

North Dakota Supreme Court Solidifies Surface Owners' Rights to Profit From and Seek Damages for Unauthorized Use of Pore Space

August 10, 2022 D.J. Beaty, Garrett Martin, Julia Peebles

PRACTICES Litigation, Energy Litigation, Oil and Gas, Oil and Gas Litigation

In an August 4, 2022, decision concerning the use of pore space, the *North Dakota Supreme Court in Northwest Landowners Association v. State*, struck down North Dakota's statutes that authorized oil and gas operators to utilize pore space without owner compensation or consent. --- N.W.2d ---, 2022 WL 3096724 (N.D. August 4, 2022).

Background:

The North Dakota Legislative Assembly enacted Senate Bill 2344 ("S.B. 2344") in 2019. The legislation (1) allowed unrestricted use of pore space by oil and gas operators, (2) excluded pore space from the definition of "land" in the North Dakota Oil and Gas Production Damage Compensation Act, such that landowners were not automatically entitled to compensation for a producer's use of subsurface pore space, and (3) barred tort claims altogether for injection or migration of substances into pore spaces. In response, the Northwest Landowners Association (the "Association") filed a complaint against the State challenging S.B. 2344's constitutionality. The Association argued that SB 2344 precluded surface owners from seeking compensation for the loss of their otherwise valuable subsurface pore space or asserting damages through tort actions relating to uses of pore space. The district court granted the Association's motion for summary judgment, ruling that S.B. 2344 was unconstitutional on its face and striking down the entirety of the legislation as an impermissible taking under state and federal Constitutions. The State, joined by producer Continental Resources, appealed.

The North Dakota Supreme Court:

The North Dakota Supreme Court largely affirmed the district court's decision. The Court first reviewed the historical scope of landowner rights to pore space and determined that North Dakota law long established that surface owners had a property interest in pore space. Historically, North Dakota surface owners were entitled to compensation for a mineral developer's use of pore space for disposal of saltwater. Also, prior to the enactment of S.B. 2344, surface owners could sue a mineral developer for trespass for use of the surface estate that was not "reasonably necessary" to develop the mineral estate. Against this backdrop, the Court determined that portions of S.B. 2344 constituted a per se physical-invasion taking because it permitted operators to "physically invade a landowner's property by injecting substances into the landowner's pore space." The Court then concluded that S.B. 2344 effectively removed landowners' rights to exclude operators from trespassing and disposing waste into their pore space and that "[s]urface owners have a right to compensation for the use of their pore space for disposal and storage operations." Relatedly, the court rejected an argument that the "dominant mineral estate" saved the legislation from a takings violation, because it barred landowners from bringing tort actions for "disposal operations beyond the scope of the implied easement [that] would otherwise be considered a trespass." As such, the Court upheld the fundamental finding that S.B. 2344 was facially unconstitutional and struck down

the offending portions of the legislation. Nevertheless, the Court partially reversed the trial court's wholesale invalidation of S.B. 2344 on the grounds that portions of the legislation—such as a provision designating use of carbon dioxide as acceptable for enhanced recovery of oil, gas, and other minerals—did not implicate an unconstitutional taking.

The Takeaway:

While the decision does not prohibit use of pore space by oil and gas operators, the decision emphasizes the need for surface-owner consideration prior to use of pore space. The decision effectively establishes landowners' ownership of pore space and entitles surface owners to compensation for pore-space use. Producers seeking to use pore space may consider contractual agreements with surface owners, such as surface use agreements, before using pore space to avoid claims, including those in tort that S.B. 2344 formerly barred. And even when such agreements are not necessary because of other contractual or administrative rights, producers may still want to consider compensation for pore space under the Oil and Gas Production Damage Compensation Act.