



**Case Alert – *Northwest Landowners Association v. North Dakota, et al.*
No. 05-2019-CV-00085 (Northeast Judicial Dist. January 21, 2021)**

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In a recent [Memorandum Opinion](#), the Northeast Judicial District Court of North Dakota struck down Senate Bill 2344 (“SB 2344”), allowing oil and gas operators to use pore space without compensating surface owners, for violating the U.S. and North Dakota Constitutions. As a result, oil and gas operators should ensure they have the surface owner’s written permission to use pore space to minimize liability.

In 2019, the North Dakota legislature, through SB 2344, amended and reenacted the following North Dakota statutes, N.D.C.C. §§ 38-08-25, 38-11.1-01, and 38-11.1-03. SB 2344 also enacted a new law; N.D.C.C. § 47-31-09. These statutes address pore space ownership, pore space usage, and the compensation owed to the surface owner for the usage of the pore space. Specifically, they eliminated the need for oil and gas operators to compensate surface owners for the use of pore space and barred tort remedies for the same. The constitutionality of these statutes was challenged by the plaintiff, Northwest Landowners Association, and relying on both the United States Constitution and the North Dakota Constitution, the court found SB 2344 to be facially unconstitutional because it deprived the plaintiffs of their property for the benefit of a private party without compensation.

Why it matters: Use of pore space for oil and gas operations in North Dakota, including development, storage, carbon sequestration, and other disposal activities, requires the agreement of the surface owner and compensation.

Details: The following are the key relevant statements or restatements of law or statutory interpretations the court made:

Statements of Law

- In determining the validity of a facial challenge to a statute, the court determines whether any application of the law is constitutional.
- The United States Constitution states that private property shall not be taken “for a public use, without just compensation.” U.S. Const. amend. V (applied to the states via U.S. Const. Amend. XIV).
- The North Dakota Constitution states that “[p]rivate property shall not be taken or damaged for public use without just compensation...,” that “public use does not include public

benefits of economic development...,” and that “[p]rivate property shall not be taken for the use of, or ownership by any private individual or entity, unless that property is necessary for conducting a common carrier or utility business” N.D. Const., art. I, § 16.

- Surface owners in North Dakota have a property right to their subsurface pore space, which has inherent value “which need not be proven by various affidavits and statistics proffered by both sides”. *Mosser v. Denbury Res., Inc.* 2017 ND 169, 898 N.W.2d 406.
- “The declaration of part of a law as unconstitutional does not require the court to declare the entire law invalid unless all provisions are so connected and dependent upon each other that one can conclude that the Legislature intended the law to take effect in its entirety or not at all.” *State v. Fischer*, 349 N.W.2d 16, 18 (N.D. 1984) (citing *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

Court Determined Impacts of SB 2344 as Drafted

- SB 2344 eliminates the need for an oil and gas operator to compensate the surface owner for the use of the pore space under an NDIC-authorized oil and gas operation.
- SB 2344 allows any NDIC-authorized oil and gas operator to use the pore space without compensation and bars the other available remedies in trespass, nuisance or other torts. (N.D.C.C. § 47-31-09, established by SB 2344, states that “[i]njection or migration of substances into pore space...is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort.”)
- SB 2344 devalues the pore space of the surface owner without compensation and for an improper purpose, i.e. for a non-public purpose. SB 2344 results in a taking of a property right for the improper purpose of economic development, which transfers the value of this property right to a private party, for a non-public purpose.

Conclusion(s): The court determined the application of SB 2344 constituted a taking of the surface owner’s pore space for an impermissible purpose without compensation and is therefore unconstitutional under both the United States Constitution and the North Dakota Constitution. Moreover, the court found the provisions of SB 2344 to be sufficiently intertwined with those provisions which were determined to be unconstitutional that the correct remedy was the striking down of SB 2344 in its entirety.

Takeaways: A North Dakota court rejected statutes allowing oil and gas operators to transverse or use pore space underlying a surface owner’s real property interest without the surface owner’s prior agreement and paying reasonable compensation. This decision aligns North Dakota with other oil and gas producing states in recognizing that surface owners have the right to control and contract for the use of the pore space underlying their surface interest.

If you would like to discuss how this case may impact your operations, please contact [Scott Petitmermet](#) or [Ryan McKee](#).