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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, vs. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant.	Supreme Court No. 20210148 Civil No. 05-2019-CV-00085

Appeal from Judgment Entered on April 13, 2021
Case No. 05-2019-CV-00085
County of Bottineau, Northeast Judicial District
The Honorable Anthony S. Benson, Presiding

NORTH DAKOTA PETROLEUM COUNCIL'S BRIEF OF AMICUS CURIAE IN SUPPORT OF THE CONSTITUTIONALITY OF N.D.C.C. §§ 38-08-25, 38-11.1-01, 38-11.1-03, AND 47-31-09 AND REVERSAL OF THE DECISION BELOW

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STATEMENT OF IDENTITY AND INTEREST

[¶ 1] The North Dakota Petroleum Council ("NDPC") is a trade association representing more than 500 companies. Senate Bill 2344 ("SB 2344") amended and reenacted N.D.C.C. §§ 38-08-25, 38-11.1-01, 38-11.1-03, and 47-31-09 to clarify provisions related to the use of subsurface geologic formations for oil and gas operations. Because many NDPC members use subsurface geologic formations in North Dakota for conducting their operations, the question presented before this Court is of vital interest to the NDPC.

[¶ 2] Pursuant to N.D.R.App.P. 29(a)(4)(D), NDPC states this brief was authored by counsel for the NDPC, and not counsel for any other party. Nor did any other party's counsel or person other than the NDPC contribute money to prepare or submit this brief.

BACKGROUND

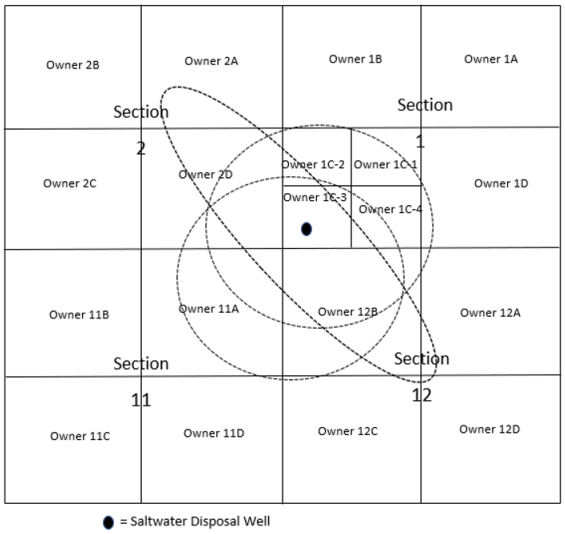
[¶ 3] N.D.C.C. ch. 38-11.1 (the "Damage Compensation Act") was enacted in 1979 to compensate surface owners for damage to the surface estate from oil and gas operations, a right that surface owners did not have at common law. See generally 1979 N.D. Laws ch. 396, § 1 (creating Chapter 38-11.1); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979); see also Kartch v. EOG Res., Inc., No. 4:10-cv-014, 2010 WL 4260103 at **1-3 (D.N.D. Oct. 22, 2010). The Legislature desired to protect the "economic well-being of individuals engaged in agricultural production." N.D.C.C. § 38-11.1-01(1). The Damage Compensation Act did not define the term "land," nor did it address pore space. In 2009, N.D.C.C. ch. 47-31 (the "Pore Space Act") was enacted, creating a statutory definition for the term "pore space." The purpose of the Pore Space Act is to regulate the storage of carbon dioxide for North Dakota's lignite industry. The lack of definitions for the terms "surface owner," "land," and "pore space" in the Damage Compensation Act and the Pore Space Act, as they related to oil and gas operations, led to uncertainty over whether the Damage Compensation Act required an operator to compensate a surface owner for using pore space pursuant to a contractual or property right.

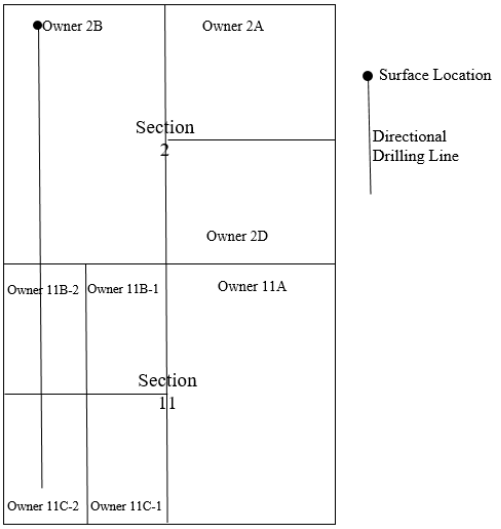
[¶ 4] That uncertainty occurred against the backdrop of an unprecedented increase in oil and gas exploration and production in North Dakota over the past two decades and an increased need to use pore space for purposes related to that exploration and production. For example, pore space may be utilized for the disposal of salt water that is a necessary incident of oil and gas production by way of injection. See Mosser v. Denbury Res., Inc., 112 F. Supp. 3d 906, 913 (D.N.D. 2015). Pore space may also be used for the temporary storage of produced natural gas or the permanent storage of carbon dioxide. See Northwest Landowners Association v. Stenehjem, et. al., Case No. 05-2019-CV-00085, Bottineau County, North Dakota, Doc. ID# 83, at ¶¶ 22, 26. These are just a few of the purposes for which pore space has been and may yet be used as North Dakota's oil and gas fields mature.

[¶ 5] The uncertainty associated with the Damage Compensation Act and the increased use of pore space culminated in Mosser v. Denbury Resources, Inc., 2017 ND 169, 898 N.W.2d 406. In Mosser, the Mossers sued Denbury Resources, Inc. ("Denbury"), primarily alleging they were entitled to damages under the Damage Compensation Act because Denbury's injection of saltwater into their pore space diminished their land's value and deprived them of the opportunity to use and access their pore space. Id. at ¶ 4. The United States District Court for the District of North Dakota certified questions to this Court, including whether "the provisions of N.D.C.C. § 38-11.1-04 that require compensation be paid to a surface owner for 'lost land value' and 'lost use of and access to' a surface owner's land extend to a mineral developer's use of the subsurface pore space for the disposal of saltwater." Id. ¶ 18. This Court determined that "pore space is part of the surface owner's interest in the land," and that "a surface owner may be entitled to compensation under N.D.C.C. § 38–11.1–04 for a mineral developer's use of the surface owner's subsurface pore space for disposal of saltwater." Id. at ¶ 24.

[¶ 6] Mosser raises far-reaching pragmatic concerns, given the necessities of horizontal drilling and the possibly transient nature of fluids or other materials injected into

subsurface strata. Consider the hypothetical saltwater disposal operation and the hypothetical horizontal well depicted respectively in the following illustrations:





In the first illustration, Owner 1C-3 owns the SWSW of Section 1, upon which the Operator plans to drill a saltwater disposal well. Prior to commencing this work, the Operator compensates Owner 1C-3 for damages under N.D.C.C. § 38-11.1-04. Owner 1C-3's land is surrounded by lands owned by multiple other Owners, however. And, as indicated by the circles on the illustration (as only three of infinite possibilities), it is possible that the injected saltwater could migrate in any direction, and into pore space owned by any of the other Owners, away from the well bore. Requiring the Operator to predict where the injected saltwater will migrate, and requiring the Operator to compensate each of those other Owners for possible entry into their pore space, is problematic in practice. If the Operator predicts that saltwater will migrate into the SW of Section 11 but no such migration occurs, the Operator might compensate Owner 11C despite no saltwater migrating into Owner 11C's pore space. As a corollary, if the Operator predicted that saltwater would not migrate into the SE of Section 11, but such migration occurs, Owner 11D might sue the Operator under the Damage Compensation Act. The second illustration depicts a horizontal well drilled on a 1280-acre spacing unit with a surface location in the

NWNW of Section 2 and a terminus in the SWSW of Section 11. Mosser could be read to require not only an award of compensation to Owner 2B for the surface location, but also unprecedented awards of compensation to Owner 2B, Owner 11B-2, and Owner 11C-2 for the subsurface pore space occupied by the wellbore. The foregoing examples, like countless others, demonstrate the need for clarity regarding the meaning of "land" and "pore space" related to pore space use. This is exactly what SB 2344 provides.

[¶ 7] On April 18, 2019, Governor Doug Burgum signed SB 2344, amending and reenacting certain portions of the Damage Compensation Act and the Pore Space Act. Specifically, Section 1 of SB 2344 amended N.D.C.C. § 38-08-25 to allow the use of subsurface geologic formations as reasonably necessary to allow for various authorized oil and gas operations, including disposal operations.[1] Section 3 of SB 2344 added and amended certain definitions in N.D.C.C. § 38-11.1-03, including "land," "pore space," and "surface owner".[2] Section 4 of SB 2344 amended N.D.C.C. § 47-31-09 to provide that contractual obligations are not impaired, and that the mere "[i]njection or migration of substances into pore space for disposal operations…is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort." (emphasis added). The act allows that a tort may occur if a subsurface migration of fluids results in foreseeable and actual damages.

[¶ 8] The Northwest Landowners Association ("NWLA") brought action against the Defendants/Appellants (collectively, the "State"). The NWLA alleges that Section 1 is unconstitutional because it "allows oil and gas operators to use landowners' subsurface pore space;" that Section 3 is unconstitutional because it "changes the very definition of 'land' in the Act so that the definition excludes pore space, thus divesting landowners from

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[1] "Subsurface geologic formation" is defined as "any cavity or void, whether natural or artificially crated, in a subsurface sedimentary stratum." N.D.C.C. § 38-08-25(5).

[2] Section 2 of SB 2344, which is not disputed, made clear that actual title to pore space, as set forth by N.D.C.C. § 47-31-03 would not be altered by the addition/amendment of these definitions. See N.D.C.C. § 38-11.1-01(4).

the long-vested right to compensation for the use of pore space;" and, that Section 4 is unconstitutional because it "bars landowners from using tort law…to remedy subsurface trespasses." Northwest Landowners Association v. Stenehjem, et. al., Case No. 05-2019-CV-00085, Bottineau County, North Dakota, Doc. ID# 83. Each count alleges SB 2344 facially violates the Takings Clauses of the Federal and North Dakota Constitutions. The District Court agreed with the NWLA. The State now appeals to this Court.

ARGUMENT

I. Senate Bill 2344 Does Not Impair Property Rights in Pore Space.

[¶ 9] The Federal and North Dakota Constitutions provide that private property shall not be taken for public use without just compensation. U.S. Const. amend. V.; N.D. Const. art. I, ¶ 16 (collectively referred to herein as "Takings Clauses"). As set forth herein, SB 2344 does not take any private property interest, and the NWLA's facial takings challenges to the contrary must fail. See Sorum v. State, 2020 ND 175, ¶ 21, 947 N.W.2d 382 (setting forth this Court's standard of review for facial challenges to statutes); see also Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 295 (1981) (setting for the standard for facial takings claims).

A. Senate Bill 2344 does not change ownership of pore space, nor does it permit non-owners to damage pore space without compensation.

[¶ 10] Section 1 of SB 2344 does not change ownership of any pore space. Section 1 of SB 2344 provides that surface owners may not "prohibit or demand payment for the use of subsurface geologic formation [i.e., pore space] for unit operations for…disposal operations…conducted under this chapter." N.D.C.C. § 38-08-25(5). The NWLA argues that this "effectively turn[s] landowners' privately-owned subsurface pore space into communal property …." Northwest Landowners Association, Case No. 05-2019-CV-00085 at Doc. ID# 83. This is simply not the case—SB 2344 explicitly provides that title to pore space is not altered, amended, repealed, or modified. N.D.C.C. § 38-11.1-01.

[¶ 11] Owners other than the surface owner, e.g., owners of a severed mineral estate, often have contractual and property rights to use the pore space beneath a surface owner's land. "Where there is no express constitutional or statutory declaration upon the subject the common law is applied." Reese v. Reese-Young, 2020 ND 35, ¶ 20, 938 N.W.2d 405. Common law is "determined by studying the decisions of our federal and state courts and the writings of past and present students of our country's law." Id. at ¶ 21 (citation omitted). Decisions by this Court and others make clear that surface owners do not have an absolute right to use of their pore space as against a dominant mineral estate.

[¶ 12] Generally, surface owners have no right to prevent the use of their pore space when the land is subject to an oil and gas lease. The dominant nature of a severed mineral estate allows the mineral estate owner to use as much of the surface estate as is reasonably necessary to develop the mineral estate. Kerbaugh, 283 N.W.2d at 135. This includes those activities that are "necessary, incident to or convenient for the economical operation for the production of oil from the land." Feland v. Placid Oil Co., 171 N.W.2d 829, 832 (N.D. 1969). When the mineral estate is subject to an oil and gas lease, the lessee has that same right to utilize the surface estate generally and the pore space specifically Mosser, 112 F. Supp. 3d at 914. The surface owner has no right to interfere with or prevent that use. See Feland, 171 N.W.2d at 834. Section 1 of SB 2344 does not authorize use of pore space in such situations beyond what is already permitted as a matter of contract and property law, which would be necessary for a facial constitutional violation to occur.

[¶ 13] Nor does SB 2344 vary the common law concerning subsurface migration of fluids. Federal and state courts have determined that "the trend in the law is that property owners do not have the right to exclude deep subsurface migration of fluids." FPL Farming, Ltd. v. Texas Nat. Res. Conservation Comm'n, No. 03-02-00477-CV, 2003

WL 247183, at *3 (Tex. App. Feb. 6, 2003).[3] In Chance v. BP Chemicals, Inc., the Ohio Supreme Court reviewed a claim that BP Chemicals trespassed on the plaintiff's land when legally injected fluids laterally migrated into the plaintiff's subsurface. 670 N.E.2d 985, 986. The court reasoned that "[j]ust as a property owner must accept some limitations on the ownership rights extending above the surface of the property, there are also limitations on property owners' subsurface rights." Id. at 992. Surface owners' "subsurface rights in their properties include the right to exclude invasions of the subsurface property that actually interfere with [landowners'] reasonable and foreseeable use of the subsurface." Id. (emphasis added).[4] The Chance holding strikes the proper balance between protecting a landowner's interests and supporting oil and gas development for the public interest.

[¶ 14] Section 1 of SB 2344 does not permit any use of pore space beyond that already allowed by the common law. Nor does it preclude surface owners from using or leasing their pore space. See Mosser, 112 F. Supp. 3d at 919. It merely requires an owner prove actual damages to maintain a claim for subsurface migration.[5] Because there is no property interest taken by SB 2344, Section 1 of SB 2344 is facially constitutional.

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[3] See also Chance v. BP Chemicals, Inc., 670 N.E.2d 985 (Ohio 1996); Railroad Comm'n v. Manziel, 361 S.W.2d 560, 568-69 (Tex.1962); Raymond v. Union Tex. Petroleum Corp., 697 F.Supp. 270, 274-75 (E.D.La.1988); Mongrue v. Monsanto Co., 249 F.3d 422 (5th Cir. 2001); W. Edmond Salt Water Disposal Ass'n v. Rosecrans, 226 P.2d 965, 970 (Okla. 1950); Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 11–17 (Tex. 2008).

[4] This holding is supported by several legal academics. See e.g., Owen L. Anderson, Lord Coke, the Restatement, and Modern Subsurface Trespass Law, 6 TEX. J. OIL GAS & ENERGY L. 203 (2010-11); Owen L. Anderson, "Subsurface Trespass": A Man's Subsurface Is Not His Castle, 49 WASHBURN L.J. 247 (2010); John G. Sprankling, Owning the Center of the Earth, 55 UCLA L. REV. 979 (2008).

[5] Surface owners do not typically have a reasonable and foreseeable future use for pore space. Most pore space is found at depths of over 2,500 feet below the surface. "[V]irtually all subsurface activities by humans…occur in the very shallow crust within 1,000 feet of the surface." Sprankling, supra, at 994. "The only current economic uses below this point in the United States are oil and gas wells, special wells used for the disposal of chemical wastes, and certain mines." Id. (emphasis added). Even if a given surface owner did have a use for their pore space, the migration of some fluids likely would not "actually interfere" with that use, given the vast amount of pore space in North Dakota's subsurface geologic formations. *See* Chance, 670 N.E.2d at 992.

B. There is no property interest in unaccrued statutory benefits.

[¶ 15] Section 3 of SB 2344 does not take private property, as there is no property interest in a statutory benefit that has not yet accrued. Section 3 of SB 2344 excluded "pore space," as defined at N.D.C.C. § 38-11.1-03(7), from the definition of "land," as defined at N.D.C.C. § 38-11.1-03(3), that otherwise applies under the Damage Compensation Act. As a result, the compensatory provisions of the Damage Compensation Act for lost value, lost access, and lost use do not apply to pore space. See N.D.C.C. § 38-11.1-04.

[¶ 16] The benefits of the Damage Compensation Act were created by the Legislature. The Legislature created these benefits in 1979 "to ameliorate what was perceived to be inequities resulting from application of the common law doctrine that the mineral estate is dominant and permits cost-free use of the surface estate." Mosser, 112 F. Supp. 3d at 918. The compensation granted under the Damage Compensation Act is a matter of legislative grace, not common law property rights. The Legislature has "the power to amend and repeal its own acts when in its judgment it sees fit." State ex rel. Strutz v. Baker, 71 N.D. 153, 299 N.W. 574, 576 (N.D. 1941). The wisdom of the Legislature's decision to provide this benefit in 1979, or to repeal it in 2019, is not for the Court to determine. See Meier v. N.D. Dept. of Human Serv., 2012 ND 134, ¶ 9, 818 N.W.2d 774.

[¶ 17] Nothing about the Legislature's repeal of statutory benefits facially offends the Takings Clauses. Bowen v. Gilliard, 483 U.S. 587, 604 (1987); see also Tri Cty. Wholesale Distributors, Inc. v. Labatt USA Operating Co., LLC, 828 F.3d 421, 429 (6th Cir. 2016) (the state is free to take away a statutory right it created); Pittman v. Chicago Bd. of Educ., 64 F.3d 1098, 1104 (7th Cir. 1995) ("[A] statute is not a commitment by the legislature to never repeal the statute."). The Legislature is free to enact statutes that convey benefits to landowners, but by conveying such benefits it does not forfeit its right to withdraw them. And as the Mosser Court noted, it is the Legislature's prerogative to

amend statutory protections, including N.D.C.C. ch. 38-11.1, when prompted by judicial decisions. See Mosser, 2017 ND 169, ¶ 24, 898 N.W.2d 406. Surface owners have no property interest in an expectation of statutory benefits. Cf. Ennis v. Williams County Bd. of Com'rs,. 493 N.W.2d 675, 679 (N.D. 1992) (noting a "unilateral expectation" of statutory benefits "does not create a constitutionally protected property interest").

[¶ 18] The right to compensation under the Damage Compensation Act is a statutory benefit, but this benefit does not give rise to a property interest when it has not yet accrued. Notably, the Damage Compensation Act still applies to the persons for whom it was originally intended—the "person who holds record title to the surface estate on which a drilling operation occurs or is conducted." N.D.C.C. § 38-11.1-03(9). The statute still requires compensation associated with lost land value and lost use and access to the surface estate other than the pore space, which is more than would be available at common law. See Mosser, 112 F. Supp. 3d at 918. Section 3 of SB 2344 is facially constitutional.

C. There is no property interest in unaccrued tort claims.

[¶ 19] Section 4 of SB 2344 does not take private property, as there is no property interest in unaccrued tort claims. Section 4 of SB 2344 created and enacted N.D.C.C. § 47-31-09, providing that "[i]njection or migration of substances into pore space for disposal operations…is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort." (emphasis added). Section 4 of SB 2344 is facially sound.

[¶ 20] There is no recognized property interest in an unaccrued tort claim. This Court has made clear that "[t]here is no vested right to a specific remedy." Manitoba Pub. Ins. Corp. v. Dakota Fire Ins. Co., 2007 ND 206, ¶ 8, 743 N.W.2d 788, 791. Moreover, "a legal claim for tortious injury affords no definite or enforceable property right until reduced to final judgment." Salmon v. Schwarz, 948 F.2d 1131, 1143 (10th Cir. 1991) (emphasis

added).[6] "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." See New York Central R.R. Co. v. White, 243 U.S. 188, 198 (1917)). Put simply, the law does not recognize a property interest in prospective tort claims upon which a taking could occur in this case.

[¶ 21] It is also important to note that Section 4 of SB 2344 does not bar all tort claims. Section 4 of SB 2344 still allows surface owners to pursue tort claims should subsurface migration into neighboring pore space result in actual damages arising from interference with the owner's use. This requires a showing of more than mere migration of legally injected fluids into the pore space, which other courts have recognized does not necessarily cause actual damage. Cf. Burlington Res. Oil & Gas Co. LP v. Lang and Sons, Inc., 2011 MT 199, ¶ 28, 259 P.3d 766. This modifies, for instance, common law civil trespass, which requires "a person intentionally and without a consensual or other privilege…[enter] land in possession of another or any part thereof or causes a thing or third person to do so" but for which "actual harm is not one of the requisite elements . . . ." G&D Enterprises v. Liebelt, 2020 ND 213, ¶¶ 17-18, 949 N.W.2d 853 (internal citation omitted). SB 2344 limits civil trespass to those situations where actual harm has occurred to the surface owner's pore space. The only difference is that the owner must prove damages associated with subsurface migration; if actual damages exist, there is liability in tort for those damages. Contrary to Plaintiffs' contention, no owner is barred "from using tort law, such as trespass, to remedy subsurface trespasses." See Northwest Landowners

[6] See also Zucker v. Rodriguez, 919 F.3d 649, 659 (1st Cir. 2019); Ducharme v. Merrill-Nat'l Lab'ys, 574 F.2d 1307, 1309 (5th Cir. 1978); Arbour v. Jenkins, 903 F.2d 416, 420 (6th Cir. 1990); Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1145 (8th Cir. 2015); Bowers v. Whitman, 671 F.3d 905, 914 (9th Cir. 2012); Sowell v. Am. Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989).

Association, Case No. 05-2019-CV-00085 at Doc. ID# 83. Surrounding surface owners (those owning land upon which the drilling operations are not conducted) still have an action for tort when an operator has no contractual or property right to use the pore space and such drilling operations cause some actual harm to the surface owners' pore space.

[¶ 22] Because Section 4 of SB 2344 does not bar a surface owner from using tort law in instances involving actual damages, nor do unaccrued tort claims constitute a property interest, Section 4 of SB 2344 is facially constitutional.

II. Senate Bill 2344 Does Not Result in a Facial Taking.

[¶ 23] If the Court finds, despite the foregoing, that SB 2344 may impair a property interest, it must determine whether SB 2344 facially takes that property interest. The posture is critical because an "important distinction" exists between a facial and an as-applied takings challenge. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494 (1987). By challenging SB 2344 on its face, the NWLA has "presented no concrete controversy concerning either application of [SB 2344 to a particular operation] or its effect on specific parcels of land." Hodel, 452 U.S. at 295. The issue before this Court is whether the "mere enactment" of SB 2344 constitutes a taking. Id. "The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" Id. at 295-96. A facial takings claim places a "heavy burden" on a claimant in fighting "an uphill battle." Keystone, 480 U.S. at 495, 501-502.

[¶ 24] SB 2344 does not amount to a physical taking because it does not permit physical invasion of pore space beyond what the common law already permits for a dominant mineral estate or a lateral migration of fluids. To sustain its facial challenge as a regulatory taking, the NWLA must show that SB 2344 denies a surface owner of all

economically viable uses of the surface estate. Generally, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." Andrus v. Allard, 444 U.S. 51, 65–66 (1979). To determine whether a governmental action constitutes a taking, not just a destruction of one "strand of the bundle" of property rights, the Court should apply the parcel-as-a-whole rule. See Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 17, 705 N.W.2d 850. Under this rule, a court must "compare the value that has been taken from the property with the value that remains in the property." Keystone, 480 U.S. at 497. A court "does not divide a single parcel into discrete segments," but focuses on "the nature of the interference with rights in the parcel as a whole." Id.

[¶ 25] Under the parcel-as-a-whole rule, the question is whether SB 2344 denies a surface owner an economically viable use of the surface estate. The clear answer is no. SB 2344 only affect the cavities or voids in the subsurface sedimentary stratum. See N.D.C.C. 38-11.1-03(7). Surface owners are still otherwise allowed to use the surface state as they see fit, whether for agricultural, commercial, or other purposes. As such, this is not a situation where S.B. 2344 "deprives the owner of all or substantially all reasonable uses of the property." Wild Rice River, 2005 ND 193, at ¶ 17. SB 2344, rather, "does nothing more than regulate one particular future use of property while leaving available to the property owner all other uses." Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 347 (N.D. 1987). That is not a taking sufficient to sustain a facial challenge. Hodel, 452 U.S. at 296 (concluding no facial taking occurred when the "Act does not purport to regulate alternative uses to which the . . . lands may be put.").

[¶ 26] The same conclusion applies even when considering the pore space specifically. N.D.C.C. § 47-31-05 does not allow a surface owner to sever the pore space from the surface estate, but surface owners may still freely use the pore space. See Mosser,

112 F. Supp. 3d at 919. They may do so by using the pore space themselves or leasing the pore space to someone else. Id. Nothing in SB 2344 prevents a surface owner from doing either. See Hodel, 452 U.S. at 296 (concluding no facial taking occurred when "the Act does not, on its face, prevent beneficial use of [the] lands."). The NWLA avers SB 2344 will dissuade surface owners or their lessees from using pore space, but such speculation does not support a conclusion that a facial taking has occurred. Keystone, 480 U.S. at 501-02 (concluding that a property owners' facial attack under the Takings Clause "must surely fail" without evidence of how the taking affected the property). And even if the NWLA's averments were true, "a reduction in the value of property is not necessarily equated with a taking." Andrus, 444 U.S. 51 at 66. SB 2344 does not deprive a surface owner of all economically viable uses of the surface estate, or even the pore space itself; they are free to use the surface estate and the pore space, subject to the rights of the dominant mineral estate. SB 2344 is not a facial taking of the pore space. See Hodel, 452 U.S. at 296.

[¶ 27] The NWLA's arguments concerning the alleged takings occasioned by SB 2344 more appropriately concern as-applied, rather than facial, takings. Keystone, 480 U.S. at 493–94. Facial constitutional challenges do not permit consideration of "ad hoc, factual inquires" that "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." Id. at 495 (quoting Hodel, 452 U.S. at 296). Whether a particular factual scenario results in interference that rises to the level of a taking is a case-by-case determination that cannot resolved on this facial challenge to SB 2344. Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (noting each takings claim turns on "situation-specific factual inquiries" to determine whether a taking occurred).

[¶ 28] The issue presented to this Court by the NWLA's facial takings challenge is straightforward—whether the "mere enactment" of SB 2344 necessarily denies surface owners all economically viable uses for their property. Hodel, 452 U.S. at 295. SB 2344 does no such thing. Notwithstanding any impact on the pore space, the surface owner may freely use all other aspects of their surface estate. Even if the pore space were considered as separate property distinct from the remainder of the surface estate (it is not), the surface owner may still freely use their pore space. Nothing in SB 2344 necessarily results in the "taking" of a surface owner's pore space. "Under these circumstances, [the NWLA's] facial attack under the Takings Clause must surely fail." Keystone, 480 U.S. at 501-02.

III. Invalidation of SB 2344 Is Not an Appropriate Remedy.

[¶ 29] Finally, even assuming for the sake of argument that SB 2344 effectuates a taking of private property, the District Court erred in invalidating SB 2344 and enjoining its enforcement. The Takings Clauses proscribe the taking of private property without just compensation; the Takings Clauses do not proscribe the taking of private property. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985), overruled on other grounds by Knick v. Twp. Of Scott, Pennsylvania, 139 S. Ct. 2162 (2019). When a taking has occurred, the property owner's appropriate remedy is compensation. See id.; see also Wilkinson v. Bd. of Univ. and School Lands, 2017 ND 231, ¶ 24, 903 N.W.2d 51. Equitable relief is generally not available to redress a taking. Knick, 139 S. Ct. at 2177; see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984). This precedent is clear—enjoining or invalidating a statute or other government action is generally not the appropriate remedy for violations of the Takings Clauses. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,

482 U.S. 304, 315 (1987) (noting the Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

[¶ 30] Here, the NWLA requests a declaration that SB 2344 is facially unconstitutional under the Takings Clauses and requests an injunction against its enforcement. Even if the NWLA is correct that SB 2344 violates the Takings Clauses (it is not), the NWLA errs in its requested relief. Even if SB 2344 effects a taking (it does not), compensation is the remedy dictated by the Takings Clauses. Nowhere in its Complaint or briefing before the District Court did the NWLA allege or demonstrate that property owners impacted by SB 2344 lack means to obtain just compensation under North Dakota law. Without that showing, the relief that the NWLA requests is simply not available or appropriate under the Takings Clauses. Knick, 139 S. Ct. at 2177.

CONCLUSION

[¶ 31] For the foregoing reasons, this Court should hold that SB 2344 does not facially violate the Takings Clauses and reverse the judgment of the district court.

Dated this 8th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Amicus Curiae, North Dakota Petroleum Council., hereby certifies the above brief is in compliance with Rule 29(a)(5) of the North Dakota Rules of Appellant Procedure. The total number of pages in the brief, excluding the certificate of service and this compliance totals 19 pages.

Dated this 8th day of November, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, vs. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant	Supreme Court No. 20210148 Civil No. 05-2019-CV-00085

Appeal from Judgment Entered on April 13, 2021
Case No. 05-2019-CV-00085
County of Bottineau, Northeast Judicial District
The Honorable Anthony S. Benson, Presiding

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 8th, 2021, I filed North Dakota Petroleum Council's Brief of Amicus Curiae in Support of the Constitutionality of N.D.C.C. §§ 38-08-25, 38-11.1-01, 38-11.1-03, and 47-31-09 electronically with the Clerk of the North Dakota Supreme Court through the E-filing Portal which served copies by e-mail on the following:

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