

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BOTTINEAU

NORTHEAST JUDICIAL DISTRICT

Northwest Landowners Association,)
)
 Plaintiff,)
)
 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 as the Chairman and a)
 member of the North Dakota Industrial)
 Commission, and 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.)

Case No 05-2023-CV-00065

COMPLAINT

Plaintiff, for its Complaint in the above-referenced action, states and alleges as follows:

I. INTRODUCTION

1. Article I, § 1 of the Constitution of North Dakota declares: “All individuals are by nature equally free and independent and have certain inalienable rights, among which [is that] of ... acquiring, possessing and protecting property....”
2. Article I, § 16 of the Constitution of North Dakota declares: “Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner.... Compensation shall be ascertained by a jury, unless a jury be waived.”

3. The Supreme Court of North Dakota recently said: “The North Dakota Constitution provides overlapping and broader protection [than the federal constitution] against government interference with property rights: ‘Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner.’ N.D. Const. art. I, § 16. It ‘was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.’” *Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 16, 978 N.W.2d 679.

II. JURISDICTION

4. This Court has jurisdiction over the claims in this complaint pursuant to Article VI, § 8 of the Constitution of North Dakota and N.D.C.C. § 27-05-06, and under N.D.C.C. ch. 32-23. This action arises under the Constitution of North Dakota, and other law cited herein. Plaintiff seeks a declaration that N.D.C.C. §§ 38-22-10 and 38-25-08 constitute an unconstitutional taking without just compensation under art. 1, § 16 of the Constitution of North Dakota and of the United States Constitution, Amendment V (as applied to the state of North Dakota through Amendment XIV), and are a violation of procedural and substantive due process under art. 1, § 12 and of the United States Constitution, Amendment V and Amendment XIV.
5. N.D.C.C. § 38-22-03(7) is an unconstitutional delegation of legislative power under N.D. Const. Art. IV, § 13 and *State v. Riggan*, 2021 ND 87, 959 N.W.2d 855, and under Art. I, § 1 of the United States Constitution.
6. Sections 32-15-06 and 24-05-09 are unconstitutional authorizations of physical invasions without just compensation in violation of art. 1, § 16 of the Constitution of North Dakota and of the United States Constitution, Amendment V (as applied to the state of North Dakota through Amendment XIV).

III. NORTHWEST LANDOWNERS ASSOCIATION

7. Plaintiff Northwest Landowners Association is a North Dakota nonprofit corporation that strives to bring landowners and stewards of North Dakota's resources together, to protect, inform and educate. The mission of Northwest Landowners Association is to create a network of information on issues as they pertain to mineral owners, landowners, operators, or occupants; to share and discuss the development of North Dakota's resources; and to become educated, such that its members may help maintain a balance in resource development and property rights of individuals in a responsible manner. Northwest Landowners Association strives to provide unbiased education regarding current and past resource development processes, to bring together those with similar issues to solve common problems, to aid in the development of comprehensive legislation to protect the resources of the citizens of North Dakota well into the future, and to ensure a more harmonious coexistence between landowners, residents, and the energy industry.
8. During the 2019 legislative session, Northwest Landowners Association addressed legislators numerous times during committee and subcommittee hearings regarding pore space and property rights as they related to Senate Bill 2344. During one legislative hearing, President Troy Coons explained the landowners' position on the use of their pore space:

We as landowners are not opposed to the storage of gas or to CO₂ injection. Almost all of the saltwater disposals in this state are operated through voluntary contracts with landowners. As an organization we have always tried to work with industry and regulators to address our concerns. Unfortunately, we were not at the table when this bill was drafted, and we are opposed to this unprecedented taking of private property rights. We remain committed to working cooperatively with industry, and our invitation to sit down and address the concerns raised by this bill is an open offer. But this bill remains offensive to what we stand for....

Fundamentally, the laws at issue in this matter suffer from the same constitutional infirmity as Senate Bill 2344, and for the same reasons, Northwest Landowners Association brings this action to protect the landowners of North Dakota.

IV. DEFENDANTS

9. The State of North Dakota through its Legislative Assembly has adopted laws which on their face contravene the Constitution of North Dakota.
10. The North Dakota Industrial Commission has jurisdiction to administer Chapters 38-22 and 38-25 of the North Dakota Century Code and purported authority to issue orders “amalgamating” property.
11. The Industrial Commission consists of Chairman Doug Burgum (Governor), Attorney General Drew Wrigley, and Agriculture Commissioner Doug Goehring. Its office is located at 600 East Boulevard Avenue, Department 405, Bismarck, ND 58505-0840.
12. The Honorable Doug Burgum is the Governor of the state of North Dakota and is the chair and a member of the North Dakota Industrial Commission pursuant to N.D.C.C. §§ 54-17-02, 54-17-03. The Office of Governor Burgum is located at 600 East Boulevard Avenue, Bismarck, North Dakota 58505. The Constitution of North Dakota, art. V, § 7, obligates Governor Burgum to ensure that the laws of the State of North Dakota “are faithfully executed.” Governor Burgum is named as a Defendant to this action solely in his official capacities.
13. The Honorable Drew Wrigley is the Attorney General of the state of North Dakota and a member of the North Dakota Industrial Commission pursuant to N.D.C.C. § 54-17-02. The Office of the Attorney General is located at 600 East Boulevard Avenue, Department 125, Bismarck, North Dakota 58505. “The Attorney General is the principal law officer of the state with duties and authorities coextensive with the public legal affairs of the whole community.”

North Dakota State Bd. of Higher Educ. v. Jaeger, 2012 ND 64, ¶ 17, 815 N.W.2d 215. The North Dakota Century Code authorizes the Attorney General to “[i]nstitute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of any state officer” and to “[a]pppear and defend all actions and proceedings against any state officer in the attorney general’s official capacity in any of the courts of this state....” N.D.C.C. § 54-12-01(2), (3). The Attorney General is named as a Defendant to this action solely in his official capacity and in his role as chief legal officer of the state and as one of three members of the North Dakota Industrial Commission pursuant to N.D.C.C. § 54-17-02. The Attorney General is not named in his official capacity as the attorney to the North Dakota Industrial Commission.

14. The Hon. Doug Goehring is the Agriculture Commissioner of the state of North Dakota and is one of three members of the North Dakota Industrial Commission pursuant to N.D.C.C. § 54-17-02. Commissioner Goehring is named as a Defendant to this action solely in his official capacities.

V. BACKGROUND

15. This relates to the prior ruling of this Court and the ruling of the Supreme Court of North Dakota in *Nw. Landowners Ass'n v. State*, 2022 ND 150, 978 N.W.2d 679 striking down Senate Bill 2344. This action also relates to the ruling of the United States Supreme Court quoted therein, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), wherein the Court stated that “a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that ‘compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.’” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

16. In *Nw. Landowners Ass'n v. State* the Supreme Court of North Dakota struck down parts of Senate Bill 2344 (2019), which authorized access to a landowner's pore space by third parties without just compensation in violation of the state and federal constitutions.
17. Senate Bill 2344 (2019) deprived private landowners of their property and of any remedies for temporary and permanent physical occupations of their property, effectively displacing their possession of this private property and handing it over to select private entities for private economic purposes.
18. The Hon. Anthony Benson struck down Senate Bill 2344 on January 21, 2021 in Case Number 05-2019-CV-00085 stating: "The provisions of SB 2344, both individually and taken together, prohibit landowners from obtaining any compensation for any oil and gas operators' use of their pore space estate, whether reasonable or unreasonable, whether at large or small volumes, whether at a large financial detriment or small financial detriment. These provisions act as an absolute bar to not just money damages, but to all other meaningful remedies, including trespass, nuisance or other torts. The three provisions at issue here, enacted or amended within SB 2344, render pore space worthless in every instance of its application, and it is unconstitutional on its face."
19. On August 4, 2022, the Supreme Court of North Dakota affirmed, stating: "Senate Bill 2344 constitutes a per se taking. It allows third-party oil and gas operators to physically invade a landowner's property by injecting substances into the landowner's pore space. As demonstrated in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), physical invasion by water, even for a limited duration, results in a per se taking. Furthermore, because S.B. 2344 permits oil and gas operators to use pore space to temporarily or permanently store or dispose of gases and wastes, the bill authorizes

an occupation of the landowners' property. Similar to the unconstitutional regulation in *Cedar Point Nursey*, S.B. 2344 grants oil and gas operators a right of access to the landowners' private property. Further, as in *Loretto*, 458 U.S. at 436, S.B. 2344 restricts landowners from having any control over the 'timing, extent, or nature of the invasion.'" *Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 26, 978 N.W.2d 679.

Carbon Dioxide Amalgamation

20. North Dakota Century Code Chapter 38-22 provides authority and procedures for the North Dakota Industrial Commission to authorize the geologic sequestration of carbon dioxide.

21. N.D.C.C. § 38-22-10 is unconstitutional on its face.

22. N.D.C.C. § 38-22-10 provides:

38-22-10. Amalgamating property interests.

If a storage operator does not obtain the consent of all persons who own the storage reservoir's pore space, the commission may require that the pore space owned by nonconsenting owners be included in a storage facility and subject to geologic storage.

23. N.D.C.C. § 38-22-02 defines "storage facility" as "...the reservoir, underground equipment, and surface facilities and equipment used or proposed to be used in a geologic storage operation... ."

24. N.D.C.C. § 38-22-02 defines "geologic storage" as "...the permanent or short-term underground storage of carbon dioxide in a storage reservoir."

25. N.D.C.C. § 38-22-02(6) defines "reservoir" to mean "a subsurface sedimentary stratum, formation, aquifer, cavity, or void, whether natural or artificially created, including oil and gas reservoirs, saline formations, and coal seams suitable for or capable of being made suitable for injecting and storing carbon dioxide."

26. N.D.C.C. § 38-22-08(14) provides that "[b]efore issuing a permit, the commission shall find... [t]hat all nonconsenting pore space owners are or will be equitably compensated."

27. The Constitution of North Dakota, Article 1, section 16 states: “Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner... . Compensation shall be ascertained by a jury, unless a jury be waived.”
28. N.D.C.C. § 38-22-10 authorizes the North Dakota Industrial Commission to “allow[] third-party ... operators to physically invade a landowner’s property by injecting substances into the landowner’s pore space” which is precisely what the Supreme Court of North Dakota ruled is a *per se* taking because it constitutes a physical invasion of the landowners’ property.
29. Although N.D.C.C. § 38-22-08(14) requires the commission to find that all nonconsenting pore space owners are or will be equitably compensated, this finding is not a suitable replacement for the safeguards guaranteed by the Constitution of North Dakota and Chapter 32-15.
30. The Constitution requires that just compensation be paid before any taking of private property, and a determination and payment of just compensation, not equitable compensation, is constitutionally required before this taking can occur. A landowner must also be given a jury trial for this determination unless it is waived and just compensation must be paid or deposited before a taking may occur.

Oil and Gas Storage

31. North Dakota Century Code Chapter 38-25 provides authority and procedures for the North Dakota Industrial Commission to authorize the geologic storage of oil and gas.
32. N.D.C.C. § 38-25-08 is unconstitutional on its face.
33. N.D.C.C. § 38-25-08 provides in part: “**Amalgamating property interests.** If a storage operator does not obtain the consent of all persons owning a pore space and of mineral interest owners when required by this chapter, the commission may require the interest owned by the

nonconsenting owners be included in an approved storage facility and subject to geologic storage if the minimum percentage of consent is obtained as specified in this chapter.”

34. N.D.C.C. § 38-25-01 defines “storage facility” as “the reservoir, salt cavern, underground equipment, and surface facilities and equipment used or proposed to be used in an underground storage operation.”

35. N.D.C.C. § 38-25-01 defines “geologic storage” as “the underground storage of oil or gas in a storage reservoir or salt cavern.”

36. N.D.C.C. § 38-25-01(8) defines “reservoir” as “a subsurface sedimentary stratum, formation, aquifer, or void, whether natural or artificially created, including oil and gas reservoirs and saline formations suitable for or capable of being made suitable for injecting, storing, and withdrawing oil or gas....”

37. N.D.C.C. §§ 38-25-05(18), 38-25-06(15), and 38-25-07(16) all generally state that the commission must find that all nonconsenting owners are or will be equitably compensated before issuing a permit.

38. The Constitution requires that just compensation be paid before any taking of private property, and a determination and payment of just compensation, not equitable compensation, is constitutionally required before this taking can occur. A landowner must also be given a jury trial for this determination unless it is waived.

Unconstitutional delegation to North Dakota Industrial Commission

39. N.D.C.C. § 38-22-03(7) states that the North Dakota Industrial Commission has authority to “grant, for good cause, exceptions to this chapter’s requirements and implementing rules.”

40. This is an unconstitutional delegation of legislative power to the North Dakota Industrial Commission by the Legislative Assembly. Granting the commission the authority to suspend

the operation of any provision of Chapter 38-22 allows the commission to essentially rewrite, ignore, or selectively apply the law in any situation based on its own determination of whether “good cause” exists. This is a delegation of a non-delegable legislative power and even if it was a delegable power, it contains no reasonable guidelines for implementation. Delegating the legislative authority to suspend the entirety of this “chapter’s requirements” to an executive agency is unconstitutional on its face.

Pre-condemnation survey authorization

41. N.D.C.C. § 32-15-06 provides:

32-15-06. Entry for making surveys.

In all cases when land is required for public use, the person or corporation, or the person's or corporation's agents, in charge of such use may survey and locate the same, but it must be located in the manner which will be compatible with the greatest public benefit and the least private injury and subject to the provisions of section 32-15-21. Whoever is in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof, and such entry constitutes no claim for relief in favor of the owner of the land except for injuries resulting from negligence, wantonness, or malice.

42. The last sentence of N.D.C.C. § 32-15-06 authorizes a physical invasion which the Supreme Court of North Dakota has ruled is a *per se* taking, and by its own language it disallows just compensation. “It allows third-part[ies] ... to physically invade a landowner’s property Similar to the unconstitutional regulation in *Cedar Point Nursey*, [this statute grants] a right of access to the landowners’ private property. Further, as in *Loretto*, 458 U.S. at 436, [this statute] restricts landowners from having any control over the ‘timing, extent, or nature of the invasion.’” *Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 26, 978 N.W.2d 679.

43. The last sentence of N.D.C.C. § 32-15-06 violates the Constitution of North Dakota, Article 1, Section 16 and Amendment V of the United States Constitution as applied to the states through Amendment XIV.

44. N.D.C.C. § 24-05-09 provides:

24-05-09. Purchase or condemnation of right of way.

The board of county commissioners of any county of the state, by resolution or order, as part of the cost of constructing, reconstructing, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining, any highway in said county, may purchase, acquire, take over, or, subject to section 32-15-01, condemn, under the right and power of eminent domain, for such county, any and all lands which it deems necessary for the present use, either temporary or permanent, and to provide adequate drainage in the improvement, constructing, reconstructing, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining of any highways in said county, and by the same means it may acquire said lands notwithstanding the fact that the title thereto is vested in the state or any of its subdivisions. Whenever the board of county commissioners determines, by resolution or order, that the public necessity requires the taking of land as aforesaid, it shall cause said lands to be surveyed and described and a plat thereof prepared and recorded in the office of the recorder of the county wherein the same is located. The board of county commissioners, or its duly authorized agents and employees, may enter upon any land for the purpose of making such survey, examination, or test, but in case of damages to the premises the board of county commissioners forthwith shall pay to the owner of said premises the amount of such damages.

45. The last sentence of Section 24-05-09 provides for damages, but authorizes a physical invasion which the Supreme Court of North Dakota has ruled is a *per se* taking, and by its own language it unconstitutionally deprives landowners of their right to compensation by explicitly disallowing constitutionally mandated just compensation. “It allows third-part[ies] ... to physically invade a landowner’s property Similar to the unconstitutional regulation in *Cedar Point Nursey*, [this statute grants] a right of access to the landowners’ private property. Further, as in *Loretto*, 458 U.S. at 436, [this statute] restricts landowners from having any control over the ‘timing, extent, or nature of the invasion.’” *Nw. Landowners Ass’n v. State*, 2022 ND 150, ¶ 26, 978 N.W.2d 679.

46. The Constitution requires that just compensation be paid before any taking of private property, and a determination and payment of just compensation, not damages, is constitutionally required before this taking can occur. Just compensation is not limited to “damages” or claims

for “negligence, wantonness, or malice” as these statutes are limited. A landowner must also be given a jury trial for the determination of just compensation unless it is waived.

47. For these reasons the last sentences of both N.D.C.C. §§ 32-15-06 and 24-05-09 are unconstitutional.

COUNT I

N.D.C.C. §§ 38-22-10, 38-25-08, 32-15-06, and 24-05-09 Violate Article 1, Section 16 of the Constitution of North Dakota and Amendment V of the United States Constitution as applied to North Dakota through Amendment XIV, because they Authorize a Physical Invasion and *per se* Taking without Just Compensation Determined by a Jury

48. The allegations of the preceding paragraphs are incorporated herein by reference.

49. N.D.C.C. §§ 38-22-10 and 38-25-08 violate Article 1, Section 16 of the Constitution of North Dakota and Amendment V of the United States Constitution as applied to North Dakota through Amendment XIV because they authorize a physical invasion and *per se* taking. Although N.D.C.C. §§ 38-25-05(18), 38-25-06(15), 38-25-07(16) and N.D.C.C. § 38-22-08(14) all generally state that the commission must find that all nonconsenting owners are or will be equitably compensated before issuing a permit, this is insufficient. The Legislative Assembly’s sophistry masquerades as fairness to distract from the taking of property rights inherent in this law.

50. A finding that owners will be equitably compensated is not an acceptable replacement for the determination and payment of just compensation *prior to* any taking, which is required by North Dakota law. This finding by the commission is not acceptable and is not a replacement for the constitutional safeguards of Article 1, Section 16 of the Constitution of North Dakota and Chapter 32-15 of the Century Code and Amendment V of the United States Constitution as applied to North Dakota through Amendment XIV.

51. Because in conjunction these statutes, on their face, effect a taking of private property without payment of just compensation as determined by a jury, they are unconstitutional on their face.

52. Similarly, because the last sentences of sections 32-15-06 and 24-05-09 authorize a physical invasion without requiring the prior payment of just compensation, they also effect a taking of private property without payment of just compensation as determined by a jury, and they are also unconstitutional on their face.

COUNT II

N.D.C.C. §§ 38-22-10, 38-25-08, 32-15-06, and 24-05-09 Violate Article 1, Section 12 of the Constitution of North Dakota and Amendment V and Amendment XIV of the United States Constitution because they Remove the Right to Procedural and Substantive Due Process of Law

53. The allegations of the preceding paragraphs are incorporated herein by reference.

54. Sections N.D.C.C. §§ 38-22-10 and 38-25-08, and the last sentences of §§ 32-15-06 and 24-05-09 attempt to bypass the procedural and substantive safeguards of Article 1, Section 16 of the Constitution of North Dakota and Chapter 32-15 of the Century Code. In the context of government takings of private property, the North Dakota Constitution as well as Chapter 32-15 sets forth numerous substantive and procedural safeguards to protect private landowners from government overreach. By depriving landowners of these rights under N.D.C.C. §§ 38-22-10, 38-25-08, 32-15-06, and 24-05-09, these statutes violate the substantive and due process rights of North Dakota's landowners. The provisions contained at N.D.C.C. §§ 38-25-05(18), 38-25-06(15), 38-25-07(16) and N.D.C.C. § 38-22-08(14) do not save N.D.C.C. §§ 38-22-10 and 38-25-08 from these due process claims because due process in this context is defined by the safeguards contained in Article 1, Section 16 of the Constitution of North Dakota and Chapter 32-15 of the Century Code.

COUNT III

N.D.C.C. § 38-22-03(7) Violates the Constitutional Separate of Powers Doctrine and Is an Unconstitutional Delegation of a Non-delegable Legislative Function.

55. The allegations of the preceding paragraphs are incorporated herein by reference.

56. N.D.C.C. § 38-22-03(7) delegates to the North Dakota Industrial Commission the authority to grant exceptions to any and all of the requirements in the entirety of Chapter 38-22. The Commission merely needs to believe there to be “good cause.” The ability to suspend any requirement in the entire chapter is the equivalent of the ability to rewrite the entire chapter and is a non-delegable legislative function, and the delegation is therefore a violation of separate of powers and is unconstitutional. Even if this authority were delegable, “good cause” is not a sufficient directive for implementation and it still fails to pass constitutional muster.

PRAYER FOR RELIEF

WHEREFORE, Northwest Landowners Association requests judgment against Defendants as follows:

1. Declaring N.D.C.C. §§ 38-22-10, 38-25-08, and the last sentences of §§ 32-15-06 and 24-05-09, to be unconstitutional and void, and of no effect;
2. Enjoining the State of North Dakota, the North Dakota Industrial Commission and its members the Hon. Doug Burgum, the Hon. Drew Wrigley, and the Hon. Doug Goehring, from further implementation or enforcement of N.D.C.C. §§ 38-22-10 and 38-25-08, including authorizing or enacting any administrative rules pursuant to these statutes or hold any hearings or issuing any decision on any applications pursuant to these statutes;
3. Enjoining the State of North Dakota, and the Hon. Doug Burgum, the Hon. Drew Wrigley, and the Hon. Doug Goehring, from further implementation or enforcement of the last sentences of

N.D.C.C. §§ 32-15-06 and 24-05-09, and enjoining the same from instructing or allowing executive agencies and political subdivisions to utilize these unconstitutional provisions;

4. For other such relief as the Court deems just and equitable, together with costs and disbursements, and attorneys' fees allowed by law.

Dated this 31st day of May, 2023.

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