

IN THE SUPREME COURT OF NORTH DAKOTA

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

Plaintiffs and Appellants,

v.

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, 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

North Dakota Farm Bureau,

Intervenor-Plaintiff and Appellant,

and

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

Intervenor-Defendants and Appellees.

Supreme Court No. 20240298

Bottineau County
No. 05-2023-CV-00065

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,
IN THE DISTRICT COURT OF BOTTINEAU COUNTY,
STATE OF NORTH DAKOTA,
THE HONORABLE ANTHONY SWAIN BENSON, PRESIDING

- ORAL ARGUMENT REQUESTED -

INTERVENOR-PLAINTIFF/APPELLANT'S BRIEF

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INTRODUCTION

[¶1] The North Dakota Legislature enacted statutes allowing for the taking of pore space without affording property owners payment of just compensation, a jury trial, or payment prior to the taking of their property. Because the pore space statutes violate the basic rights guaranteed to property owners, the statutes are unconstitutional. Indeed, the statutes resemble pore space legislation this Court recently struck down as unconstitutional.

[¶2] However, the district court declined to reach the constitutional challenges to the pore space statutes based on two legal determinations. First, the court applied a six- or ten-year statute of limitations to bar the challenge to statutes allowing for the taking of pore space for carbon dioxide storage. Second, the court dismissed the challenge to statutes allowing for the taking of pore space for oil and gas storage after determining that potential future action by the government rendered the statutes immune to a facial challenge. The court erred as a matter of law in each determination because the Plaintiffs presented a timely and proper challenge to the pore space statutes. Thus, this Court should reverse the dismissal of the claims and remand to the district court for consideration on the merits.

STATEMENT OF ISSUES PRESENTED

[¶3] Whether the district court erred as a matter of law by dismissing the constitutional challenges to North Dakota's carbon dioxide amalgamation statute under statutes of limitations that do not apply to the declaratory judgment claims in question.

[¶4] Whether the district court erred as a matter of law by concluding the constitutional challenges to North Dakota's carbon dioxide amalgamation statute are time-barred when the claims in question accrued within the limitations period.

[¶5] Whether the district court erred as a matter of law by concluding North Dakota’s oil and gas amalgamation statutes are not subject to a facial challenge when the court’s order conflicts with itself, North Dakota’s declaratory judgment statutes, and this Court’s standards for considering facial challenges to the constitutionality of a statute.

STATEMENT OF THE CASE

[¶6] On May 31, 2023, the Northwest Landowners Association (“NWLA”) filed a Complaint seeking to declare as unconstitutional N.D.C.C. §§ 38-22-10, 38-25-08, and the last sentences of N.D.C.C. §§ 32-15-06 and 24-05-09. (R1). The State of North Dakota, the North Dakota Industrial Commission, the 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, the Hon. Drew Wrigley in his official capacity as Attorney General of North Dakota and as a member of the North Dakota Industrial Commission, and the Hon. Doug Goehring in his official capacity as Agriculture Commissioner of North Dakota and as a member of the North Dakota Industrial Commission (collectively referred to as the “State Appellees”), submitted an Answer on June 20, 2023. (R13).

[¶7] On June 28, 2023, SCS Carbon Transport, LLC, SCS Permanent Carbon Storage LLC, and Summit Carbon Solutions, LLC (collectively referred to as “Summit”) moved to intervene as defendants. (R19). This was followed by a motion to intervene as a defendant filed by Minnkota Power Cooperative, Inc. (“Minnkota”). (R25). The district court granted the motions to intervene from Summit and Minnkota on July 25, 2023. (R44-R45). On August 8, 2023, Basin Electric Power Cooperative and Dakota Gasification Company (collectively referred to as “Basin”) moved to intervene as defendants. (R52). The court granted Basin’s motion to intervene on August 23, 2023. (R60).

[¶8] On October 24, 2023, the North Dakota Farm Bureau (“NDFB”) moved to intervene as a plaintiff. (R61). The court granted NDFB’s motion on December 12, 2023. (R111). NDFB filed its Complaint on January 12, 2024, which challenged the constitutionality of N.D.C.C. §§ 38-22-10, 38-25-08, and 38-22-03(7). NDFB did not contest the other statutes challenged by NWLA (N.D.C.C. §§ 32-15-06 and 24-05-09).

[¶9] On October 26, 2023, the State Appellees sought to amend their Answer to include an affirmative defense based on the statute of limitations. (R67). Meanwhile, NWLA moved to amend its Complaint to join Michael Dresser, Sandra Short, and the Swenson Living Trust as Plaintiffs on November 22, 2023. (R100). The court granted both motions on December 22, 2023. (R114-R115).

[¶10] On April 12, 2024, all parties moved for summary judgment. (R152-200). Following responsive briefing, the district court held a hearing on June 28, 2024. On August 27, 2024, the court entered a Memorandum Opinion and Order Granting Summary Judgment to Defendant and Intervenor-Defendants (the “Summary Judgment Order”). (R248). The court entered final Judgment on August 29, 2024. (R251). NWLA and NDFB both filed a notice of appeal on October 24, 2024. (R254, R257).

STATEMENT OF THE FACTS

[¶11] North Dakota Farm Bureau is a non-profit organization comprised of more than 28,000 North Dakota farmers, ranchers, and agricultural enthusiasts from across the State, along with 50 organized county farm bureaus. (R210). NDFB members own real property interests within North Dakota. The protection of private property rights, including the freedom and security to use land for agriculture and ranching purposes, and control other uses of and infringements upon such private property is of critical importance to

NDFB and its members. Id. Accordingly, NDFB and its members became concerned with the infringement upon their private property rights imposed by state statutes regulating subsurface pore space. Id.

[¶12] There are two pore space statutory schemes at issue (collectively, the “Pore Space Statutes”). First, the 2009 Legislative Assembly passed S.B. 2095, which enacted Chapter 38-22 of the North Dakota Century Code relating to the geologic storage of carbon dioxide. Second, the 2021 Legislative Assembly passed S.B. 2065, which created Chapter 38-25 relating to the underground storage of oil and gas. The Pore Space Statutes set forth comparable provisions. For instance, each of the Pore Space Statutes endows the North Dakota Industrial Commission (the “Commission”) with broad authority over all persons and property to enforce the Legislature’s objectives. N.D.C.C. §§ 38-22-03; 38-25-02.

[¶13] The Pore Space Statutes acknowledge that geologic storage of materials requires the “use of surface and subsurface property interests.” N.D.C.C. § 38-22-01. Geologic storage occurs when substances are injected into pore space, which each Chapter defines as “a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.” N.D.C.C. §§ 38-22-02(5); 38-25-01(6). Under North Dakota law, the surface owner owns title to pore space in all strata underlying the surface. N.D.C.C. §§ 47-31-03; 47-01-12. However, the Pore Space Statutes enable the Commission to “amalgamate” the interests of pore space owners and subject those interests to geologic storage for the benefit of third-party storage operators. If a pore space owner does not consent, each statute allows the Commission to require the pore space to be included in the storage facility and subject to storage. N.D.C.C. §§ 38-22-10; 38-25-08.

[¶14] Neither of the Pore Space Statutes define the term “amalgamating.” However, the statutes envision the Commission “amalgamating” pore space rights by requiring the interests of nonconsenting owners to be included to a storage facility operated by third parties. Although the Pore Space Statutes require that “nonconsenting pore space owners are or will be equitably compensated,” there are no provisions entitling owners to just compensation determined by a jury, or to have that compensation paid prior to the taking, as is mandated in other contexts when property rights are taken. Compare N.D.C.C. §§ 38-22-08 and 38-25-08 with N.D.C.C. §§ 32-15-06.1 and 32-15-22. Moreover, even if “equitable compensation” was synonymous with “just compensation,” N.D.C.C. § 38-22-03(7) enables the Commission to grant exceptions to any of the Chapter’s requirements.

[¶15] In a similar context, this Court struck down pore space statutes as unconstitutional. In Northwest Landowners Association v. State, 2022 ND 150, 978 N.W.2d 679 [NWLA I], the Court considered a 2019 North Dakota law that allowed third party operators to utilize pore space in connection with the use of carbon dioxide for enhanced recovery of oil and gas. The Court concluded that pore space has value as a matter of law, landowners have a recognizable property right in their pore space, and the law in question was facially invalid because it allowed third parties to physically invade that property by injecting substances into the landowners’ pore space. Id. ¶¶ 22, 26, 43.

[¶16] On the heels of its successful constitutional challenge in NWLA I, NWLA commenced this action to contest the constitutionality of the Pore Space Statutes. NDFB joined in the challenge as Plaintiff-Intervenor. The State Appellees opposed the constitutional claims, joined by Intervenor-Appellees Summit, Minnkota, and Basin, which are private companies dealing in oil, gas, electric and/or power.

[¶17] Various carbon sequestration projects of the Intervenor-Appellees are pending, have been permitted, and/or have been approved by the Commission in counties where NDFB members own pore space rights, and for which NDFB members have refused to consent. (R189). For instance, the Commission entered Order No. 31583 and Order No. 31586 on January 21, 2022, which granted Minnkota the right to conduct geological storage on various tracts of land owned by NDFB members. *Id.* at 4-5. Minnkota holds another permit for the amalgamation of pore space in Oliver County, North Dakota, that the Commission granted in October 2023. (R154). The Commission also granted permits to Basin for amalgamation of pore space in Mercer County, North Dakota. (R165).

[¶18] The district court dismissed the constitutional challenges asserted by NWLA and NDFB without reaching the merits. First, the court concluded the challenges to N.D.C.C. §§ 38-22-10 and 38-22-03(7), as well as NWLA's additional challenges to N.D.C.C. §§ 32-15-06 and 24-05-09, were barred by either a six- or ten-year statute of limitations because more than ten years had expired since the time the Legislature enacted those statutes. (R248 at 3-5). The court determined the challenge to N.D.C.C. § 38-25-08 was not time-barred because the statute was enacted in 2021. *Id.* at 5. Moreover, the court concluded NWLA and NDFB maintained standing and there was no failure to exhaust remedies prior to challenging the constitutionality of the statute. *Id.* at 5-6. However, N.D.C.C. § 38-25-08 was not amenable to a facial challenge, the court held, because the statute had no immediate impact and turned on future acts of the Commission. *Id.* at 7-8. Finally, the court held the statutes were not subject to a due process challenge. *Id.* at 8-9. As a result, the court granted summary judgment in favor of the Appellees. *Id.* at 9. NDFB now appeals the district court's dismissal of its the claims as a matter of law.

LAW AND ARGUMENT

I. Standard of Review.

[¶19] “Summary judgment under N.D.R.Civ.P. 56 is a procedural device for the prompt resolution of a controversy on the merits 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.” Schmidt v. Hess Corp., 2024 ND 72, ¶ 5, 5 N.W.3d 787. “Whether the district court properly granted summary judgment is a question of law that [this Court] review[s] de novo on the entire record.” Id. “On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law.” Id.

II. The district court erred as a matter of law by applying the statutes of limitation to bar the constitutional challenges to N.D.C.C. §§ 38-22-10 and 38-22-03(7).

[¶20] First, the district court erred as a matter of law by dismissing NDFB’s challenges to N.D.C.C. §§ 38-22-10 and 38-22-03(7). The district court dismissed NDFB’s claims based upon N.D.C.C. §§ 28-01-16 and 28-01-22. N.D.C.C. § 28-01-16 provides that certain actions must be commenced within six years after the claim for relief accrues, including contract actions, actions upon statutory liabilities, trespass claims, and fraud claims. N.D.C.C. § 28-01-22 states, “An action for relief not otherwise provided for must be commenced within ten years after the claim for relief has accrued.”

[¶21] “Interpreting a statute of limitations is a question of law fully reviewable on appeal.” Powell v. Statoil Oil & Gas LP, 2023 ND 235, ¶ 10, 999 N.W.2d 203. As set forth below, the statutes of limitation relied upon by the district court do not apply to NDFB’s claims and, even if they did, NDFB’s claims were timely filed.

A. The statutes of limitation relied upon by the district court do not apply to NDFB’s constitutional challenges in question.

[¶22] The starting point in determining whether a statute of limitations applies is to identify the underlying claims for relief. Hager v. City of Devils Lake, 2009 ND 180, ¶ 34, 773 N.W.2d 420. Here, NDFB’s Complaint sought a declaration that N.D.C.C. §§ 38-22-10 and 38-22-03(7) violate the Constitution in multiple facets. (R122 at 2-3).

1. The Pore Space Statutes are unconstitutional.

[¶23] First, the Pore Space Statutes are unconstitutional because they enable a third party to take property without payment of just compensation to the property owner. Under North Dakota law, “[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.” N.D.C.C. § 47-31-03; see also NWLA I, 2022 ND 150, ¶ 22 (“North Dakota law has long established that surface owners have a property interest in pore space.”). In NWLA I, this Court recognized that just compensation must be provided when the government requires a pore space owner to suffer a physical invasion of her property. Id. at ¶¶ 23, 25, 33. NWLA I follows N.D. Const. art. I, § 16, which declares that 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.”

[¶24] Although the Pore Space Statutes contemplate pore space owners receiving “equitable compensation,” this undefined form of compensation falls short of the “just compensation” demanded by the Constitution. For instance, the landowner’s loss, not the condemnor’s gain, is the focal point in a takings case. Brown v. Legal Found. of Washington, 538 U.S. 216, 235-236 (2003). By concentrating the lens on the harm to *the landowner*, “just compensation” is not concerned with the financial impact on *the condemnor*. By contrast, “equitable compensation” necessarily must account for the

impacts to the condemnor because the concept of doing equity, by definition, is to examine what is fair between the parties. See generally McKechnie v. Berg, 2003 ND 136, ¶ 11, 667 N.W.2d 628; Merriam-Webster’s Dictionary (11th ed.) (defining “equitable” as “having or by exhibiting equity: dealing fairly with all concerned”).

[¶25] Aside from the impermissible shift in perspective, the “equitable compensation” provided by the Pore Space Statutes does not guarantee landowners the broad array of damages encompassed by “just compensation.” See Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893) (defining just compensation as a “full and perfect equivalent for the property taken.”). For example, in a takings case, the landowner is entitled to not only the fair market value of the property that is taken, but severance damages for impacts to property that is not taken, etc. These guarantees are not present under the Pore Space Statutes. Compare N.D.C.C. § 32-15-22 (describing what must be included in damages for a taking) with N.D.C.C. § 38-22-08(14). Moreover, the plain language of the Pore Space Statutes empowers the Commission to grant exceptions to any of the Chapter’s requirements. N.D.C.C. § 38-22-03(7). Thus, the State cannot claim the Pore Space Statutes pass constitutional muster by requiring compensation when the same statutes expressly allow the Commission to waive the compensation requirement.

[¶26] Second, aside from the adequacy of just compensation, there are constitutional defects with *who* decides the takings issues under the Pore Space Statutes. “In this state the question of necessity of taking of private property for public use is entrusted to the determination of the judicial branch of the government[.]” Pembina County v. Nord, 49 N.W.2d 665, 667 (N.D. 1951). Afterwards, “[a] jury decides the amount of compensation due for the taking, unless a jury is waived.” Sauvageau v. Bailey, 2022 ND

86, ¶ 9, 973 N.W.2d 207 (citing N.D. Const. art. I, § 16). Thus, the Pore Space Statutes impermissibly allow the Commission to determine the propriety and timing of the taking, and what amount of compensation, if any, must be paid.¹

[¶27] This constitutional infirmity is particularly troublesome when considering the State’s self-proclaimed interests in promoting geologic storage. The stated policy in N.D.C.C. § 38-22-01 is to “promote the geologic storage of carbon dioxide,” which will “ensure the viability of the state’s coal and power industries[.]” Notably, the former Director of the Department of Mineral Resources testified in favor of S.B. 2344 – which this Court invalidated in NWLA I because of the lack of just compensation protections – in part because the economics of not compensating pore space owners justified that bill. See Hearing on S.B. 2344 Before the Senate Energy and Natural Res. Comm., 66th N.D. Legis. Sess. (Feb. 1, 2019) (testimony of Lynn Helms).

[¶28] Third, N.D. Const. art. I, § 16 does not permit property to be taken “without just compensation having been first made to, or paid into court for the owner.” See also Donaldson v. City of Bismarck, 3 N.W.2d 808, 815 (N.D. 1942) (“Under the Constitution, [a landowner] was entitled to be paid such compensation *before* the property was taken or

¹ “[T]he essential functions of government are divided among three departments, the legislative, executive, and judicial.” State ex rel. Mason v. Baker, 288 N.W. 202, 204 (N.D. 1939). “No difficulty is presented in the determination that under our system the legislative assembly cannot delegate duties belonging to one department to another.” State v. Blaisdell, 132 N.W. 769, 773 (N.D. 1911). By allowing the Commission to resolve all takings issues, the Pore Space Statutes impermissibly delegate duties belonging to the judicial branch.

damaged.”) (emphasis added). The Pore Space Statutes violate this provision because they expressly allow property to be taken prior to the payment of any compensation. See N.D.C.C. § 38-22-08(14) (directing the Commission to find “[t]hat all nonconsenting pore space owners are *or will be* equitably compensated”) (emphasis added).

[¶29] Finally, N.D. Const. art. I, § 16 further prohibits a non-common carrier or utility from taking private property. However, the Pore Space Statutes broadly allow any individual or entity to take property as a “storage operator.” See N.D.C.C. § 38-22-02(8) (defining “storage operator” as “a person holding or applying for a permit.”).

2. NDFB asserted claims for declaratory relief.

[¶30] NDFB presented the above challenges by asserting claims for declaratory relief. (R122 at 2-3, 12). “NDCC Ch. 32-23, the Declaratory Judgment Act, is specifically designed to bring an action challenging the constitutionality of statutes, ordinances, etc.” First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584 (N.D. 1984). Any person “whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and may obtain a declaration of rights, status, or other legal relations thereunder.” N.D.C.C. § 32-23-02; see also N.D.C.C. § 32-23-01. This includes groups like NDFB, who have “standing to bring an action for declaratory judgment to determine any question of construction or validity of any statute . . . that threatens to injure its members.” N.D.C.C. § 32-23-11.

[¶31] While the Legislature could have imposed a statute of limitations on claims for declaratory relief if it desired, there is no such statute that appears in Chapter 32-23. Nor is there a restriction stated in Chapter 32-23, or any other statute, whereby the validity of a statute may only be determined if a person asserts a claim within a defined period after the enactment of the statute. This includes the statutes relied upon by the district court,

which neither reference claims under Chapter 32-23 nor fit the underlying claims for relief. For instance, NDFB's claims do not concern a contract under the first subdivision of N.D.C.C. § 28-01-16. Likewise, there is no action upon a liability created by statute. Finally, the constitutional challenge plainly is not an action for trespass, to recover personal property, for criminal conversion, or for fraud. Indeed, in other cases, this Court has agreed that N.D.C.C. § 28-01-16 did not bar an action seeking declaratory relief under Chapter 32-23. Niles v. Eldridge, 2013 ND 52, ¶ 11, 828 N.W.2d 521.

[¶32] The district court's misapplication of the six-year statute of limitations in N.D.C.C. § 28-01-16 stemmed in part on its reliance on Hager v. City of Devils Lake, 2009 ND 180. In Hager, landowners asserted that the City's construction of a storm sewer system negatively impacted their land, resulting in a taking by inverse condemnation. Id. ¶ 3. This Court explained that "we look to the legal theory undergirding the cause of action to determine which statute of limitations applies." Id. ¶ 34. Hager reasoned that the inverse condemnation claim was, in effect, a contract claim for compensation, which triggered the six-year statute of limitations for contract claims under N.D.C.C. § 28-01-16(1). Id.

[¶33] By applying the same statute of limitations as Hager, the district court failed to follow this Court's directive to "look to the legal theory undergirding the cause of action to determine which statute of limitations applies." Id. Hager involved an inverse condemnation claim, through which the landowners recognized the government's authority to take property, but sought compensation for property damage. By contrast, NDFB challenges the constitutionality of the Pore Space Statutes without seeking an award of compensation. In other words, the claim here is the opposite of the claim in Hager. Thus,

while the contract-based statute of limitations may apply to an inverse condemnation claim, it has no bearing on this non-contract constitutional challenge to the Pore Space Statutes.²

[¶34] The district court also cited Owens v. Okure, 488 U.S. 235 (1989) and Twardowski v. Bismarck Police Department, 2017 WL 8791103 (D.N.D. 2017), which raised federal civil rights claims under 42 U.S.C. § 1983 for personal injuries sustained at the hands of law enforcement. It is well established that section 1983 claims are characterized as personal injury claims subject to a state’s residual personal injury statute of limitations. See, e.g., Wilson v. Garcia, 471 U.S. 261 (1985); Owens, 488 U.S. at 350. Once again, section 1983 claims for compensation as a result of personal injury are distinct from the constitutional challenges to the Pore Space Statutes. As a result, the district court erred as a matter of law by treating the two claims as synonymous.

B. Alternatively, NDFB’s constitutional challenges to the Pore Space Statutes are timely even if the statutes of limitation are applied.

[¶35] Assuming the district court correctly applied the six- or ten-year statute of limitations in the first instance, it opens up the second question of when the constitutional challenges to the Pore Space Statutes accrued. As discussed below, NDFB timely filed its claims because the injuries were sustained within the limitations period.

² In contexts like quiet title claims, this Court refuses to apply contract-based statutes of limitation to statutory procedures to determine property rights. Sabot v. Fox, 272 N.W.2d 280, 283 (N.D. 1978). In these cases, a plaintiff’s “right to maintain an action . . . is a continuing right which cannot be barred by limitation.” Yttredahl v. Fed. Farm Mortg. Corp., 104 N.W.2d 705, 708 (N.D. 1960). There is no reason to conclude otherwise here.

1. The discovery rule postpones the accrual date.

[¶36] As an initial matter, the district court failed to give effect to the case law applying the statutes of limitations. “Generally, the statute of limitations begins to run from the commission of the wrongful act giving rise to the cause of action; however, that rule is subject to a discovery rule.” Larson v. Midland Hosp. Supply, Inc., 2016 ND 214, ¶ 11, 891 N.W.2d 364. “The discovery rule postpones a claim’s accrual until the plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury.” Id. (internal quotation marks and citation omitted). “The discovery rule is meant to balance the need for prompt assertion of claims against the policy favoring adjudication of claims on the merits and ensuring that a party with a valid claim will be given an opportunity to present it.” Kuntz v. Muehler, 1999 ND 215, ¶ 6, 603 N.W.2d 43.

[¶37] It is undisputed that NDFB members suffered injuries well within either the six- or ten-year limitations periods. For instance, the Commission entered orders on January 21, 2022 granting Minnkota the right to inject carbon dioxide into NDFB members’ pore space. (R154). The Commission’s Order cites the notice given by Minnkota just prior to obtaining amalgamation authority. Id. at 4-5.

[¶38] In short, it constitutes an error of law to apply the cited statutes of limitations without likewise considering when the wrongful act giving rise to the claims occurred – and when that wrongful act was discovered. Since the Commission acted in 2022 with respect to the pore space rights of NDFB’s members, and NDFB’s Complaint was filed less than two years later, the discovery rule enables the claims to be heard on the merits.

2. The district court misconstrued the accrual of NDFB's constitutional claims.

[¶39] Perhaps more importantly, the district court erred by misconstruing the accrual of NDFB's claims even without consideration of the discovery rule. Specifically, the district court erroneously concluded that a facial challenge to the Pore Space Statutes must be brought within six or ten years after the enactment of the statutes. As set forth below, NDFB properly brought its constitutional challenge within the limitations period.

a) The accrual of a facial challenge does not differ from the accrual of an as-applied challenge.

[¶40] “A statute of limitation bars a right of action unless it is filed within a specified period of time after an injury occurs.” Hoffner v. Johnson, 2003 ND 79, ¶ 9, 660 N.W.2d 909. In most cases, the injury and the resulting accrual of the claim is not subject to dispute. In other instances, including this matter, the time of accrual is less clear because it involves the question of when the plaintiff's rights are finally and clearly affected by the law that is challenged as unconstitutional.

[¶41] A common misconception is that the accrual of a claim raising a facial challenge differs from the accrual of an as-applied challenge. The distinction between facial and as-applied challenges “goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.” Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331 (2010). While the plaintiff must show injury as a jurisdictional matter, once that injury occurs, the plaintiff may argue the appropriate theory as she sees fit, *i.e.*, whether the law is unconstitutional on its face, as applied, or both. Thus, the facial vs. as-applied distinction does not bear on the issue of accrual nor, by extension, the statute of limitations.

[¶42] The district court concluded the statutes of limitations accrued as of the date the Pore Space Statutes were enacted. If the court's reasoning was sound, some of the most

well-known cases in history could have never been decided. See Loving v. Virginia, 388 U.S. 1 (1967) (finding unconstitutional anti-miscegenation laws through plaintiff's 1964 challenge to 1924 law banning interracial marriage); Brown v. Board of Education, 347 U.S. 438 (1954) (finding racial segregation in schools unconstitutional, where plaintiffs brought suit in 1951 challenging policy based on an 1879 Kansas law); Obergefell v. Hodges, 576 U.S. 644 (2015) (finding unconstitutional state laws defining marriage as a union between one man and one woman enacted before many plaintiffs were even born).

[¶43] For example, in Lawrence v. Texas, 539 U.S. 558, 581 (2003), the state prosecuted the defendant in 1998 for violating a 1973 Texas law prohibiting same-sex conduct. The defendant successfully challenged the 25-year-old law since his injury occurred when the state acted against him. Id. at 578-579. Thus, the law was not deemed immune from facial challenge simply by virtue of the passage of time after enactment.

[¶44] In more recent years, courts have recognized that facial challenges are not barred by the mere passage of time. In Lindner v. Kindig, 826 N.W.2d 868, 870 (Neb. 2013), the plaintiff challenged the constitutionality of a city ordinance under a declaratory judgment claim. The district court dismissed the action under a four-year statute of limitations, since more than four years transpired since the time the city adopted the ordinance. Id. The Nebraska Supreme Court reversed, stating, “the distinction between a facial as opposed to an ‘as-applied’ challenge is not of great import for statute of limitations purposes” because “[a] case alleging facial unconstitutionality is ripe not simply when the law is passed but, just like an as-applied challenge, when the government acts pursuant to that law and adversely affects the plaintiff’s rights.” Id. at 873 (internal quotation marks and citation omitted). “There is simply no categorical rule that a law becomes insulated

from facial challenge by the mere passage of time.” Id. Instead, “[t]he time at which a cause of action accrues will differ depending on the facts of the case, but it will come whenever the plaintiff’s rights are finally and clearly affected pursuant to the law that he or she believes is constitutional.” Id. (internal quotation marks and citation omitted). As a result, the court rejected the notion that the limitations period begins upon enactment. Id. at 874.

[¶45] Similarly, in Gillmor v. Summit County, 246 P.3d 102, 109 (Utah 2010), the Supreme Court of Utah reversed the district court’s dismissal of a facial challenge to an ordinance based on a statute of limitations. According to the court, “[a]lthough the facial/as-applied distinction may be procedurally significant in some contexts, this distinction generally has nothing to do with the accrual or ripeness of a cause of action for statute of limitations purposes.” Id. (internal quotation marks and citation omitted). “Instead, the accrual date of a facial or as-applied challenge is identical to the accrual date of other substantive claims – the date upon which the plaintiff’s injury occurred and the cause of action became complete.” Id. Thus, so long as the plaintiff satisfies the jurisdictional prerequisites, “she may challenge a law’s validity whether she chooses to argue that the law is facially unconstitutional or only unconstitutionally applied in her case.” Id. (internal quotation marks and citation omitted). Since the plaintiff timely brought her claims after the county acted against her, she could mount a facial challenge. Id. at 110.

[¶46] The court further explained the “illogical, unjust, and potentially unconstitutional result” that would be inherent with a bright-line rule deeming claims untimely if they are not presented after the enactment of the law in question. Id. at 111. If claims must be brought after enactment, then “a property owner subjected to some constitutional violation would be without remedy unless the owner had the foresight to

challenge the ordinance when it was enacted, possibly years or even decades before it was applied to her property and before she ever had standing to assert her claims.” Id. “Furthermore, as past cases have demonstrated, a facially unconstitutional statute or ordinance may linger on the books of a jurisdiction for many years before ever causing injury to a particular plaintiff, . . . [b]ut this does not render the statute or ordinance immune from facial challenge[.]” Id. “For example, as one scholar has thoughtfully explained,

Imagine ... a community in which all the citizens are white and in which an ordinance forbids black persons from voting. That ordinance would be facially unconstitutional, even though it would not affect any of the residents. But years later, when a black person moves into that community and discovers that the law forbids him from voting, he has suffered an injury, his cause of action accrues, and he may seek redress by challenging the facial constitutionality of the law.”

Id. at 61 (quoting Timothy Sandefur, *The Timing of Facial Challenges*, 43 AKRON L.REV. 51, 61 (2010)). Likewise, the court concluded a landowner may raise a facial challenge after she suffered injury as a result of the application of the law in question. Id.

[¶47] Here, although N.D.C.C. § 38-22-10 was enacted in 2009, the Commission granted permits in 2022 impacting the pore space rights of NDFB members and others. As with Lindner, the landowners were injured when the Commission took adverse action in 2022 pursuant to N.D.C.C. § 38-22-10. At that time, the Plaintiffs were free to raise either facial or as-applied claims. Because the Plaintiffs commenced this action within the limitations period after their rights were impacted, the facial challenge to N.D.C.C. § 38-22-10 is timely. As Gillmor explained, a contrary holding would leave these pore space owners with no remedy to bring a facial challenge unless they had the foresight to contest N.D.C.C. § 38-22-10 more than 12 years before the Commission took adverse action against their rights. Gillmor, 246 P.3d at 111.

b) The district court did not appreciate the distinction between a facial challenge and a regulatory taking.

[¶48] In addition to misconstruing the accrual of NDFB’s facial challenge, the district court erroneously conflated NDFB’s claim with a regulatory taking claim. Like an inverse condemnation claim, a regulatory taking claim presupposes the validity of the statute and requests compensation as a result of the taking. By contrast, NDFB’s facial challenge contends N.D.C.C. § 38-22-10 is void on its face. NDFB requested a declaratory judgment striking down the law as unconstitutional, rather than compensation for a taking. Thus, NDFB did not raise a regulatory taking claim, *i.e.*, a claim that NDFB’s members were owed just compensation due to the passage of N.D.C.C. § 38-22-10.

[¶49] The district court failed to recognize this distinction. This is made evident by its rationale and its reliance upon the Defendants’ “heavily cited” case of Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez, 659 F.3d 42, 47 (1st Cir. 2011), which considered the statute of limitations applicable to a regulatory taking claim. (R248 at 4). Since this claim differs from NDFB’s claim, the district court erroneously relied upon Juarbe-Jiménez to conclude the limitations period accrued upon enactment of N.D.C.C. § 38-22-10. See Lowenberg v. City of Dallas, 168 S.W.3d 800, 801 (Tex. 2005) (holding a cause of action for a physical taking accrues when the property is taken, as opposed to a regulatory taking that may accrue upon enactment).

[¶50] Even in the regulatory context, claim accrual may not occur merely upon passage of the subject regulation. For example, in Corner Post, Inc. v. Board of Governors of Federal Reserve System, 144 S.Ct. 2440 (2024), the Supreme Court considered the application of a six-year statute of limitations to a facial challenge to a regulation. The Plaintiff, a truckstop in Watford City, North Dakota, challenged a regulation that

established the amount of fees paid to banks for debit card transactions. Id. at 2448. The district court dismissed the lawsuit as untimely because it was not brought within six years after the publication of the regulation, despite the fact the Plaintiff’s business was not in existence at that time. Id. at 2448-2449. The Supreme Court reversed after recognizing that “a cause of action accrues on the date that damage is sustained and not the date when causes are set in motion which ultimately produce injury.” Id. at 2451 (internal quotation marks and citation omitted). “If an act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and in such case no cause of action accrues until the loss or damage occurs.” Id. (internal quotation marks and citation omitted). This is the standard rule, the Court noted, which is used to determine when a claim accrues for purposes of applying a statute of limitations. Id. at 2452.

[¶51] Applying the traditional rule, the Court concluded the statute of limitations only begins to run when the plaintiff had a complete and present cause of action. Id. “Because injury, not just finality, is required to sue” the plaintiff’s cause of action was not complete and present until it was injured by the regulation. Id. at 2452-2453. The Court rejected the claim that the limitations period began to run upon publication of the rule because the statute of limitations did not refer to promulgation, but to the time of accrual. Id. at 2453. This result was also in line with the “plaintiff specific” approach exemplified by the statute of limitations, as opposed to the contrary argument that “would start the limitations period applicable to the plaintiff not when *she* had a complete and present cause of action but when the agency action was final and, theoretically, some *other* plaintiff was injured and could have sued.” Id. at 2455 (emphasis in original). To hold otherwise “would

create a defendant-focused rule” for these types of suits, “while retaining the traditional challenger-specific accrual rule for other suits,” which “would give the same statutory text – ‘right of action first accrues’ – different meanings in different contexts[.]” Id. at 2456.

[¶52] The reasoning of Corner Post, Inc. may be applied here as well. Once again, while the statute was passed in 2009, the claim accrued upon the injury to NDFB’s members in 2022. Id. at 2451. Likewise, as with the statute of limitations in Corner Post, Inc., neither N.D.C.C. §§ 28-01-16 nor 28-01-22 refer to enactment of the statute as the triggering point for a claim; instead, both statutes refer generally to bringing a claim “after the claim for relief has accrued.” Thus, N.D.C.C. §§ 28-01-16 nor 28-01-22 are “plaintiff specific” statutes like the one at issue in Corner Post, Inc.; consequently, the limitations period only starts when the plaintiffs have a complete and present cause of action – not when some *other* plaintiff was injured and could have sued. Id. at 2455. To hold otherwise would give the statutes’ accrual language different meanings in different contexts.

[¶53] The district court’s interpretation is further incorrect because it equates N.D.C.C. §§ 28-01-16 nor 28-01-22 with statutes of repose. Corner Post, Inc. cautioned that there is a critical distinction between a statute of limitations, which “creates a time limit for suing in a civil case, based on the date when the claim accrued,” from a statute of repose, which “puts an outer limit on the right to bring a civil action that is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant.” Id. at 2452. As this Court explained:

A statute of repose period begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs. A person injured after the statutory period of repose is left without a remedy for the injury. Because of this harsh result, many courts have found statutes of repose to be unconstitutional.

Hanson v. Williams Cnty., 389 N.W.2d 319, 321–22 (N.D. 1986). This is precisely what the district court did: bar the challenges to N.D.C.C. § 38-22-10 regardless of when the injury was suffered, thus leaving pore space owners without the remedy of a facial challenge. See N.D. Const. art. I, § 9 (“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”). Because the court’s determination runs afoul of well-established law governing claim accrual, this Court should reverse.

c) The purpose of a statute of limitations is not served by the district court’s decision.

[¶54] Finally, “[t]he purpose of a statute of limitation is to prevent plaintiffs from sleeping on their legal rights to the detriment of defendants.” Hoffner v. Johnson, 2003 ND 79, ¶ 9, 660 N.W.2d 909 (internal quotation marks and citation omitted). “Thus, statutes of limitation are designed to prevent the plaintiff’s enforcement of stale claims when, through the lapse of time, evidence regarding the claim has become difficult to procure or even lost entirely.” Langowski v. Altendorf, 2012 ND 34, ¶ 8, 812 N.W.2d 427.

[¶55] The concerns of fairness to the defendants through a stale claim are absent here. There is no fear that ““evidence has been lost, memories have faded, and witnesses have disappeared.”” Burr v. Trinity Med. Ctr., 492 N.W.2d 904, 910–11 (N.D. 1992) (quoting Burnett v. New York Central Railroad Co., 380 U.S. 424, 428 (1965)). Both parties and the Court can readily ascertain whether the Pore Space Statutes are constitutional as a matter of law – which this Court routinely does in other contexts.

[¶56] Most notably, in NWLA I, this Court struck down a pore space statute as unconstitutional. This Court not only affirmed a grant of summary judgment on the constitutional question, it concluded that further discovery was not needed to flesh out fact

issues. NWLA I, 2022 ND 150, ¶ 43. There is no reason the constitutional challenges in this case cannot also be resolved as a matter of law. Instead, as it currently stands, the district court’s decision means that North Dakota’s statutes attempting to allow the injection of carbon dioxide into pore space are unconstitutional under NWLA I, but similar statutes allowing the injection of carbon dioxide into pore space are immune from a facial constitutional challenge. Neither the Plaintiffs nor the Court should be deprived of the opportunity to consider the facial challenge to the Pore Space Statutes in this matter.

III. The district court erred as a matter of law by dismissing the facial constitutional challenge to N.D.C.C. § 38-25-08.

[¶57] The second issue on appeal concerns the oil and gas amalgamation statute, N.D.C.C. § 38-25-08. The district court held the challenge was not barred by the statute of limitations since N.D.C.C. § 38-25-08 was passed in 2021, but the court nonetheless dismissed NDFB’s challenge after concluding the statute did not pose an immediate impact and depended on the future acts of the Commission. (R248 at 5-7). As discussed below, the district court contradicted its holding with respect to N.D.C.C. § 38-22-08 and, in any event, the court erred as a matter of law by not allowing a facial challenge.

A. The district court’s order contradicts itself.

[¶58] At the outset, the district court’s order conflicts with itself in several respects. The court held the Plaintiffs’ challenge to N.D.C.C. § 38-22-08 was barred because the claim accrued at the moment of enactment, but N.D.C.C. § 38-25-08 is not amenable to a facial challenge because the statute’s “impact here is not immediate,” and “depends on the future acts of government officials (the NDIC).” (R248 at 4, 7). N.D.C.C. §§ 38-22-08 and 38-25-08 are virtually identical, with both stating, “the commission may require” any pore space owned by nonconsenting owners to “be included” in a storage

facility “and subject to geologic storage.” Thus, if the court correctly determined that N.D.C.C. § 38-25-08 does not pose an immediate impact, then the same must be true of N.D.C.C. § 38-22-08. Likewise, if pore space owners must await the Commission’s decision before challenging N.D.C.C. § 38-25-08, then the court could not simultaneously bar the challenge to N.D.C.C. § 38-22-08 after the Commission made that very decision.

[¶59] Under the district court’s reasoning, pore space owners cannot raise a facial challenge upon enactment of the statutes because the Commission had not yet acted; but when the Commission did act, the owners could not raise a facial challenge because the limitations period expired. Simply put, the district court employed circular logic that effectively forecloses pore space owners from ever being able to mount a facial challenge.

[¶60] The district court’s determination with respect to N.D.C.C. § 38-25-08 also conflicts with the court’s conclusions on related issues like whether the Plaintiffs were required to exhaust administrative remedies. In that instance, the court stated “there are no factual determinations to be made, only constitutional issues and questions of law.” (R248 at 6). Thus, the court correctly determined that exhaustion was not required because there was “no record which, if developed, would assist in the determination to be made.” Id. The court went further by recognizing that the Commission “could not grant adequate relief regardless of its decision-making under N.D.C.C. § 38-25-08.” Id. As the court acknowledged, the Commission “cannot hold a jury trial regarding compensation nor does it have any authority to assign a matter to a district court for the same.” Id. As a result, the court reasoned there would be no purpose served by requiring exhaustion. Id.

[¶61] On the heels of the court’s exhaustion analysis, it makes little sense for the court to conclude that N.D.C.C. § 38-25-08 is not subject to a facial challenge until the

Commission acts. If there is no need for the Commission to develop the record, as the court correctly recognized in rejecting the Defendants' exhaustion argument, then why would such a need arise before a facial challenge could proceed? Moreover, there is no basis for the court to conclude a facial challenge may not proceed until the Commission acts after the court already recognized the Commission lacks the legal authority to carry out those acts in the first instance. Under these circumstances, the internal conflicts within the court's order exemplify the errors of law that compel reversal.

B. The district court's determination undermines the declaratory judgment statutes.

[¶62] Beyond contradicting itself, the district court's order again conflicts with North Dakota's declaratory judgment statutes. N.D.C.C. § 32-23-11 expressly permits NDFB "to bring an action for declaratory judgment to determine any question of construction or validity of any statute, ordinance, resolution, rule, or regulation that threatens to injure its members." The language of N.D.C.C. § 32-23-11 is instructive: the statute permits challenges when the law merely "threatens to injure" persons, which recognizes that actual injury or action need not occur to challenge a statute. See, e.g., N.D. Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900, 911 (D.N.D. 2018).

[¶63] The district court found the test under N.D.C.C. § 32-23-11 was satisfied because NDFB's challenge is based on an "actual, well-founded fear" of N.D.C.C. § 38-25-08 being applied. (R248 at 6). However, the court then refused to rule on the constitutionality of N.D.C.C. § 38-25-08 based on its view that the statute's impact was not immediate. The court's reasoning cannot be squared with N.D.C.C. § 32-23-11, which expressly allows constitutional challenges upon the mere threat of an injury. Stated differently, by declining to address the constitutionality of N.D.C.C. § 38-25-08 until the

Commission acts, the court effectively required an actual injury to occur. The court's determination undermines North Dakota's declaratory judgment statutes by not declaring the constitutionality of N.D.C.C. § 38-25-08 upon presentment of a proper challenge.

C. No future action by government officials will make the Pore Space Statutes constitutional.

[¶64] In any event, the point remains that the constitutional challenge to N.D.C.C. § 38-25-08 does not depend on future government action. First, the district court misinterpreted this Court's holdings in NWLA I and Sorum v. State, 2020 ND 175, 947 N.W.2d 382. In Sorum, the State argued the challengers to a statute must establish that there is "no set of circumstances" under which the statute could constitutionally be applied, in line with United States v. Salerno, 481 U.S. 739 (1987). Sorum, 2020 ND 175, ¶ 22. According to this Court, "[t]he Defendants' assertion that they can defeat all of these facial challenges at the outset by hypothesizing a constitutional application is unpersuasive and inconsistent with how we have analyzed facial challenges[.]" Id.

[¶65] The Defendants in NWLA I advanced the same argument that the claims may not proceed because constitutional applications of S.B. 2344 could be identified. NWLA I, 2022 ND 150, ¶ 13. As it did in Sorum, this Court again rejected this argument because courts have declined to apply the Salerno "no set of circumstances" test to facial challenges. Id. at ¶ 14. NWLA I explained, "[n]o consideration of circumstances is necessary to resolve a facial challenge because the claim is that upon enactment, the legislation has an immediate unconstitutional legal effect." Id. To resolve the constitutional claim, the Court stated it "need only interpret the enacted language of S.B. 2344 and the relevant constitutional provisions to determine whether there is a conflict." Id. at ¶ 15.

[¶66] The same test applied in NWLA I can be extended to N.D.C.C. § 38-25-08: the Court need only interpret the language of the statute and the relevant constitutional provisions to determine whether there is a conflict. Such a conflict unquestionably exists. For instance, as discussed above, there is a critical distinction between the “equitable compensation” afforded by the Pore Space Statutes and the “just compensation” demanded by the Constitution. Likewise, N.D.C.C. § 38-25-08 allows the Commission to determine the taking and the amount of any compensation rather than a jury. The statute further violates landowners’ rights by allowing the Commission to authorize a taking prior to payment of any compensation.³ See N.D.C.C. § 38-25-05 (stating the Commission need only find “nonconsenting owners are or will be compensated equitably”).

[¶67] None of these conflicts require future action by the Commission. Upon enactment of N.D.C.C. § 38-25-08, the Legislature granted the Commission authority the Commission cannot possess under the Constitution. Sorum, 2020 ND 175, ¶ 21. As a result, N.D.C.C. § 38-25-08 had an unconstitutional effect upon enactment and there are no future contingencies or developments that will eliminate the fundamental conflict between N.D.C.C. § 38-25-08 and the Constitution.

³ The Pore Space Statutes violate the substantive and procedural due process rights guaranteed to pore space owners by both the federal and State Constitution. See, e.g., N.D. Const. art. I, § 16; N.D. Const. art. I, § 9; U.S. Const. Amend. 5 (“No person shall ... be deprived of life, liberty, or property, without due process of law”); U.S. Const. Amend. 14, § 1. The district court erred as a matter of law by dismissing the due process challenges to the Pore Space Statutes for the same reasons as discussed above.

[¶68] To be sure, N.D.C.C. § 38-25-08 states the Commission “may” require amalgamation of nonconsenting pore space interests. The district court relied upon this language to defer to the potential future action by the Commission, but in doing so, the court overlooked that this future action would be unconstitutional because the Commission lacks the power to take property. Moreover, as an administrative agency, the Commission generally “do[es] not determine constitutional issues, especially those under which they are to act.” Conrad, 350 N.W.2d at 585. “An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power.” Id. (internal quotation marks and citation omitted). Accordingly, the Commission has no authority “to declare any law unconstitutional,” particularly the very law upon which the Commission would be purporting to act, N.D.C.C. § 38-25-08. Id.

[¶69] In sum, N.D.C.C. § 38-25-08 does not avoid a challenge by giving the Commission discretion to take pore space when the Commission lacks that power altogether, and lacks the power to determine the constitutionality of the statute. Thus, the fact the Commission is empowered with discretion to take property is not a defense of the statute’s constitutionality – it is a validation that the statute is unconstitutional. See State v. McCray, 186 N.W. 280, 282 (N.D. 1921) (“It is well settled that the constitutionality of a statute does not depend upon what is done under it, nor how it has been applied in a particular case, but upon what may be done under its authority.”).

[¶70] At most, if the Commission declined its improperly-awarded discretion and did not require amalgamation, it would give rise to an argument that there were potentially constitutional applications of the statute. But as this Court explained in NWLA I, N.D.C.C. § 38-25-08 “does not avoid a facial challenge ‘merely because the statute includes

constitutional applications along with potentially unconstitutional applications.” NWLA I, 2022 ND 150, ¶ 14. In other words, the district court’s view that the Commission “may” require amalgamation is nothing more than an attempt to resurrect the Salerno “no set of circumstances” test that this Court already rejected twice in Sorum and NWLA I.

[¶71] Finally, NWLA I is notable for two additional reasons. First, NWLA I challenged a bill that had not taken effect. NWLA I, 2022 ND 150, ¶ 7. Given that this Court ruled on the constitutionality of S.B. 2344 before the law took effect, the district court erred by refusing to determine the constitutionality of N.D.C.C. § 38-25-08.

[¶72] Second, the bill in NWLA I also contained permissive language that stated pore space “may” be used for storage. Id. at ¶ 3. While the district court stated that a third party “may” decide to use pore space, rather than the government, this is a distinction without a difference for purposes of assessing the immediacy of the statute. The issue undergirding the court’s decision on the susceptibility of N.D.C.C. § 38-25-08 to a facial challenge is whether the statute poses an immediate impact; the answer to that question does not change based upon the identity of the party who acts to use pore space.

[¶73] In short, N.D.C.C. § 38-25-08 is unconstitutional on its face. Pore space owners need not wait for future acts of the Commission to mount a facial challenge when the Commission lacks the constitutional authority to act in the first instance. Under these circumstances, the Court should reverse the district court’s ruling on N.D.C.C. § 38-25-08.

IV. Oral argument would be helpful to the Court.

[¶74] NDFB requests oral argument pursuant to N.D.R.App.P. 28(h). Oral argument is appropriate because there are constitutional questions before the Court that impact the validity of North Dakota statutes.

CONCLUSION

[¶75] The Pore Space Statutes are not barred by the six- or ten-year statutes of limitation, nor are they immune to a facial challenge by deferring to the Commission to exercise a power it does not have. Thus, the fundamental property rights issues that are implicated by the Pore Space Statutes should be heard on the merits, just as this Court did when it struck down similar legislation as unconstitutional in NWLA I. Under these circumstances, the Court should reverse the district court’s dismissal of NDFB’s claims and remand the matter for consideration on the merits of the constitutional challenges.

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CERTIFICATE OF COMPLIANCE

[¶76] In accordance with N.D.R.App.P. 32(a)(8)(A), the undersigned certifies that this brief contains 38 pages, excluding the signature page and addenda, which is within the limit of 38 pages. The above brief has been prepared in a proportionally spaced typeface using Microsoft Office word processing software in Times New Roman 12-point font.

/s/ Andrew D. Cook
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