

VOGEL Law Firm

“My Space, Your Space, We All Scream for Pore Space”
By – Joshua A. Swanson

March 23, 2023

A framework for this discussion



Rules of Engagement

- (1) Be participatory.
- (2) You rarely get all this “free” time with a lawyer without getting a bill. Ask questions.
- (3) No question is a bad one.

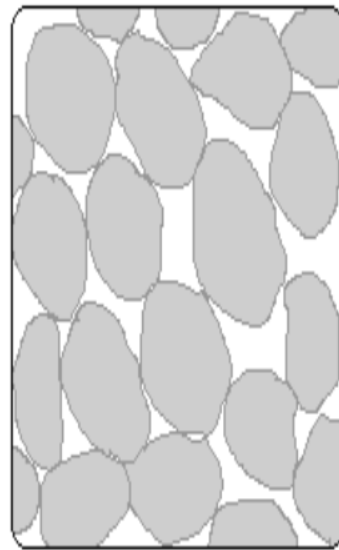
What is Pore Space

- N.D.C.C. 47-31-02 defines pore space as “a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.”
- It’s the space between the soil and rock below the surface of the land.
- Pore space is part of the surface estate.
- The right to possess, use, lease, and inject substances into the pore space belongs to the surface owner.

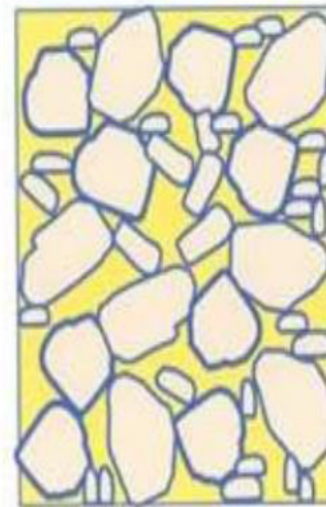
Visualizing Pore Space



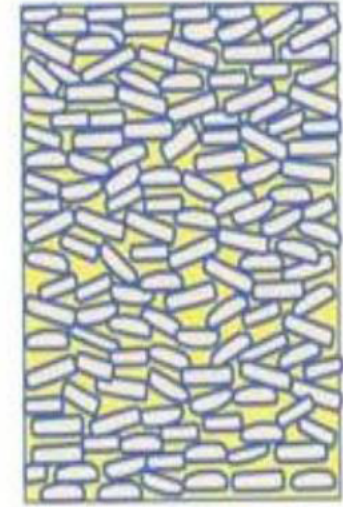
a) High porosity



b) Low porosity

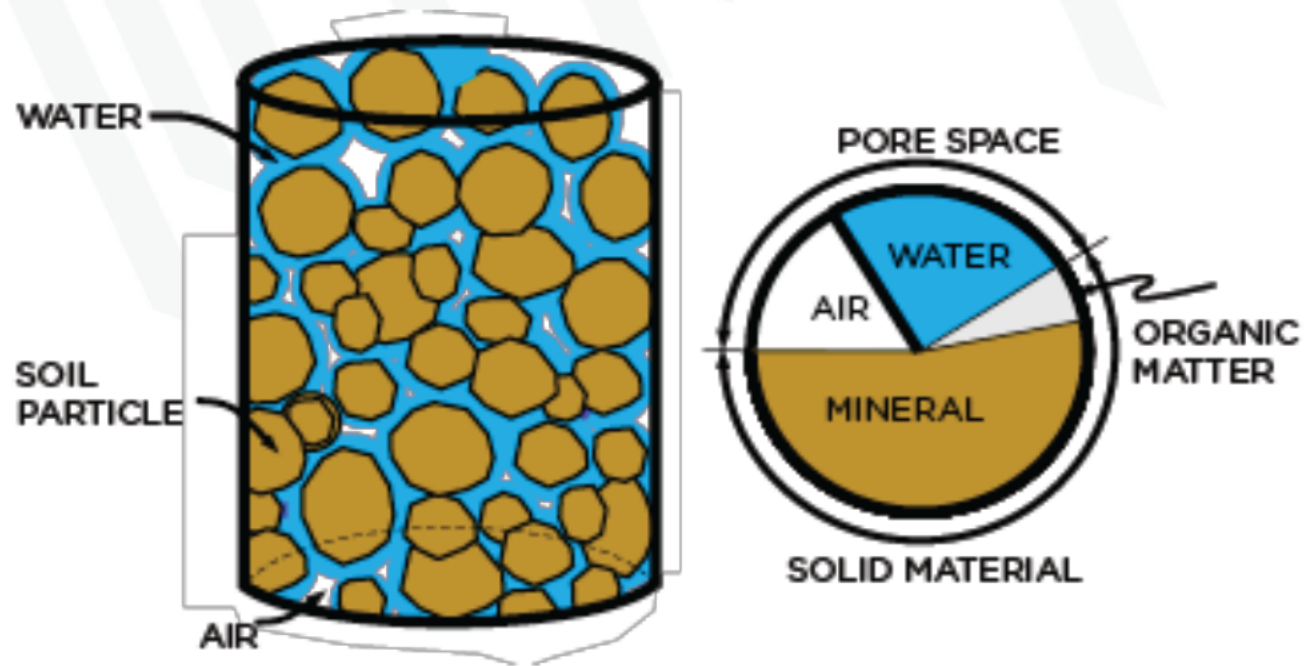


Pore space in
sandy soils



Pore space in
clay soils

Visualizing Pore Space



Why it matters ...



- Pore space has value because someone wants to use it.
- For what? *Injecting stuff* – think of it as massive underground storage space.
- Oil & Gas Industry needs to dispose of saltwater.
- Carbon Storage.

Mosser v. Denbury Res., Inc. 2017 ND 169, 898 N.W.2d 406

- Supreme Court concluded 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.
- The statute 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 their lost use of and access to the **pore space** regardless of the surface owner’s current use or future plan for use of the **pore space**.

Mosser v. Denbury Res., Inc.
2017 ND 169, 898 N.W.2d 406

- How do we set a value? What's the market say it's worth ...
- 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**. That price per barrel others are paying for disposal may provide probative evidence of the amount a surface owner is damaged for "lost use of and access to the surface owner's land."
- Supreme Court did "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."

What is Chpt. 38-11.1

- In 1979, the Legislature provided a statutory remedy for surface owners in enacting the Oil and Gas Production Damage Compensation Act.
- Purpose was “to provide the maximum amount of constitutionally permissible protection to surface owners” from the undesirable effects of development of minerals.”
N.D.C.C. 38-11.1-02.



James MacPherson / AP

What is Chpt. 38-11.1



- It balances the playing field ... sort of, but problematic.
- In enacting chapter 38-11.1, legislature explicitly found that owners of the surface estate should be justly compensated for the injury to their persons or property and interference with the use of their property occasioned by oil and gas development. N.D.C.C. 38-11.1-01(3).

What is Chpt. 38-11.1

- N.D.C.C. 38-11.1-04 → Damage & Disruption Payments
- The damages may be determined by any formula agreeable between the surface owner and the mineral developer. E.g., Surface Use Agreement (we'll come back to this).
- When determining damages and disruption payments, consideration must be given to the time during which the loss occurs and the surface owner must be compensated for harm caused by a single sum payment.
- The payments contemplated by this section only cover land directly affected by drilling operations. Payments under this section are intended to compensate the surface owner for damage and disruption.

What is Chpt. 38-11.1

- N.D.C.C. 38-11.1-08.1 → Loss of production payments
- The mineral developer shall pay the surface owner a sum of money equal to the damages sustained by the surface owner and their tenant, if any, for loss of agricultural production and income caused by oil and gas production and completion operations.
- When determining damages for loss of production, consideration must be given to the time during which the loss occurs and the damages for loss of production must be paid annually unless the surface owner elects to receive a single lump sum payment.
- Payments under this section are intended to compensate the surface owner for loss of production.

Notwithstanding ... Chpt. 38-11.1 To Take, or Not to Take, That is the Question!

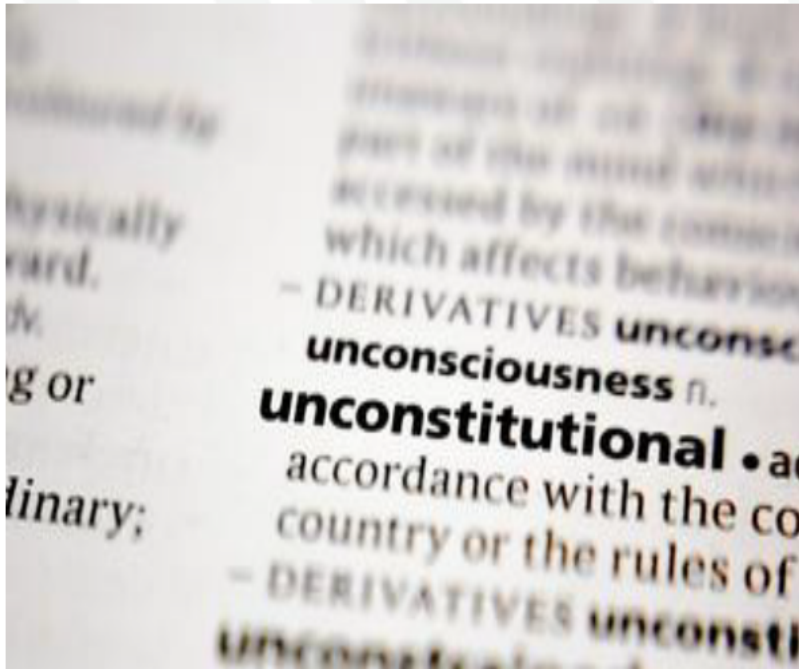
- *Not so fast my friend!*
- Legislature passes SB 2344 in 2019.
- Allowed oil and gas operators to use pore space and denied the surface owner the right to exclude others or to demand compensation for this subsurface use.
- Anyone see a problem with that?



Nw. Landowners Ass'n v. State, **2022 ND 150, 978 N.W.2d 679**

- North Dakota Supreme Court saw a problem with Legislature giving away surface owner's pore space without compensation.
- Northwest Landowners Assoc. brought suit challenging the constitutionality of SB 2344 relating to pore space.
- Also amended N.D.C.C. 38-11.1-01, supplemented existing legislative findings emphasizing importance of agriculture to the public welfare and recognized importance of "preserving and facilitating exploration through use of pore space in accordance with an approved unitization or similar agreement, an oil and gas lease, or as otherwise permitted by law."

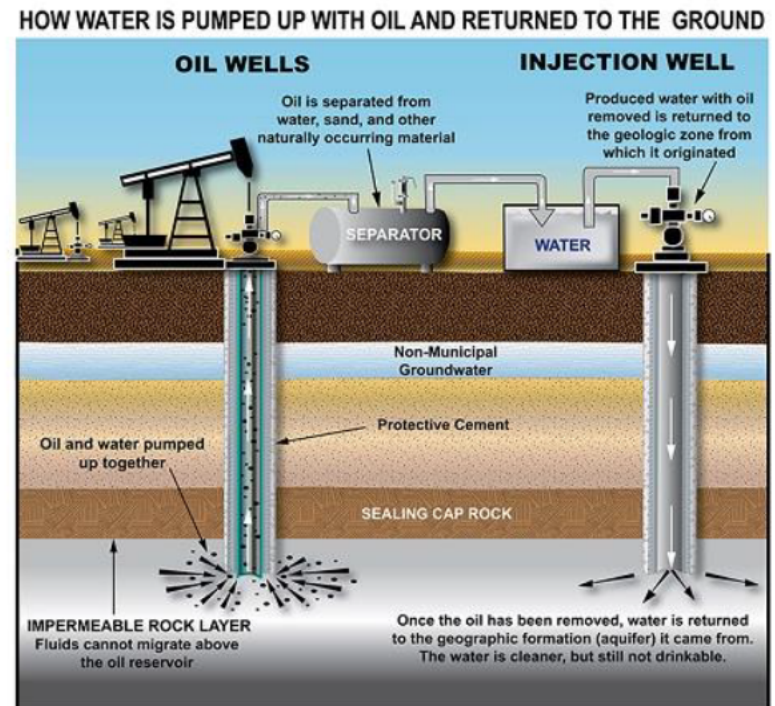
Nw. Landowners Ass'n v. State, 2022 ND 150, 978 N.W.2d 679



- Also amended N.D.C.C. 38-11.1-03, adopting new definition of “Land” that excluded pore space.
- Statute requires operator to compensate landowner for “lost land value, lost use of and access to surface owner’s land, and lost value of improvements.”

Nw. Landowners Ass'n v. State, 2022 ND 150, 978 N.W.2d 679

- The Association argued SB 2344 was a taking because it stripped landowners of their right to possess and use the pore space and allowed the State to redistribute that right to others without the consent of, or compensating, the landowners.
- District Court granted summary judgment for landowners, Supreme Court affirmed.



Nw. Landowners Ass'n v. State, 2022 ND 150, 978 N.W.2d 679

- In 2009, the Legislative Assembly enacted the pore space statute to provide a statutory definition of pore space and to confirm that title to pore space is vested in the surface owner. N.D.C.C. 47-31-03, 47-31-05.
- In 2017, the Court addressed whether the term “land” in 38-11.1-04 authorized surface owners to recover compensation for a mineral developer’s use of their pore space for the disposal of saltwater generated from drilling operations. *Mosser*, at ¶ 23.
- Court held that the term “land” in N.D.C.C. 38-11.1-04 included pore space.

***Nw. Landowners Ass'n v. State,* 2022 ND 150, 978 N.W.2d 679**

- North Dakota law has long established that surface owners have a property interest in pore space. *Nw. Landowners*, at ¶ 22.
- It has been law in ND since before statehood that an “owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.”
- The 2009 enactment of chapter 47-31, N.D.C.C., confirmed that surface owners own the pore space under their surface.
- Court concluded that surface owners have a constitutionally protected property interest in pore space under state law.
- Court concluded SB 2344 was a per se taking, and unconstitutional.

So now what ...



- Important to remember that an oil and gas operator can use the pore space within a spacing unit to inject saltwater but must compensate the landowner for doing so.
- What is the mechanism for doing so?

Surface Use & ROW plus Exhibit “B”

- Get protections in writing.
- Be careful about your writing.
- Look out for your interests, not the operator’s.
- What’s in the agreement will control.
- Avoid *Krenz v. XTO Energy*, 2017 ND 19, 890 N.W.2d 222 problem.



Krenz v. XTO Energy, Inc. 2017 ND 19, 890 N.W.2d 222

- XTO argues the district court erred in ruling XTO's extension of its pipeline across the Krenzes' land in Section 15 was not authorized by the April 2007 easement and was a trespass.
- The April 2007 easement expressly granted XTO authority to construct, repair, and maintain "pipelines" and "lines" across parts of the Krenzes' land in Sections 9, 10, and 15 and gave XTO "the exclusive right and privilege to select the route of any and all pipelines" across the ' land.
- The easement also stated it was "limited to a maximum of one pipeline within the surveyed right of way" with "centerline description and width to be described in surveyor's plat."

Krenz v. XTO Energy, Inc. **2017 ND 19, 890 N.W.2d 222**

- The Krenzes' easement granted XTO's predecessor the right to construct “pipelines” and “the exclusive right and privilege to select the route of any and all pipelines.”
- The easement also says it’s limited to “one pipeline within the surveyed right of way.”
- On its face, the language of the easement is not clear about whether the Krenzes granted an easement for one pipeline in the entire described area, or for one pipeline in each described section.
- Because of the conflicting references to “pipelines” and “one pipeline,” Court concluded the easement was subject to rational arguments for contrary interpretations and is ambiguous.

SCS Carbon Transport v. Malloy **Case No. 30-2022-cv-00665**

- SCS Carbon Transport moved for summary judgment.
- Landowners challenged: (1) the constitutionality of N.D.C.C. 32-15-06 (ND's survey-access statute); (2) SCS Carbon Transport's status as a common carrier pipeline that may exercise eminent domain power under ND law; (3) N.D.C.C. 32-15-06's applicability to the examinations that SCS seeks to do.
- Landowners rely on SCOTUS decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), arguing N.D.C.C. 32-15-06 violates US and State Constitution takings clauses because it authorizes surveys and examinations that amount to a taking without compensation.

SCS Carbon Transport v. Malloy **Case No. 30-2022-cv-00665**

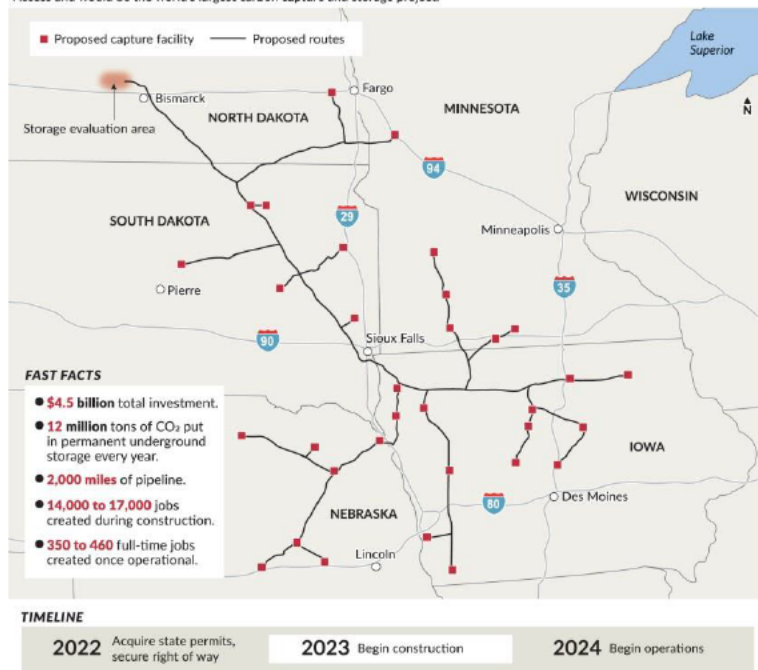
- Landowners argue SCS is not a common carrier, and that the proposed pipeline is not a public use. Landowners argue there are questions of fact whether SCS is a common carrier.
- Landowners rely heavily on NW Landowners decision.
- SCS argues they are constructing an interstate pipeline to transport CO₂ and will offer its services to the public for hire, which satisfies common carrier status.
- State filed amicus brief on Jan. 23, 2023, taking SCS's side (sort of), asserting that N.D.C.C. 32-15-06 is constitutional.

SCS Carbon Transport v. Malloy

Case No. 30-2022-cv-00665

Midwest Carbon Express

Summit Carbon Solutions' proposed Midwest Carbon Express pipeline intends to gather carbon dioxide from 31 ethanol plants and send it to western North Dakota for permanent underground storage. The pipeline would be comparable in size to Dakota Access and would be the world's largest carbon capture and storage project.



Source: Summit Carbon Solutions

Troy Becker / The Forum

- Landowners argue SCS cannot satisfy statutory requirements of being a common carrier because they do not own, operate, or manage any pipeline in ND (or anywhere). SCS only has plans to own and construct.
- Landowners argue there's no evidence SCS is transporting CO₂ to the public or for public.

SCS Carbon Transport v. Malloy Case No. 30-2022-cv-00665

- Summary judgment hearing before Judge Narum, Morton County, is set for tomorrow (March 24).
- Court may rule motion is premature and deny motion or may rule genuine issues of fact.
- Either way, this will end up at Supreme Court.



Legislative Update

- SB 2317: Relating to the amalgamation of the underground storage of oil and gas; to repeal N.D.C.C. 38-25-08, relating to amalgamating property interests; and to declare an emergency. **FAILED**
- SB 2228: Relating to permit req's for pore space storage; to repeal N.D.C.C. 38-22-10, relating to amalgamation property interests; and to declare an emergency. **FAILED**
- SB 2212: Relating to eminent domain and carbon dioxide pipelines; and to declare an emergency. Sought to remove right of eminent domain for carbon dioxide pipelines. **FAILED**
- SB 2209: Would've required the ND PSC to approve use of eminent domain after a public hearing in every impacted county for any common pipeline carrier and require 85% consent from impacted landowners in those counties. **FAILED**

So ... now what?

- See what Court does in *Malloy*.
- Negotiate strong protections in pipeline ROW, or Surface Use Agreement, seek limitations.
- Hire an attorney.
- Elect some new legislators.
- Stay tuned ...

Questions & Wrap Up!

- (1) Questions & closing thoughts.
- (2) Feel free to reach out: jswanson@vogellaw.com



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