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# IMPACT OF THE 45Q TAX CREDIT ON THE OWNERSHIP OF PORE SPACES

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### *Introduction*

With the ownership of real property comes the bundle of property rights associated with such ownership. These rights are the right of possession, the right of control, the right of exclusion, the right of enjoyment, and the right of disposition. It is in the exercise of these rights that a property owner can truly be said to be the owner and controller of the land. There are times, however, when these rights are not absolute. For example, through the police power, the government has the power to take private property for public benefit and use if it provides just compensation to the property owner.[1]

A pore space is defined as, "[a] cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum."[2] In other words, a pore space is an area beneath the ground capable of storing carbon dioxide ("$CO_2$") and other potentially harmful gases or liquids. Pore spaces are often used for carbon sequestration activities that are known to be beneficial for the environment when trying to combat climate change.[3] In North Dakota, pore space ownership has always been vested in the surface owners of a property rather than the mineral owners.[4] Mineral owners own the right to extract and use minerals found beneath the surface of a piece of land. There is also an implied easement between mineral owners and surface owners giving mineral owners the right to use the surface land for anything reasonably necessary for the exploration, development, or transportation of the minerals.[5] So, while the ownership of pore spaces is vested in the surface owners, mineral owners have access to them through this implied easement.

With the recent passage of the Inflation Reduction Act ("IRA")[6], the question of who owns property rights in subsurface pore spaces has increased in relevance. The IRA provides tax benefits for companies that engage in carbon sequestration activities, meaning more oil and gas companies will be looking for pore space in which to engage in these activities, including the 45Q tax credit. The 45Q tax credit provides a financial incentive for potential recipients to permanently capture and store

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1. Chicago, B. & Q. Ry. Co. v. People of State of Ill., 200 U.S. 561 (1906).
2. N.D. Cent. Code Ann. § 47-31-02 (West 2009).
3. Grayson P. Walker, *A Regulating and Watchful Law: Oil and Gas Conservation Law & the North Dakota Industrial Commission,* 5 Oil & Gas, Nat. Resources & Energy J. 427 (2020)
4. N.D.C.C. § 47-31-03 (West 2009).
5. Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022).
6. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat 1818 (2022).

https://digitalcommons.law.ou.edu/onej/vol9/iss1/7

$CO_2$. The IRA enhances the 45Q tax credit anywhere from two to three times in value across the board from what it once was. The credit is gained for 12 years after the carbon capture and storage takes place and, starting in 2027, will be adjusted for inflation.[7] The IRA also outlines direct payment and transferability options for receiving the credit. The purpose of broadening the 45Q tax credit is to increase the use of carbon capture and storage activities. Climate change experts believe these activities will be instrumental in the fight against climate change going forward and think it is important to incentivize more industries to engage in them.[8]

In a recent Supreme Court of North Dakota decision, *Northwest Landowners Association v. State*[9], the court reaffirmed that surface owners have a statutory property right in their subsurface pore spaces. The state had passed a law granting access to these pore spaces to oil and gas companies for use in carbon sequestration activities. The court ruled that this statute violated the takings clause of both the Constitution of North Dakota and the United States Constitution. The court made an important, and arguably correct, decision in this case. In North Dakota, it has long been statutorily established[10] that surface owners own the property right in subsurface pore spaces, not the mineral owners. However, in some states this is not the case, or at least it is not as clear.[11] In states like North Dakota, this decision should be relatively simple: any law allowing companies access to a private citizen's land without just compensation is a taking and should not survive a constitutional challenge.

Property rights in pore spaces are important in this context because, while oil and gas companies will benefit from the 45Q tax credit, landowners also stand to gain economically from their property rights in subsurface pore spaces. Any attempt by a legislative body to deprive them of the right to use their land or exclude others from it without just compensation should constitute a per se taking. Landowners should retain the right to benefit economically from the use of their land.

It is possible that other state legislatures will feel it is necessary to regulate which third parties are using landowners' pore spaces for carbon sequestration activities. These states would do well to learn from North

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7. *Id*.

8. Blayne N. Grave, *Carbon Capture and Storage in South Dakota: The Need for A Clear Designation of Pore Space Ownership*, 55 S.D. L. Rev. 72 (2010).

9. *Nw. Landowners Ass'n*, 978 N.W.2d 679.

10. N.D. Cent. Code Ann. § 47-31-03 (West 2009).

11. Blayne N. Grave, *Carbon Capture and Storage in South Dakota: The Need for A Clear Designation of Pore Space Ownership*, 55 S.D.L. Rev. 72 (2010).

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Dakota and ensure that they establish a compelling public use for the pore spaces being taken and that they provide just compensation to the landowners. Otherwise, the statute will likely be ruled unconstitutional as a taking of private property without just compensation in violation of the Fifth Amendment.[12] What follows is an analysis of the Supreme Court of North Dakota's decision in *Northwest Landowners Association* as well as suggestions for how future state legislatures can abide by federal and state takings clauses.

## *I. Background*

### *A. Law Before the Case*

Before this case was decided by the Supreme Court of North Dakota, surface owners, not mineral owners, had a property right in their subsurface pore spaces in North Dakota. This right is statutorily defined in N.D.C.C. § 47-31-02.[13] In fact, the court says that this right "has been in our law since before statehood"[14] in *Mosser v. Denbury Resources, Inc*. Pore spaces are also statutorily defined as a "cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum" by N.D.C.C. § 47-31-02. In a legislative session leading up to the passage of SB 2344, an advocate for the landowners used a sponge to illustrate what pore spaces are and how they work. Like a sponge, soil beneath the ground contains many pockets of space that can be used for the storage of $CO_2$ and other potentially harmful gasses and liquids.[15]

Use of pore spaces for carbon sequestration activities is made an increasingly important issue by the passage of the IRA. The increases to the tax incentives that already existed for engaging in carbon sequestration activities will push big corporations to seek out pore space that can be used to do so.[16]

### *B. Mineral Rights and SB 2344*

As for the rights of mineral owners concerning pore spaces, *Hunt Oil Company v. Kerbaugh* states that mineral owners have access to the surface estate when it is "reasonably necessary" to "explore, develop, and transport

12. U.S. Const. Amend. V.

13. N.D.C.C. § 47-31-02.

14. Mosser v. Denbury Res., Inc., 112 F. Supp. 3d 906, 918-19 (D.N.D. 2015).

15. Brief of Appellee, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085) 2022 WL 678797.

16. Biden signs landmark bill with corporate tax implications, 2022 WL 3592215.

the minerals."[17] In *Mosser*, the court held that pore spaces were included in the definition of "land" in this context. Therefore, mineral owners could use those spaces if it was reasonably necessary but could be sued for trespass by the surface owner if it was not, or alternatively the surface owner could be entitled to compensation.[18] Thus, the use of pore spaces by parties other than the surface owners is not unprecedented.

The legislation that North Dakota attempted to pass, SB 2344, would have given third parties access to the pore spaces belonging to surface landowners, whether this use was reasonably necessary or not. The bill also prevented landowners from seeking any compensation for such use of their land.[19] The bill stated that the purpose of these policies was to benefit the economy of North Dakota, presumably in an attempt to meet the public use requirement for an appropriate taking of private property.[20]

Before this case, the property rights in subsurface pore spaces unequivocally resided with the surface owners, with mineral owners owning an "implied easement" for reasonably necessary operations.[21] The decision made by the court was important to preserve the status of the law in this area and prevent the government from seizing the property rights of landowners. While parties other than the surface owners of land can be granted access to pore spaces, sometimes through implied easements, the state attempted to grant access to third parties that had no such easements while eliminating the opportunity for surface owners to exercise their rights concerning their pore spaces.

## *II. Statement of the Case*

### *A. Legal Issue*

The issue in this case is whether S.B. 2344[22] is facially unconstitutional and whether it constitutes a taking under the federal and state takings clauses. The Association chose to make a facial challenge rather than an as applied challenge, so for it to prevail there could not have been any scenario in which the statute could be constitutionally applied.[23]

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17. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135-136 (N.D. 1979).
18. Mosser, 112 F. Supp. 3d 906, 918-19.
19. N.D.C.C. § 38-08-25 (West 2009).
20. Brief of Appellee, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085) 2022 WL 678797.
21. .Nw. Landowners Ass'n v. State, 978 N.W.2d 679, 689 (N.D. 2022).
22. N.D.C.C. § 38-08-25 (West 2019).
23. Sorum v. State, 2020 ND 175, 947 N.W.2d 382 (N.D. 2020).

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The state of North Dakota passed S.B. 2344[24], which in part gave third parties access to the subsurface pore spaces of landowners to be used for carbon sequestration activities. The bill also deprived landowners of any remedial action, such as suing for trespass, for the loss of property rights they would suffer as a result of the bill. Surface owners were effectively robbed of their right to exclude under the statute. Northwest Landowners Association ("the Landowners") filed a facial constitutional challenge, arguing that S.B. 2344 was a taking because it deprived surface owners of several sticks in the bundle of property ownership without just compensation. The state argued that the taking of pore spaces was part of its police power and that surface owners should anticipate that the use of their land will be restricted in some ways.[25]

The district court ruled in favor of the Landowners, holding that the surface owners have a right to compensation for use of their pore spaces and that there was not a way to apply the law that would be constitutional under the federal or state takings clauses.[26]

The Supreme Court of North Dakota held parts of S.B. 2344 to be unconstitutional and enough to establish a per se physical taking without just compensation.[27] Among the unconstitutional provisions was the provision allowing third parties access to the pore spaces belonging to surface owners. The parts of the bill that did not constitute a per se taking were deemed severable by the Supreme Court. The state's arguments did not fare well before the court, as the court stated that even when the state uses its police power, property owners are still owed just compensation and property owners should expect to have the use of their property regulated, but not altogether taken from them.[28]

As the landowners point out, under North Dakota law, a regulatory action taken by the government that limits the rights of property owners can be a per se taking if it involves a permanent physical invasion or if the landowner is deprived of all economic use of the property.[29] SB 2344 allows third parties to have access to private property for the purposes of

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24. N.D.C.C. § 38-08-25 (West 2019).

25. Nw. Landowners Ass'n, 978 N.W.2d at 693.

26. *Id*.

27. *Id.* at 694. The unconstitutional sections of the statute were those in which property interest in pore spaces was seized and granted to third parties for use in carbon sequestration activities.

28. *Id.* at 694.

29. Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, 705 N.W.2d 850 (N.D. 2005).

engaging in carbon sequestration activities.[30] The nature of these activities involves the injection of $CO_2$ into the pore space where it is stored permanently. Thus, after a landowner's pore space is used in such a manner, the pore space has been permanently physically invaded by a third party and the landowner's available economic use of their property has been diminished. When land is invaded permanently in this manner, a per se taking has occurred.[31]

*B. Arguments of the Parties*

The state presented two main arguments in this case: that the taking of pore spaces falls within the scope of their police power and that landowners "took title with the expectation that their pore space would be limited by state law."[32]

According to the court, prior cases leave it clear that the state's police power can be limited by the takings clause. Furthermore, even when a state action falls within the scope of the police power, just compensation is still be owed to the owner of the effected property.[33] The police power is not an absolute power, but rather a power subject to limits outlined in the Constitution. In this case, the state attempted to use its police power to deprive landowners of some of the sticks in the bundle of property ownership. It is clearly not within the scope of the police power to deprive people of the right to economically benefit from the use of their property. The police power is to be used to "promote the order, safety, health, morals, and general welfare of society."[34] What SB 2344 sought to accomplish cannot be said to promote any of those things, and even if it did, North Dakota case law calls for just compensation when the police power is used to take private property unless in the case of emergency.[35] In this case, the state does not demonstrate any clear emergency that would allow the state to get around the constitutional limitations of the police power.

The constitutional limits on the police power outlined by the court are the federal and state takings clauses. The federal takings clause, found in

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30. N.D.C.C. § 38-08-25 (West 2019).

31. Chicago, B. & Q. Ry. Co. v. People of State of Illinois, 200 U.S. 561 (1906).

32. Nw. Landowners Ass'n, 978 N.W.2d at 694.

33. *Id.,* see also Wilson v. City of Fargo, 141 N.W.2d 727 (N.D. 1965).

34. State ex rel. City of Minot v. Gronna, 79 N.D. 673, 699, 59 N.W.2d 514, 532 (N.D. 1953).

35. 978 N.W.2d 679, 694 (N.D. 2022); Irwin v. City of Minot, 2015 ND 60, ¶ 8, 860 N.W.2d 849 (quoting Wilson, 141 N.W.2d at 728).

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the Fifth Amendment,[36] states that private property shall not be taken or destroyed without just compensation. The takings clause in the North Dakota constitution is similar, but also provides additional protection for property owners. It states, "[p]rivate property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner."[37] Based on the applicable caselaw and the language of these constitutional provisions, this argument from the state is an obvious failure. While it may be within the scope of its police power to take property, the state is required to provide just compensation to the property owners.

The other argument the state makes is that property owners should be aware that the use of their property may at times be limited by state law.[38] However, as the court points out, this argument only applies to regulatory takings and not to physical invasions.[39] Because SB 2344 is not a regulation on how landowners can use property, but rather a physical invasion of that property by the state, it is not a regulatory taking and the landowners did not take title to their property with the understanding that its use could be limited by state law. Thus, the state's second argument also falls flat in the face of precedent. Among the things a landowner should expect when taking ownership of land, being deprived of all economically beneficial use by the government is not one of them.[40]

The state claims that SB 2344 does not take away all the landowners' property right in their pore space. It argues that the landowners should be aware that their property rights in pore spaces "are not absolute"[41] and that as the servient estate in the implied easement with the mineral estate,[42] the landowners should have been aware that another party could conceivably use the landowners' pore space for an activity reasonably necessary for mineral extraction. The state also argues that it had always had power to authorize oil development and that landowners were, or should have been, aware of this.[43] Although landowners are the servient estate in the implied

36. U.S. Const. Amend. V.

37. N.D. Const. art. I, § 16.

38. Nw. Landowners Ass'n, 978 N.W.2d at 694.

39. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

40. *Id.*

41. Brief of State Defendants/Appellants & Addendum, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085), 2021 WL 7290578.

42. Nw. Landowners Ass'n, 978 N.W.2d 679.

43. *Id.* at 694.

easement with the mineral owners, that is not reason for them to expect to be deprived of all economically beneficial use of their land.

In its brief, the state also claims that the Supreme Court of North Dakota has never ruled that a landowner be compensated for the use of their pore space for mineral development.[44] The state asserts that SB 2344 does not deprive landowners of the ability to receive compensation for the use of their pore spaces.

The Association's arguments center around its takings challenge. It argues that S.B. 2344 acts to deprive them of their property rights, thus violating the Fifth Amendment of the United States Constitution and Article I § 16 of the North Dakota Constitution.[45] While these provisions are similar, the North Dakota takings clause provides more protection for landowners, going so far as to protect their economic interests in being property owners.[46] In analyzing this challenge, the court stated, "[w]hen this court interprets constitutional provisions, 'we apply general principles of statutory construction.'"[47] The court determined that because the landowners had a statutorily defined property right in the subsurface pore space, that property right is protected by the constitutional provisions outlined above. As for the takings challenge itself, the court determined that SB 2344 constituted a per se taking under prior caselaw.[48] According to the prior caselaw, there are two categories of per se takings, including one "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[49] Because SB 2344 granted access to pore spaces for third party usage, the property owners suffered a physical invasion. Thus, SB 2344 constituted a per se taking under the physical invasion category.

*C. Decision of the Case*

The court's decision in this case made it clear that surface owners have a statutorily defined and protected property right in their subsurface pore spaces and that the government cannot take those property rights from them without just compensation. For there to be a violation of the takings clause, the party asserting a violation must have a property right in the property

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44. Brief of State Defendants/Appellants & Addendum, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085), 2021 WL 7290578.

45. U.S. Const. Amend. V and N.D. Const. art. I, § 16.

46. Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W. 2d 344, 346 (N.D. 1987).

47. State v. Storm, 2019 ND 9, ¶ 6, 921 N.W.2d 660 (N.D. 2019).

48. Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850 (N.D. 2005).

49. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

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being seized.[50] Because surface owners have a statutorily defined property interest in their subsurface pore spaces, the court determined that the pore spaces are constitutionally protected.[51] This decision can be characterized as a reaffirmation of a long-standing recognition of the property right of surface owners. This reaffirmation comes at an important time when the economic benefit of pore spaces may become more important to landowners. While the case does not specifically mention the Inflation Reduction Act, the implications of the IRA on landowners' ability to economically benefit from their land are clear. The decision of the North Dakota Supreme Court in this case leaves it clear that when oil and gas companies seek the use of pore spaces in order to obtain tax benefits, they must give compensation to the owners of these pore spaces; the government cannot simply grant the companies access to the property and its uses.

### *D. Unconstitutional Provisions*

The court specifically ruled which parts of SB 2344 were unconstitutional, including a portion of section 3 that changed the statutory definition of "land" in North Dakota to exclude pore space.[52] These provisions were held to be severable from the rest of the otherwise constitutional provisions in the statute. The court cited North Dakota caselaw and statutes[53] that call for unconstitutional provisions to be severed and for the remainder of the statute to be left intact.[54] The court also cited the *Sorum* case which states that if a statute is facially unconstitutional, that means the legislature exceeded their constitutional power in enacting it.[55] The landowners filed a facial challenge in hopes that the unconstitutional statute would be treated "as if it never were enacted."[56]

### *E. Importance of Decision*

It was important for the court to reject the unconstitutional portions of this statute clearly and soundly. This was the decision the law required, law which was designed to prevent the government from unjustly depriving citizens of their property rights. Why the North Dakota legislature thought it could legislate something that so clearly constitutes taking without just

50. Phillips v. Washington Legal Found., 524 U.S. 156 (1998).
51. Nw. Landowners Ass'n, 978 N.W.2d at 690.
52. Nw. Landowners Ass'n, 978 N.W.2d at 695.
53. N.D.C.C. § 1-02-20 (West).
54. State v. Fischer, 349 N.W.2d 16, 18 (N.D. 1984).
55. Sorum v. State, 2020 ND 175, ¶ 21, 947 N.W.2d 382 (N.D. 2020).
56. *Id.*

compensation is another question, but the court made the correct decision. If there is potential for economic gain deriving out of the use of one's land, that landowner should be the one to benefit. Otherwise, the very essence of what it is to be a property owner loses its meaning, and a precedent is set for other sticks in the bundle of property ownership to be diminished or taken away. Because North Dakota has a statutory definition of "pore space," it is clear that in North Dakota, surface owners also own property rights in their subsurface pore spaces. So, while this decision was an important one to ensure those rights stayed with the surface owners, it was also a relatively easy decision for the court to make. In most states, property rights in pore spaces also belong to surface owners rather than mineral owners. However, in those states where that is not the case, and where there is no statutory definition of "pore space", a similar statute might be enforceable if it is unclear who has property rights in the pore space. Other state legislatures that attempt to regulate usage of pore spaces would do well to learn from the mistakes of the North Dakota legislature and ensure compliance with federal and state takings clauses.

The court ruled that SB 2344 was unconstitutional and constituted a per se taking because it acted as a permanent physical invasion of private property without just compensation.[57] It also effectively deprived landowners of the economic use and benefit of their pore spaces.[58] The state argued that these actions fell within the parameters of its police power and were therefore constitutional. It is true that the state has the authority, through the police power, to take private property for public use. Here, the state argued that the public use it intended to serve was the economy of North Dakota. The bill also contained provisions that prevented landowners from seeking compensation through tort claims. Thus, SB 2344 constituted a permanent physical invasion and a deprivation of economic benefit while preventing landowners from obtaining just compensation. Applying the takings analysis to the facts of this case makes it clear that the North Dakota state legislature overstepped its bounds by attempting to pass this legislation. With the increased focus and determination to mitigate climate change issues, and particularly in light of the expansion of the 45Q tax credit in the IRA, other state legislatures may be inclined to pass legislation similar to SB 2344 to make it easier for oil and gas companies to obtain access to pore spaces. However, other state legislatures must learn from the North Dakota legislature's mistakes and avoid passing a law that constitutes

57. NW. Landowners Ass'n, 978 N.W.2d at 690.
58. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

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a per se taking. To accomplish this, legislatures must establish a stronger public need that the land must be taken to serve and give just compensation to the affected landowners. I offer some solutions to these problems legislatures may face if they want to pass similar legislation.

## *III. Analysis*

### *A. Public Use*

To deprive a landowner of their property rights under the police power, the state action must advance a public welfare.[59] It may be that this public welfare incidentally benefits some private party as well, and this does not negate the benefit to the public.[60] *Murphy v. Amoco Prod. Co.*, an 8th circuit court of appeals case, says just that, "[t]he decision to build a public road, for example, may advance the public welfare even though it also benefits the contractors who are hired to build it and the property owners whose land becomes more valuable because the road makes it more accessible."[61] Therefore, while oil and gas companies stand to benefit greatly from the provisions in SB 2344 that grant them access to pore spaces, this does not mean that the state would have been unable to establish a legitimate public interest in doing so. One of the issues with SB 2344 is that the state of North Dakota did not establish a compelling enough public use for the land that it seized through the statute. Other state legislatures that see fit to pass similar legislation would do well to establish a more compelling public use for the land being seized, to satisfy constitutional requirements. The fact that landowners will potentially suffer while oil and gas companies stand to benefit greatly does not preclude a state from using its police power, provided the public benefits as well. *Murphy* also points out that when two parties have competing interests in land, such as landowners and companies seeking tax credits, the government can use its police power to benefit one of those parties if their interest in the land is also the public's interest.[62] Therefore, other state legislatures should be able to pass similar legislation if the public interest in doing so is legitimate.

The state of North Dakota argued that it passed SB 2344 to benefit "the state's coal and power industries and to benefit the state economy."[63] As the

59. Chicago, B. & Q. Ry. Co. v. People of State of Illinois, 200 U.S. 561 (1906).
60. Murphy v. Amoco Prod. Co., 729 F.2d 552 (8th Cir. 1984).
61. *Id.*
62. *Id.*
63. Brief of Appellee, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085) 2022 WL 678797.

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landowners point out, how the local economy is benefitted by depriving individuals of their ability to benefit economically from the use of their land is a mystery. The state does not seem to have done enough to establish the public use it needs to use its police power to take land from private landowners. Simply stating that it is to "benefit the economy" is not a strong enough argument without explicitly stating how these actions will benefit the economy. Given what society now knows about the risks of climate change and how those risks can be mitigated by reducing carbon emissions through carbon sequestration, a stronger public use argument would have been to benefit the environment and give oil and gas companies with vast resources access to pore spaces to engage in such activities.[64] Other state legislatures seeking to pass legislation similar to SB 2344 should take this into consideration when explaining what public need is being served by the use of the police power to take private land. Stating that it is to "benefit the economy" is overbroad and uncompelling. Part of ensuring that the use of the police power does not constitute a per se taking is establishing a compelling public use for the land that is being taken.[65] I suggest that benefitting the environment and reducing carbon emissions is a more compelling reason to allow third party access to pore spaces than merely benefitting the economy.

Carbon capture and storage is a process involving the removal of harmful $CO_2$ emissions and storing them underground, usually in pore spaces.[66] According to climate experts, $CO_2$ emissions in the atmosphere are one of the main reasons for temperature increase. Removing these emissions is key to keeping the environment safe and maintaining the future habitability of the planet. The 45Q tax credit is meant to incentivize large corporations to engage in carbon capture and storage. The state of North Dakota also apparently wanted to incentivize oil and gas companies to engage in these activities by granting them access to pore spaces in SB 2344. It is in the best interest of each state in the US to incentivize carbon sequestration activities among large companies with the resources to make a difference. The current Presidential administration clearly agrees since it enhanced the 45Q tax credit in the Inflation Reduction Act to incentivize carbon sequestration and storage activities.

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64. Blayne N. Grave, *Carbon Capture and Storage in South Dakota: The Need for A Clear Designation of Pore Space Ownership*, 55 S.D.L. Rev. 72 (2010).

65. Square Butte Elec. Co-op. v. Hilken, 244 N.W.2d 519, 523 (N.D. 1976).

66. Blayne N. Grave, *Carbon Capture and Storage in South Dakota: The Need for A Clear Designation of Pore Space Ownership*, 55 S.D.L. Rev. 72 (2010).

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It arguably would have been a stronger argument for the state to claim environmental benefits as its reasoning for granting third parties access to private land instead of generically stating it did so to "benefit the economy."[67] Without any specific evidence as to how the economy benefits from the regulations SB 2344 imposes, the state's argument carries little weight. If, however, another state was to attempt to enforce a similar statute, the public use argument could potentially be stronger if the argument centered around benefitting the local environment by reducing $CO_2$ emissions, thus helping in the fight against climate change or at least making it easier for large companies to engage in the fight against climate change and excessive carbon emissions.

In the state's brief, it claims that it was the landowners' assertion that SB 2344 was written to promote the coal industry and benefit the economy and that the real reason for the law was to update the legislation to be in accordance with *Mosser*.[68] Whether the court agrees with the state or the landowners on this particular point, it is still apparent that the state needed to present a more compelling public use for taking the landowners' pore spaces. Due to the lack of such a justification combined with the lack of avenues for compensation for the loss of land, the court had to rule that SB 2344 was a per se taking in violation of the Constitution of North Dakota and the Constitution of the United States.

### *B. Just Compensation*

Even if the State of North Dakota's argument that seizing private land for the benefit of the economy was strong enough, it would still be required to provide just compensation to the landowners for SB 2344 to avoid being classified as a per se taking. SB 2344 deprives landowners of any economic benefit deriving from their land by preventing them from seeking compensation for the use of the pore spaces that are part of the surface owner's property. The bill outright grants access to these pore spaces and prevents landowners from seeking compensation.[69] The bill also prevents landowners from seeking compensation in the form of tort claims, such as suing for damages brought about by trespass. The prevention of any way to seek compensation for losing the right to use and exclude others from their land is part of what makes SB 2344 so clearly a per se taking. Through the

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67. Brief of Appellee, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085) 2022 WL 678797.

68. Mosser v. Denbury Res., Inc., 2017 ND 169, 898 N.W.2d 406 (N.D. 2017).

69. Brief of Appellee, Nw. Landowners Ass'n v. State, 978 N.W.2d 679 (N.D. 2022) (No. 05-2019-CV-00085) 2022 WL 678797.

police power, the state may take private property for public use, but it must provide just compensation. Here, not only is no compensation offered, but any avenue for obtaining just compensation is shut off.[70] If other state legislatures feel inclined to pass similar legislation in the name of being active in the fight to reduce $CO_2$ emissions, they will need to ensure that the bill provides just compensation for the landowners, or else it will likely be ruled a per se taking.

As for how to provide just compensation to landowners for the limitation of their right to use and exclude others from their pore spaces, I propose two options. First, leave available the option to sue for tortious conduct. Second, if the government is going to find oil and gas companies to lease the pore space to, ensure that surface owners get a percentage of the money that comes in from the lease.

The right of landowners to sue for tortious conduct (i.e., nuisance and trespass) has been afforded to landowners of North Dakota since at least 1979[71] with the enactment of NDCC 38-11.1.[72] This statute allowed landowners to receive compensation for the use of their property, whether or not such use was based in the implied easement that mineral owners have in the surface estate. The ability to sue for and receive compensation for the use of land provides value to the landowner; value that the landowner had a property right in thanks to Chapter 38.11.1. Thus, under Chapter 38.11.1, North Dakota landowners were permitted to sue for loss of value of their land due to mineral extraction whether or not the activities of the mineral owners were reasonably necessary to the mineral extraction. SB 2344 attempted to take away this right by amending 38-11.1 and not allowing landowners to receive compensation for loss of value to their land, making the law function as a per se taking.[73] Other states attempting to pass similar legislation should consider leaving a path for landowners to receive compensation for the use of their land through the ability to sue for trespass and other tortious conduct. In *Mosser,* the court ruled that landowners were owed compensation under Chapter 38.11.1 for the use of their subsurface pore space.[74] This avenue to financial compensation for the use of land is key to avoiding a per se taking, and its absence is one of the reasons SB 2344 was ruled as such. If landowners cannot choose who has access to

70. *Id*.
71. N.D.C.C. § 38-11.1-04 (West 2011).
72. N.D.C.C. § 38-11.1 (West 2011).
73. NW. Landowners Ass'n, 978 N.W.2d at 687.
74. Mosser v. Denbury Res., Inc., 2017 ND 169, 898 N.W.2d 406 (N.D. 2017).

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their land, including pore spaces,[75] they should still be able to gain financially from the use of their land or be compensated for the loss of their rights. The language of SB 2344 leaves landowners with no remedy for the loss of their property rights or the potential misuse of their land, including misuse involving tortious conduct.

In *Mosser,* the issue before the court was whether the mineral owner owed financial compensation to the surface owner under Chapter 38.11.1 for use of the surface owner's pore space to dispose of salt water.[76] The court ruled that the pore space belonged to the surface owner and that the surface owner was entitled to compensation for the use of that pore space under 38.11.1. The language of 38.11.1 allows for surface owners to recover damages for the "lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations."[77] The *Mosser* court specified that compensation for damages were not limited to the diminution in value of the property because of the use, but also extended to the surface owner's lost opportunities to use their pore space. Here, by seizing surface owner's pore space and leasing it to oil and gas companies to use for carbon sequestration activities, the North Dakota government would deprive surface owners of the opportunity to use their pore spaces as they wish. *Mosser* declares that the ability to sue for damages that result from the use of one's land is of value to the landowner; therefore, if that right is maintained, the landowner is not deprived of all of the value of their land.[78]

Under SB 2344, landowners would have been left without a remedy for lost value or opportunity to use their land.[79] The law was struck down, in part, because there was no avenue for landowners to receive just compensation for the loss of their land. Other state legislatures that feel it necessary to pass similar legislation should be aware of this and provide some recourse for surface owners to be compensated for the use of their land. Allowing landowners to sue for trespass and other tortious conduct is an option that would prevent landowners from being deprived of all the value of their land.

The next option for providing just compensation to landowners for the use of their pore spaces is to grant them a percentage of the lease that the oil and gas companies will pay. While it might be better for landowners to find

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75. *Id.*
76. *Id.*
77. N.D.C.C. § 38-11.1.
78. Mosser, 2017 ND 169, 898 N.W.2d 406.
79. Nw. Landowners Ass'n, 987 N.W.2d at 689.

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their own lessees to maximize the financial opportunities that come from their land ownership, if the government has an adequate publicly beneficial reason for seizing pore spaces, granting a percentage of the revenue to the landowners could be a way to provide just compensation for the loss of land. Some landowners may even prefer to pass the responsibility of finding a lessee onto the government to simplify the process. As discussed above, state legislatures that feel the need to pass legislation similar to SB 2344 must present a more convincing public need than the North Dakota legislature did. If the public need is strong enough, the physical invasion of private land can be justified if there is just compensation. It could be argued by other state legislatures that there is a public need to protect the environment and mitigate the consequences of climate change by increasing the amount of carbon sequestration activities performed in that state. The argument should be that this public need to mitigate climate change effects is so urgent that it cannot be left up to individual citizens to all make the right decision, because it is unlikely that enough landowners will make their pore space available to make a significant difference.

If this public need is accepted as sufficient to avoid a per se taking, there still would need to be just compensation provided to the landowners. This compensation could come in the form of a percentage of the rent paid for the leasing of pore spaces. The government could seek out oil and gas companies interested in the tax benefits that engaging in carbon sequestration would provide them, and lease out the pore spaces of landowners, much like the basic structure of SB 2344. However, a provision could be built into the lease to ensure that landowners are justly compensated for the use of their pore spaces, thus fully avoiding a per se taking by establishing a compelling public need and providing just compensation to the landowners.

## *Conclusion*

In *Northwest Landowners Association v. State*, the Supreme Court of North Dakota correctly ruled that SB 2344 was a taking that deprived landowners of all the value of their property rights in their subsurface pore spaces. For a law to avoid constituting a taking, it must establish a public use for the land being taken and provide just compensation to the landowner. SB 2344 failed in both regards. However, given the recent passage of the Inflation Reduction Act and its intent to fight climate change, other state legislatures may find it necessary to regulate the usage of pore spaces for carbon sequestration activities. These practices can

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benefit the environment, and more oil and gas companies will soon be interested in engaging in them to qualify for the new tax benefits in the Inflation Reduction Act.[80] If other state legislatures find it necessary to regulate the use of pore spaces for carbon sequestration activities, those states will need to establish a compelling public interest for doing so and provide just compensation to affected landowners to avoid the fate of the North Dakota statute SB 2344.

80. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat 1818 (2022).

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