IN THE SUPREME COURT 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, Intervenor-Plaintiff, Appellant, and Cross-Appellee, 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 SCS Carbon Transport LLC, SCS Permanent Carbon Storage, LLC, and Summit Carbon Solutions, LLC, Intervenor-Defendants, Appellees, and Cross-Appellants and 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

INTERVENOR-PLAINTIFF. APPELLANT AND CROSS-APPELLEE'S REPLY BRIEF

Andrew D. Cook, ND ID #06278
Tyler J. Leverington, ND ID#08312
Attorneys for North Dakota Farm Bureau

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078-0458
(701) 282-3249
acook@ohnstadlaw.com
tleverington@ohnstadlaw.com

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LAW AND ARGUMENT

I. The Appellees do not meaningfully address NDFB's arguments.

[¶1] The Appellees continue to take contradictory positions. On the one hand, they claim the Pore Space Statutes are immune to a facial challenge because the law had no immediate effect absent further action by the Commission. Once the Commission acted, the Appellees claim the challenge is time-barred because the law took effect at enactment. These "heads I win, tails you lose" arguments obfuscate NDFB's position on both fronts.

[¶2] In a facial challenge, a court "need only interpret the enacted language of [a statute] and the relevant constitutional provisions to determine whether there is a conflict." Nw. Landowners Ass'n v. State, 2022 ND 150, ¶ 15, 978 N.W.2d 679 (hereinafter "NWLA I"). The Appellees suggest the Pore Space Statutes had no immediate effect because they did not literally take property at enactment. However, the Pore Space Statutes (1) allow third parties to invade pore space; (2) fail to provide just compensation; (3) empower the Commission, not a jury, to determine compensation; and (4) allow property to be taken before payment. Each of these are unconstitutional effects upon enactment. No later act by the Commission will cure the unconstitutionality of the statutes.

[¶3] In any event, the Commission has acted under the CO_2 Pore Space Statutes. Thus, even under the Appellees' theory, the taking occurred and may be challenged. After sustaining injury through the permits granted by the Commission, the Plaintiffs may raise either facial or as-applied challenges, as discussed in section II.B.2 of the Appellant's Brief. The Appellees provide little response to this argument or the misapplication of the statutes of limitation relied upon by the district court. For example, three of the four Appellees do not even cite N.D.C.C. § 28-01-16, much less explain how that contract-based statute applies. As result, the Court should reverse the dismissal of NDFB's claims.

II. This Court's prior pore space decision controls the outcome of this matter.

A. The Pore Space Statutes are materially similar to the NWLA I statutes.

[¶4] Several of the Appellees' arguments are inconsistent with, or foreclosed by, NWLA I. The statutes in NWLA I: (1) allowed third parties to inject CO_2 into pore space; (2) declared the public interest in promoting the use of CO_2; and (3) directed the Commission to adopt rules to effectuate the statute. Given these substantially similar provisions to the Pore Space Statutes, the analysis in NWLA I applies equally here.

[¶5] For instance, the Appellees assert the statutes had no immediate effect. However, the language of the Pore Space Statutes is not materially different from those in NWLA I because both statutes merely allow third parties to use pore space at some future time when the party conducts operations. Compare NWLA I, 2022 ND 150, ¶ 3 (stating a person "*may* utilize subsurface geologic formations" in operations) with N.D.C.C. 38-22-10 ("[T]he commission *may* require that the pore space owned by nonconsenting owners be included in a storage facility and subject to geologic storage."). Despite this language, NWLA I held the plaintiffs raised a proper facial challenge because the legislation had an immediate unconstitutional effect. NWLA I, 2022 ND 150, ¶ 14. The same is true here.

[¶6] Minnkota and Summit also assert the Pore Space Statutes express the State's public interest in promoting CO_2 storage. The legislation in NWLA I declared "that certain activities relating to the use of carbon dioxide are in the public interest[.]" NWLA I, 2022 ND 150, ¶ 3. Thus, the Appellees' policy argument is inapposite because NWLA I invalidated pore space laws despite a virtually identical public interest declaration (which was upheld). Id. at ¶ 40. In any event, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

B. The distinctions in the statutes are constitutionally insignificant.

[¶7] To be sure, there is a distinction in the Commission's role between the statutes. In NWLA I, the Legislature directly authorized third parties to take pore space; under the Pore Space Statutes, the Legislature delegated power to the Commission to grant permits to third parties to take pore space. This is a distinction without a constitutional difference. The Commission does not have greater power than the Legislature, since its power derives from the Legislature. Since NWLA I held it is unconstitutional for the Legislature to allow a third party to take pore space, then it is still unconstitutional when the Legislature delegates to the Commission to allow a third party to take pore space.

C. The Appellees' arguments cannot be harmonized with NWLA I.

[¶8] Finally, the Appellees suggest the wishes of the majority of property owners negate the objections of the minority, which violates this Court's steadfast protection of property rights. Owners "have a constitutionally protected property interest in pore space that is recognized under state law." NWLA I, 2022 ND 150, ¶ 20. Other decisions agree:

> Property rights in a physical thing have been described as the rights to possess, use and dispose of it. To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36. NWLA I rightly focused on protecting the "treasured property rights" – which is antithetical to the "majority rules" view espoused by the Appellees.

III. The Pore Space Statutes are unconstitutional.

[¶9] The Appellees focus more on the merits than on the district court's basis for dismissal. Although the merits should be reached, the Court should follow its usual course of remanding for the district court to do so first. See Kuntz v. Muehler, 1999 ND 215, ¶¶ 12-13, 927 N.W.2d 872. This would allow NDFB to fully brief the matter without the constraints coinciding with this reply brief. Due to these constraints, NDFB incorporates its briefing below. (R176) (Brief); (R208-209) (Response); (R230) (Reply).

A. The correlative rights doctrine does not support the Pore Space Statutes.

[¶10] First, the Appellees argue the State may regulate pore space under its police power because the Pore Space Statutes are akin to unitization laws that protect the correlative rights of landowners. The Appellees' argument again conflicts with NWLA I, which rejected the argument that S.B. 2344 was a proper exercise of the police power. There are two categories of takings: (1) physical invasions under Loretto and (2) regulatory takings under Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). NWLA I, 2022 ND 150, ¶ 23. The theory that "landowners took title with the expectation that their pore space would be limited by state law applies only to regulatory takings under the Lucas line of cases, which is the second per se category." Id. at ¶ 23. "Whatever Lucas had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away." Id. Thus, the police power is constrained by the constitution and the claim was "not premised on a regulation of what the surface owners may do with their property, but rather on the State's granting a broad authorization to third parties to physically occupy the surface owners' pore space." Id.

[¶11] The same is true here. The correlative rights argument arises under the umbrella of the State's police power as a background restriction on property. Since those

background restrictions only pertain to the second category of regulatory takings, and pore space injections are a physical invasion under the first category, then it follows that the correlative rights doctrine cannot excuse a taking under the first category.[1]

[¶12] Beyond this fatal defect, the correlative rights doctrine has no bearing. Unlike oil and gas unitization statutes, there is no mention of correlative rights in Chapter 38-22. Compare N.D.C.C. § 38-08-01 with N.D.C.C. § 38-22-01. The Court cannot rewrite Chapter 38-22 to include correlative rights; to the contrary, it must presume there was no correlative rights protection because the Legislature knew how to do so had it so desired. Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 14, 829 N.W.2d 453.

[¶13] Next, historically, oil and gas development was governed by the rule of capture, which allowed landowners to "drill as many wells on his land as he pleases" without liability to others, because the neighbor's remedy was to do the same. Texaco Inc. v. Indus. Comm'n of State of N. D., 448 N.W.2d 621, 623 n.2 (N.D. 1989). This created significant problems due to the incentivization of drilling excessive and inefficient wells. Cont'l Res., Inc. v. Farrar Oil Co., 1997 ND 31, ¶ 10, 559 N.W.2d 841. Thus, the Legislature enacted legislation to restrict the right to produce. Hanson v. Indus. Comm'n of N. D., 466 N.W.2d 587, 594 (N.D. 1991). "[T]he Act modifies the 'rule of capture' by

[1]While the government may assert a preexisting limitation upon title, those limitations are not like allowing a taking. "For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place." Cedar Point Nursery v. Hassid, 594 U.S. 139, 160, 141 S. Ct. 2063 (2021). The Pore Space Statutes do not regulate nuisances.

authorizing the Commission to set spacing units for a common source of supply when necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights." Texaco Inc., 448 N.W.2d at 623. Along with curtailing production, "an effort is made to protect correlative rights by diving fairly, among the various owners, production from a common source of supply." Hanson, 466 N.W.2d at 594.

[¶14] The need to protect correlative rights in the oil and gas context arose when the State curtailed drilling that would have otherwise occurred with the rule of capture. That need is absent here because the underlying problem that generated the correlative rights doctrine – the rule of capture – does not exist for pore space injection. In short, the correlative rights doctrine is a shield to protect property rights from the unwieldy effects of the rule of capture. Here, the Appellees seek to do the opposite: use the correlative rights doctrine as a sword to take property rights from landowners to pursue private projects.

B. Causby does not provide a blanket exception for pore space takings.

[¶15] Next, the Appellees ask the Court to analyze the Pore Space Statutes under United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062 (1946) instead of Loretto. Causby is inapplicable. First, unlike in Causby, where Congress declared airspace to be public, pore space is private property protected by well-established law. Thus, the rights at stake vary.

[¶16] Second, landowners have transacted, severed, and used subsurface rights far more extensively than airspace rights. These transactions resulted in ownership of the subsurface by a multitude of private parties, businesses, and state and federal governmental entities. These owners use and exploit the subsurface property in a myriad of ways.

[¶17] The third distinction is a function of the first two: airspace is controlled by a single public interest that competes with surface interests, whereas surface interests compete with a variety of uses in subsurface property. For instance, subsurface activity

occurs through oil and gas development, natural gas storage, coal production, injection of fluids, compressed air storage, storage of fresh water, and groundwater uses.

[¶18] Fourth, Causby itself held that frequent airspace invasions *were* a taking. Loretto, 458 U.S. at 430. Loretto cited Causby but reaffirmed "the traditional rule that a permanent physical occupation of property is a taking." Id. at 441. Pore space invasions fall under Loretto, as NWLA I recognized, because there is a permanent physical occupation. Storage operators propose to inject millions of metric tons of CO_2 into a non-consenting landowner's property, store it for generations to come, and then transfer title to the State. Since this is not the same as a temporary flight passing overhead that causes no interference with the property, Causby does not permit pore space to be taken.

IV. The district court correctly ruled that exhaustion of administrative remedies was not required to hear the constitutional challenges to the statutes.

[¶19] Finally, Summit and Basin contest the district court's conclusion that no exhaustion of administrative remedies was required. The court correctly recognized the exhaustion doctrine "'depends on a mixed bundle of considerations, including, but not limited to, expertise of administrative bodies, statutory interpretation, pure questions of law, constitutional issues, discretionary authority of the courts, primary, concurrent, or exclusive jurisdiction, inadequacies of administrative bodies, etc.'" (R248 at 6) (quoting Garaas as Co-Trustees of Barbara Susan Garaas Fam. Tr. v. Petro-Hunt, L.L.C., 2024 ND 34, ¶ 12, 3 N.W.3d 156). There are also "several well-recognized exceptions," including "when a legal question simply involves statutory interpretation and does not need the exercise of an agency's expertise in making factual decisions." Id. at ¶ 12.

[¶20] The parties agreed there were no factual determinations to be made or any record that, if developed, would assist the court. (R248 at 6). Rather, the court need only

decide questions of law, which require no agency expertise to enable the court to rule. Id. This Court inherently agreed when it decided similar questions in NWLA I. Even in this appeal, Summit and Basin continue to urge the Court to rule on the merits, which belies the suggestion that the Commission must hear the matter before the Court can rule.

[¶21] Finally, as the district court made clear, "the NDIC could not grant adequate relief" because it "cannot hold a jury trial regarding compensation[.]" Id. Moreover, it makes little sense to demand NDFB wait for the Commission to act when NDFB challenges the very authority of the Commission to act, particularly when exhaustion is grounded in the separation of powers doctrine and aims to recognize the agency's authority. Olympic Fin. Grp., Inc. v. N.D. Dep't of Fin. Insts., 2023 ND 38, ¶¶ 21, 24, 561 N.W.2d 634. The Pore Space Statutes improperly delegate judicial authority to the executive; there is no agency authority that must be recognized because the statutes are unconstitutional.

CONCLUSION

[¶22] For the reasons stated above, the Court should reverse the dismissal of NDFB's claims and remand for consideration on the merits of the constitutional challenges.

Dated: March 21, 2025.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID#06278
Attorney for North Dakota Farm Bureau

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
West Fargo, ND 58078-0458
(701) 282-3249
acook@ohnstadlaw.com

CERTIFICATE OF COMPLIANCE

[¶23] In accordance with N.D.R.App.P. 32(a)(8)(A), the undersigned certifies that this brief contains 12 pages, excluding the signature page and addenda, which is within the limit of 12 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
Andrew D. Cook, ND ID#06278

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