

North Dakota CO₂ Storage Law Struck Down

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Overview

A significant development in the realm of property rights and carbon capture and storage (CCS) projects unfolded on December 2, 2025. In the case of *North Dakota Landowners Association, et al. v. North Dakota, et al.*, No. 05-2023-CV-00065, Bottineau Co. N.D. Dist. Ct. (Dec. 2, 2025), the court ruled that a key provision of the North Dakota CO₂ Storage Law is unconstitutional.

The decision sides with landowners, asserting that the law, which allows for the forced use of underground pore space for carbon storage without providing for "just compensation" as determined by a jury, violates the Takings Clauses of both the state and federal constitutions. The ruling introduces substantial legal uncertainty for the rapidly developing carbon capture industry in the state.

Analysis of the Court's Decision

The core of the dispute revolved around the legal status and use of pore space. That's the subterranean cavities in rock formations where captured carbon dioxide is intended to be permanently stored. North Dakota established a mechanism known as amalgamation.

The amalgamation provision. The specific provision in the CO₂ storage law allowed the North Dakota Industrial Commission (NDIC) to authorize carbon storage projects to proceed even if they lacked unanimous consent from all affected landowners. If at least 60 percent of the affected landowners agreed to the project, the non-consenting minority landowners could be forced to participate in the unitized storage facility.

The District Court found this "amalgamation" provision to be an unconstitutional taking of private property. Key points in the judge's reasoning included the following:

- **Pore space as private property:** The court reaffirmed that North Dakota law recognizes a surface owner's right to the underlying pore space as a constitutionally protected property interest.
- **Physical invasion:** The injection of carbon dioxide into the pore space was deemed a "government-authorized physical invasion" of the property. This classification is critical because under Fifth Amendment jurisprudence (and its state-level equivalent), a permanent physical occupation of private property is considered a per se taking, regardless of the public benefit or the minimal economic impact on the owner. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 429 (1992)).
- **Right to exclude:** The law interfered with one of the most fundamental rights of property ownership - the right to exclude others from one's land. By compelling non-consenting landowners to allow CO₂ injection, the court reasoned that the state effectively stripped non-consenting landowners of this right.



- **Lack of just compensation:** Crucially, the court found that the law did not provide an adequate constitutional mechanism for "just compensation" to the non-consenting owners. The North Dakota Constitution, like the Fifth Amendment to the U.S. Constitution, requires that private property shall not be taken for public use without just compensation, and historically, this compensation is determined by a jury. The court found the statutory compensation process lacking this constitutional safeguard.

In essence, the court concluded that the state legislature attempted to facilitate the carbon storage industry by essentially gifting private property rights (the pore space) from a minority of landowners to private development companies without fulfilling the constitutional requirement for compensation.

Implications of the District Court's Decision

Current projects. The state of North Dakota and private industry intervenors (such as Summit Carbon Solutions) are widely expected to appeal the decision to the North Dakota Supreme Court. If the District Court's ruling is affirmed, the legal and economic fallout would be significant for carbon capture and storage (CCS) projects in North Dakota and potentially nationwide.

If upheld on appeal, the decision could immediately void all NDIC orders that required mandatory landowner participation in existing or proposed carbon storage facilities. The multi-state CO₂ pipeline and storage project of Summit Carbon Solutions, which is arguably the largest of its kind, would face an immediate roadblock. While the company may have signed on a large majority of landowners for its storage facility, the project's viability depends on the entire, contiguous pore space being available. The inability to use amalgamation to compel the remaining non-consenting landowners would create significant gaps, effectively halting the storage component of the project. Other major CCS initiatives, like Minnkota Power's Project Tundra (a carbon capture effort at a coal-fired power plant), would also be forced to find new legal pathways to secure 100 percent of the pore space.

The "holdout" problem. Another impact of the decision, if upheld on appeal, would be that project developers would need to secure 100 percent voluntary participation from all affected pore space owners through private negotiation. This creates a significant "holdout" problem, where a small number of landowners could demand exorbitant compensation, effectively making a project financially unfeasible or significantly delaying it. As a result, project developers would be required to follow the traditional (and constitutionally required) eminent domain process, which is typically slower, more expensive, and requires proving the project serves a public use. While this would pose potentially contentious issue for private ventures, it is protective of property rights.

It is the protection of private property that is the foundation of economic freedom and efficiency. The only way for individuals to be free to use their knowledge and resources efficiently is by having the ability to control their property. From an economic perspective, let alone the constitutional concerns, the North Dakota CO₂ Storage Law's amalgamation provision with its compulsory participation violates both principles. It is a violation of the fundamental right to exclude and an abuse of governmental power to transfer property rights (the pore space) from one private owner to another for a non-traditional "public use."

In a free market, the right to refuse to sell (i.e., to be a "holdout") is a core component of property ownership. The "holdout problem" is simply the market at work. If a property owner values their pore space more than the



price offered by the buyer (the CCS developer), they are rationally maximizing their utility, which is a key tenet of free market economics and the protection of private property (a fundamental constitutional right).

While eminent domain is generally reserved for true public uses (like roads or public schools), the use of amalgamation for a private carbon capture company is a distortion of the market and a giveaway to special interests (the CCS industry and its investors). It's an example of government failure by its attempt to fix a perceived "market failure" (the "holdout problem") but does so by creating a major constitutional and ethical failure: the forced taking of private property without a true market transaction or adequate constitutional safeguards.

Observation: The solution to the "holdout problem" must ultimately be found within the voluntary bargaining of the free market, not through coercion. The "holdout problem" is, from a market perspective, a bargaining problem, not a legal one. If the Carbon Capture and Storage (CCS) project truly generates enough value to be economically viable and benefit society, the developer should be able to offer a price (even a very high one) that is sufficient to induce the holdout landowners to sell. Conversely, if the developer cannot secure all the needed property at a price that makes the project profitable, the project is simply neither economically efficient nor socially desirable enough to warrant the private property transfer. The failure to complete the project due to holdouts is the market correctly signaling that the cost (the landowner's valuation) outweighs the benefit (the developer's profit).

Possible Legislative response. If the decision stands, the North Dakota Legislature would have to either amend the CO₂ Storage Law or draft entirely new legislation to address the constitutional deficiencies. Any new law would need to ensure that there is a clear mechanism for "just compensation" determined by a jury for any forced taking. The law would also need to have a strong, defensible legal foundation for treating CO₂ storage as a "public use" if eminent domain is to be employed.

National Precedent

North Dakota is a leader in seeking regulatory primacy from the U.S. Environmental Protection Agency (EPA) for Class VI injection wells (used for CO₂ storage). This decision, if upheld, could serve as a major precedent for other energy-producing states with similar laws. It would confirm that the property rights of surface owners over their subsurface pore space cannot be easily overridden for the benefit of the nascent CCS industry. This would raise the legal risk profile for CCS developers across the country.

Conclusion

The Bottineau County District Court's ruling is a resounding victory for private property rights in the face of emerging energy and climate-related infrastructure. By striking down the amalgamation provision as an unconstitutional taking without just compensation, the court has prioritized the right to exclude, and the constitutional guarantee of compensation determined by a jury.



While an appeal is certain, the decision signals to the energy industry that the development of carbon capture projects in North Dakota, and likely elsewhere, will need to proceed with greater attention to landowner consent and equitable, market-based compensation, rather than relying on state-authorized compulsory participation.

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