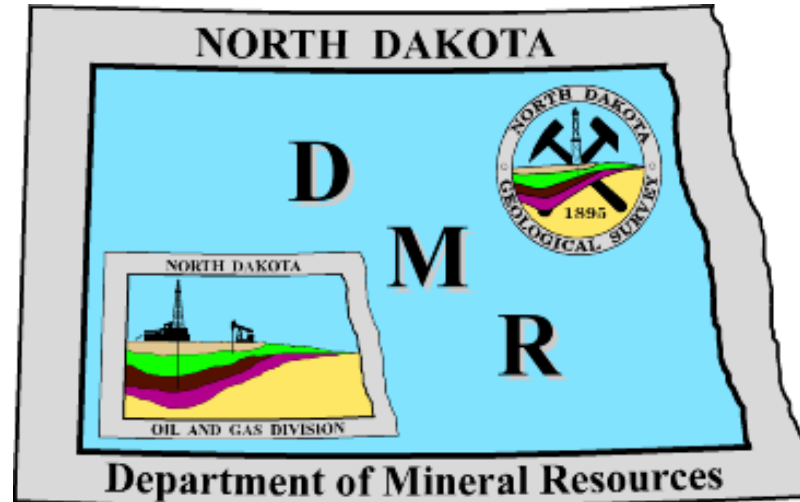


North Dakota Department of Mineral Resources



<http://www.oilgas.nd.gov>

<http://www.state.nd.us/ndgs>

600 East Boulevard Ave. - Dept 405

Bismarck, ND 58505-0840

(701) 328-8020 (701) 328-8000

Class VI Primacy Timeline

At the request of the NDIC a task force was formed, known as North Dakota Carbon Dioxide Storage Workgroup

North Dakota passed legislation granting the NDIC's Oil and Gas Division regulatory authority

IOGCC Carbon Capture and Geologic Storage Task Force developed model rules and regulations in 2007 guidance

North Dakota adopted administrative rules for geologic storage of carbon dioxide effective April 1, 2010

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

North Dakota creates one full-time position for Class VI primacy

2007

2008

2009

2010

2011

2012

2013

2014

2015

2016

2017

2018

EPA finalized Class VI rule December 10, 2010

Sept. 7, 2011 EPA became the acting regulatory authority in all States, including North Dakota.

EPA Region VIII - 30 day Comment Period - No substantive comments received

EPA offices recommend approval: Office of Water, Office of Policy, Office of General Council, and Region VIII. Sent to EPA Administrator for final approval

May 8, 2017 EPA Adm. Scott Pruitt signed a proposal to issue a rule approving North Dakota's application – 60 day comment period 15 Comments received

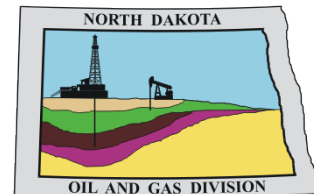
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Comments on North Dakota's Class VI Primacy Application

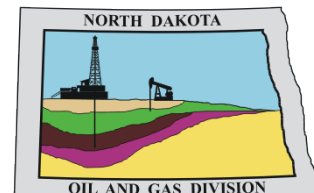
60 Day Public Comment Period: May 19, 2017 – July 18, 2017

- **15 Comments Received**
 - **11 of the 15 Comments supported North Dakota receiving primacy approval**
 - **Included the EERC, Center for Carbon Removal, Red Trail Energy, and 8 comments from individuals (mostly North Dakotans)**
 - **Comments from the Sierra Club, NRDC, and the Clean Air Task Force**
 - **Concerns raised in these comments have all been addressed in the North Dakota statutes and regulations**
 - **North Dakota's Geologic Storage of Carbon Dioxide Program meets the stringency of the Federal Class VI UIC Program**
 - **1 anonymous comment:**
 - **“How To Freeze The Decline Of Earth's Endangered Species. Animal extinction happens more often than you think”**



Current Status of North Dakota's Class VI Primacy Application

- EPA has reviewed all comments received and is currently preparing responses to the comments.
 - EPA Region VIII will be responding to comments
 - The EPA employee tasked with responding to comments is currently on a 2 year detail working in another division (As of 2016 EPA has 15,376 employees)
 - December also marks EPA's vacation time cutoff (use it or lose it).
- EPA's response to comments will be published in the final rule approving North Dakota's Class VI primacy application
- The goal is for North Dakota primacy approval to be published in the Federal Register in January 2018.



IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2017 ND 169

Randall Mosser, Douglas Mosser, Marilyn
Koon, and Jayne Harkin, Plaintiffs

v.

Denbury Resources, Inc., and Denbury
Onshore, LLC, Defendants

No. 20160379

Certified Questions of Law from the United
States District Court for the District of North
Dakota, the Honorable Charles S. Miller.

CERTIFIED QUESTIONS ANSWERED IN PART
AND DENIED IN PART.

Opinion of the Court by [Kapsner, Justice](#).
[Stephen D. Easton](#) (argued), Laramie, WY, and
[Christina M. Wenko](#) (appeared), Dickinson, ND,
for plaintiffs.

[Amy L. De Kok](#) (argued) and [Lawrence Bender](#)
(on brief), Bismarck, ND, for defendants.

Mosser v. Denbury Resources
No. 20160379

Kapsner, Justice.

[¶1] Under [N.D.R.App.P. 47](#), the magistrate judge for the United States District Court for North Dakota certified seven questions to this Court involving a surface owner's right to recover compensation under N.D.C.C. ch. 38-11.1 for a mineral developer's use of pore space beneath the surface of the surface owner's estate for saltwater disposal. We conclude that under N.D.C.C. § 38-11.1-04 a mineral developer may be liable to a surface owner for saltwater disposal into pore space, and we answer the certified questions accordingly.

47-31-02. Pore space defined.

In this chapter "pore space" means a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.

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.

47-31-04. Conveyance of real property conveys pore space.

A conveyance of title to the surface of real property conveys the pore space in all strata underlying the surface of the real property.

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.

47-31-06. Transactions allowed.

Leasing pore space is not a severance prohibited by this chapter.

[¶14] The first certified question involves ownership of pore space beneath a surface estate, a predicate to potential liability in this case, and provides:

1. In North Dakota, does the owner of the surface estate own the pore space deep below the surface, absent some conveyance of the pore space to a third party and even when the mineral estate has been severed from the surface estate?

[¶17] When the foregoing statutory provisions are construed together, we agree with the federal magistrate judge and the parties that 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. *See Mosser*, 112 F. Supp. 3d at 918-19 (stating parties did not seriously contest that a surface owner owns the subsurface pore space under N.D.C.C. § 47-01-12 and N.D.C.C. ch. 47-31). **We therefore answer "yes" to the first certified question.**

[¶23] Here, the issue is whether the use of the term "land" in N.D.C.C. § 38-11.1-04 authorizes a surface owner to recover compensation for a mineral developer's use of "pore space" for saltwater disposal. The federal magistrate judge in this case and the federal district court in a separate lawsuit have concluded **the term "land" in N.D.C.C. § 38-11.1-04 encompasses "pore space" for purposes of statutory claims involving disposal of saltwater.** *Mosser*, 112 F. Supp. 3d at 920-23; *Fisher v. Cont'l Res., Inc.*, Case No. 1:13-cv-097, 2015 WL 11400124 at 4-5 (D. N.D. Oct. 8, 2015). In its certification order to this Court, the federal magistrate judge quoted the federal district court's conclusion that "land" encompasses "pore space":

[¶24] The legislature has not amended the relevant statutes since the 2015 interpretations of N.D.C.C. ch. 38-11.1 by the federal magistrate judge and the federal district court. When the provisions of N.D.C.C. §§ 38-11.1-04, 47-01-04, and 47-01-12 are read together, we agree with the interpretations by the federal magistrate judge and the federal district court that pore space is part of the surface owner's interest in the land for purposes of N.D.C.C. § 38-11.1-04. **We conclude a surface owner may be entitled to compensation under N.D.C.C. § 38-11.1-04 for a mineral developer's use of the surface owner's subsurface pore space for disposal of saltwater generated as a result of drilling operations. We answer the second certified question "yes."**

[¶25] The five remaining certified questions address evidentiary issues for a surface owner to be entitled to compensation under N.D.C.C. § 38-11.1-04 and provide:

3. If the answer to the second certified question is yes, is the ability to recover damages under N.D.C.C. § 38-11.1-04 limited to when the surface owner is **currently using the pore space** or when there is evidence that the surface owner is **likely to make use of the pore space within the reasonably near future**, either by personally using it or leasing it to another?
4. Are damages under N.D.C.C. § 38-11.1-04 for a mineral developer's use of subsurface pore space for disposal of saltwater **recoverable only if the surface owner can prove a diminution in the market value of the affected property?**
5. In order to recover damages for a mineral developer's use of subsurface pore space for the disposal of saltwater under N.D.C.C. § 38-11.1-04, **must the surface owner prove some damage other than the mere occupancy or loss of access to the pore space**, e.g., an interference with the surface owner's actual use of the pore space or a concrete plan to do so in the reasonably near future or evidence of diminution in the market value of the property affected by the saltwater disposal?
6. Can a surface owner recover damages under N.D.C.C. § 38-11.1-04 for a mineral developer's use of the surface owner's pore space for the disposal of saltwater when the **only evidence upon which to calculate damages is (1) proof of what is being paid to other surface owners for the use of their pore space for the disposal of saltwater on a per barrel basis (assuming the third party transactions being relied upon are "arms length" and fairly comparable); and (2) evidence of the number of barrels of injected saltwater that, more likely than not, is occupying the surface owner's pore space?**

[¶30] Moreover, the plain language of N.D.C.C. § 38-11.1-04 does not preclude a surface owner from recovering what others may be paying to dispose of saltwater in pore space; rather, the price per barrel others are paying for saltwater disposal may provide some probative evidence of the amount a surface owner may be damaged for "lost use of and access to the surface owner's land" under N.D.C.C. § 38-11.1-04. We do not speculate on the extent of the evidence a surface owner may proffer to establish lost use of and access to a surface owner's land, because the probative effect and admissibility of proffered evidence is a matter for a trial court's discretion. See F.R.Ev. 401-403 and N.D.R.Ev. 401-403. Rather, for purposes of these certified questions, **we conclude certified questions 3 through 6 may be determinative of this action and answer "no" to questions 3 through 5 and "yes" to question 6.**

7. If a surface owner can recover damages under N.D.C.C. § 38-11.1-04 for a mineral developer's use of the surface owner's subsurface pore space based on an amount per barrel for barrels of saltwater injected into the subsurface, can the surface owner in the same action recover additional damages based on an estimate of how many more barrels of saltwater could be injected into the pore space if the surface owner is able to prove, more likely than not: (1) the mineral developer's disposal of saltwater has foreclosed the ability of the surface owner to make use of the remaining capacity in the formation into which the saltwater is being injected; and (2) the remaining capacity of the formation into which the saltwater is being injected?

[¶31] In formulating question 7, however, the federal district court said it anticipated the plaintiffs will offer evidence that Denbury's saltwater disposal has foreclosed their ability to use or otherwise access the remaining pore space under their surface estate. The court's explanation indicates question 7 is based on Denbury's anticipated future conduct as well as potential regulatory or physical barriers to accessing any remaining pore space, none of which is certain to occur. **We decline to speculate on what evidence might be used to show foreclosed access to remaining pore space, and we decline to answer question 7.**

[¶29] The plain language of N.D.C.C. § 38-11.1-04 requires a mineral developer to pay a surface owner a sum of money equal to the amount of damages sustained by the surface owner for **lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations**. The plain language of that statute is not limited to whether the owner of a surface estate is currently using or planning to use the pore space in the near future. Rather, the statutory language requires the mineral developer to pay the surface owner for "lost land value, lost use of and access to the surface owner's land, and lost value of improvements." That language is not limited to a diminution in market value of the owner of the surface estate's interest and includes a surface owner's lost use of and access to a surface owner's pore space at some time in the future regardless of the surface owner's current use or future plan for use of the pore space. That interpretation is consistent with the legislature's stated purpose for N.D.C.C. ch. 38-11.1 "to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of development of minerals" and the legislature's separate rule of construction that N.D.C.C. § 38-11.1-04 "must be interpreted to benefit surface owners." N.D.C.C. § 38-11.1-02.

38-22-08. PERMIT REQUIREMENTS. Before issuing a permit, the commission shall find:

1. That the storage operator has complied with all requirements set by the commission.
2. That the storage facility is suitable and feasible for carbon dioxide injection and storage.
3. That the carbon dioxide to be stored is of a quality that allows it to be safely and efficiently stored in the storage reservoir.
4. That the storage operator has made a good-faith effort to get the consent of all persons who own the storage reservoir's pore space.
5. That the storage operator has obtained the consent of persons who own at least sixty percent of the storage reservoir's pore space.
6. Whether the storage facility contains commercially valuable minerals and, if it does, a permit may be issued only if the commission is satisfied that the interests of the mineral owners or mineral lessees will not be adversely affected or have been addressed in an arrangement entered into by the mineral owners or mineral lessees and the storage operator.
7. That the proposed storage facility will not adversely affect surface waters or formations containing fresh water.
8. That carbon dioxide will not escape from the storage reservoir.
9. That substances that compromise the objectives of this chapter or the integrity of a storage reservoir will not enter a storage reservoir.
10. That the storage facility will not endanger human health nor unduly endanger the environment.
11. That the storage facility is in the public interest.
12. That the horizontal and vertical boundaries of the storage reservoir are defined. These boundaries must include buffer areas to ensure that the storage facility is operated safely and as contemplated.
13. That the storage operator will establish monitoring facilities and protocols to assess the location and migration of carbon dioxide injected for storage and to ensure compliance with all permit, statutory, and administrative requirements.
14. That all nonconsenting pore space owners are or will be equitably compensated.

Source: N.D. Century Code.

38-22-09. PERMIT PROVISIONS. The commission may include in a permit or order all things necessary to carry out this chapter's objectives and to protect and adjust the respective rights and obligations of persons affected by geologic storage.

Source: N.D. Century Code.

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.**

Source: N.D. Century Code.

38-22-13. PRESERVATION OF RIGHTS. Nothing in this chapter nor the issuing of a permit:

1. Prejudices the rights of property owners within a storage facility to exercise rights that have not been committed to a storage facility.
2. Prevents a mineral owner or mineral lessee from drilling through or near a storage reservoir to explore for and develop minerals, provided the drilling, production, and related activities comply with commission requirements that preserve the storage facility's integrity and protect this chapter's objectives.

Source: N.D. Century Code.

North Dakota Assistant Attorney General analysis:

- 1) Mosser vs Denbury certified questions and answers are crafted to apply specifically to saltwater disposal.
- 2) The use of surface and pore space for saltwater disposal by an oil & gas unit because all surface within the unit becomes subject to the access requirement of the dominant mineral estate is very different than the use of surface and pore space that is leased with compensation within an amalgamated storage project.
- 3) Permit requirements 4, 5, and 14 in NDCC 38-22-08 and provisions in NDCC 38-22-09 will appear as findings in any Industrial Commission order and as such should protect the storage operator from claims like those in Mosser vs Denbury.
- 4) Industrial Commission authority for statutory amalgamation of storage rights in NDCC 38-22-10 will appear as finding(s) in any Industrial Commission order and as such should protect the storage operator from claims like those in Mosser vs Denbury.
- 5) Preservation of rights in NDCC 38-22-13 is subject to Industrial Commission jurisdiction and as such should protect the storage operator from speculative evidence and claims like those in Mosser vs Denbury question 7 which the North Dakota Supreme Court declined to answer.

Thank you !