

Lawsuit against North Dakota

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NWLA

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Northwest Landowners Association

has filed another lawsuit against the state of North Dakota, asking a court to strike down certain laws as unconstitutional takings of private property rights. Northwest Landowners Association has been engaged in a fight to protect the pore space of private landowners in North Dakota since Senate Bill 2344 was introduced during the 2019 legislative session. Through lobbying,

“

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Troy Coons

public outreach and education, and direct litigation, Northwest Landowners Association took on this fight to protect the rights of the people North Dakota. NWLA was successful in that previous fight and has filed a new lawsuit to address other laws that take private property in violation of the constitution similar to those struck down by the North Dakota Supreme Court in *Nw. Landowners Ass v. State*, 2022 ND150, 978 N.W.2d 679.

Troy Coons, the chairman of the Association, said “it is always our goal to work cooperatively with the government and industry to address issues related to use of the land for energy development. Unfortunately, on this issue, the state and the industry chose to ignore our concerns and forced us to raise them in a court of law. We always begin by holding our hand out to the industry and government and asking to work together. If we end up in court, it is not because we did not roll up our sleeves and work hard to find solutions.” Last session, NWLA worked hard with Senator Jeff Magrum from District 8, who stood up for the constitution and the landowners. Together NWLA and Sen. Magrum tried to address some of these issues in a constructive manner to try to find solutions with other stakeholders, and their efforts were repeatedly rebuffed by the industry.

The Dakota Supreme Court agreed with the landowners regarding prior attempts to take their pore space, stating that the law struck down in the prior NWLA lawsuit “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....Allowing such usage takes away one of the most treasured property rights because it takes away landowners' right to exclude ... operators from trespassing and disposing waste into their pore space. Surface owners have a right to compensation for the use of their pore space for disposal and storage operations."

The laws at issue in the new lawsuit filed by NWLA are largely related to the injection of carbon dioxide into the pore space to sequester it, and the storage of gas. Carbon sequestration projects are focusing in on North Dakota as tax incentives from the federal government's Green New Deal flow toward these carbon sequestration projects. The specific laws at issue give the North Dakota Industrial Commission authority to "amalgamate" the pore space to create a storage facility, but this is really just a made-up word for taking property. The statute takes the property from the surface owner and gives it to the storage facility operator to use, and this is precisely the type of taking the courts ruled was unconstitutional in the Landowners' prior lawsuit.

In addition, there are other laws in North Dakota that allow for what is called pre-condemnation survey access. Following the prior *Nw. Landowners Ass'n* lawsuit in North Dakota, and a recent United States Supreme Court ruling in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), these types of laws purporting to grant access to private property without condemnation and just compensation are also a "physical invasion" of the private property and therefore a per se taking under the law.

Northwest Landowners Association is asking for the specific laws that violate the takings clauses of the state and federal constitutions to be struck down, and is also asking for certain of these laws to be interpreted by the courts in a manner that makes them constitutional. For example, one law states that the NDIC will find that landowners will be equitably compensated, but it does not require a determination by a jury or "just compensation," as the constitution does.

Now it is unfortunately the role of the courts to once again pass on these constitutional issues. NWLA has brought the present lawsuit in order to address the unconstitutional laws that must be struck down for the same reasons as the laws struck down in *Nw. Landowners Ass v. State*, 2022 ND 150, 978 N.W.2d 679 and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

"This is why we have a constitution in this country – there are some lines that the government cannot cross" said Troy Coons, chairman.

Sierra Coons

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