STATE OF NORTH DAKOTA

COUNTY OF BOTTINEAU

IN DISTRICT COURT

NORTHEAST JUDICIAL DISTRICT

Northwest Landowners Association,

Plaintiff,

vs.

State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota,

Defendants,

And,

Continental Resources, Inc.,

Intervenor-Defendant.

Memorandum Opinion, Order Granting Summary Judgment to Plaintiff/Denying Judgment on the Pleadings/Denying Cross-Motion for Summary Judgment, Order Denying Defendants' Emergency Motion for Rule 56(f) Continuance and Order Regarding Motion to Strike Declaration of JJ England

Case Number: 05-2019-CV-00085

[¶1] This action involves statutory enactments and amendments that occurred in the 2019 legislative session. Senate Bill 2344 contains three sections that amended and reenacted three existing statutes: N.D.C.C. § 38-08-25 (Section 1 of bill), N.D.C.C. § 38-11.1-01 (Section 2 of bill), and N.D.C.C. § 38-11.1-03 (Section 3 of bill). 2019 N.D.Sess. Laws ch. 300, §§1-3. Section 4 of the bill created and enacted a new section of law, N.D.C.C. § 47-31-09. Id. at § 4.

[¶2] Plaintiff Northwest Landowners Association ("NWLA") raises a constitutional challenge to amendments and enactments in N.D.C.C. §§ 47-31-09, 38-08-25, 38-11.1-01 and 38-11.1-03 (hereafter referred to collectively as "SB 2344" for brevity). The statutes pertain to pore space usage and compensation for usage.

[¶3] In May 2020, this Court allowed Continental Resources, Inc. (hereafter "Continental") to intervene in the matter. (Odyssey Doc. 48) On May 11th, 2020, the originally named Defendants (hereafter collectively referred to as "the State") filed a Motion for Judgment on the Pleadings and supporting brief. (Odyssey Docs. 57-58) NWLA then filed a Motion for Summary Judgment and "Brief in Opposition to Defendants' Motion for Judgment on the Pleadings and in Support of Cross-Motion for Summary Judgment." (Odyssey Docs. 82-83) NWLA also filed six affidavits and two exhibits, including an affidavit by one of its attorneys, JJ England. (Odyssey Docs. 84-91) Both the

State and Continental then filed reply briefs in support of judgment on the pleadings. (Odyssey Docs. 96 and 98)

[¶4] A status conference was held July 17th, 2020. The parties raised several issues, including whether further discovery was necessary before the State could respond to NWLA's cross-motion, particularly deposition of individuals who submitted affidavits on behalf of NWLA. This Court informed the parties that it would not consider the issue unless N.D.R.Civ.P. 56 was followed. (Odyssey Doc. 104) An Emergency Motion for Rule 56(f) Continuance was then filed by the State on August 19th, 2020. (Odyssey Doc. 106)

[¶5] On August 21st, the State cross-motioned for summary judgment. (Odyssey Doc. 113) The following day, Continental filed a Motion to Strike Declaration of Plaintiff's Counsel, JJ England, arguing an attorney cannot make himself a factual witness regarding contested issues in the case. (Odyssey Doc. 123) NWLA opposes this motion, arguing the affidavit outlined publicly available information from the North Dakota Industrial Commission, which the Court could judicially notice, and was only done to assist the Court. NWLA did indicate, however, it had "no preference as to whether or not the declaration" be stricken. Id.

[¶6] Due to North Dakota Supreme Court administrative orders related to the COVID-19 pandemic, a reliable, electronic Zoom hearing on the various motions was held on October 29th, 2020. Derrick Braaten and JJ England appeared on behalf of NWLA. Matthew Sagsveen argued on behalf of the State. Alex Obrecht and L. Poe Leggette appeared on behalf of Continental. The Court received arguments from counsel and took the various motions under advisement.

[¶7] The Court has reviewed the entire extensive record, including any responses or replies which the Court has not specifically outlined above, in making its decision. Having considered the motions and positions of the parties, the Court now enters this Memorandum Opinion, Order Granting Summary Judgment to Plaintiff/Denying Motion for Judgment on the Pleadings/Denying Cross-Motion for Summary Judgment, Order Denying Defendants' Emergency Motion for Rule 56(f) Continuance and Order Regarding Motion to Strike Declaration of JJ England.

MEMORANDUM OPINION

[¶8] **Rule 56(f) Motion.** The motion based upon N.D.R.Civ.P. 56(f) is denied. It was argued further discovery was necessary to establish the value of pore space, usage of that space, etc. However, per the holdings in the cases of Mosser v. Denbury Resources, Inc., 2017 ND 169, 898 N.W.2d 406, and Mosser v. Denbury Res., Inc., 112 F.Supp.3d 906, 919 (D.N.D. 2015), the Court finds pore space has value as a matter of law and does not find further discovery on this issue necessary. The

Court did not rely on assertions and expert opinions by either party in concluding pore space has value. See more detailed discussion of pore space property rights and value *infra* at ¶¶ 17-20

[¶9] **Motion to Strike JJ England Affidavit.** Under N.D. R. Prof. Conduct 3.7(a), a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue. If Mr. England does not withdraw his affidavit, he has made himself a factual witness regarding contested issues in this case. This Court agrees the affidavit of JJ England goes beyond a procedural affidavit and presents material, disputed facts and factual context as a witness.

[¶10] The Court notes its decision herein does not rely upon the data or affidavit JJ England. Nonetheless, the Court recognizes this decision will likely proceed to an appeal and the record will be reviewed. As such, the Court sees only two options to proceed - the affidavit is stricken from the record, or Mr. England withdraws as co-counsel. If Mr. England does not withdraw as counsel for NWLA within ten (10) days of the date of this Order, the affidavit of JJ England shall be stricken from the record in this matter.

[¶11] **Motion for Judgment on the Pleadings and Motions Seeking Summary Judgment.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. N.D.R.Civ.P. 12(c). If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. N.D.R.Civ.P. 12(c). Here, matters outside the pleadings were not considered by this Court, as noted above.

[¶12] Review of motions for judgment on the pleadings was discussed in Tibert v. Minto Grain, LLC, 2004 ND 133, ¶¶ 7-8, 682 N.W.2d 294 (internal citations omitted):

> [W]e recognize that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court's inquiry is directed to whether or not the allegations constitute a statement of a claim under Rule 8(a), N.D.R.Civ.P., which sets forth the requirements for pleading a claim and calls for a short and plain statement of the claim showing that the pleader is entitled to relief.
>
> The complaint is to be construed in the light most favorable to the plaintiff, and the allegations of the complaint are taken as true. The motion for dismissal of the complaint should be granted only if it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted.
>
> . . .

> Under North Dakota's notice pleading requirements, a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." N.D.R.Civ.P. 8(a); Estate of Hill, 492 N.W.2d 288, 296 (N.D.1992).

[¶13] NWLA filed a motion for summary judgment and the State followed with its own cross-motion for summary judgment. A party claiming relief in this manner may move, with or without supporting affidavits, for summary judgment on all or part of the claim. N.D.R.Civ.P. 56(a). The standard of review for summary judgments is well established:

> Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. "Whether summary judgment was properly granted is 'a question of law which we review de novo on the entire record.'" On appeal, this Court decides if the information available to the trial court precluded the existence of a genuine issue of material fact and entitled the moving party to summary judgment as a matter of law. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial.

In re Est. of Richmond, 2005 ND 145, ¶ 12, 701 N.W.2d 897 (internal citations omitted).

[¶14] **Unconstitutional As Applied.** A generally accepted principle of constitutional law is that a party may challenge the constitutionality of a statute only as applied to him. State v. Morris, 331 N.W.2d 48, 58 (N.D. 1983) (citation omitted). There was extensive briefing on this type of challenge. However, NWLA affirmatively stated it is not making an as-applied challenge ("That might be true for an as-applied challenge, but here, NWLA has brought a facial challenge to the statute." Odyssey Doc. 135 at ¶ 6). As such, this Court moves on to whether the challenged statutes, as amended or enacted by SB 2344, are facially unconstitutional.

[¶15] **Facial Constitutional Challenge.** A facial challenge can best be described as an argument that no application of a law is constitutional, as opposed to application of the law to a specific case or set of circumstances of a party. NWLA argues the three sections it outlines of SB 2344, both individually and taken together, render the pore space estate worthless in every instance of its application.

[¶16] Both the federal and state constitutions contain relevant provisions. The United States Constitutional asserts 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 portion of our state constitution which NWLA alleges is violated by the challenged provisions of SB 2344 is N.D. Const. art. I, § 16, which indicates:

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law . . .
>
> For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private 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.

Also, as outlined in Continental Res., Inc. v. Farrar Oil Co., 1997 ND 31, ¶ 15, 559 N.W.2d 841:

> Property rights are protected by the North Dakota Constitution. See N.D. Const., art. I, § 1 ("inalienable rights" include "acquiring, possessing, and protecting property"); id. § 12 ("No person shall ... be deprived of ... property without due process of law."); id. § 16 ("Private property shall not be taken or damaged for public use without just compensation....").

"Our state constitutional provision is broader in some respects than its federal counterpart because the state provision 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.'" Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 16, 705 N.W.2d 850 (citations omitted).

[¶17] This Court concludes, as a matter of law, that surface owners in North Dakota have a property right to their subsurface pore space, and that said pore space has inherent value, as outlined in decisions by the North Dakota Supreme Court. As explained in a federal court decision, Mosser v. Denbury Res., Inc., 112 F. Supp. 3d 906, 919 (D.N.D. 2015):

> In North Dakota, it is clear that the surface owner owns the subsurface pore space given that N.D.C.C. § 47–01–12 (which dates back to at least the 1877 Civil Code for the Dakota Territory) provides:
>
> > § 47–01–12. Scope of ownership—Above and below the surface.
> > The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.
>
> (italics added). See also Burlington Resources Oil & Gas Co., LP v. Lang and Sons Incorporated, a/k/a Lang and Sons, Inc., 2011 MT 199, ¶¶ 23–24, 361 Mont. 407, 259 P.3d 766 ("Burlington Resources ") (construing an almost identical statute to include pore space).
>
> More recently, the North Dakota Legislature in 2009 adopted N.D.C.C. ch. 47–31 to address subsurface pore space. While N.D.C.C. § 47–31–03 provides that "[t]itle to pore space in all strata underlying the surface of lands and waters is vested in the owner of the overlying surface estate[,]" this appears to do nothing more than put a finer point on what already has been the long-established law in North Dakota. Of more significance, and probably the reason for the enactment of ch. 47–31, are the provisions that prohibit severance of the pore space from the surface estate along with the provision making clear

that a lease of the pore space is not a prohibited severance. See N.D.C.C. §§ 47–31–04 to 47–31–06.11

Not surprisingly, Denbury does not appear to contest that the surface owner owns the pore space in North Dakota.

[¶18] In a later opinion involving seven certified questions of law for the North Dakota Supreme Court, Mosser v. Denbury Res. Inc., 2017 ND 169, 898 N.W.2d 406, further guidance is found. First, pore space is a vested right for surface owners: "The legislation codifying pore space policy was intended to **confirm** that surface owners own the pore space under their surface estate…That testimony is consistent with N.D.C.C. § 47-01-12, N.D.C.C., which dates back to 1877 Civil Code for the Dakota Territory, and states 'the owner of land in fee has the right to the surface and to everything permanently situated beneath it." Mosser, 2017 ND 169 at ¶ 16 (emphasis added). Use of the word "confirm" in this sentence supports this Court's conclusion that legislation did not create a property right to pore space which it could "legislate away" later, but confirmed a property right created in the state constitution and laws that formed the Dakota Territory.

[¶19] Second, pore space is part of a surface owner's interest in "land" and a surface owner may be entitled to compensation for a mineral developer's use of it under N.D.C.C. § 38-11.1-04. Id. at ¶ 24. The Mosser decision further held the ability to recover damages is not limited to when a surface owner is currently using or is likely to make use of that pore space within the reasonably near future. Id. at ¶ 25. Additionally, damages are not appropriate only if diminution in the market value of the affected property is proven, nor does a surface owner need to prove some damage other than mere occupancy or loss of access to pore space. Id. at ¶ 25. These holdings support a conclusion that surface owners have a clear, inherent right to control and enjoy their pore space, and a further conclusion that pore space has an inherent value for surface owners which need not be proven by the various affidavits and statistics proffered by both sides to the present action as to value or volume of pore space, etc.

[¶20] The Court concludes, as a matter of law (relying on both Mosser decisions and without considering various assertions by the parties as to volumes and values of pore space, etc.) that North Dakota case precedent supports a conclusion that there is a constitutional property right for surface owners which includes pore space, and that this property right has inherent value for the landowner.

[¶21] **Salerno Test.** The State and Continental both argue each of the contested provisions in SB 2344 are constitutionally valid under the Salerno test, as circumstances exist under which N.D.C.C. §§ 38-08-25, 38-11.1-01, 38-11.1-03 and 47-31-09 can be validly applied.

[¶22] Regarding whether to declare a statute unconstitutional, the Court has explained:

> Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination. This Court exercises the power to declare legislation unconstitutional with great restraint.

Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶ 7, 908 N.W.2d 442 (citations omitted). A facial challenge to a statute requires the challenger to establish that no set of circumstances exists under which the statute would be valid. Larimore, at ¶ 38 (citing U.S. v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)).

[¶23] The State and Continental argue certain circumstances exist where the statutes are valid and cause this facial challenge to fail the Salerno test. Upon review of each set of circumstances, this Court does not conclude a scenario has been shown which causes NWLA's facial challenge to fail the Salerno test.

[¶24] First, the State and Continental argue the statutes only apply to units, where normal property principles do not apply, per Fischer v. Continental Resources, Inc., 49 F.Supp.3d 637, 645 (D.N.D. 2014) (citing Cont'l Res. Inc. v. Farrar Oil Co., 559 N.W.2d 841, 846 (N.D. 1997)):

> Since forced-pool oil and gas operations are 'deemed, for all purposes,' to be the proper 'conduct of such operations upon each separately owned tract in the drilling unit by several owners thereof' under NDCC 38-08-08(1) of the Resources Act, the property law of trespass does not affect those authorized operations and, to that extent, property law is necessarily superseded.

NWLA counters that the plain language of the statute clearly applies to more operations under Chap. 38-08 than just units. While the language in N.D.C.C. § 38-08-25(5) does specifically address units, it continues with a comma, followed by the specific text "or any other operation authorized by the commission *under this chapter*," (the parties appear to agree "commission" references the North Dakota Industrial Commission). The law plainly applies within units, but it also applies to land with any other NDIC-authorized operation under Chap. 38-08.

[¶25] The State and Continental also argue that because someone could own land (and thus title to pore space) without a NDIC-authorized oil and gas operation and also located outside any unit, a Salerno exception exists. The Court does not agree. This would be a scenario where the offending statutes do not apply. Chapter 38-08 addresses mining, oil and gas operations, and the amendments currently at issue are to code sections referring to units and NDIC-authorized oil and gas operations "under this chapter," i.e. under Chapter 38-08. If there are no oil and/or gas operations upon the land, then it doesn't fall under the purview of Chapter 38-08, and therefore cannot serve as a

scenario where application of Chapter 38-08 is applied constitutionally, because Chapter 38-08 would not be applied at all in such a scenario. To somehow conclude that a situation where a law doesn't apply at all shows a valid application of the law (and thus a failure of the Salerno test) is akin to upholding a tort remedy cap because it does not limit damages in a breach of contract claim. This appears to be the legal equivalent of comparing apples to oranges.

[¶26] Even if the law only applied to units, as the State argues, the police powers of the State are not unlimited and must be reasonably necessary. See, e.g., Mosser, 112 F.Supp.3d 906 at 918, expressing skepticism that those police powers "would go so far as to authorize the burdening of plaintiffs' land with the disposal of salt water generated from outside the Unit." NWLA points out, and the parties appear to agree, that even within a unit, the use was previously limited to what was "reasonably necessary." See State of North Dakota Brief in Support of Judgment on the Pleadings, Odyssey Doc. 58 at ¶ 33: ". . . although the right was subject to the well-established requirement that any such use be reasonable."

[¶27] The same "reasonably necessary" limitation holds true for implied covenants, which the State and Continental raise as another scenario wherein the statutes are validly applied and the Salerno test is not met. Per Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 42, 890 N.W.2d 222:

> The mineral lessee, however, may not use more of the surface estate than is reasonably necessary to explore, develop, and transport minerals. Hunt Oil, at 135. As a corollary to that implied right, a lessee generally cannot, in the absence of contractual permission, use the surface of one lease to benefit mining operations on adjacent land. See 1 Williams & Meyers, Oil & Gas Law § 218.4 (2016); Annotation, Right of Owner of Title to or Interest in Minerals Under One Tract to Use Surface, or Underground Passages, in Connection With Mining Other Tract, 83 A.L.R.2d 665, 670 (1962).

[¶28] The State and Continental also argue the statutes validly apply in cases where there is a disposal contract in place. The newly enacted N.D.C.C. § 47-31-09 reads as follows:

> 1. This chapter may not be construed to limit the rights or dominance of a mineral estate to drill or recomplete a well under chapter 38-08. Injection or migration of substances into pore space for disposal operations, for secondary or tertiary oil recovery operations, or otherwise to facilitate production of oil, gas, or other minerals is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort.
>
> 2. This section and chapter 38-08 may not be construed to impair the obligations of any contract for use of the surface estate for disposal operations, provided the contract was entered before the effective date of the unit approved by the commission pursuant to sections 38-08-09 through 38-08-09.17, and provided the disposal well is located within the unit area of the approved unit.
>
> 3. This section and chapter 38-08 may not be construed to allow the operator of a disposal well where the contract has expired after the effective date of the unit approved by the

commission pursuant to sections 38-08-09 through 38-08-09.17 to claim the surface owner should not be compensated as if the new contract for the disposal well on which the contract has expired had been entered after the effective date of the approved unit.

4. The owner of the surface estate upon which the surface location of a disposal well is located does not lose, and may not be deemed to have lost, a claim for trespass, nuisance, or other tort if the operator of the disposal well commences or continues operations of the disposal well in violation of subsections 2 or 3.

[¶29] If an existing contract does not specifically articulate allowable usage, it is difficult to ascertain exactly what remedies the landowner could seek beyond contractual remedies once the statutes of SB 2344 are applied, as all other remedies (trespass, nuisance, or other tort) are eliminated by SB 2344. While it doesn't extinguish existing contracts, which certainly would give rise to a litany of legal challenges, SB 2344 prospectively, across the board, takes away any and all right to contract for compensation for the use of pore space by a NDIC-authorized oil and gas operation in the future, no matter the level of necessity of use, reasonable or not. This law allows for physical intrusion of a land owner's property, without any right of the land owner to contract for or seek other relief from such intrusion.

[¶30] A final scenario offered by the State and Continental as defeating the Salerno test is severed mineral rights, allowable in North Dakota prior to April 2009. Per Mosser v. Denbury Res., Inc., 2017 ND 169, ¶ 23:

> Land is considered real property. N.D.C.C. § 47–01–03. Thus, in the absence of a severance of the mineral estate, or the severance of the pore space estate made prior to April 9, 2009, the effective date of Chapter 47–31, a fee simple owner of land owns not only the surface, but all which lies beneath the land, including the minerals and the pore space. Pore space, which is no longer severable from the surface estate in North Dakota, is an estate in land much like the mineral estate. The North Dakota Legislature has irrevocably tied the pore space estate to the surface estate in Chapter 47–31. Chapter 47-31 makes clear that title to the pore space estate is vested in the owner of the surface estate, and severance of the pore space from the surface estate is prohibited.

If an individual owns land with severed mineral interests, the argument goes, that landowner is not impacted by the challenged sections of SB 2344 and the law is constitutionally applied.

[¶31] The Court does not agree that this scenario provides an exception illustrating a valid application under the Salerno test. A landowner can certainly freely give away or sell a property right, or purchase property with limited rights already in place, such as land burdened by easements. The key distinction here is that landowners who have title to their pore space have had all value stripped by SB 2344, without compensation and for an improper purpose. There is no choice in the matter. This is an unconstitutional taking of an inherent, inalienable property right for the improper

purpose of economic development, by giving all value of those property rights to a private party, for a non-public purpose.

[¶32] NWLA also argues this case is distinguishable from Larimore in one important way. The Court in Larimore noted at ¶ 23:

> The damage cap for tort claims against political subdivisions is not an absolute bar to a money damages remedy. Nor does it set a limit so arbitrarily low as to be the functional equivalent of an absolute bar. Therefore, it does not violate N.D. Const. art. I, § 9.

Section 9, N.D. Const. art. I, states: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." NWLA contends SB 2344 is an absolute bar to not just money damages, but all other remedies generally available to landowners; that it is an absolute bar or the functional equivalent of an absolute bar.

[¶33] This Court agrees. The provisions of SB 2344, both individually and taken together, prohibit landowners from obtaining any compensation for any oil and gas operators' use of their pore space estate, whether reasonable or unreasonable, whether at large or small volumes, whether at a large financial detriment or small financial detriment. These provisions act as an absolute bar to not just money damages, but to all other meaningful remedies, including trespass, nuisance or other torts. The three provisions at issue here, enacted or amended within SB 2344, render the pore space worthless in every instance of its application, and it is unconstitutional on its face.

[¶34] The taking of pore space from surface owners is clearly and unambiguously for the constitutionally impermissible purpose of economic development to benefit private parties, i.e. the oil and gas industry. This is a violation of N.D. Const. art. I, § 16, which specifically directs that "a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health" and "[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."

[¶35] The purpose of this transfer was laid out in the initial draft of Section 1 of SB 2344: "to help ensure the viability of the state's coal and power industries, and to benefit the state economy," though this was eventually amended and enacted to read "3. It is in the public interest to encourage and authorize cycling, recycling, pressure maintenance, secondary recovery operations, and enhanced recovery operations utilizing carbon dioxide for the greatest possible economic recovery of oil and gas." N.D.C.C. § 38-08-25(3).

[¶36] The State has countered with an amended legislative finding that expressly recognizes a surface owner's title to pore space: "4. This chapter may not be construed to alter, amend, repeal, or modify the law concerning title to pore space under section 47-31-03." N.D.C.C. § 38-11.1-04. This declaration provides little solace to this Court and even less to surface owners in our state, because it is directly contradicted by the other amendments and enactments which effectively remove all *value* that title to pore space could provide to a surface owner. The clear improper purpose renders the challenged enactments and amendments of SB 2344 unconstitutional.

[¶37] SB 2344 explicitly allows any NDIC-authorized oil and gas operators to use a landowner's pore space without compensation, without limits on reasonableness of the use, and acts as an absolute bar to not just compensation, but the other available remedies in trespass, nuisance or other tort.

[¶38] While the parties agree, and this Court acknowledges, that the legislature can alter statutory remedies, the effect of SB 2344 is to remove all value of pore space, a property right, and all other available remedies, effectually taking that private property right for a non-public, impermissible purpose. It acts to give North Dakota landowners' value from pore space to the oil and gas industry, for free, under the guise of the North Dakota Industrial Commission. The citizens of North Dakota are protected from such action by both the state and federal constitutions.

[¶39] The United States Supreme Court has explained:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

Kelo v. City of New London, Conn., 545 U.S. 469, 477, 125 S. Ct. 2655, 2661 (2005). The three challenged provisions of SB 2344 accomplish the first proposition: take a property right from surface owners (property of A) for the sole purpose of transferring all value and use of pore space to unit or other oil and gas operators (private party B).

[¶40] **Remedy.** "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)). Here, this Court concludes the Legislature intended the law to take effect in its

entirety, based on the intertwined provisions both changing definitions and treatment under various laws, and because the challenged sections make up a large, substantive portion of the bill's entirety.

ORDER

[¶41] As outlined above, this Court did not rely on factual allegations of pore space value/volume/etc. to reach this decision, which renders the State's Rule 56(f) motion, joined by Continental, unnecessary. The State of North Dakota's Rule 56(f) motion is DENIED.

[¶42] The Court did not rely upon the information and affidavit of JJ England, but does conclude such an affidavit by an attorney in the case is inappropriate and an act which would transform Mr. England into a factual witness. The affidavit of JJ England (Odyssey Doc. 89) shall be stricken in this matter unless Mr. England choses to withdraw as co-counsel within ten (10) days of this Order.

[¶43] The State's Motion for Judgment on the Pleadings and the State's Cross-Motion for Summary Judgment are DENIED. Plaintiff's Motion for Summary Judgment is GRANTED. As a matter of law, the enactments and amendments to N.D.C.C. chs. 38-08, 38-11.1 and 47-31 in SB 2344 are facially unconstitutional. Relief is granted in the form sought by Plaintiff, a declaration that the enactments and amendments to these sections of the code by SB 2344 are facially unconstitutional and the statutes are struck down as such, based on the inability to strike only the affected portion of the law. This Court hereby issues an injunction preventing enforcement of this law.

[¶44] SO ORDERED.

[¶45] Dated this 21 day of January, 2021.

BY THE COURT:

Anthony Swain Benson
District Court Judge

Copies to:

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Pl Atty ✓ Probation__IV-D__Other_____
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