STATE OF NORTH DAKOTA

COUNTY OF BOTTINEAU

IN DISTRICT COURT

NORTHEAST JUDICIAL DISTRICT

Northwest Landowners Association, Mike Dresser, Sandra Short, The Swanson Living Trust, and North Dakota Farm Bureau, Inc.,

Plaintiffs,

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 as the Chairman and a member of the North Dakota Industrial Commission, and Hon. Drew Wrigley in his official capacity as Attorney General of North Dakota and as a member of the North Dakota Industrial Commission, and Hon. Doug Goehring in his official capacity as Agricultural Commissioner of North Dakota and as a member of the North Dakota Industrial Commission,

Defendant,

and

SCS Carbon Transport LLC, Minnkota Power Cooperative, Basin Electric Power Cooperative, and Dakota Gasification Co.,

Intervenor-Defendants.

Memorandum Opinion and Order Granting Summary Judgment to Plaintiffs and Denying Summary Judgment to Defendants and Intervenor-Defendants

Case Number: 05-2023-CV-00065

[¶1] This action is before the Court following a remand by the North Dakota Supreme Court in the decision Northwest Landowners Ass'n v. State, 2025 ND 147, 25 N.W.3d 220 (hereafter "NWLA II"). For brevity, "Defendants" will refer to Defendants and Intervenor-Defendants herein. The sole remaining claim upon remand is the merits of Plaintiffs' constitutional challenge of the amalgamation provisions in N.D.C.C. ch. 38-22. NWLA II, at ¶ 34. The NWLA II decision disposed of the issues regarding statute of limitations, standing, and failure to exhaust administrative remedies. Id. at ¶¶ 8-31. The Court summarized the remaining legal claim in ¶ 31 (emphasis added):

> **[Plaintiffs] assert the laws, as implemented by NDIC orders approving permits, authorize the injection of carbon dioxide into their pore space without prior payment of just compensation. In other words, the Plaintiffs claim they have or will suffer an unconstitutional physical invasion of their property.**

[¶2] On September 5, 2025, this Court sent all counsel correspondence indicating the Court would consider the remaining motions for summary judgment pertaining to this issue based upon prior briefing, unless concerns or objections were raised. *Index* 267. There were no objections or requests for further oral argument and this Court took the matter under advisement.

[¶3] Having considered the motions by all parties, as well as the briefs, responses, replies, oral argument, the record and the pleadings, the Court now enters this Memorandum Opinion and Order Granting Summary Judgment to Plaintiffs and Denying Summary Judgment to Defendants and Intervenor-Defendants.

MEMORANDUM OPINION

[¶4] **Summary Judgment Legal Standards.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of a claim. N.D.R.Civ.P. 56(a). Our standard of review for summary judgments is well established:

> Summary judgment is a procedural device under N.D.R.Civ.P. 56(c) for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party seeking summary judgment must demonstrate there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, we view the evidence in the light most favorable to the opposing party, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact. When reasonable persons can reach only one conclusion from the evidence, a question of fact may become a matter of law for the court to decide.

N.D. Private Investigative & Sec. Bd. v. TigerSwan, LLC, 2019 ND 219, ¶ 8, 932 N.W.2d 756 (citations omitted). The Court analyzes the competing motions for summary judgment by these standards.

[¶5] **Challenged Statute.** Plaintiffs challenge the constitutionality of N.D.C.C. Chapter 38-22 – Carbon Dioxide Underground Storage (hereafter "CO2 Storage statute"). Before issuing a permit, the North Dakota Industrial Commission ("NDIC") shall find that all nonconsenting pore space owners "are or will be equitably compensated." N.D.C.C. § 38-22-08(14). Regarding consent, N.D.C.C. § 38-22-10 indicates:

> If a storage operator does not obtain the consent of all persons who own the storage reservoir's pore space, the commission may require that the pore space owned by nonconsenting owners be included in a storage facility and subject to geologic storage.

Once the carbon capture project is completed, "**[t]itle** to the storage facility and to the stored carbon dioxide **transfers, without payment of any compensation**, to the state." N.D.C.C. § 38-22-17(6)(a) (emphasis added).

[¶6] As noted above, the NWLA II decision determined Plaintiffs have standing, this Court has jurisdiction, and neither the failure to exhaust administrative remedies nor the statute of limitations bar this particular statutory challenge by Plaintiffs.

[¶7] **Unconstitutional Takings Analysis.** The analysis of whether the CO2 Storage statute is unconstitutional as argued by Plaintiffs was outlined in a 2022 case, Northwest Landowners Ass'n v. State, 2022 ND 150, ¶ 16 and 19, 978 N.W.2d 679 (hereafter "NWLA I"):

> The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. "The takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment." *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 12, 705 N.W.2d 850. The North Dakota Constitution provides overlapping and broader protection against government interference with property rights: "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." N.D. Const. art. I, § 16. It "was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable." *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346 (N.D. 1987).
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> To establish a violation under the Takings Clause, challengers must demonstrate they have a property interest that is constitutionally protected. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Id.*

[¶8] The NWLA I case involved saltwater injection into pore space. The NWLA I decision analyzed state law and legislative intent, and the North Dakota Supreme Court concluded that surface owners "**have a constitutionally protected property interest in pore space that is recognized under state law.**" Id. at ¶ 22. This Court concludes the pore space interest at issue here is a constitutionally protected property interest subject to a takings analysis.

[¶9] Defendants argue the proper standard to determine whether a government-authorized invasion of non-surface property constitutes a taking is found in U.S. v. Causby, 328 U.S. 256, 266, 66 S. Ct. 1062 (1946). The Court in Causby concluded such an invasion constituted a taking only if it amounts to "a direct and immediate interference with the enjoyment and use of the land." Id.

[¶10] Plaintiffs argue the standard to apply in the present case is found in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982) and was used in the taking analysis in NWLA I: "[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." NWLA I, at ¶ 23 (citing Loretto and Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 13, 705 N.W.2d 850).

[¶11] Both the State and Continental Resources had argued in appellant briefs in NWLA I that Causby should apply to pore space as opposed to Loretto. See NWLA I Appellant Brief of Continental Resources at ¶¶ 50-51 and Appellant Brief of State of North Dakota at ¶¶ 52-54. It is clear the North Dakota Supreme Court rejected those arguments and applied Loretto. See NWLA I, at ¶¶ 23-28.

[¶12] This Court finds the factual distinctions between the present case involving pore space invasion and NWLA I weigh even more heavily in favor of applying Loretto here, as outlined in more detail below.

[¶13] As explained in NWLA I, ¶ 25 (internal citations omitted) (emphasis added):

> **Government-authorized physical invasions of property constitute the "clearest sort of taking" and therefore are a per se taking.** "[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." A physical invasion "is qualitatively more severe than a regulation of the use of property ... since the owner may have no control over the timing, extent, or nature of the invasion." Further, **regardless of whether the physical occupation is permanent or temporary, just compensation is required.** Even if the physical invasion has only minimal economic impact on the owner, **compensation is required because when there is a physical occupation of property, it effectively destroys the owner's rights to possess, use, and dispose of the property.** Further, because government-authorized physical invasions take away the landowner's right to exclude - "one of the most treasured" rights of property ownership - they are a per se taking.

[¶14] A "permanent physical invasion" is a per se taking because "the owner's right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests." Wild Rice River, at ¶ 13. Loretto also concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Id. at 426 (emphasis added). In other words, whether appropriation of a property owner's pore space to store CO2 is in the public interest is not dispositive of whether the statute allowing the same poses an unconstitutional taking.

[¶15] As noted in Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322–23, 122 S. Ct. 1465, 1478–79 (2002):

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); or when its planes use private airspace to approach a government airport, *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), it is required to pay for that share no matter how small.

[¶16] Unlike a temporary flight in airspace far overhead, or allowing installation of cable television components on a rooftop, which could be argued to cause little or no interference, the pore space invasion here is much more extensive.

[¶17] Under the CO2 Storage statute, storage operators could inject millions of metric tons of CO2 into pore space, store it for an undetermined amount of time, and eventually title of the carbon and the storage facility transfers to the State of North Dakota. In more generalized terms, a landowner's constitutionally protected pore space property interest is subject to a private company's physical invasion authorized by the State of North Dakota, for an undetermined number of years - which could span decades, and then that landowner's constitutionally protected pore space property interest is permanently titled to the State of North Dakota under N.D.C.C. § 38-22-17(6)(a) once the carbon capture project is completed.

[¶18] This Court concludes N.D.C.C. Chapter 38-22 clearly contains a government-authorized physical invasion of an interest in property, and interferes with a landowner's use and enjoyment of property, including, but not limited to, a landowner's right to exclude others.

[¶19] **Just Compensation.** Having concluded N.D.C.C. Chapter 38-22 allows a government-authorized physical invasion of property constituting the "clearest sort of taking" and a per se taking, the Court must next determine whether there is just compensation provided for said taking.

[¶20] Defendants argue the present case is distinguished from NWLA I as that case deprived surface owners from demanding compensation for physical occupation of pore space, while N.D.C.C. Chapter 38-22 does not deprive surface owners of compensation. Plaintiffs counter that the compensation scheme in N.D.C.C. Chapter 38-22 is nonetheless unconstitutional, as it fails to provide for *just* compensation as provided by Article I, § 16, N.D. Const.

[¶21] This Court agrees N.D.C.C. Chapter 38-22 provides for "compensation," but clearly does not provide "just compensation" as defined in North Dakota.

[¶22] Defendants rely on Martin v. Tyler, 60 N.W. 392, 400 (N.D. 1894) to argue a jury need not determine compensation in a taking such as this.

> First it speaks of "just compensation" as applied generally. It then creates the exceptional class, and for that class it demands "full compensation," and adds "which compensation shall be ascertained by a jury." Ordinarily, these words would not include both characters of compensation, but would include that last under discussion, to wit, full compensation; and such we think was the intention.

The Martin court relied on specific language in the "takings" provision that limited a jury determination to a certain class. However, that language was amended in 1956. See Article amendment 66, H.C.R. "O", approved June 26, 1956. The amendment put the language that compensation is determined by a jury into a wholly independent sentence. The Court does not conclude that the amendment was an idle act, and Article I, § 16 of the North Dakota Constitution now clearly requires compensation for taking private property to be determined by a jury, unless that is waived: "Compensation shall be ascertained by a jury, unless a jury be waived."

[¶23] Other language in Article I, § 16 indicates that even compensation which an owner opts to receive in annual payment form is by "a jury trial, unless a jury be waived . . ." Id. Further, a more recent case, Sauvageau v. Bailey, 2022 ND 86, ¶ 9, 973 N.W.2d 207 (emphasis added), supports this interpretation:

> Article I, § 16, N.D. Const., states "[p]rivate 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." **A jury decides the amount of compensation due for the taking, unless a jury is waived.** *Id.* Section 16 also authorizes the state to acquire a right of way by quick take. Quick take allows the state to "take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located." *Id.* **The owner of the right of way may have a jury decide the quick take damages.** *Id.* **Quick take offers an owner less protection because the condemnor can take possession of the property before trial on the amount of just compensation due.** *Johnson v. Wells Cty. Water Res. Bd.*, 410 N.W.2d 525, 529 (N.D. 1987).

[¶24] The decision in Sauvageau notes Article I, § 16, N.D. Const. has a timing requirement: "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 by law." Id. While there are actions that allow certain possession before trial, such as "quick take," no party argued N.D.C.C. Chapter 38-22 involves this.

[¶25] The Court concludes N.D.C.C. Chapter § 38-22, like the law challenged in NWLA I, is "in conflict with the higher law of the state and federal constitutions" and is therefore "unenforceable." NWLA I, at ¶ 35. Specifically, the Court concludes N.D.C.C. Chapter 38-22 is unconstitutional as it provides for a government-authorized physical invasion of property, which constitutes a taking, and it does not provide for "just" compensation as outlined as Article I, § 16 of the N.D. Constitution.

[¶26] **Correlative Rights.** Defendants argue pore space amalgamation, like oil and gas pooling, is allowed under police powers and the correlative rights doctrine, citing Texaco Inc. v. Indus. Comm'n, 448 N.W.2d 621, n. 1 (N.D. 1989) and Cont'l Res., Inc. v. Farrar Oil Co., 1997 ND 31, ¶¶ 16-17, 559 N.W.2d 841. They argue laws and precedent which allow forced pooling of oil and gas interests in a shared reservoir also justify amalgamation of interests in a shared pore space reservoir. *Index* 184, ¶ 88.

[¶27] The State argues its ability to amalgamate interests in pore space reservoirs, at the behest of the majority of owners, is a valid exercise of the State's traditional powers to regulate the development of reservoir resources with shared ownership. Id. at ¶¶ 78-87, 97. It argues such an ability is necessary for a state that is pioneering the development of laws for regulating carbon capture storage operations. Id. The State claims "Pore space reservoirs capable of CO2 storage are remarkably similar to oil and gas reservoirs." Id. at ¶ 115.

[¶28] Defendants repeatedly refer to amalgamating interests, while Plaintiffs argue the statute actually amalgamates a vested property right, pore space. Correlative rights cases cited in Defendants' briefs in support of summary judgment do mostly involve extraction of oil, though Finite Res., Ltd. V. DTE Methane Res., LLC, 44 F.4th 680 (7th Cir. 2022) involved extraction of coal mine methane gas. *Index* 184, ¶¶ 89-92. In another case relied upon by Defendants, Syverson v. N.D. State Indust. Comm., 111 N.W.2d 128, 133-134 (N.D. 1961), injection of water into a unit reservoir was upheld as "unitization was in the best public interest, was protective of correlative rights, and was reasonably necessary to insure the greatest ultimate recovery [of oil or gas] and to prevent waste [of oil or gas]."

[¶29] Even in the Finite and Syverson cases, *extraction* of a resource was the essence of the claim. In all the cases cited, references to an owner's "just and equitable share" referred to preventing waste and ensuring maximum recovery of a landowner's resource, *i.e.* oil, gas, coal mine methane. Such references did not refer to ensuring maximum use of an owner's property right, *i.e.* pore space.

The Court concludes this key distinction is critical to the analysis of whether the correlative rights doctrine applies here.

[¶30] The decision in NWLA I clearly held pore space was a vested property right, and the law in this case, N.D.C.C. Chapter 38-22, seeks to pool that vested property right.

[¶31] Unitization to maximize *extraction* of a resource (like oil and gas) on one's land is clearly not the aim here. Instead, the aim is to maximize storage of a resource that may or may not be present on the owner's property (carbon). While this might be possible using other legal avenues (i.e. eminent domain), the Court concludes it is done here in an unconstitutional manner, without just compensation before the government-authorized intrusion resulting in a taking has occurred.

[¶32] In other words, units efficiently use shared natural resources within the unit, while this pore space amalgamation would bring carbon to a unit from where ever it was previously located, forcing non-consenting owners to store in their pore space carbon not native to their land. Once the carbon project is finished, title to that carbon project is then held by the state, depriving the landowner of that property right indefinitely. Finally, the statute allows a government-authorized physical invasion and thus prohibits landowners from excluding others from use of the landowner's property right, without just compensation being determined by a jury, in accordance with our state constitution.

[¶33] There are concerns with application of the correlative rights doctrine to a property right in this manner, as opposed to a resource. The Court sees no distinction preventing application to create units for storage on land of garbage (*i.e.* landfills), nuclear waste, industrial waste, or flood waters, to name only a few. The Court concludes this circles back to exactly why the takings clause exists in the first place, and places the analysis for this case squarely back into Loretto and similar cases.

[¶34] The Court declines to be the first jurisdiction to declare constitutional a leap from unitization of a resource to forced pooling of vested property rights to store a resource which may or may not be present on the owner's property.

[¶35] **Valid Exercise of Police Powers.** Defendants also argue the statute is a valid exercise of police powers. The Court concludes such an argument was made extensively in NWLA I and wholly rejected by the North Dakota Supreme Court at ¶¶ 31-33:

> Here, the takings claim is not premised on a regulation of what the surface owners may do with their property, but rather on the State's granting a broad authorization to third parties to physically occupy the surface owners' pore space. This is an exercise of the State's police power that is limited by the takings clause. Property owners necessarily expect their use of property may be regulated through the exercise of a State's police powers, but they

do not take title subject to the possibility that their property can be "actually occupied or taken away" without just compensation. Id. NWLA I, at ¶ 33.

[¶36] This Court concludes this analysis in NWLA I is persuasive and applicable here as well, and N.D.C.C. Chapter 38-22 is not a valid exercise of police powers not subject to the takings clause.

[¶37] **Costs, Disbursements and Attorney's Fees.** The pleadings sought disbursements, costs and attorney's fees.

[¶38] This action involves a constitutional challenge raised by Plaintiffs to certain amendments and enactments in state law. This Court has now ruled in Plaintiffs' favor. Federal statutes 42 U.S.C. §§1983 and 1988 allow an award of attorneys' fees and expenses if a party prevails in a constitutional challenge to a state statute against state defendants acting in their official capacities. Specifically, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

[¶39] The other statute, 42 U.S.C. § 1988(b), then allows attorney's fees in any action to enforce a provision of § 1983.

[¶40] Similar to NWLA I, this case involves state actors in their official capacity, and it is not determinative that Plaintiffs did not specifically plead §§ 1983 or 1988. Plaintiffs' claim was substantively a proceeding to enforce § 1983 within the meaning of § 1988(b), even if not in form. Plaintiffs are prevailing plaintiffs in a meritorious civil rights claim and can recover attorney fees under § 1988(b) even without specifically pleading or arguing § 1983.

[¶41] Plaintiffs are also the prevailing parties entitled to payment of fees and expenses in accordance with N.D.C.C. § 28-26-02, N.D.C.C. § 28-26-06, and N.D.R.Civ.P. 54(e). Plaintiffs shall file and serve verified statements of costs, fees, and disbursements in accordance with N.D.R.Civ.P. 54(e), and this issue will proceed in accordance with Rule 54.

[¶42] Once the issue of disbursements, costs and attorney's fees has been heard, Plaintiffs shall prepare a judgment.

Conclusion

[¶43] The Court concludes N.D.C.C. Chapter 38-22 is unconstitutional as it provides for a government-authorized physical invasion of property constituting a taking and it does not provide

for "just" compensation as outlined as Article I, § 16 of the N.D. Constitution. Plaintiffs' motions for summary judgment are GRANTED as to this claim and Defendants' and Intervenor-Defendants' motions for summary judgment as to this issue are DENIED.

ORDER

[¶44] Summary judgment is GRANTED in favor of Plaintiffs and summary judgment is DENIED as to Defendants and Intervenor/Defendants. Plaintiffs are the prevailing parties entitled to payment of disbursements, costs and attorney's fees. Plaintiffs shall file and serve verified statements of costs, fees, and disbursements in accordance with N.D.R.Civ.P. 54(e). Further proceedings in accordance with N.D.R.Civ.P. 54(e) shall occur before a final judgment is issued in this matter. Once a final judgment can be issued, Plaintiffs shall prepare the same.

[¶45] **IT IS SO ORDERED.**

Dated this 2ND day of December, 2025.

BY THE COURT:

Anthony Swain Benson
District Court Judge