

Council of Oil & Gas Attorneys:

*North Dakota Court Decisions on
Constitutionality of CCUS Statute*

May 18, 2026

Oklahoma City, Oklahoma

IOGCC Annual Business Meeting





NORTH DAKOTA UIC CLASS VI PROGRAM

UIC CLASS VI INJECTION REGULATORY AUTHORITY

Federal Authority

- Safe Water Drinking Act (1974, 1986, 1996)
- 40 CFR 144, 145, 146

State Authority

- North Dakota Century Code Chapter 38-22
 - Carbon Dioxide Underground Storage
 - <https://ndlegis.gov/cencode/t38c22.pdf>
- North Dakota Administrative Code Article 43-05
 - Geologic Storage Of Carbon Dioxide
 - <https://ndlegis.gov/information/acdata/pdf/43-05-01.pdf>

NORTH DAKOTA UIC CLASS VI PROGRAM HISTORY

2009

- North Dakota passed Senate Bill 2095 Creating NDCC 38-22 - Carbon Dioxide Underground Storage
- North Dakota passed Senate Bill 2139 Creating NDCC 47-31 - Subsurface Pore Space Policy

2010

- North Dakota adopted NDAC 43-05 Geologic Storage Of Carbon Dioxide (effective April 1, 2010)
- EPA finalized the Class VI rule December 10, 2010 (75 FR 77230)

2011

- North Dakota creates one full-time position to apply for and obtain Class VI primacy
- Sept. 7, 2011 EPA became the acting regulatory authority in all States, including North Dakota.

2013

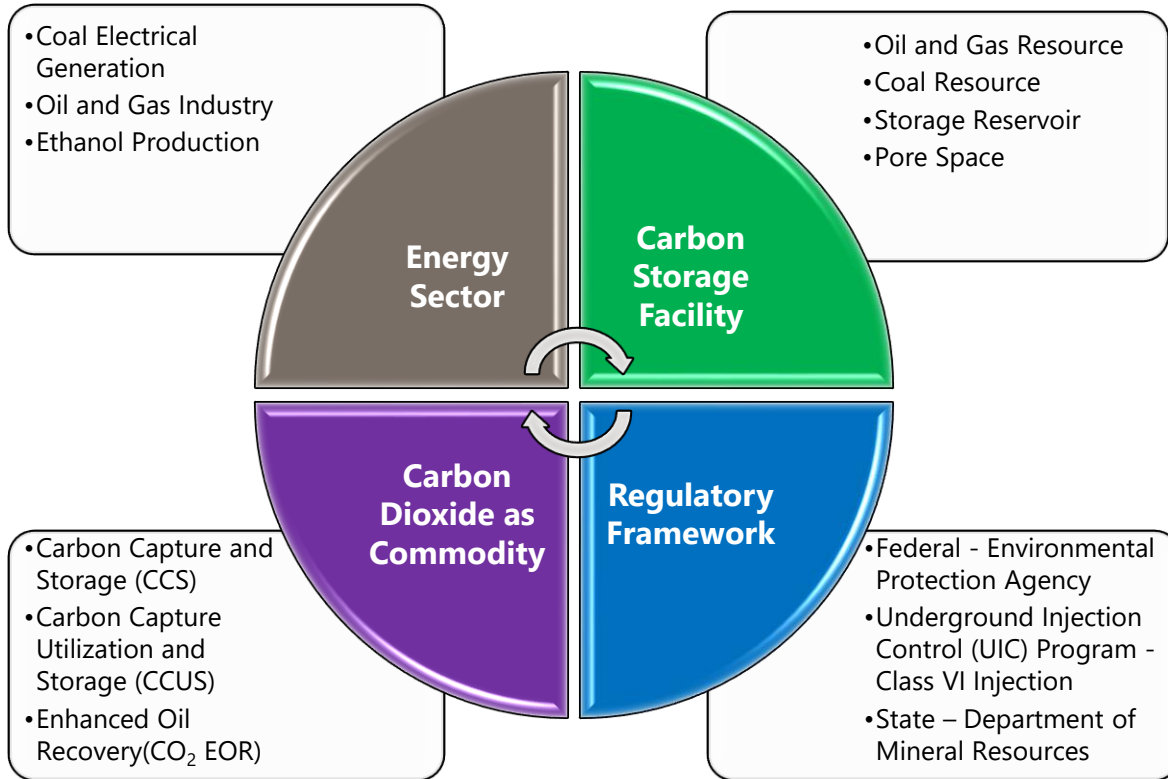
- North Dakota amended administrative rules to meet stringency of federal Class VI rule (effective April 1, 2013)
- **North Dakota submits Class VI Primacy Application June 21, 2013**

2018

- April 10, 2018 EPA Adm. Scott Pruitt signed North Dakota's Primacy Application.
- **April 24, 2018 North Dakota Receives Class VI Primacy**

NORTH DAKOTA UIC CLASS VI PROGRAM OVERVIEW

Resource Management Regulatory Framework

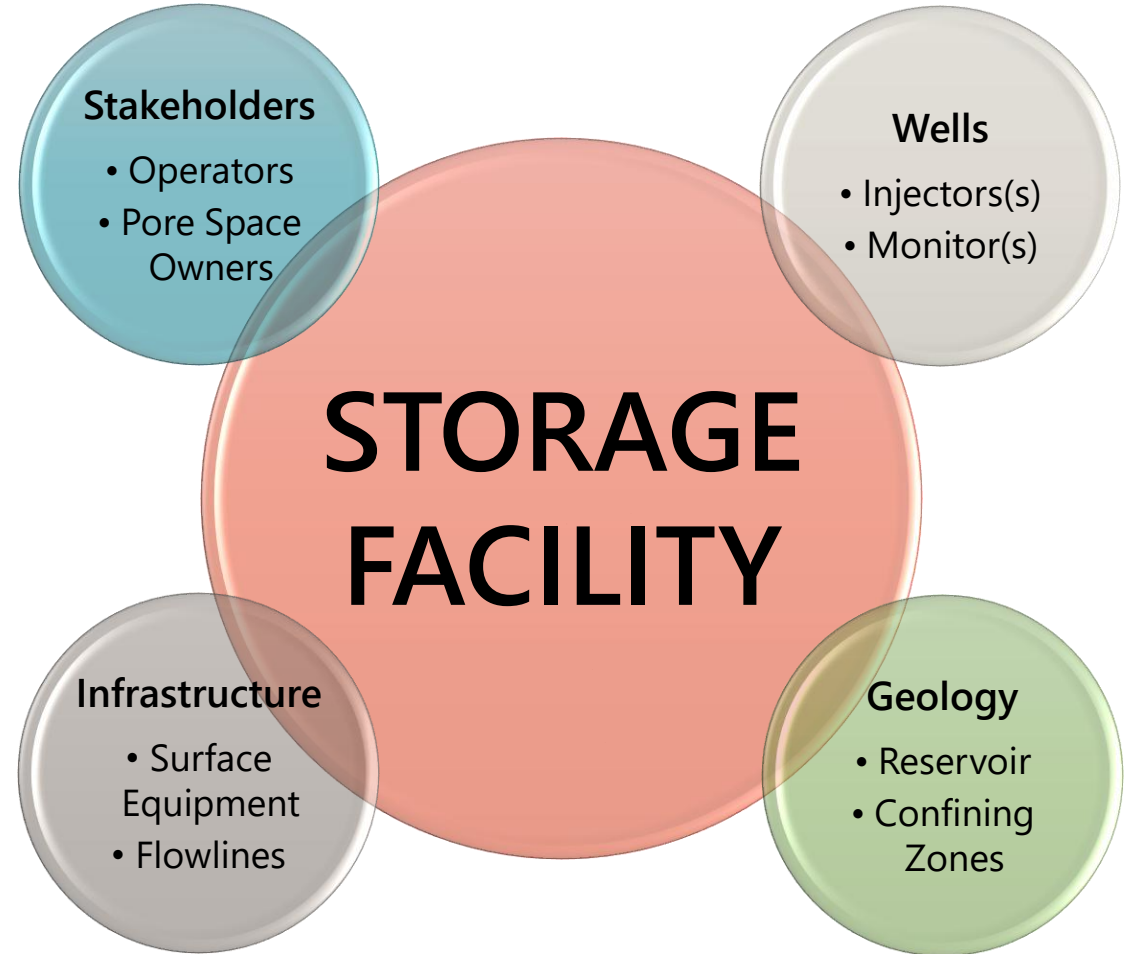


CO₂ is considered a commodity

The pore space is managed as a resource

Utilizes a risk-based approach to regulation, enforcement, and inspection

North Dakota Carbon Storage Facility



Dual Permitting Process

CO₂ Storage Facility (SF) Permit

Well Permit(s) - Injector(s) and Monitor(s)

PORE SPACE OWNERSHIP

North Dakota Century Code Chapter 47-31 Subsurface Pore Space Policy

- 47-31-03. Title to pore space.

Title to pore space in all strata underlying the surface of lands and waters is vested in the owner of the overlying surface estate.

North Dakota Supreme Court Decision

- Mosser v. Denbury Resources, inc.
 - Chapter 47-31, N.D.C.C., was enacted in 2009 “was intended to confirm that surface owners own the pore space under their surface estate”
 - N.D.C.C. § 47-01-12, N.D.C.C., which dates back to 1877 Civil Code for the Dakota Territory, and states the “owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.”
 - “ When the foregoing statutory provisions are construed together ... the owner of a surface estate owns the underlying pore space absent a conveyance of the pore space to a third party before April 9, 2009.”



LEGAL CHALLENGES

PRIMARY TARGET

NDCC 38-22

- **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.

- **Amalgamation vs Unitization**

Amalgamation of pore space intended to be the equivalent of Unitization of minerals

38-22-01

POLICY

It is in the public interest to promote the geologic storage of carbon dioxide. Doing so will benefit the state and the global environment by reducing greenhouse gas emissions. Doing so will help ensure the viability of the state's coal and power industries, to the economic benefit of North Dakota and its citizens. Further, geologic storage of carbon dioxide, a potentially valuable commodity, may allow for its ready availability if needed for commercial, industrial, or other uses, including enhanced recovery of oil, gas, and other minerals. Geologic storage, however, to be practical and effective requires cooperative use of surface and subsurface property interests and the collaboration of property owners. Obtaining consent from all owners may not be feasible, requiring procedures that promote, in a manner fair to all interests, cooperative management, thereby ensuring the maximum use of natural resources.

SECONDARY TARGET

NDCC 38-22

- **38-22-16. Title to carbon dioxide.**

The storage operator has title to the carbon dioxide injected into and stored in a storage reservoir and holds title until the commission issues a certificate of project completion. While the storage operator holds title, the operator is liable for any damage the carbon dioxide may cause, including damage caused by carbon dioxide that escapes from the storage facility.

- **38-22-17. Certificate of project completion - Release - Transfer of title and custody**

- 6. Once a certificate is issued:
 - a. Title to the storage facility and to the stored carbon dioxide transfers, without payment of any compensation, to the state.
 - b. Title acquired by the state includes all rights and interests in, and all responsibilities associated with, the stored carbon dioxide.

Northwest Landowners Association v. State of North Dakota (NWLA II)

History

- NWLA II filed in ND District Court in 2023 (challenging amalgamation)
- District Court initial decision 2025 - Dismissed (Statute of Limitations)
- ND Supreme Court NWLA II appeal – (August 25): reversed dismissal and remanded constitutional challenge
- District Court NWLA II Dec 2, 2025: Memorandum of Opinion granting Summary Judgment (Amalgamation found to be an unconstitutional Taking)
- Final judgement pending

Northwest Landowners Association v. State of North Dakota (NWLA II)

Findings

- Takings Analysis
 - Court applied the Loretto per se physical invasion standard rather than Causby following NDSC decision in NWLA I
 - U.S. v. Causby (328 U.S. 256, 266, 66 S. Ct. 1062 (1946))
 - Loretto v. Teleprompter Manhattan CATV Corp. (458 U.S. 419, 102 S.Ct. 3164 (1982))
- Court concludes N.D.C.C. Chapter 38-22 clearly contains a government-authorized physical invasion of an interest in property, and interferes with a landowner's use and enjoyment of property, including, but not limited to, a landowner's right to exclude others.
- Just Compensation.
 - North Dakota Constitution now clearly requires compensation for taking private property to be determined by a jury, unless that is waived: "Compensation shall be ascertained by a jury, unless a jury be waived."
 - 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, unless the owner chooses to accept annual payments as may be provided by law
- Court concludes N.D.C.C. Chapter 38-22 is unconstitutional as it provides for a government-authorized physical invasion of property, which constitutes a taking, and it does not provide for "just" compensation as outlined as Article I, § 16 of the N.D. Constitution.

Northwest Landowners Association v. State of North Dakota (NWLA II)

Findings

Correlative Rights & Valid Exercise of Police Powers

- Defendants argue laws and precedent which allow forced pooling of oil and gas interests in a shared reservoir also justify amalgamation of interests in a shared pore space reservoir.
- In the Finite and Syverson cases, **extraction** of a resource was the essence of the claim. In all the cases cited, references to an owner's 'just and equitable share" referred to preventing waste and ensuring maximum recovery of a landowner's resource, *i.e.* oil, gas, coal mine methane. Such references did not refer to ensuring maximum use of an owner's property right, *i.e.* pore space. The Court concludes this key distinction is critical to the analysis of whether the correlative rights doctrine applies here.
 - Finite Res., Ltd. V. DTE Methane Res., LLC, 44 F.4th 680 (7th Cir. 2022)
 - Syverson v. N.D. State Indust. Comm., 111 N.W.2d 128, 133-134 (N.D. 1961),
- **Unitization to maximize *extraction* of a resource (like oil and gas) on one's land is clearly not the aim here. Instead, the aim is to maximize storage of a resource that may or may not be present on the owner's property (carbon).**
- Once the carbon project is finished, title to that carbon project is then held by the state, depriving the landowner of that property right indefinitely.
- There are concerns with application of the correlative rights doctrine to a property right in this manner, as opposed to a resource. The Court sees no distinction preventing application to create units for storage on land of garbage (*i.e.* landfills), nuclear waste, industrial waste, or flood waters, to name only a few.
- **The Court declines to be the first jurisdiction to declare constitutional a leap from unitization of a resource to forced pooling of vested property rights to store a resource which may or may not be present on the owner's property.**
- Defendants also argue the statute is a valid exercise of police powers. The Court concludes such an argument was made extensively in NWLA I and wholly rejected by the North Dakota Supreme Court

Northwest Landowners Association v. State of North Dakota (NWLA II)

Decision

- District Court (Summary Judgment Order): held “N.D.C.C. Chapter 38-22 is unconstitutional as it provides for a government-authorized physical invasion of property constituting a taking and it does not provide for “just” compensation as outlined as [sic] Article I, § 16 of the ND Constitution”
- Pending final judgment (anticipating redline revision to 38-22)
- Note: NDCC 1-02-20. Severability.
In the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered.

Swenson Living Trust v. North Dakota Industrial Commission

History

- December 2024 NDIC issues orders granting Summit Carbon Solutions 3 storage facility permits.
- SLT vs NIDC filed in ND District Court (January 25): Appeal NDIC Orders
- SLT vs NIDC (March 26): Reversed NIDC Orders - Amalgamation found to be an unconstitutional Taking

Swenson Living Trust v. North Dakota Industrial Commission

Challenges

- Landowners challenge the constitutionality of N.D.C.C. § 38-22-10 by asserting it effectuates a taking
- Landowners also challenge the constitutionality of N.D.C.C. § 38-22-03(07) by asserting it is an unconstitutional delegation of legislative authority to the NDIC
- Landowners argue the NDIC deprived them of procedural due process by failing to provide fair and meaningful procedures during the pendency of the matter before them
- The Landowners assert the NDIC is without authority to impose a contract upon them
- The Landowners argue NDIC's findings regarding whether Summit engaged in "good faith" efforts, whether the proposed storage facilities would harm human health or unduly endanger the environment, whether the horizontal and vertical boundaries of the storage reservoir are defined, and whether all non-consenting pore space owners are or will be equitably compensated are not supported by substantial evidence and the NDIC's conclusions are erroneous

Swenson Living Trust v. North Dakota Industrial Commission

Findings

- The Landowners have a recognized and constitutionally protected property interest in their pore space.
- The payment of compensation does not control whether a taking has occurred, it merely determines whether the taking is constitutional. The Takings Clause does not prohibit takings, it prohibits takings without compensation.
- This case does not involve a temporary limited occupation. Chapter 38-22, N.D.C.C., including N.D.C.C. 38-22-10, authorizes the potentially permanent injection of carbon dioxide into a landowner's pore space. Following the carbon dioxide injection, title to the pore space may transfer to the State of North Dakota without compensation. This is a permanent physical invasion of a landowner's property and a permanent interference with a landowner's property rights
- The NDIC may require that the pore space owned by nonconsenting owners to be included in a storage facility if the NDIC finds the nonconsenting owners *will be* equitably compensated." N.D.C.C. 38-22-08(14)(emphasis added). This violates Article I, section 16, by allowing the compensation to follow the taking.
- The Court finds there is a right to have a jury determine just compensation under Article I, section 16.
- The Supreme Court has stated "[a]n owner whose property has been taken by condemnation is entitled to the fair market value of the property taken." *Cass Cnty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228,, 7, 918 N.W.2d 371. "[The Supreme] Court has defined 'fair market value' as 'the highest price property can be sold for in the open market'
 - **47-31-05. Severing pore space prohibited.**
Title to pore space may not be severed from title to the surface of the real property overlying the pore space. An instrument or arrangement that seeks to sever title to pore space from title to the surface is void as to the severance of the pore space from the surface interest.
- The Landowners have not established that the concepts of equity and justice are incompatible and that N.D.C.C. § 38-22-08(14) violates the Constitution.

Swenson Living Trust v. North Dakota Industrial Commission

Findings

- The protection of correlative rights is an expressed part of North Dakota's policy regarding oil and gas control. N.D.C.C. § 38-08-01. The term "correlative rights" is not mentioned in North Dakota's policy regarding the geologic storage of carbon dioxide. N.D.C.C. § 38-22-01. This policy states geologic storage" ... to be practical and effective requires cooperative use of surface and subsurface property interests and the collaboration of property owners. Obtaining consent from all owners may not be feasible, requiring procedures that promote, in a manner fair to all interests, cooperative management, thereby ensuring the maximum use of natural resources." *Id.* The term "correlative rights" is not found anywhere in chapter 38-22. Whether intentional or inadvertent, the omission is apt
- The doctrine of correlative rights is nothing more than a limitation on the rule of capture.
- The NDIC and Summit essentially argue pore space ownership rights are communal and no individual landowner has the right to object to the use of his pore space. In other words, the NDIC rather than the landowner controls access to the pore space. This argument is difficult to reconcile with the Supreme Court's decision in *NWLA I* where the Supreme Court found "Senate Bill 2344 constitutes a per se taking [as] [i]t allows third-party oil and gas operators to physically invade a landowner's property by injecting substances into the landowner's pore space."

Swenson Living Trust v. North Dakota Industrial Commission

Decision

- The Court finds that while the NDIC pursued its authority and made findings and conclusions consistent with N.D.C.C. ch. 38-22, the statutes that were applied violate Article I, section 16, of the North Dakota Constitution. Specifically, they allow for the taking of the Landowners' pore space without just compensation being paid prior to the taking and they permit the NDIC, rather than a jury to determine the adequacy of the compensation. Because the findings and conclusions of the NDIC are not sustained by the North Dakota Constitution, they must be reversed
 - *Because, resolution of the Landowners' Taking Clause argument is dispositive, the Court declines to address their remaining arguments*
- The Court finds that the findings and conclusions of the NDIC are contrary to Article I, section 16, of the North Dakota Constitution and its Orders are therefore **REVERSED**.



NORTH DAKOTA CONSTITUTION

NORTH DAKOTA CONSTITUTION

<https://ndlegis.gov/constitution>

ARTICLE I : DECLARATION OF RIGHTS

Section 16. 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, unless the owner chooses to accept annual payments as may be provided for by law. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation. **Compensation shall be ascertained by a jury**, unless a jury be waived. When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.

For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

(questions?)

