

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Northwest Landowners Association, Mike Dresser, Sandra Short, and the Swenson Living Trust,

Plaintiffs, Appellants, and Cross-Appellees,

and

North Dakota Farm Bureau, Inc.,

Intervenor-Plaintiff, Appellant, and Cross-Appellee,

vs.

State of North Dakota, North 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 Agriculture Commissioner of North Dakota and as a member of the North Dakota Industrial Commission,

Defendants and Appellees,

and

SCS Carbon Transport, LLC, SCS Permanent Carbon Storage, LLC, and Summit Carbon Solutions, LLC,

Intervenor-Defendants, Appellees, and Cross-Appellants,

and

SUPREME COURT NO. 20240298

Civil No. 05-2023-CV-00065

Minnkota Power Cooperative, Basin Electric
Power Cooperative, and Dakota Gasification
Co.,

Intervenor-Defendants and
Appellees.

ON APPEAL FROM THE MEMORANDUM OPINION AND
ORDER GRANTING SUMMARY JUDGMENT TO
DEFENDANT AND INTERVENOR-DEFENDANTS,
ENTERED ON AUGUST 27, 2024, AND JUDGMENT
ENTERED AUGUST 29, 2024, THE HONORABLE ANTHONY
SWAIN BENSON, BOTTINEAU COUNTY DISTRICT
COURT, NORTHEAST JUDICIAL DISTRICT

**BRIEF OF INTERVENOR-DEFENDANT AND APPELLEE
MINNKOTA POWER COOPERATIVE**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the District Court properly granted summary judgment in favor of the State of North Dakota et al., in determining that the Northwest Landowners Association et al. (collectively, “NWLA”) and North Dakota Farm Bureau’s (“NDFB”) constitutional challenges to N.D.C.C. §§ 38-22-10 (Amalgamating CO2 Storage), 38-25-08 (“Amalgamating Oil and Gas Storage”), 38-22-03(7) (NDIC Authority Statute) and 32-15-06 and 24-05-09 (Survey Statute) failed as a matter of law because: (1) NWLA and NDFB’s facial constitutional challenges to §§ 38-22-10, 38-22-03(7), 32-15-06, and 24-05-09 were barred by the statute of limitations (R248 at ¶¶ 7 – 16); (2) that the constitutional takings claim to § 38-25-08 was not susceptible to a facial challenge because it depended on future action and involved consideration of various factual circumstances (R248 at ¶¶ 17 – 28); and (3) that the due process challenge to § 38-25-08 was “directly premised on and rooted in [plaintiffs’] takings claims,” and thus failed for the same reasons (R248 at ¶¶ 18 – 32).

[¶2] If the Court reaches the merits of NWLA and NDFB’s claims, specifically, its challenges to the Amalgamating CO2 Storage (§ 38-22-10) and Amalgamating Oil and Gas Storage (§38-25-08) statutes, whether they nonetheless fail because they were proper and constitutional exercises of the State’s authority under the Correlative Rights Doctrine.

REQUEST FOR ORAL ARGUMENT

[¶3] Minnkota requests oral argument. Oral argument would be helpful as the questions before the Court involve significant matters of law and policy, which have long allowed the State to regulate property that is crucial for developing shared-resources that are vital for our State’s economy, and necessary to protect the correlative rights of Minnkota, and

the majorities of landowners, against NWLA and NDFB's challenges that have been previously rejected by this Court in similar cases.

STATEMENT OF THE CASE

[¶4] Minnkota agrees with, and adopts, the State's recitation of the Statement of the Case. See State Appellee Brief at ¶¶ 19 – 27.

STATEMENT OF THE FACTS

[¶5] Minnkota agrees with, and adopts, the State's recitation of the Statement of the Facts. See State Appellee Brief at ¶¶ 7 – 18, and 19 – 27.

[¶6] Minnkota supplements the State's Statement of the Facts because it is important for the Court to understand the nature of Minnkota's interest in pore space within a shared reservoir that would be existentially threatened if the Court rules in NWLA and NDFB's favor. The challenged statutes are similar in law and effect as the oil and gas conservation statutes at Chapter 38-08, N.D.C.C, because they protect the correlative rights of Minnkota and the more than 200 surface owners in their pore space interests within an interconnected reservoir, which Minnkota has the right to develop by virtue of its pore space leases with those surface owners.

A. Minnkota's Project Tundra.

[¶7] Minnkota holds three geologic storage facility permits issued as a result of Orders from the NDIC for the amalgamation of pore space in the Minnkota Center MRYS [Milton R. Young Station] Broom Creek Storage Facility #1, and the amalgamation of pore space in the Minnkota Center MRYS Deadwood Storage Facility #1, both in Oliver County. Minnkota, through its subsidiary DCC West Project LLC, also holds a storage facility permit that provides redundancy and operating flexibility for Project Tundra, the "DCC West Broom Creek Storage Facility #1," which was approved by the NDIC.

[¶8] In its applications to the NDIC, Minnkota provided thousands of pages of details regarding Project Tundra. See Case Nos. 29029 – 29034, and 30122 – 30125. This included information sent to each pore space owner. Project Tundra captures and stores CO₂ on site more than a mile underground in geologic formations. See Case No. 29029 at pp. 01033 – 01035. The CO₂ is injected in a dense-phase fluid that slowly spreads out from the injection point – similar to a saltwater injection well, non-hazardous wastewater, or natural gas injection – in the amalgamated pore space area. Project Tundra is designed to capture 95 percent of the CO₂ from the flue gas scrubbed from the two generators at the coal-based Milton R. Young Station. This amounts to about four million metric tons per year, the equivalent of taking 800,000 gasoline fueled vehicles off the road. Id. With respect to the CO₂ injected into the pore space, Minnkota’s primary baseload generating resource is the two-unit Milton R. Young Station (MRYS), a mine-mouth lignite coal-fired power plant located in Oliver County. See id. at p. 1099. The lignite, sourced from the mine located adjacent to the MRYS, is the fuel for electrical generation, and is the primary combustion source of the captured CO₂ that will be securely stored by Project Tundra. Id.

[¶9] In Order No. 31584, see R158, the NDIC approved Minnkota’s application for an order determining the amalgamation of the reservoir’s pore space for use as a carbon dioxide storage facility within portions of Sections 35 and 36, Township 142 North, Range 84 West, Sections 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, Township 142 North, Range 83 West, Sections 1, 2, 12, and 13, Township 141 North, Range 84 West, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, and 21, Township 141 North, Range 83 West, Oliver County, in the Broom Creek Formation. This was for the

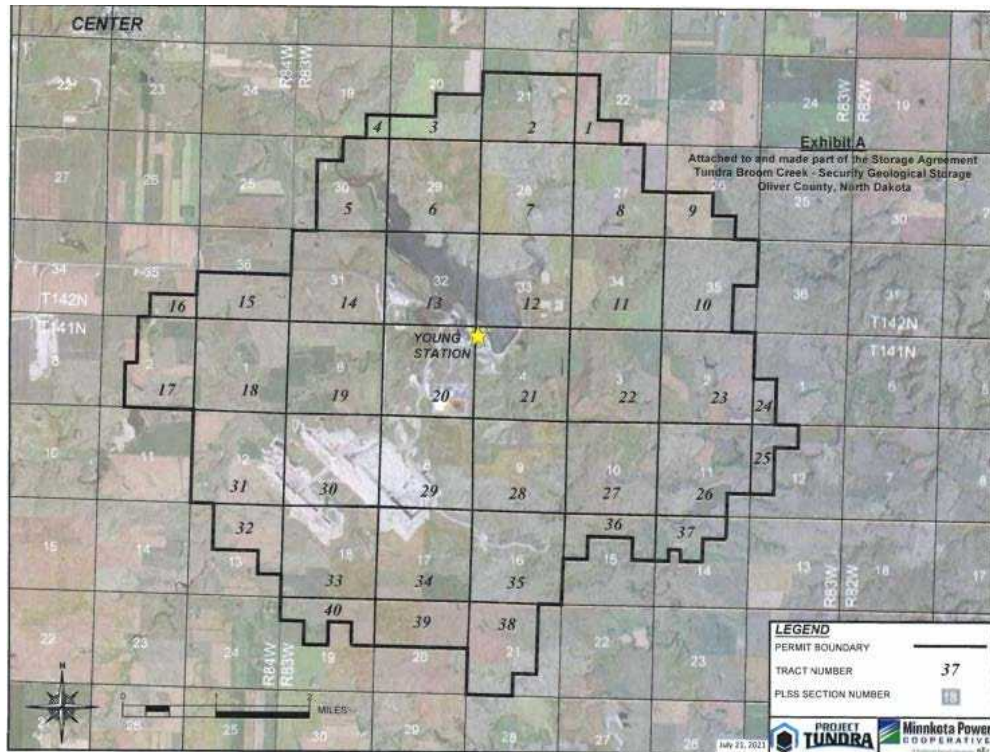
Minnkota Center MRYS Broom Creek Storage Facility #1, and encompasses 18,903 acres.¹

[¶10] For comparison purposes, the NDIC regularly issues orders unitizing oil and gas interests encompassing a similar number of acres. In June 2022, the Commission approved the unitization of 15,356.8 acres in McKenzie County, Township 148 North, Range 98 West, for the development of Burlington Resources' Haystack Butte (Bakken Pool) Unit. See Order No. 31792. This unit was at the center of the dispute in Liberty Petroleum Corp. v. N. Dakota Indus. Comm'n, 2024 ND 183, ¶ 5, 11 N.W.3d 851 reh'g denied (Oct. 16, 2024). In December 2011, the NDIC approved the unitization of 30,833.94 acres in Dunn County, Township 147 North, Range 94 and 95 West, for the development of Burlington Resources' Lost Bridge-Bakken Unit. See Order No. 18849. In March 2019, the NDIC approved the unitization of 17,242.4 acres in McKenzie and Williams Counties for XTO Energy's Grinnell-Bakken Unit. See Order No. 29708.

[¶11] The map showing the property in Oliver County for Minnkota's Broom Creek storage facility, and a table identifying every surface owner that Minnkota has a pore space lease with, or whose interest was deemed nonconsenting and amalgamated into the Broom Creek storage reservoir is at R25 (this was also filed with the NDIC). This reproduction

¹ The entire NDIC file for Order No. 31584, including all documents submitted by Minnkota seeking approval for amalgamating the pore space, is a public record available without charge at: <https://www.dmr.nd.gov/dmr/sites/www/files/documents/Oil%20and%20Gas/Class%20VI/Minnkota/BC/C29029.pdf>. The case file is 1,756 pages.

shows the boundary lines of the Project Tundra Broom Creek Facility Area, and the pore space amalgamated under § 38-22-10 (the Amalgamating CO2 Storage statute).



[¶12] Minnkota’s application to the NDIC for the amalgamation of storage reservoir pore space for Broom Creek Storage Facility #1 was made pursuant to a Geologic Storage Agreement that was signed, ratified, or approved by surface owners owning at least sixty percent of the pore space within these lands as required per § 38-22-10. See Order No. 31584 at ¶ 2 (R28).

[¶13] In Order No. 31587 (R30), the NDIC approved Minnkota’s application for an order determining the amalgamation of the reservoir’s pore space within portions of Sections 35 and 36, Township 142 North, Range 84 West, Sections 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, Township 142 North, Range 83 West, Sections 1, 2, 12, and 13, Township 141 North, Range 84 West, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, and 21, Township 141 North, Range 83 West, Oliver County, in the

Deadwood Formation. This was for the Minnkota Center MRYS Deadwood Storage Facility #1, and while a different formation than Broom Creek, also encompasses 18,903 acres in Oliver County.²

[¶14] A copy of the map showing this property in Oliver County for the Deadwood formation, and a table identifying every surface owner that Minnkota either has a pore space lease with, or whose interest were deemed nonconsenting and amalgamated into the Deadwood storage reservoir is at R31 (this was also filed with the NDIC). Minnkota's application to the Commission for the amalgamation of the reservoir's pore space for use as a carbon dioxide storage facility for its Deadwood Storage Facility #1 was made pursuant to a Geologic Storage Agreement that was signed, ratified, or approved by surface owners owning at least sixty percent of the pore space interest within these lands under § 38-22-10. See R30 (Order No. 31587 at ¶ 2).

[¶15] In Order No. 32806 (R160), the Commission approved Minnkota's application for DCC West Broom Creek Storage Facility #1 for an order determining the amalgamation of the reservoir's pore space within portions of Township 141 North, Range 84 West, Section 2-11, 14-21, 29-32, Township 141 North, Range 85 West, Sections 1-4, 9-16, 22-27, and 36, Township 142 North, Range 84 West, Sections 19-21 and 28-34, and Township

² The entire NDIC file for Order No. 31587, including all documents submitted by Minnkota seeking approval of the amalgamation of pore space, is a public record available without charge at: <https://www.dmr.nd.gov/dmr/sites/www/files/documents/Oil%20and%20Gas/Class%20VI/Minnkota/DW/C29032.pdf>. The case file is 1,654 pages.

142 North, Range 85 West, Sections 24, 25, 33, 34, 35 and 36, Oliver County, in the Broom Creek formation. It encompasses 29,903 acres.

[¶16] The Commission’s Orders for the Broom Creek and Deadwood formations, and the Minnkota Center MRYS Deadwood Storage Facility #1 and Minnkota Center MRYS Broom Creek Storage Facility #1, are part of Minnkota’s Project Tundra. R154 at ¶¶ 4 – 8 (Mikula Affidavit). Minnkota has led this project for the past ten years, and along with its partners, the State of North Dakota the Department of Energy, spent over \$90,000,000 towards its development. R154 at ¶ 6. The pore space interest acquisition by Minnkota needed for Project Tundra was subject to North Dakota law, specifically, § 38-22-08(5), which states, “Before issuing a permit, the commission shall find: (5) That the storage operator has obtained the consent of persons who own at least sixty percent of the storage reservoir’s pore space.” (emphasis added). The threshold is an even higher percentage than the fifty-five percent of royalty owners that must consent to a plan of unitization for oil and gas interests as required by North Dakota law per § 38-08-09.5 (Ratification or approval of plan by lessees and owners).

[¶17] Minnkota’s acquisition for Project Tundra, including Deadwood Storage Facility #1, Broom Creek Storage Facility #1, and for DCC West Project, included pore space leases from 208 individual landowners. R154 at ¶¶ 8 – 9. Minnkota has received 98.69 percent voluntary leasing with respect to the pore space subject of Order Nos. 31584 (R28) and 31587 (R30), and 80.33 percent voluntary leasing for the DCC West Broom Creek Storage Facility #1 as to the pore space subject of Order No. 32806 (R160). See R154.

[¶18] But for the Pore Space Amalgamation Statutes, Minnkota and its stakeholders would not have invested the capital and resources into developing Project Tundra, and

could not have secured the necessary State permits for Deadwood Storage Facility #1, Broom Creek Storage Facility #1, and DCC West Broom Creek Storage Facility #1. R154 at ¶ 11. If the statutes are deemed unconstitutional, it will, quite simply, have a severe and immediate negative impact on Project Tundra and Minnkota’s correlative rights. It would create regulatory uncertainty, impeding Minnkota’s ability to finance, construct the project and develop its own property interests and the property interests voluntarily leased by the majorities of surface ownership, compromise MRYS’s ability to comply with the Clean Air Act and therefore threaten its continued operation, and threaten North Dakota’s energy industry. ³ See id. Under Section 111(d) of the Clean Air Act, the EPA has proposed GHG (greenhouse gas) regulations for existing coal combustion EGUs (electric generating unit). *See* 88 Fed. Reg. 3,3296 (May 23, 2023) (to be codified at 40 CFR pt. 60, subpt. UUUUb). The EPA proposes that the “Best System of emission Reduction” (BSER) for coal combustion EGUs is carbon capture and sequestration. Under the proposed rule, EGUs that do not plan to, and announce, a pre-2040 retirement date must comply with reducing emissions by 88.4 percent by 2030. Other than retirement of EGUs the only way to do this is carbon capture and sequestration. Project Tundra is one of two projects identified by the

³ Then-Governor Doug Burgum described Project Tundra as a “game-changer” for North Dakota. “The technology being developed for Minnkota’s project has the potential to be a game-changer for our state, the nation and the world by curbing emissions and ensuring that the reliable, affordable energy we’ve come to expect from coal continues to keep the lights on.” Bismarck Tribune, December 14, 2023, *Project Tundra Gets \$350 million from the Energy Department*. See R153 at ¶ 18 n. 6.

EPA in its proposed rulemaking as an example of demonstrating this technology on EGUs in the United States. Without carbon storage and sequestration, there is no way to achieve such a significant reduction in GHG emissions on EGUs, which presents an existential threat to the very existence of coal-fired powered plants in North Dakota, like Minnkota's Milton R. Young Station, which began generating electricity in 1970.

B. In addition to securing leases with the vast majority of pore space owners, Minnkota notified all landowners within Project Tundra's boundary.

[¶19] In each of its Orders approving the amalgamation of reservoir pore space, the NDIC determined that Minnkota provided the required statutory notice to all impacted pore space pursuant to § 38-22-06(3).

(10) Pursuant to NDCC Section 38-22-06 and NDAC Section 43-05-01-08: The notice of filing of the application and petition and the time and place of hearing thereof was given, and that at least 45 days prior to the hearing, Minnkota, as the applicant, did give notice of the time and place of said hearing and the Commission has accepted the notice as adequate, and that the applicant did, at least 45 days prior to the hearing, file with the Commission engineering, geological and other technical exhibits to be used and which were used at said hearing, and that the notice so given did specify that such material was filed with the Commission; that due public notice having been given, as required by law, the Commission has jurisdiction of this cause and the subject matter.

R28 (Order No. 31584 at ¶ 10). See also R30 (Order No. 31587 at ¶10) (containing identical language); and R160 (Order No. 32806 at ¶ 9) (similar language). As to Deadwood Storage Facility #1 and Broom Creek Storage Facility #1, not one pore space owner filed an objection with the NDIC. With respect to DCC West Broom Creek Storage Facility #1, only a single objection was filed by a pore space owner, which the Commission found was "either inapplicable or irrelevant to this case." See R160 at ¶ 12.

[¶20] Of the 48,806 acres of pore space acquired by Minnkota for Project Tundra and amalgamated under North Dakota law, the only plaintiff that owned any acreage was Mike

Dresser, and he owns a total of 80 acres. R154 at ¶ 10 (he did not object at the NDIC). That amounts to 0.1639142 percent of the total acres that were amalgamated for the Deadwood Storage Facility #1, Broom Creek Storage Facility #1, and DCC West Project. Prior to the NDIC issuing its Orders granting these permits, Minnkota was required to make a good faith attempt to obtain the consent of all pore space owners within the reservoir identified for development of a carbon dioxide storage facility. In amalgamating the nonconsenting owner's pore space, much like nonconsenting oil and gas owners are force-pooled, the NDIC found that the nonconsenting owners would be equitably compensated for their pore space. See e.g., R28 (Order No. 31584 at ¶¶17 and 19) (concluding that Minnkota's formula fairly and equitably compensated pore space owners, and was "protective of correlative rights and should not be modified.") Cf. R154 at ¶ 12 (attesting that Minnkota has tendered payment to nonconsenting owners in the same amount as leased pore space owners). Not a single nonconsenting owner appealed the NDIC's Orders.

C. As to how pore space functions, Minnkota adopts the recitations made in Dr. Harju's expert report.

[¶21] As to the functional operation and characteristics of reservoir pore space, Minnkota agrees with the detailed report of the State's expert, Dr. Harju, at R157.

LAW AND ARGUMENT

A. Minnkota agrees with, and joins, the State and other defendant-intervenors in their arguments as to NWLA and NDFB's takings claim not being subject to a facial challenge, and being barred by the statute of limitations.

[¶22] Minnkota agrees with, and joins, the State and other defendant-intervenors in their arguments that the Pore Space Amalgamation Statutes at §§ 38-22-10 (Amalgamating CO2 Storage) and 38-25-08 (Amalgamating Oil and Gas Storage) are not subject to a facial challenge as a matter of law. See State Appellees Brief at ¶¶ 32 – 43. Similarly, Minnkota

agrees with, and joins, the State and other defendant-intervenors in their argument that NWLA and NDFB's facial challenges to §§ 38-22-10, 32-15-06, and 24-05-09 are barred by the statute of limitations. *Id.* at ¶¶ 44 – 55. Minnkota agrees with, and joins, the State in its argument that NWLA and NDFB's due process claims fail because they are “directly premised on and rooted in their takings claims,” thus failing for the same reasons. *Id.* at ¶¶ 90 – 95. Minnkota also agrees with, and joins, the State in its argument that NWLA and NDFB do not have standing to challenge § 38-22-03(7). *Id.* at ¶¶ 96 – 105.

[¶23] If the Court reverses the District Court's ruling on these questions and then considers the merits of NWLA and NDFB's takings claim without remand, the Court must still affirm and conclude that the challenged statutes are constitutional because §§ 38-22-10 and 38-25-08 were a proper exercise of the State's long-recognized authority under the Correlative Rights Doctrine.

B. The standard for declaring a statute unconstitutional is purposely hard to meet, and NWLA and NDFB fall far short of it.

[¶24] Statutes duly passed by the Legislature and signed into law by the Governor are not meant to easily be overturned on constitutional grounds, nor should they be given the separation of powers between our co-equal branches of government. “A party raising a constitutional challenge must bring up the ‘heavy artillery’ or forego the attack entirely.” Bolinske v. Jaeger, 2008 ND 180, ¶ 17, 756 N.W.2d 336. Whether a statute is constitutional is a question of law, and any doubts about constitutionality are resolved in favor of the statute's validity. “Whether a statute is unconstitutional is a question of law, and a statute will be upheld unless its challenger demonstrates the statute is unconstitutional. A legislative act is presumed to be constitutional, and any doubt about its constitutionality

must, where possible, be resolved in favor of its validity.” State v. M.B., 2010 ND 57, ¶ 4, 780 N.W.2d 663 (cleaned up).

[¶25] The power to declare a statute unconstitutional is exercised with great restraint. “The power to hold an Act of the Legislature invalid is one of the highest functions of the courts, and such power should be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the judgment of the court, beyond a reasonable doubt.” MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994) (cleaned up). See also Manikowske v. North Dakota Workmen’s Compensation Bureau, 338 N.W.2d 823, 825 (N.D.1983) (“The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination.”); and MCI Holdings at 522 (“The policy of upholding the constitutionality of a statute whenever possible is so strong that our state constitution provides that this court ‘shall not declare a legislative enactment unconstitutional unless at least four of the members of the [Supreme] court so decide.’ Article VI, § 4, N.D. Const.”)

C. The amalgamation of pore space is no different than the concepts of pooling and unitization in North Dakota.

[¶26] For at least 140 years, the United States Supreme Court has upheld a State’s right to regulate property when landowners have a “common interest,” where the regulation is within the “public good,” and when one property owner’s right to benefit from that common interest is at risk by the actions of another. In Ohio Oil Co., the Court held that a regulation like Indiana’s, which regulated a property right as to a common natural resource, was subject to the legislative power of the state to prevent a destruction of the common property by one of the common owners. 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900).

Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *faroe naturae*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.

Ohio Oil Co., 177 U.S. at 210. The interspersed and interconnected pore space within a reservoir is the transient, *faroe naturae*, characteristic that the Court finds a necessary legislative authority to act upon for the preservation of the rights of the common owners. Id.; and R185:¶¶4:10) (Harju Expert Report). The Court concluded that given the shared interest in the common property, “[w]e cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority.” Id. at 212. See also Murphy v. Amoco Prod. Co., 729 F.2d 552, 555 (8th Cir. 1984) (“[w]here different persons have incompatible interests in the same property, the state can legitimately exercise its police power to protect the interest that matters most to the public welfare, even at the cost of an uncompensated destruction of other interests.”) (applying North Dakota law); and Patterson v. Stanolind Oil & Gas Co., 77 P.2d 83, 89 (Okla. 1938) (“The lawful exercise of the state’s power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the State or Federal Constitution which prohibit the taking of property without just compensation . . .”).

[¶27] Pore space does not somehow lose its *faroe naturae* characteristic that necessitates the State’s balancing of interests for the benefit of every owner’s correlative rights when it is developed, used, and regulated under North Dakota law for one industry— carbon capture and sequestration— over another – oil and gas. *It is an unbounded and interconnected natural resource* just the same. Allowing a handful of nonconsenting owners to prevent the use and development of the amalgamated pore space in the permitted storage areas runs afoul of the holding in Syverson v. N. Dakota State Indus. Comm’n, where the Court explained that “if one or more persons with interests within the boundaries of the proposed unit could, by refusing to sign the agreement, make it inoperative and thus defeat the entire conservation program for the field,” stating:

In this case, approximately ninety-eight percent of those owning interests in the field have signed such unitization agreement. If one or more persons with interests within the boundaries of the proposed unit could, by refusing to sign the agreement, make it inoperative and thus defeat the entire conservation program for the field, which the appellants themselves agree will substantially increase the amount of oil and gas recovered from this field, all conservation efforts could be blocked. If this were possible, the appellants could force the operator of such unit to either give them an unreasonably greater share of the production than they are entitled to receive or they could, though owning but a very small fraction of the mineral and royalty interests in the field, defeat the entire conservation program and thus leave large amounts of oil and gas in the pool which would remain unrecovered. Surely, on the showing made by the appellants in this case, such a result would be unjust.

Syverson, 111 N.W.2d 128, 133 (N.D. 1961). Likewise, allowing NWLA and NDFB to prevent the development and use of the shared pore space “on the showing made by the appellants in this case,” as noted by the Court, “would be unjust.”

[¶28] In her article, “Correlative Rights and Limited Common Property in the Pore Space: A Response to the Challenge of Subsurface Trespass in Carbon Capture and Sequestration,” Tara K. Righetti, a law professor at the University of Wyoming and leading scholar on carbon capture, urged that the correlative rights of all owners in pore space

should be considered, and regulated, for the same reason that states abandoned the rule of capture and shifted to considering factors like correlative rights in conservation statutes, such as Chapter 38 – 08.

This Article argues that in order to facilitate the significant public good of carbon capture projects, pore space rights in the deep subsurface should be conceptualized based on the acknowledgment that “compartmentalized ownership of the reservoir is impossible.” Doing so permits consideration of deep subsurface pore space ownership as something akin to what Prof. Carol Rose refers to as “limited common property.” This concept would create a legal privilege granting each owner within the reservoir community a right of proportionate use. Accordingly, rather than treating ownership as exclusive, the rights of each owner within the private interconnected storage complex would be shared among members of the reservoir community based on principles of proportionate and coequal rights of use. As Professor Pierce notes, the concept of correlative rights fits neatly within the framework of limited common property. Correlative rights refers to the notion that each property owner in a common pool or source of supply has the opportunity to use his or her just and equitable share of that property. Given the established legal framework of correlative rights in oil and gas, it provides a foundation on which laws governing the use of subsurface property for non-mineral purposes can be constructed.

Righetti, 47 *Envtl. L. Rep. News & Analysis* 10420, 10421–22. This squares with the NDIC’s findings as expressed in Order No. 31584 (R28) that:

- (17) A one-phase formula based on surface acres will fairly compensate owners farther away from the injection well that will eventually have pore space occupied by carbon dioxide. The Commission believes the 100% weighting on surface acreage is acceptable and that the one-phase formula is protective of correlative rights and should not be modified.
....
- (19) The Geologic Storage Agreement contains fair, reasonable, and equitable provisions for: (a) The amalgamation of pore space interests for the storage of carbon dioxide within said pore spaces of the storage reservoir.
- (20) Such amalgamation of the storage reservoir’s pore space and the Geologic Storage Agreement are in the public interest, and require procedures that promote, in a manner fair to all interested, cooperative management, thereby ensuring the maximum use of natural resources, and that said Geologic Storage Agreement, as contained herein, appears to conform and comply with the provisions and requirements of NDCC 38-22-08.
...
- (23) The approval of this application is in the public interest by promoting the policy stated in NDCC Section 38-22-01.

[¶29] Minnkota further notes that courts have already held that the use of a nonconsenting surface owner’s pore space for injection operations inside a unit approved by the NDIC was lawful, in the context of Chapter 38-11.1, in Mosser v. Denbury Resources, Inc., 2017 ND 169, 898 N.W.2d 406, and Cont’l Res., Inc. v. Fisher, No. 1:18-CV-181, 2021 WL 665102 (D.N.D. Feb. 19, 2021). In Fisher, the Court recognized the connection between Chapter 38-11.1 and § 38-22-08(14) with respect to the compensation paid to a pore space owner, stating, “North Dakota’s laws relating to the underground storage of carbon dioxide require that all non-consenting pore space owners be compensated. See N.D.C.C. §§ 38–22–08(5) and 38–22–08(14).” Fisher, at 649 n. 3 (D.N.D. 2014).

[¶30] The Court also recognized the similarities between pore space and oil and gas development. In discussing pore space in the context of § 38-11.1, the Court noted that:

North Dakota’s unitization statute recognizes the need of the unit operator to have access to the entire unit in order to carry out oil field operations. “Wells drilled or operated on any part of the unit area no matter where located must for all purposes be regarded as wells drilled on each separately owned tract within such unit area.” N.D.C.C. § 38–08–09.8. In the closely-related context of forced pooling, the North Dakota Supreme Court has recognized the creation of a pooled spacing unit gives the unit operator the right to make reasonable use of the surface and subsurface of the entire pooled unit, without regard to whether the operator holds a lease covering that particular part of the pooled unit. Cont’l Res. Inc. v. Farrar Oil Co., 559 N.W.2d 841, 846 (N.D.1997).

Id. at 644 (emphasis added). The Court referred to the use of pore space as being “closely-related” to “forced pooling,” and noted this Court has approved an operator making reasonable use of the entire subsurface of the pooled area, akin to amalgamation, whether or not the operator held a lease with the landowner. These are apples from the same tree.

[¶31] The NDIC’s ability to regulate our State’s natural resources under its statutory authority, with respect to pooling or unitization, has been uniformly upheld as valid by the

courts. In Murphy, the Court held that where different people have “incompatible interests in the same property” – such as consenting (leased) amalgamated pore space owners versus nonconsenting pore space owners – “the state can legitimately exercise its police power to protect the interest that matter most to the public welfare.” Id. at 555. This logically extends to the use and development of reservoir pore space to ensure the maximum utilization of our State’s natural resources, and the protection of the correlative rights of owners like Minnkota and the several hundred individuals with pore space leases in Project Tundra. See also Cont’l Res., Inc. v. Farrar Oil Co., 1997 ND 31, ¶ 16, 559 N.W.2d 841 (“The police powers of the State are properly exercised when the Industrial Commission orders spacing or compels pooling.”); Texaco Inc. v. Indus. Comm’n of State of N. Dakota, 448 N.W.2d 621, 623 (N.D. 1989) (“In furtherance of that public interest the Act modifies the ‘rule of capture’ by authorizing the Commission to set spacing units for a common source of supply ‘[w]hen necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights.’”); and Slawson v. N. Dakota Indus. Comm’n, 339 N.W.2d 772, 777 (N.D. 1983) (“We conclude that § 38–08–08(1), N.D.C.C., provides the Commission with authority to treat unleased mineral interests as cost free interests as to a portion thereof when entering a compulsory pooling order.”)

[¶32] The only expert to issue a report in this case, Dr. Harju from the University of North Dakota’s EERC [Energy & Environmental Research Center], explained that in operation, the amalgamation of pore space is no different than the concepts of pooling and unitization in North Dakota. “Because of the similarity of being a shared underground resource belonging to multiple property owners, pore space amalgamation in the CO₂ storage context is comparable to the pooling and unitization process that has long been utilized in

the hydrocarbon (oil and gas) production industry. And it is notable that in North Dakota the Industrial Commission regulates both the amalgamation of pore space reservoirs for CO₂ storage and the pooling and unitization of oil and gas reservoirs for hydrocarbon production.” R157 at ¶ 26.

[¶33] Just as the State’s powers are properly exercised when the NDIC orders spacing or unitization, or compels pooling, the State constitutionally exercises its powers when it amalgamates reservoir pore space. The amalgamation of pore space under §§ 38-22-10 and 38-25-08 is an apple from the same tree as the spacing, unitization, and pooling of oil and gas under their sister statutes at Chapter 38-08, including N.D.C.C. §§ 38-08-01 (Declaration of policy) 38-08-07 (Commission shall set spacing units), 38-08-08 (Integration of fractional tracts), 38-08-09.2 (Power and authority of Commission), and 38-08-09.4 (Order – Unit and unit area – Plan of unitization).

[¶34] In both form and function, the Pore Space Amalgamation Statutes operate no differently than every other law balancing common interests and preserving correlative rights in a shared natural resource in North Dakota. NWLA and NDFB have not offered any compelling argument amounting to the “heavy artillery” required to have this Court declare the Pore Space Amalgamation Statutes unconstitutional, nor explained why the challenged statutes should receive any different treatment when analyzing them as compared to unitization, spacing, and pooling in Chapter 38-08.

D. The Court should not let NWLA and NDFB hijack and hold hostage Minnkota’s correlative rights, and the vast majority of correlative rights of surface owners who voluntarily entered pore space leases.

[¶35] Minnkota and its leased owners have a right, under North Dakota law, to enjoy the benefits of their pore space ownership. This right goes back at least 140 years.

We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature. When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.

Head v. Amoskeag Mfg. Co., 113 U.S. 9, 21, 5 S. Ct. 441, 445–46, 28 L. Ed. 889 (1885).

This is exactly what regulating property to protect correlative rights is – the balancing between interdependent rights and duties of each landowner in a common natural resource so that one single landowner, or minority of landowners, cannot frustrate the overall common interest.

[¶36] The Court’s description in Head aligns with this Court’s definition of correlative rights. “Thus, correlative rights includes interdependent rights and duties of each landowner in the common source of supply. Each landowner is entitled to a just and equitable share of oil or gas in the pool; however, that right is limited by the landowner’s duty to all the other owners of interests in the common source of supply not to damage or take an undue proportion of the oil or gas from that common source of supply.” Hystad v. Indus. Comm’n, 389 N.W.2d 590, 595-96 (N.D. 1986) (emphasis added).

[¶37] As recognized numerous times in analogous cases by this Court, the correlative rights of Minnkota and its leased landowners to enjoy their pore space ownership, including benefitting financially from the same, must be protected from claims by a small minority of owners seeking to frustrate and prevent the development of the resource.

The several sections of the act consistently stress the protection of correlative rights. They are clearly designed to protect adjoining landowners under whose lands a pool may extend. To do so in a fair, reasonable, and adequate manner, and to permit an adjoining owner to obtain, recover, and receive his just and equitable share, the

pooling order may be made retroactive to the time production started and, insofar as costs are concerned, to the start of drilling operations. Unless the order may be made effective retroactively, it may on occasion verge on the confiscatory.

Texaco Inc., 448 N.W.2d at 624. See Slawson, 339 N.W.2d at 774 (“The purposes of pooling are to prevent the physical and economic waste that accompany the drilling of unnecessary wells and to protect the correlative rights of landowners over a reservoir.”) In Slawson, the Court held that protecting correlative rights of all landowners in a reservoir “are reflected in § 38-08-01, N.D.C.C.,” which provides, “It is hereby declared to be in the public interest to authorize and provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected;” Id. at 774.

[¶38] The protection of correlative rights and their embodiment in the Declaration of Policy at § 38-08-01 is no different from the Declaration of Policy in Chapter 38 – 22. This is reflected by comparing the language in the two statutes as they mirror one another.

It is in the public interest to promote the geologic storage of carbon dioxide. Doing so will benefit the state and the global environment by reducing greenhouse gas emissions. Doing so will help ensure the viability of the state’s coal and power industries, to the economic benefit of North Dakota and its citizens. . . . Geologic storage, however, to be practical and effective requires cooperative use of surface and subsurface property interests and the collaboration of property owners. Obtaining consent from all owners may not be feasible, requiring procedures that promote, in a manner fair to all interests, cooperative management, thereby ensuring the maximum use of natural resources.

§ 38-22-01 (emphasis added). The Pore Space Amalgamation Statutes, just like their oil and gas sisters in Chapter 38 – 08, allow the NDIC to protect the correlative rights of pore space owners who have a shared interest in the reservoir pore space, a common ownership interest. Like oil and gas unitization, North Dakota law requires an operator to achieve a minimum threshold before the NDIC will grant its permit request to amalgamate pore space

under the carbon statutes. See § 38-22-08(5). That is a higher percentage than the 55 percent of consenting mineral owners required by § 38-08-09.5 for a unitization order to issue from the Commission. Minnkota has received 98.69 percent voluntary leasing of pore space in Oliver County for the NDIC-approved Deadwood Storage Facility #1 and Broom Creek Storage Facility #1, and 80.33 percent voluntary leasing for the DCC West Broom Creek Storage Facility. See R154.

[¶39] Not allowing Minnkota and these 208 landowners with leases to receive the beneficial enjoyment accompanying the use of their pore space by virtue of the carbon statutes is, effectively, a confiscation of their rights. The correlative rights of Minnkota and the 208 pore space owners that leased to Minnkota are in jeopardy if the Court holds that the challenged carbon statutes are unconstitutional.

E. Like Chapter 38-08, Chapters 38-22 and 38-25 are comprehensive statutes that are in the public interest, ensure the viability of our state's energy industry, economically benefit North Dakota and her citizens, and protect correlative rights.

[¶40] Much like Chapter 38-08 (Control of Gas and Oil Resources), Chapters 38-22 (Carbon Dioxide Underground Storage) and 38-25 (Underground Storage of Oil and Gas) were enacted by the Legislature as comprehensive statutory regimes to encourage and regulate underground storage of carbon dioxide, which fundamentally shares the same purpose and aim as the laws on unitizing and pooling oil and gas under Chapter 38-08.

[¶41] While Legislative History is not determinative of the question, it provides helpful context regarding the similarities between the challenged statutes and Chapter 38-08 regarding the pooling and unitization of oil and gas. Lynn Helms, who was at the time the Director of the Department of Mineral Resources at the NDIC, testified the NDIC's authority to set up, regulate the operation, and oversee the closure of geologic storage sites

was “very similar to the statutory unitization authority the commission has exercised for more than 40 years.” Helms Testimony on SB 2095, February 26, 2009. The Legislative History for SB 2095 and SB 2139, regarding the geologic storage of carbon dioxide, is at R156. With respect to the amalgamation authority under § 38-22-10, Helms testified that it “gives the Industrial Commission the authority to amalgamate the ownership [of pore space]. The process would be very similar to the one utilized today to unitize an oil and gas reservoir.” *Id.* (emphasis added).

[¶42] At their core, the oil and gas statutes at Chapter 38-08 and the carbon statutes at Chapters 38-22 and 38-25 are each “in the public interest” to promote and foster the development of North Dakota’s “natural resources” to achieve their “greatest” and “maximum” use, and to protect the correlative rights of all property owners. *Cf.* § 38-08-01 to 38-22-01. The consequences to the public interest of declaring the Pore Space Amalgamation Statutes unconstitutional was described in exacting detail by Harju.

- “Consequently, the continued reliability of North Dakota’s energy sector will, at least in part, likely rest upon the use of carbon capture technology and sequestration to offset the carbon emissions for energy production.” R185 at ¶ 37.
- “The impact of CO₂ storage on energy production is not limited to only coal-based power. The application of CCS [carbon capture and storage] technologies is also viewed by oil and gas production and processing companies as a critical means of reducing carbon intensity of those operations as well, which have been the subject of increasing federal regulation and directives (Biden, EO 14057).” *Id.* ¶ 44.
- “In short, energy production in North Dakota is likely to continue relying upon fossil fuels, at least to some extent, for the foreseeable future. CO₂ emissions are

an unavoidable aspect of fossil fuel-generated energy. In a regulatory environment that is becoming increasingly less accepting of CO₂ emissions into the environment, managing the CO₂ emissions from fossil fuels in power generation is becoming just as important as managing the fossil fuels themselves. CCS offers a route for lowering the environmental impact of generating energy from fossil fuels, and North Dakota is positioned upon geologic formations with pore space capable of implementing CCS on a commercially viable scale for many decades to come.” Id. at ¶ 48.

- “Implementing CCS [carbon capture and storage] within North Dakota is having, and will continue to have, far-reaching implications for industries such as lignite coal, ethanol, and oil and gas. All of these industries play major roles in the economic health and well-being of the state of North Dakota.” Id. at ¶ 49.
- “Three of the existing CO₂ storage permits in North Dakota [two of which are Minnkota’s] are affiliated with plans to store CO₂ from operations associated with the lignite energy industry. Two of the existing permits are associated with the Milton R. Young Station, while the third is associated with the Great Plains Synfuels Plant. In 2022, the lignite energy industry accounted for \$5.75 billion in gross business volume in the state (Bangsund and Hodur, 2023). Over 12,000 jobs (direct and secondary) were supported by the North Dakota lignite energy industry (mining, coal conversion and electricity generation, and transmission/distribution) (Bangsund and Hodur, 2023). In 2022, \$104 million in local and state government revenues was generated by the lignite energy industry (Bangsund and Hodur, 2023).” Id. at ¶ 50.

- “If energy companies are not able to reduce their carbon footprint through the use of CCS [carbon capture and storage], it is possible they may be forced out of existence because of increasingly stringent emission restrictions from the federal government.” Id. at ¶ 55.
- “Additionally, it is also notable there are ongoing efforts to develop a hydrogen energy industry in North Dakota that will likely rely on CO₂ storage. On October 5, 2022, a memorandum of understanding (MOU) was made by and between the states of Minnesota, Montana, North Dakota, and Wisconsin which established a framework for coordinating and developing a regional clean hydrogen hub, referred to as the Heartland Hydrogen Hub. The production process for fossil fuel-derived hydrogen generates large volumes of CO₂ as a by-product. In order for fossil fuel-derived hydrogen to be considered ‘clean’ hydrogen, its production would need to include CCS [carbon capture and storage]. The planning, design, execution, and operation of the Heartland Hydrogen Hub is expected to require billions of dollars of investment. If established, the Heartland Hydrogen Hub is anticipated to ultimately become a contributor to the North Dakota economy on par with the lignite energy industry (North Dakota Office of the Governor, 2022).” Id. at ¶ 56.
- “The requirements for the geological storage of oil and gas in many respects mirror the requirements for the geological storage of CO₂. And before pore space can be amalgamated for the storage of oil and gas, just as with amalgamating pore space for the storage of CO₂, the storage operator is mandated by North Dakota statute to obtain the consent of a majority of the landowners who own the pore space of

the storage reservoir (NDCC Ch. 38-25) [specifically, N.D.C.C. § 38-25-05].” Id.
at ¶ 64.

[¶43] Clearly, the regulation of reservoir pore space as a natural resource is intrinsic to established and continuing natural resource development in North Dakota. Harju concluded that without the ability to amalgamate reservoir pore space through the challenged statutes at §§ 38-22-10 and 38-25-08, the State and public will not realize the greatest possible good, consenting pore space owner’s correlative rights would be violated, and the State’s energy sector would be at risk. “Without the ability to amalgamate a pore space storage reservoir into a single storage unit, the majority of landowners who wish to commercialize the storage value of their pore space would effectively be denied the ability to make use of their common pore space resource. The state and its energy sector would similarly be deprived of the ability to utilize an energy resource that the majority of landowners would like to develop.” Id. at ¶ 66 (echoing Minnkota’s affidavit at R154 that without the Pore Space Amalgamation Statutes, Project Tundra is not possible).

CONCLUSION

[¶44] Minnkota respectfully requests that the Court affirm the District Court’s decision granting summary judgment and dismissing NWLA and NDFB’s claims.

Respectfully submitted this 7th date of March, 2025.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limit of Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and consists of 31 pages.

Dated this 7th day of March, 2025.

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on March 7, 2025, I served the following documents:

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