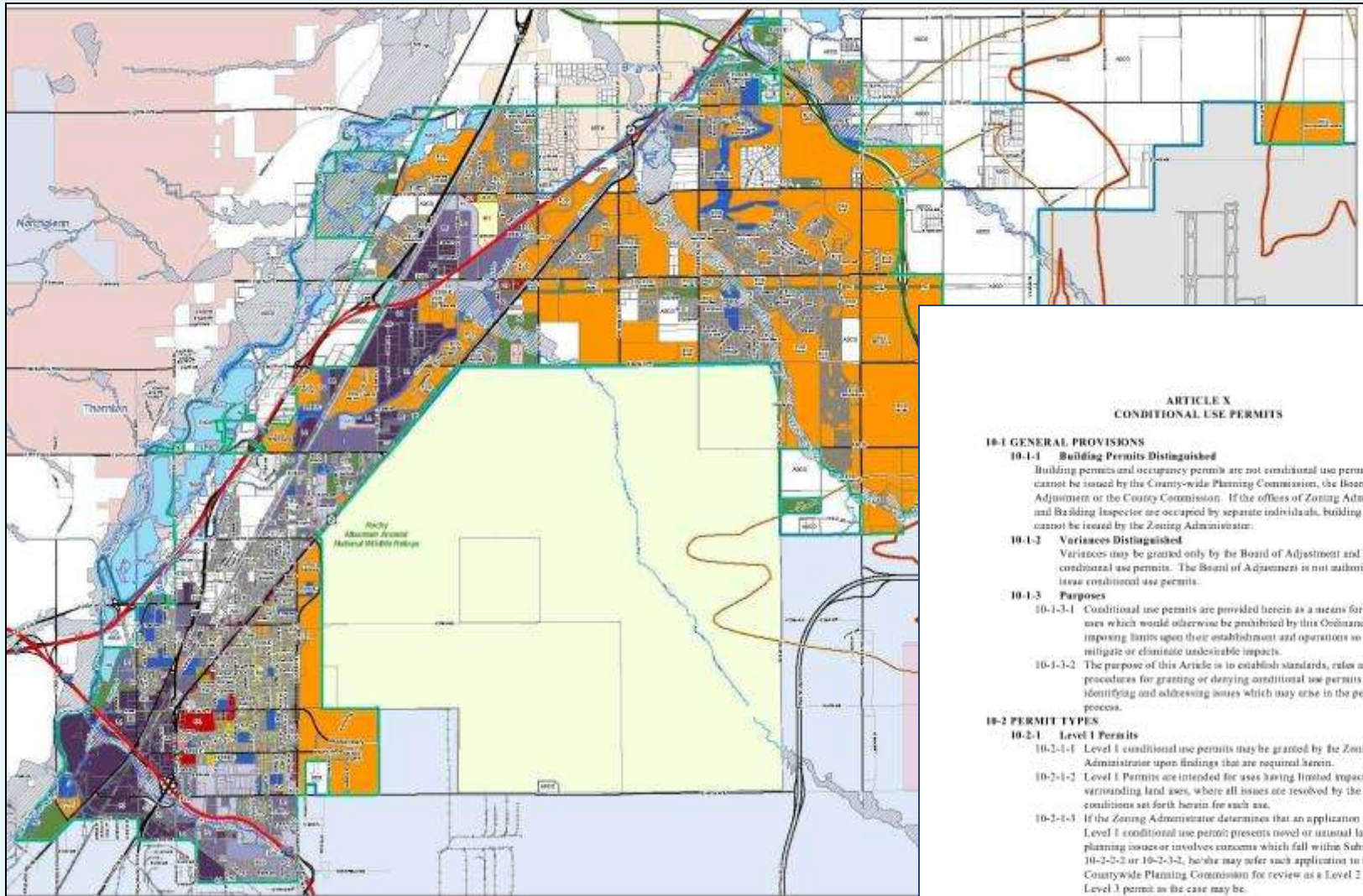
Regulatory Tools of Local Governments

- Master plans
- Zoning and special or conditional use permits
- Subdivision regulations
- Impact fees
- Surface use agreements
- Temporary moratoria
- 1041 powers
- Watershed protection and floodplain regulations

Master Plans



Zoning and Special or Conditional Use



ARTICLE X CONDITIONAL USE PERMITS

10-1 GENERAL PROVISIONS

10-1-1 Building Permits Distinguished

Building permits and occupancy permits are not conditional use permits and cannot be issued by the County-wide Planning Commission, the Board of Adjustment or the County Commission. If the offices of Zoning Administrator and Building Inspector are occupied by separate individuals, building permits cannot be issued by the Zoning Administrator.

10-1-2 Variances Distinguished

Variances may be granted only by the Board of Adjustment and are not conditional use permits. The Board of Adjustment is not authorized to issue conditional use permits.

10-1-3 Purposes

10-1-3-1 Conditional use permits are provided herein as a means for allowing uses which would otherwise be prohibited by this Ordinance, by imposing limits upon their establishment and operations so as to mitigate or eliminate undesirable impacts.

10-1-3-2 The purpose of this Article is to establish standards, rules and procedures for granting or denying conditional use permits and for identifying and addressing issues which may arise in the permitting process.

10-2 PERMIT TYPES

10-2-1 Level 1 Permits

10-2-1-1 Level 1 conditional use permits may be granted by the Zoning Administrator upon findings that are required herein.

10-2-1-2 Level 1 Permits are intended for uses having limited impact on surrounding land uses, where all issues are resolved by the required conditions set forth herein for such use.

10-2-1-3 If the Zoning Administrator determines that an application for a Level 1 conditional use permit presents novel or unusual land use planning issues or involves concerns which fall within Subsection 10-2-2-2 or 10-2-3-2, he/she may refer such application to the Countywide Planning Commission for review as a Level 2 permit or Level 3 permit as the case may be.

10-2-1-4 Appeals may be made to the Planning Commission of any decision made by the Zoning Administrator by any aggrieved person or by an

Impact Fees



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Commerce City, Colo., to weigh moratorium on hydraulic fracturing

By Monte Whaley
The Denver Post

POSTED: 12/19/2011 01:00:00
UPDATED: 12/20/2011 03:40:28

COMMERCE CITY — The City Council is set to consider a six-month ban on hydraulic fracturing for oil and gas development within the city limits at its meeting tonight.

If the council approves the moratorium, the city would join Colorado Springs and El Paso County in moving to temporarily limit the use of the controversial oil-field technique.

The hiatus would allow the city to review its land-use standards and policies as they relate to oil and gas exploration, city spokeswoman Michelle Halstead said.

"This is for our education," Halstead said. "We just want to see where we are in this process."

The move was prompted, in part, by a proposed fracking operation at Settler's Crossing, on the east side of Tower Road just north of East 96th Avenue.

Hillcorp Energy Co. already has a producing well there but plans

RELATED ARTICLES

Jan 24:
- [Commerce City council to continue temporary frack ban](#)

- [Commerce City officials to comment on fracking ban](#)

Jan 23:
- [Commerce City officials to comment on fracking ban](#)

Jan 19:
- [Halliburton to build \\$20.1 terminal in Windsor to su hydraulic fracturing acti](#)

Jan 11:
- [Total ban on fracking not possible, says panel of ex-CO Colorado](#)

Jan 3:

1041 Powers (CO Only)



Watershed Protection and Floodplains



Trends in Local Government Regulation

- Expanding and revamping local regulations
- Model regulations authorized by state statute to avoid preemption concerns and cooperative agreements between localities and state regulatory authorities (CO)
- Shift to administrative process and away from full public hearing
- Increased collaboration with local stakeholders
- Requirements that oil and gas developers enter into surface use agreements before permit issuance

Surface Use Agreements

- What is a surface use agreement?

Agreement between mineral interest owners and surface owners or developers regarding “reasonable use of the surface”
- Background law: “reasonable accommodation”
- Relative bargaining power of parties affects scope and terms

Why enter into a surface use agreement?

- Private benefits to both estates: defines “reasonable accommodation”
- Land use regulations trigger requirements
 - Direct requirements
 - HB1088 “Surface Development Notification Act”
- COGCC regulations

What matters does a surface use agreement typically address?

- Locations where oil and gas development may take place
- Access to sites, hours of operation, coordination of mineral and other surface development activity, noise, and aesthetics
- Release of claims, bonding, indemnities, and insurance
- Notice of operations and materials used
- Other site specific issues

Illustrations

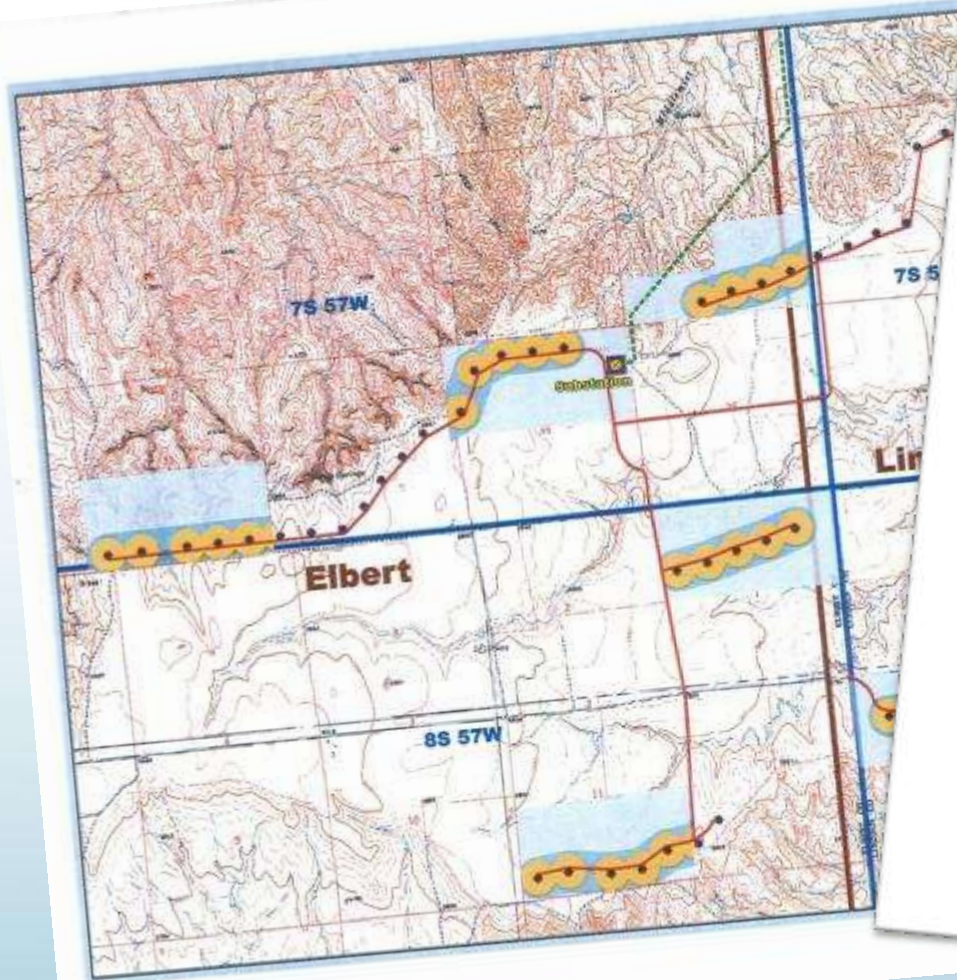


EXHIBIT C-2
MINERAL DEVELOPMENT SITES
Section 9, Township 2 South, Range 66 West



Questions?

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Good One-stop Resource Reference:

<http://www.oilandgasbmps.org/laws/index.php>

