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Northwest Landowners Association, )  
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 Plaintiff, )  
 )  
 v. )  
 )  
 State of North Dakota, North Dakota )  
 Industrial Commission, Board of )  
 University and School Lands of the State )  
 of North Dakota, Hon. Douglas )  
 Burgum in his official capacity as )  
 Governor of the State of North Dakota, )  
 and Hon. Wayne Stenehjem in his official )  
 capacity as Attorney General of North )  
 Dakota, )  
 )  
 Defendants. )

Case No: \_\_\_\_\_

**COMPLAINT**

Plaintiff, for its Complaint in the above-referenced action, states and alleges as follows:

**I. INTRODUCTION**

1. Article I, § 1 of the Constitution of North Dakota declares: “All individuals are by nature equally free and independent and have certain **inalienable rights**, among which [is that] of ... **acquiring, possessing and protecting property....**”
2. The State of North Dakota has acted in violation of the Constitution of North Dakota as well as the United States Constitution by enacting Senate Bill 2344 (2019 North Dakota Session Laws Ch. 300). This unconstitutional law was approved by the Sixty-sixth Legislative Assembly, signed by the Governor, and consequently enacted into law and will become effective August 1, 2019 (though it should be noted that numerous legislators stood opposed to this taking: Senators: Bakke; Dotzenrod; Fors; Grabinger; Heckaman; Hogan; Marcellais; Mathern; Oban; Piepkorn; Robinson; Rust. And Representatives: Adams; Anderson, B.;

Anderson, P.; Becker; Boe; Boschee; Buffalo; Dobervich; Eidson; Ertelt; Guggisberg; Hager; Hanson; Holman; Hoverson; Johnston; Longmuir; Louser; Magrum; Mitskog; Nelson, M.; Paur; Schneider; Westlind).

3. Prior to Senate Bill 2344, North Dakota's landowners had the exclusive right to possess and use the pore space within their lands, as recognized by case law and prior statutes.
4. Senate Bill 2344 strips landowners of their right to possess and use the pore space within their lands and allows the State of North Dakota to directly redistribute that right to others without the consent of or compensation to the landowners.
5. Senate Bill 2344 is a taking of the inalienable rights of North Dakota landowners. Under current law, mineral developers have, at most, an implied right to use as much of the surface estate as is reasonably necessary to produce minerals. Any use of the surface estate beyond that necessity violates the surface owner's property rights and entitles the surface owner to tort remedies. In enacting Senate Bill 2344, the State of North Dakota attempts to give mineral developers free use of the landowner's pore space and remove any rights or remedies the surface owner has to object or demand compensation.
6. Taking property from a private landowner in this manner, particularly without paying compensation, and then giving it to another private entity to use, is unconstitutional on several grounds.
7. Additionally, Senate Bill 2344 redefines the very meaning of "Land" for purposes of the Oil and Gas Production Damage Compensation Act to remove the vested right to compensation for pore space use under N.D.C.C. ch. 38-11.1 that has been recognized by two federal judges in North Dakota, and all five Justices of the Supreme Court of North Dakota. The purpose of this chapter of the Century Code as stated by the Legislative Assembly that adopted it is "to

provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of development of minerals.” The actions of the Sixty-sixth Legislative Assembly belie this purpose and turn it on its head, stripping North Dakota landowners of the protections previously provided by North Dakota law.

8. Senate Bill 2344 also includes a provision that requires all laws to be interpreted to disallow landowners from even demanding compensation for use of their pore space by mineral developers. This provision bars the doors of the courts to landowners aggrieved by unauthorized use of their property, further infringing upon landowners’ constitutional rights to redress and access to the courts.
9. Senate Bill 2344 is unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution, and under the Constitution of North Dakota, Article I, §§ 9 (open courts), 12 (due process), 16 (unconstitutional taking), and 21 & 22 (equal protection); and Article 10, § 18 (gift clause).

## **II. FACTUAL BACKGROUND**

10. The text of Senate Bill 2344 describes it as “a bill relating to injection or migration of substances into pore space; relating to pore space and oil and gas production.” It also states that it is “AN ACT to create and enact section 47-31-09 of the North Dakota Century Code, relating to injection or migration of substances into pore space; and to amend and reenact sections 38-08-25, 38-11.1-01, and 38-11.1-03 of the North Dakota Century Code, relating to pore space and oil and gas production.”
11. Senate Bill 2344 deprives private landowners of their property and of any remedies for temporary and permanent physical occupations of their property, effectively displacing their

possession of this private property and handing it over to select private entities for private economic purposes.

12. Senate Bill 2344 states, *inter alia*, that “[a]ny other provision of law may not be construed to entitle the owner of a subsurface geologic formation to prohibit or demand payment for the use of the subsurface geologic formation for unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, *or any other operation* conducted under [N.D.C.C. ch. 38-08].” This provision effectively bars any legal remedy a landowner might have for invasion of the subsurface geologic formations that are part of the surface estate under any other law.
13. Senate Bill 2344 also redefines “Land” for purposes of N.D.C.C. ch. 38-11.1, specifically excluding pore space from that definition.
14. By excluding pore space from the definition of “Land,” Senate Bill 2344 takes away a landowner’s vested rights to compensation for lost use of the landowner’s pore space, and diminution in the value of the property resulting from injection into the pore space.
15. Additionally, Senate Bill 2344 purports to strip landowners of their right to bring an action for trespass, nuisance, or other tort as a result of the injection or migration of substances into their pore space related to disposal operations, secondary or tertiary oil recovery operations, or otherwise related to facilitation of production of oil, gas, or other minerals.
16. Senate Bill 2344 was passed by the North Dakota Senate on Tuesday April 16, 2019, and the North Dakota House of Representatives on Wednesday April 17, 2019, and signed by Governor Doug Burgum on Friday April 19, 2019.

### **III. JURISDICTION**

17. This Court has jurisdiction over the claims in this Complaint pursuant to Article VI, § 8 of the Constitution of North Dakota and N.D.C.C. § 27-05-06, and under N.D.C.C. ch. 32-23. This action arises under the United States Constitution, the Constitution of North Dakota, and other law cited herein. Plaintiff seeks a declaration that the law passed as Senate Bill 2344 is an unconstitutional taking without due process and without just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States, and art. I, § 16 of the Constitution of North Dakota, a violation of the open court provision in art. I, § 9 of the Constitution of North Dakota, a violation of procedural and substantive due process under art. 1, § 12, equal protection provisions of §§ 21 & 22; and an impermissible gift under Article 10, § 18 (gift clause) of the Constitution of North Dakota. The law is void as violative of both the United States Constitution and the Constitution of North Dakota.

### **IV. DEFENDANTS**

18. The North Dakota Industrial Commission “has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of [N.D.C.C. ch. 38-08] relating to control of oil and gas resources. Under Section 1, subsection 6 of Senate Bill 2344, the Commission “may adopt and enforce rules and orders to effectuate the purposes of [SB 2344].” The Industrial Commission consists of Chairman Doug Burgum, Governor, Attorney General Wayne Stenehjem, and Agriculture Commissioner, Doug Goehring. Its office is located at 600 East Boulevard Avenue, Department 405, Bismarck, ND 58505-0840.

19. The Board of University and School Lands (“Land Board”) administers pore space rights and interests in sovereign lands. The Land Board has “[f]ull control of the selection, appraisalment,

rental, sale, disposal, and management of...[the majority of lands owned by the State ].” N.D.C.C. § 15-01-02. The Land Board consists of the Chairman, Governor of North Dakota, Doug Burgum, the North Dakota Secretary of State, Alvin Jaeger, the Superintendent of Public Instruction, Kirsten Baesler, the North Dakota Attorney General, Wayne Stenehjem, and the North Dakota State Treasurer, Kelly Schmidt. The Land Board’s office is located at 1707 North 9th St, Bismarck, ND 58506-5523.

20. The Honorable Doug Burgum is the Governor of the State of North Dakota; the head of the North Dakota Board of University Lands (the “Land Board”); and a member of the North Dakota Industrial Commission. The Office of Governor Burgum is located at 600 East Boulevard Avenue, Bismarck, North Dakota 58505. The Constitution of North Dakota, art. V, § 7, obligates Governor Burgum to ensure that the laws of the State of North Dakota “are faithfully executed.” Governor Burgum is named as a Defendant to this action solely in his official capacities.

21. The Honorable Wayne Stenehjem is the Attorney General of the State of North Dakota; a member of the Land Board; and a member of the North Dakota Industrial Commission. The Office of the Attorney General is located at 600 East Boulevard Avenue, Department 125, Bismarck, North Dakota 58505. “The Attorney General is the principal law officer of the state with duties and authorities coextensive with the public legal affairs of the whole community.” *North Dakota State Bd. of Higher Educ. v. Jaeger*, 2012 ND 64, ¶ 17, 815 N.W.2d 215. The North Dakota Century Code authorizes the Attorney General to “[i]nstitute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of any state officer” and to “[a]pppear and defend all actions and proceedings against any state officer in the attorney general’s official capacity in any of the

courts of this state....” N.D.C.C. § 54-12-01(2), (3). The Attorney General is named as a Defendant to this action solely in his official capacity and in his role as Chief Legal Officer of the State.

## V. LEGAL BACKGROUND

22. “Pore space” refers to the spaces between the rocks, sand, and soil. While a pot of soil with a plant in it may seem “full,” when we add water to it, we can see that the “full” pot of soil in fact has a lot of open space in it. This space is the “pore space.” Pore space exists immediately below the surface of the soil all the way down to the magma at the core of the earth, and even exists in some seemingly solid rock formations.
23. According to William & Meyers, the most prominent treatise on oil and gas law, “[i]n some instances, the pore space may have been occupied by minerals such as oil or natural gas or helium but have since become empty. In other instances, questions may arise over pore spaces that were not occupied by minerals. Such pore space may have commercial value for purposes of temporary storage or permanent disposal of substances originating off the land, including natural gas and undesirable fluids, such as waste gases and liquids.”
24. In Chapter 47-31 of the North Dakota Century Code, “pore space means a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.”
25. Through Senate Bill 2344, Defendant State of North Dakota has invaded and taken possession of the pore space owned by North Dakota surface owners, attempted to remove a landowner’s right to obtain compensation for trespasses, nuisances, and other such invasions of the pore space owned by the landowner, and also deprived landowners of their right to compensation under N.D.C.C. ch. 38-11.1.

*A. Ownership of pore space*

26. The owner of the surface estate has owned the pore space in North Dakota since 1877 as per Civ. C. 1877, § 265, now codified as N.D.C.C. § 47-01-12.
27. Pursuant to N.D.C.C. § 47-01-12, “the owner of land in fee has the right to the surface and to *everything* permanently situated beneath or above it.”
28. As stated by the editors of the Williams & Meyers treatise, the United States District Court for the District of North Dakota has previously explained ownership of pore space, noting that “the prevailing view in most jurisdictions” is that subsurface pore space belongs to the surface owner.
29. In 2009, the Sixty-first Legislative Assembly of North Dakota adopted Senate Bill 2139, which became N.D.C.C. ch. 47-31.
30. Pursuant to N.D.C.C. § 47-31-03, “[t]itle to pore space in all strata underlying the surface of lands and waters is vested in the owner of the overlying surface estate.”
31. A leader of the committee that drafted the bill stated in written testimony that “SB 2139 was drafted to further clarify what we believe is the existing common law in North Dakota --- that the surface owner owns the pore space.”
32. Charles Carvell, an Assistant Attorney General, testified that “[t]he consensus is that surface owners own the pore space under their land. This is consistent with the view of lawyers who participated in the Carbon Dioxide Storage Workgroup. We could wait for the North Dakota Supreme Court to confirm that view, but the wait might be long. To provide immediate certainty, the Workgroup thought it best that the legislature confirm that surface owners own the pore space under their land; hence this bill.”

33. That the owner of the surface estate owns the pore space has been the law in North Dakota for over a century.

*B. The Law in North Dakota before Senate Bill 2344*

34. In North Dakota, surface estate owners have long-held rights to exclude others from their pore space, and rights to compensation when that pore space is invaded and used by third parties, with or without authorization (i.e. compensation for use of pore space is mandatory regardless of the right to use the pore space).

*i. The Common-Law Implied Easement and Requirement to Compensate the Owner of Pore Space for Use beyond the Scope of the Implied Easement*

35. Historically, a grant of land in fee conveyed the surface and all mineral interests. Through multiple conveyances and generations, most fee interests in North Dakota have been diminished through reservations by grantors. In other words, the seller kept a part of the whole and conveyed less than what he owned. Reservations commonly involved the rights to minerals in place, such as oil, gas, and hydrocarbons. This creates “split estates,” where the ownership of some of the minerals is separate from the ownership of the remainder of the unsevered fee interest.

36. The owner of a severed mineral estate has an easement that is implied at common law to use the surface only so much as is reasonably necessary in order to extract minerals.

37. Disposal of produced water / saltwater utilizes the pore space.

38. Injection of CO<sub>2</sub> for enhanced or tertiary recover will utilize the pore space in most cases, although the extent to which it does so will be a factually dependent inquiry.

39. As was explained by the Supreme Court of North Dakota in *Hunt v. Kerbaugh*, “[t]he mineral estate is dominant in that the law implies, where it is not granted, a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the

minerals, which rights must and do involve the surface estate. Without such rights the mineral estate would be meaningless and worthless. Thus, the surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate. In the absence of other rights expressly granted or reserved, the rights of the owner of the mineral estate are limited to so much of the surface and such use thereof as are Reasonably [sic] necessary to explore, develop, and transport the minerals.”

40. In *Fisher v. Continental Resources, Inc.*, 49 F. Supp. 3d 637 (D.N.D. 2014) the United States District Court for the District of North Dakota determined that the implied easement allowed a mineral developer to conduct saltwater disposal operations in the circumstances of that case so long as the operations were reasonably necessary to production of oil and gas within the same leasehold (though whether this is allowed in any other given circumstance is always a question of fact).

41. Additionally, the court in *Fisher* recognized that this principle can be expanded to a spacing unit or unitized field, in so far as N.D.C.C. § 38-08-08 (spacing units) states that “[o]perations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof.” N.D.C.C. § 38-08-09.8 states essentially the same for unitized fields.

42. The court in *Fisher* (49 F. Supp. 3d at 644) also recognized that the rule in oil and gas law is that absent a spacing/pooling or unitization order, a mineral developer is not authorized to dispose of produced water into a disposal under its lease rights or implied easement if the produced water is from *outside* of the leased area, or *outside* of the unit.

43. Citing to *Dick Props., LLC v. Paul H. Howman Trust*, 221 P.3d 618, 621 (Kan. 2010), the North Dakota federal court stated that if “a lessee wishes to use a salt water disposal well on one lease to dispose of salt water produced on other leases, a salt water disposal lease is required.”
44. If a mineral developer disposes of off-lease and/or off-unit produced water without a lease, it is a trespass, creates a nuisance, and is an unlawful occupation of property.
45. Whether it is a trespass or not, compensation is required to the surface estate owner for such disposal in North Dakota.
- ii. Chapter 38-11.1 requires compensation for use of pore space regardless of whether it is a trespass, nuisance, or other tort*
46. N.D.C.C. ch. 38-11.1, the Oil and Gas Production Damage Compensation Act, states: “It is the purpose of this chapter to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of development of minerals. This chapter is to be interpreted in light of the legislative intent expressed herein.”
47. The Act requires payment by mineral developers for damages to and use of the surface estate. Prior to Chapter 38-11.1, payments were common to surface estate owners by mineral developers.
48. Under Chapter 38-11.1, the surface estate owner must be compensated for use of the pore space regardless of whether it is a trespass, nuisance, or other tort, and this was confirmed by the Supreme Court of North Dakota in *Mosser v. Denbury Resources, Inc.*, 898 N.W.2d 406, 412 (N.D. 2017) (“State *Mosser* case”).
49. This decision followed a 2015 decision from the United States District Court of the District of North Dakota, which reached the same conclusion in *Mosser v. Denbury Resources, Inc.*, 112 F.Supp.3d 906, 919 (D.N.D. 2015) (“Federal *Mosser* case”).

50. As was noted in the State *Mosser* Case, both a federal district court judge in *Fisher v. Cont'l Res., Inc.*, 2015 WL 11400124 at 4–5 (D.N.D. Oct. 8, 2015) and the federal magistrate judge in the Federal *Mosser* case have concluded that N.D.C.C. § 38-11.1-04 applies to claims for compensation for a mineral developer's use of the surface owner's pore space.
51. The Supreme Court of North Dakota, in the State *Mosser* case, agreed with the two federal judges and ruled that N.D.C.C. § 38-11.1-04 applies to claims involving pore space.
52. Both federal judges and the Supreme Court of North Dakota also relied on N.D.C.C. § 47-01-12, which has been the law in North Dakota for over a century and states that “[t]he owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.”
53. The federal courts and the Supreme Court of North Dakota also relied upon a Montana case, *Burlington Res. Oil & Gas Co., LP v. Lang and Sons Inc.*, 361 Mont. 407, 259 P.3d 766 (2011), in which the Supreme Court of Montana interpreted a very similar surface damage statute, and came to the same conclusion that the statute allowed compensation for pore space claims under Montana law.
54. The Supreme Court of North Dakota explained in the State *Mosser* case: “An opinion from the Montana Supreme Court offers guidance as well. In *Burlington Res. Oil & Gas Co., LP v. Lang and Sons Inc.*..., the court was asked to decide whether Montana's Surface Owner Damage and Disruption Compensation Act (“SODDCA”) required a mineral developer to pay compensation to the surface owner for use of the subsurface pore space for salt water disposal operations. While ultimately deciding the surface owner had failed to offer adequate proof of his damages and had not made a claim for ‘lost land value,’ the court acknowledged that the

SODDCA provision authorizing compensation for ‘lost land value’ “could encompass damage sustained by a surface estate owner for use of pore space.”

55. Montana’s Supreme Court acknowledged that compensation for “lost land value” could encompass use of pore space. The Supreme Court of North Dakota explained in the State *Mosser* case that, “[a]s originally enacted, [North Dakota’s statute] required a mineral developer to pay a surface owner for ‘loss of agricultural production and income, lost land value, and lost value of improvements caused by drilling operations.’ 1979 N.D. Sess. Laws ch. 396, § 4. In 1983, the legislature added the phrase ‘lost use of and access to the surface owner’s land’ to N.D.C.C. § 38–11.1–04. 1983 N.D. Sess. Laws ch. 407, § 2. The language adopted in 1983 is broader than the initial language in N.D.C.C. § 38–11.1–04.”
56. Explaining that compensation for use of the pore space is not tied to a surface owner’s ability to show an imminently planned use for the pore space, the Supreme Court of North Dakota also explained in the State *Mosser* case: “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.”
57. These cases all confirm that a surface owner has a right to compensation for use of his pore space under N.D.C.C. ch. 38-11.1. Additionally, compensation for use of the surface estate even when operations are conducted pursuant to the implied easement was likely the law even prior to N.D.C.C. ch. 38-11.1 as recognized in *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979) (“We question, however, the social desirability of a rule which potentially allows the damage or destruction of a surface estate equal or greater in value than the value of the mineral being extracted. Future mineral exploration and development can be expected to expand as our demands for energy sources grow. Equity requires a closer examination of

whether or not the cost of surface damage and destruction arising from mineral development should be borne by the owner of a severed surface estate or by the developer and consumer of the minerals. Although we do not doubt the mineral estate owner's right to use the surface estate to explore, develop and transport the minerals, we specifically do not decide if the right of reasonable use also implies the right to damage and destroy without compensation.”).

*iii. Recognition of rights to pore space in other contexts*

58. The rights inherent in the surface estate owner, such as the right to exclude, and the right to compensation for invasion of the pore space, have been recognized in North Dakota in other legal contexts.
59. In 2009, when the Sixty-first Legislative Assembly passed what is now Chapter 38-22 related to CO<sub>2</sub> sequestration, it explained in N.D.C.C. § 38-22-01 that “[g]eologic 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.”
60. Explaining a mechanism for creating a common reservoir over the objection of surface owners who own the pore space, Lynn Helms, director of the North Dakota Industrial Commission, Department of Mineral Resources, compared a sequestration project reservoir to the use of unitization of an oilfield under N.D.C.C. ch. 38-08, and reassured legislators that “[i]n both cases these folks are going to be compensated for what happens in their subsurface.”
61. Indeed, the law itself clearly required that “all nonconsenting pore space owners are or will be equitably compensated” if there was a permit issued to amalgamate interests in the pore space of a common reservoir to sequester CO<sub>2</sub> in the surface owner's pore space.

62. N.D.C.C. § 38-22-08 also protected surface owners by requiring the pore space operator to make “a good-faith effort to get the consent of all persons who own the storage reservoir’s pore space” and obtain “the consent of persons who own at least sixty percent of the storage reservoir’s pore space.”
63. These provisions are very similar to requirements imposed for a unitized field for oil and gas production, which require the consent of fifty-five percent of the mineral owners under N.D.C.C. §§ 38-08-09.5 and 38-08-09.9.
64. The law that became N.D.C.C. ch. 38-22 came from Senate Bill 2095, which was a companion bill to Senate Bill 2139 (which became N.D.C.C. ch. 47-31).
65. These laws passed in 2009 contain numerous provisions that confirm the ownership of pore space by the surface estate owner and require notice to and consent of that surface owner when the pore space is to be used, as well as compensation.

*C. Senate Bill 2344*

66. Senate Bill 2344 contains three primary provisions that are designed to, and on their face do, fully and completely invade the pore space which is part of the surface estate owned by landowners.
67. Specifically, Senate Bill 2344 takes away established and well-recognized claims a surface owner has under N.D.C.C. ch. 38-11.1, and for trespass, nuisance, and other tort for subsurface invasions of his pore space beyond the scope any rights attributed to a mineral developer by its implied easement. The abrogation of these rights displaces the surface owner’s possessory rights and constitutes an invasion of the property.
68. First, and most egregiously, in Section 1 Senate Bill 2344 sweepingly declares: “Any other provision of law may not be construed to entitle the owner of a subsurface geologic formation

to prohibit or demand payment for the use of the subsurface geologic formation for unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation conducted under [Chapter 38-08 of the North Dakota Century Code].”

69. This provision not only sweeps aside centuries of tort and property law in one fell swoop, it also purports to prohibit any law, anywhere, including the state and federal constitutions, from being interpreted to allow a surface owner to so much as ask for compensation.

70. Second, in Section 3, Senate Bill 2344 redefines “Land” in N.D.C.C. ch. 38-11.1 to remove “pore space” from the definition of Land, thereby eliminating not only the private ownership of rights in land that have long been recognized by law, but also a landowner’s longstanding right to compensation for oil and gas operations involving use of the surface.

71. Third, in Section 4, Senate Bill 2344 states that “[i]njection or migration of substances into pore space for disposal operations, for secondary or tertiary oil recovery operations, or otherwise to facilitate production of oil, gas, or other minerals is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort.”

72. Section 4 of Senate Bill 2344 leaves the surface owner with a hollow title; one which allows the surface owner to do nothing in the face of the most egregious violation of his singular right to exclude others from his property, and indeed bars him from receiving fair rents, or even so much as asking for compensation after the injury, which is consequently a bar across the courtroom’s doors.

73. The Legislative Assembly stated its purpose for Senate Bill 2344 within the bill itself, and in addition to the blatant taking of private property without just compensation, Senate Bill 2344 is also a taking of private property for impermissible purposes under the Constitution of North

Dakota, specifically the 2006 amendments prohibiting takings for benefits of economic development.

74. According to the Sixty-sixth Legislative Assembly of North Dakota, “It is in the public interest to promote the use of carbon dioxide to benefit the state, to help ensure the viability of the state’s coal and power industries, and to benefit the state economy.”

75. The Sixty-sixth Assembly also stated that “[i]t is in the public interest to encourage and authorize cycling, recycling, pressure maintenance, secondary recovery operations, and enhanced recovery operations utilizing carbon dioxide for the greatest possible economic recovery of oil and gas.”

76. Thus, the primary purposes of the takings effectuated by Senate Bill 2344 are to benefit the private energy development and operation companies, which may indirectly benefit the state economy.

77. These are impermissible purposes for taking private property rights under art. I, § 16 of the Constitution of North Dakota.

## **VI. THE LANDOWNERS**

### *A. Northwest Landowners Association*

78. Plaintiff Northwest Landowners Association is a North Dakota nonprofit corporation that strives to bring landowners and stewards of North Dakota’s resources together, to protect, inform and educate. The mission of Northwest Landowners Association is to create a network of information on issues as they pertain to mineral owners, landowners, operators, or occupants; to share and discuss the development of North Dakota’s resources; and to become educated, such that its members may help maintain a balance in resource development and property rights of individuals in a responsible manner. Northwest Landowners Association

strives to provide unbiased education regarding current and past resource development processes, to bring together those with similar issues to solve common problems, to aid in the development of comprehensive legislation to protect the resources of the citizens of North Dakota well into the future, and to ensure a more harmonious coexistence between landowners, residents, and the energy industry.

79. During the 2019 legislative session, Northwest Landowners Association addressed legislators numerous times during committee and subcommittee hearings regarding Senate Bill 2344. On one such occasion, President Troy Coons explained: “We as landowners are not opposed to the storage of gas or to CO<sub>2</sub> injection. Almost all of the saltwater disposals in this state are operated through voluntary contracts with landowners. As an organization we have always tried to work with industry and regulators to address our concerns. Unfortunately, we were not at the table when this bill was drafted, and we are opposed to this unprecedented taking of private property rights. We remain committed to working cooperatively with industry, and our invitation to sit down and address the concerns raised by this bill is an open offer. But this bill remains offensive to what we stand for....”

80. Over a dozen members of Northwest Landowners Association have saltwater disposal wells on their property, and dozens more live or own land adjacent to disposal wells. The Association has hundreds of members who are owners of surface estates in areas with oil and gas production.

81. Northwest Landowners Association and its member landowners (hereafter, collectively, “Landowners”) will be directly and negatively impacted by passage of Senate Bill 2344. By way of example and illustration, the member landowners listed below are directly, immediately, and negatively impacted by passage of Senate Bill 2344.

*B. Rick and Rosella Fisher*

82. Rick and Rosella Fisher (“The Fishers”) are members of Plaintiff Northwest Landowners Association.

83. The Fishers own the surface estate of the following described lands in Bowman County, North Dakota:

Township 131 North, Range 106 West

Section 17: E/2NE/4

(“Fisher property”)

84. The Fishers are currently being sued by Continental Resources, Inc. (“Continental”) in the United States District Court for the District of North Dakota, Case 1:18-cv-00181-CSM (“*Continental v. Fisher* case”).

85. Prior to the current lawsuit by Continental, the Fishers had brought an action against Continental for nuisance, trespass, fraudulent misrepresentation, deceit, and statutory damages under Chapter 38-11.1 of the North Dakota Century Code, for damage to the Fisher property caused by Continental’s operation of the Lonesome Dove 42-17 SWD Well (“*Fisher v. Continental* case”).

86. The Lonesome Dove 42-17 SWD Well (“Lonesome Dove disposal well”) was constructed and is being operated on the Fisher property without any consent or authorization from the Fishers.

87. Continental built the Lonesome Dove disposal well and began operating it over the Fisher’s objections based on its claimed rights under a unitization order and the implied easement.

88. Despite prior court rulings holding that Continental must pay the Fishers for disposal into the Lonesome Dove disposal well, Continental has begun operating the well and refused to pay the Fishers, and rather than pay them it sued them in federal court.

89. At the time of the *Fisher v. Continental* case, Continental had not yet begun disposing of produced water into the Lonesome Dove 42-17 SWD Well. Ruling on a motion for summary judgment, the federal court did, however, find that Continental was required to compensate the Fishers for use of the disposal, if and when Continental began disposing of produced water into the well.
90. Despite this clear holding, Continental filed a Complaint on September 7, 2018, asking the same court for a declaratory judgment that the Fishers are not entitled to compensation for Continental's operations of the well.
91. The Fishers denied Continental's contention that it did not have to compensate them, considering that the court had already determined otherwise, and also alleged that Continental's claim was frivolous and that no reasonable person could have thought a court would render judgment in Continental's favor.
92. The Fishers' confusion at Continental's Complaint was dispelled when Senate Bill 2344 was introduced and upon its enactment provided Continental with a basis for the claims it brought against the Fishers in September of 2018.
93. The passage of Senate Bill 2344 impacts the Fisher's claim to compensation, and its passage and enactment is the sole foundation for an argument that Continental's claims in the *Continental v. Fisher* case are not frivolous.
94. The enactment of Senate Bill 2344 strips the Fishers of their claims in the pending lawsuit and provides the sole basis for Continental's claims in the lawsuit. Senate Bill 2344 operates to take the Fishers' property and give it to Continental for Continental's private use.

*C. Bicker Farms*

95. Steven and Patricia Jensen are the partners of Bicker Farms LLLP (“Bicker Farms”) and are members of Northwest Landowners Association, and Patricia Jensen is a board member of the Association. Bicker Farms, LLLP (“Bicker Farms”) is a member of Northwest Landowners Association.

96. Bicker Farms owns the surface estate of the following described lands in Mountrail County, North Dakota:

Township 158 North, Range 94 West  
Section 20: S/2NW/4, NE/4, SE/4

(“Bicker Farms property”)

97. The Tioga-Madison Unit Q-139-D well (NDIC File No. 894) (“Bicker Farms disposal well”) is located on the Bicker Farms property. The Bicker Farms disposal well is operated by Hess Bakken Investments II, LLC (“Hess”) and is utilized to dispose of produced water into the Dakota formation.

98. The Bicker Farms disposal is located in the Tioga-Madison Unit.

99. Hess operates sundry wells in the Tioga-Madison Unit, and utilizes the Bicker Farms disposal well to dispose of produced water that is produced from these wells.

100. Hess also operates sundry wells that are not subject to the Tioga-Madison Unit voluntary unitization agreement which was the subject of NDIC Case No. 201 and the wells are not subject to the NDIC Order approving that agreement at NDIC Order No. 220. Some of these wells, such as the EN-Charles Wood-157-94-1720H-1 (NDIC File No. 19699) are located outside of the geographical boundaries of the Tioga-Madison Unit and also do not produce from the Madison Formation in the Tioga Pool. Other wells such as the A. Blikre 12-01H (NDIC File No. 16406) are located within the geographical boundaries of the Tioga-Madison

Unit, but are nonetheless not subject to the unitization agreement or NDIC Order No. 220 because they do not produce from the Madison Formation in the Tioga Pool, but from the Tioga-Bakken Pool.

101. Hess is disposing of produced water from these wells into the Bicker Farms disposal well without any legal right or authority.
102. Hess does not have an agreement with Bicker Farms or the Jensens (or, on information and belief, their predecessors-in-interest) for operation of the Bicker Farms disposal well.
103. There is no agreement, written or oral, that gives Hess legal authority to dispose of water from wells such as the EN-Charles Wood-157-94-1720H-1 or the A. Blikre 12-01H that are not subject to the unitization agreement or NDIC Order No. 220.
104. Hess has not compensated Bicker Farms or the Jensens for disposal of water into the Bicker Farms disposal well.
105. A portion of the water being disposed of into the Bicker Farms disposal well is unauthorized and therefore constitutes a trespass and is creating a nuisance.
106. Bicker Farms is entitled to and has not been paid compensation under N.D.C.C. ch. 38-11.1 for water disposed into the Bicker Farms disposal well.
107. The enactment of Senate Bill 2344 strips Bicker Farms of its claims to the unauthorized use of its pore space for disposal operations by a private mineral developer and to its right to compensation therefor. Senate Bill 2344 operates to take Bicker Farms' property and give it to Hess for Hess's private use.

*D. Ronald Stead*

108. Ronald Stead is a member of Northwest Landowners Association.

109. Ronald Stead owns the surface estate of the following described lands in Bottineau County, North Dakota:

Township 162 North, Range 81 West  
Section 14: SW/4

(“Stead property”).

110. The Stead 24-14 4 SWD well (NDIC File No. 12655) (“Stead disposal well”) is located on the Stead property. The Stead disposal well was operated and was utilized to dispose of produced water into the Dakota formation until approximately June of 2015.

111. The current operator of the Stead disposal well is Vast Operating LLC.

112. The Stead disposal well has been abandoned by the operator according to the scout ticket data maintained by the North Dakota Industrial Commission, Department of Mineral Resources, Oil and Gas Division.

113. The most recent document contained in the well file for the Stead disposal well is a sundry notice dated January 1, 2019, from Vast Operating LLC, which states: “This SWD well has a hole in the casing and cannot be repaired and needs to be plugged. Vast Operating LLC doesn’t have the money to pay to plug this well as this time and will likely never be able to come up with the funds.”

114. The land surrounding the Stead disposal well has become less productive and appears to be contaminated with produced water, and the area of likely contamination appears to be spreading out from the abandoned well.

115. This is a pertinent concern with respect to Senate Bill 2344, because the phrases “subsurface geologic formation” and “subsurface sedimentary stratum” are vague and ambiguous. From a geologic perspective, the glacial till in Bottineau County below the A and B horizons (i.e. below the top few feet) is all “subsurface sedimentary stratum,” and is a

“subsurface geologic formation.” As such, these phrases do not limit the taking of pore space in Senate Bill 2344 to pore space in deep formations, and the pore space immediately below the surface is also subject to the taking effectuated by Senate Bill 2344.

116. Electroconductivity and chloride levels are extremely elevated in the soil surrounding the Stead disposal well, both strong signs of contamination from produced water emanating from the disposal and migrating through the pore space owned by Mr. Stead.

117. Ronald Stead has a freshwater well on and near the Stead disposal well which was previously used by his cattle. Over time, Mr. Stead’s cattle began to shy away from drinking the water from this well unless there was no other water source available. Mr. Stead has reasonable and well-grounded fears that his water well and source of water could become contaminated due to the produced water migrating from and into his pore space and continuing to migrate from that pore space into his soil and water. Mr. Stead has reasonable fears that the hole in the casing and leaking from the Stead disposal well will cause produced water to disperse into Mr. Stead’s pore space above and outside of the depth and zone authorized for disposal of produced water, and in zones and at depths where freshwater aquifers exist and where it has the strong potential to migrate into productive soils.

118. Produced water continues to trespass into the pore space of the Stead property and continues to create a nuisance. Mr. Stead is entitled to compensation for the nuisance being maintained in his pore space and for the produced water trespassing in his pore space and threatening to contaminate the surface soils.

119. The enactment of Senate Bill 2344 strips Ronald Stead of his claims for trespass to his pore space and a nuisance created on his property and in the pore space of his land. This is a taking of Mr. Stead’s private property.

*E. Ed & Michelle Farrell*

120. Ed and Michelle Farrell (“the Farrells”) are members of Northwest Landowners Association. Ed and Michelle Farrell are the trustees of the Farrell 2005 Revocable Trust (Ed and Michelle Farrell and Farrell 2005 Revocable Trust are hereinafter referred to collectively as “the Farrells”).

121. The Farrells own the following described lands in Bottineau County, North Dakota:

Township 162 North, Range 81 West  
Section 31: Lots 1, 2; E1/2NW1/4

(the “Farrell property”).

122. The Evanson 2 disposal well (NDIC File No. 9304) is located on the Farrell property.

123. In 2008, the Farrells had to resort to legal action against an operator who had installed an unauthorized pipeline for the purpose of transporting produced water from off-lease and off-unit into their property and was disposing of this produced water into their land without authorization or authority. This lawsuit was captioned *Edward M. Farrell v. Ballantyne Oil et al.*, Bottineau County Case No. 05-08-CV-00042.

124. After prevailing in this lawsuit, the Farrells negotiated with the operator and eventually granted two separate agreements authorizing the transport and disposal of produced water originating from off of their lease and outside the spacing unit into their property through the Evanson 2 disposal well.

125. These agreements expire at the end of December 2019.

126. The Farrells are retired and depend upon the income created from these transportation and disposal agreements to maintain their present quality of life.

127. The Evanson 2 disposal well receives produced water from numerous wells in the Wayne Field. During April, 2019, the disposal well received produced water from the following off-

unit wells pursuant to the their agreements referenced *supra*: Anderson 25-1 (NDIC No. 9732), Hedges 1R (NDIC No. 5814), Hedges 2R (NDIC No. 15020), Hedges 4R (NDIC File No. 7816), Hedges 5R (NDIC File No. 9236), Hedges 6 (NDIC File No. 9235), Hedges 7H (NDIC File No. 13737), Hedges Steinhaus 8H (NDIC File No. 13857), Hedges Steinhaus 9H (NDIC File No. 13380), Hedges Steinhaus 10H (NDIC File No. 14489), Hedges Steinhaus 11H (NDIC File No. 14650), Hedges Steinhaus 12H (NDIC File No. 15060), Hedges Steinhaus 13H (NDIC File No. 15061), Hedges Thomas 3 (NDIC File No. 7815), Steinhaus E 1 (NDIC File No. 7817), Steinhaus Wm 1 (NDIC File No. 7319).

128. The Evanson 2 disposal well is in a spacing unit with two oil wells, the Evenson 1R (NDIC No. 9091) and the Evenson 3H (NDIC No. 14520).

129. Although the Evenson 1R well is not currently in production, the Evenson 3H well currently produces oil.

130. The Evenson 3H well is covered by an oil and gas lease that authorizes disposal into the Evanson 2 of (only) water produced from the Evenson 3H.

131. Senate Bill 2344 removes the Farrells' right to demand compensation or bring actions for trespass, nuisance, or other tort for the unauthorized use of their pore space for disposal operations involving off-unit produced water.

132. Because one well, the Evenson 3H, is disposing into the Evanson 2 disposal well and is authorized to do so, the Farrells likely cannot prevail upon a claim for trespass arising from the placement of the surface facilities (i.e. the surface facilities themselves are authorized, at least for disposal of produced water from the Evenson 3H).

133. Senate Bill 2344 attempts to take away the right the Farrells presently have to bring an action for trespass to their pore space for disposal of off-unit and off-lease water, and with

lapse of the disposal agreements imminent, they are left in a vulnerable position easily taken advantage of by an unscrupulous operator. An operator might simply dispose of any and all produced water it desires into this disposal, including produced water that other operators pay it to dispose of for them. This situation illustrates well the stark taking and violation of private property rights enacted by Senate Bill 2344. While one might claim that in most situations a surface owner could always bring an action for trespass caused by surface facilities and therefore the loss of a trespass claim to the pore space is inconsequential, this situation illustrates why that is not necessarily the case – the landowner may not always be able to prevail on a trespass action arising from placement of the surface facilities.

134. Senate Bill 2344 may leave the Farrells with no recourse should the Evanson 2 well continue to receive produced water for disposal into the Farrells’ property once the agreements expire.

*F. Van Eeckhout Holdings, LLLP*

135. Van Eeckhout Holdings, LLLP is a limited liability limited partnership formed under the laws of the State of North Dakota.

136. Its members are Irene Van Eeckhout, Kathy Van Eeckhout, and Gene Van Eeckhout (collectively “the Van Eeckhouts”). The Van Eeckhouts are members of Northwest Landowners Association.

137. Van Eeckhout Holdings owns property that the Van Eeckhouts’ grandmother homesteaded and patented in Mountrail County. The property is located in

Township 152 North, Range 88 West  
Section 5: SE1/4

(the “Van Eeckhout Property”)

138. The Van Eeckhout 33-5 disposal well (NDIC File No. 13008) (“Van Eeckhout disposal well”) is located on the Van Eeckhout Property and is not part of an existing spacing unit with any other producing wells.
139. The Van Eeckhout disposal well is operated by Henry Hill Oil Services, LLC (“Henry Hill”).
140. The Van Eeckhouts granted a disposal lease for the use of their land for disposal purposes at a per barrel rate that expired on March 1, 2018.
141. Henry Hill resumed injecting produced water at the Van Eeckhout disposal well without authorization on June 4, 2019, shortly after passage (but before the effective date) of Senate Bill 2344.
142. Henry Hill has no agreement or authorization to use the Van Eeckhout Property to dispose of produced water, but is doing so in open and clear violation of the present property rights of the Van Eeckhouts.
143. If Senate Bill 2344 is permitted to go into effect, the Van Eeckhouts may have no legal remedy to enforce their right to exclude Henry Hill or other operators from trespassing upon their property and depositing waste in their pore space, nor a right to demand payment in exchange for a grant of permission to use their pore space for disposal.

#### **COUNT I**

#### **Senate Bill 2344 is a Taking of Private Property in Violation of the United States Constitution under the Fifth and Fourteenth Amendments to the United States Constitution (Due Process clause)**

144. The allegations of the preceding paragraphs are incorporated herein by reference.
145. Senate Bill 2344 violates the prohibition in the United States Constitution, Amendment V as applied to the State of North Dakota through Amendment XIV, against public taking of private property without due process of law.

146. Senate Bill 2344 constitutes an invasion of the property of Landowners and all those similarly situated by the State of North Dakota, and Landowners have been afforded no process to challenge or defend their property. Indeed, Landowners have been barred from the courts and no provision of law can be construed, pursuant to Senate Bill 2344, to even allow them to ask for compensation for this violation and invasion of their inalienable property rights.
147. No government interest can justify this invasion and violation of Landowners' rights, and even if it could, Landowners have been afforded no reasonable process to defend their inalienable property rights and no right to be heard.
148. Further, the crux of Senate Bill 2344 is to advantage one party (oil and gas operators) at the expense of another (surface estate owners). This is not a legitimate government purpose.
149. These invasions of Landowners' property and property rights are violations of both substantive and procedural due process under the Constitution of the United States.
150. Senate Bill 2344 is therefore unconstitutional and should be declared void.

## **COUNT II**

### **Senate Bill 2344 is a Taking of Private Property in Violation of the United States Constitution under the Fifth and Fourteenth Amendments to the United States Constitution (Takings clause)**

151. The allegations of the preceding paragraphs are incorporated herein by reference.
152. Senate Bill 2344 violates the prohibition in the United States Constitution, Amendment V as applied to the State of North Dakota through Amendment XIV, against public taking of private property without payment of just compensation.
153. Senate Bill 2344 constitutes an invasion of the property of Landowners and all those similarly situated by the State of North Dakota, and Landowners have been paid no compensation for this invasion of their property by the government, and indeed, barred from seeking such compensation.

154. This invasion of Landowners' property without just compensation is unconstitutional and the law should be declared void.

### **COUNT III**

#### **Senate Bill 2344 Violates Article 1, Section 16 of the Constitution of North Dakota because there Is No Permissible Public Benefit or Public Use for the Taking of Private Property**

155. The allegations of the preceding paragraphs are incorporated herein by reference.

156. Senate Bill 2344 contains several conclusory statements regarding the public interest, and these are the only plausible public uses or benefits for which Landowners' property has been taken. These uses are all impermissible because, at best, they are "public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health," all of which are impermissible public uses or purposes under art. I, § 16 of the Constitution of North Dakota.

157. As such, Senate Bill 2344 is unconstitutional and should be declared void.

### **COUNT IV**

#### **Senate Bill 2344 Violates Article 1, Section 16 of the Constitution of North Dakota because it Takes Private Property for the Use of Private Individuals and Entities, and without Just Compensation**

158. The allegations of the preceding paragraphs are incorporated herein by reference.

159. Senate Bill 2344 has the overriding purpose of allowing the use, without compensation, of Landowners' pore space by certain individuals, primarily oil and gas operators. While Senate Bill 2344 does not specify which individuals these are, it references them categorically as "person[s] conducting unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation authorized by the commission under [N.D.C.C. ch. 38-08 (Mining and Gas and Oil

Production)]. Such operations and activities are conducted by private oil and gas operators and other private actors in the energy industry, and not by the State of North Dakota.

160. As to N.D.C.C. ch. 38-11.1, the elimination of compensation for use of the pore space owned by Landowners is accomplished by defining “Land” to exclude pore space, all for the benefit of “Mineral developers,” who are defined as “the person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes.” It is for the specific and special use and benefit of these private entities that the Legislative Assembly has taken Landowners’ private property.

161. Taking private property for the use of private individuals or entities is unconstitutional under art. I, § 16 of the Constitution of North Dakota, and taking private property without just compensation (and prohibiting even the demand for just compensation) is also unconstitutional, and Senate Bill 2344 should therefore be declared void.

#### **COUNT V**

#### **Senate Bill 2344 Violates Article 1, Section 9 of the Constitution of North Dakota because it Bars Access to the Courts and Deprives Landowners of any Remedy for the Invasion of their Property Rights**

162. The allegations of the preceding paragraphs are incorporated herein by reference.

163. Senate Bill 2344 declares that “[a]ny other provision of law may not be construed to entitle the owner of a subsurface geologic formation to prohibit or demand payment for the use of the subsurface geologic formation....” This prohibition on even demanding payment goes well beyond merely barring access to the courts; it is a slight semantic step away from a violation of the right to free speech.

164. North Dakota Rule of Civil Procedure 8 sets forth the items a Complaint must contain, which includes a “demand for the relief sought.” If the relief sought is payment of

compensation, then Senate Bill 2344 clearly requires all laws to be construed such that a complaint demanding this relief is prohibited.

165. Senate Bill 2344 also bars legal actions for trespass, nuisance, or other tort, thereby barring access to the courts for relief.

166. The prohibition in Senate Bill 2344 on demanding payment and barring tort actions unconstitutionally bars Landowners' access to the courts and should be declared void.

#### **COUNT VI**

#### **Senate Bill 2344 Violates Article 1, Section 12 of the Constitution of North Dakota because it Removes the Right to Procedural and Substantive Due Process of Law under the Constitution of North Dakota**

167. The allegations of the preceding paragraphs are incorporated herein by reference.

168. Senate Bill 2344 constitutes an invasion of the property of Landowners and all those similarly situated by the State of North Dakota, and Landowners have been afforded no process to challenge or defend their property. Indeed, Landowners have been barred from the courts and no provision of law can be construed, pursuant to Senate Bill 2344, to even allow them to ask for compensation for this violation and invasion of their inalienable property rights.

169. No government interest can justify this invasion and violation of Landowners' rights, and even if it could, Landowners have been afforded no reasonable process to defend their inalienable property rights and no right to be heard.

170. Further, the crux of Senate Bill 2344 is to advantage one party (oil and gas operators) at the expense of another (surface estate owners). This is not a legitimate government purpose.

171. These invasions of Landowners' property and property rights are violations of both substantive and procedural due process under art. 1, § 12 of the Constitution of the North Dakota.

172. Additionally, subsections 2-4 of Section 4 of Senate Bill 2344 are unconstitutionally vague, stating:

2. This section and chapter 38 - 08 may not be construed to impair the obligations of any contract for use of the surface estate for disposal operations, provided the contract was entered before the effective date of the unit approved by the commission pursuant to sections 38 - 08 - 09 through 38 - 08 - 09.17, and provided the disposal well is located within the unit area of the approved unit.

3. This section and chapter 38 - 08 may not be construed to allow the operator of a disposal well where the contract has expired after the effective date of the unit approved by the commission pursuant to sections 38 - 08 - 09 through 38 - 08 - 09.17 to claim the surface owner should not be compensated as if the new contract for the disposal well on which the contract has expired had been entered after the effective date of the approved unit.

4. The owner of the surface estate upon which the surface location of a disposal well is located does not lose, and may not be deemed to have lost, a claim for trespass, nuisance, or other tort if the operator of the disposal well commences or continues operations of the disposal well in violation of subsections 2 or 3.

173. The inability to discern the meaning of these subsections violates art. 1, § 12 of the Constitution of North Dakota.

174. The phrases “subsurface geologic formation” and “subsurface sedimentary stratum” are unconstitutionally vague and overly broad. From a geologic perspective, the glacial till in Bottineau County below the A and B horizons is all “subsurface sedimentary stratum,” and is a “subsurface geologic formation.” In western North Dakota, the C Horizon regolith soils are essentially bedrock that has been broken up, and this soil horizon exists in many areas as shallow as fifteen inches, above the area in which pipelines, electronic lines, and other facilities are installed for oil and gas production operations under N.D.C.C. ch. 38-08. As such, these phrases do not limit the taking of pore space in Senate Bill 2344 to pore space in deep formations, and the pore space immediately below the surface is also subject to the taking effectuated by Senate Bill 2344. Whether intended or not, this is the plain meaning of the

language in Senate Bill 2344, and such a taking is overly broad and beyond any reasonable purpose for exercise of the police power. As such, Senate Bill 2344 is unconstitutionally vague and overly broad, and a substantive due process violation under art. 1, § 12 of the Constitution of North Dakota.

175. Senate Bill 2344 is therefore unconstitutional and should be declared void.

#### **COUNT VII**

#### **Senate Bill 2344 Violates Article I, Sections 21 & 22 of the Constitution of North Dakota because it Grants Privileges to One Class of Citizens that Are Not upon the Same Terms Granted to All Citizens**

176. The allegations of the preceding paragraphs are incorporated herein by reference.

177. Senate Bill 2344 bars surface estate owners from bring actions in trespass, nuisance, or other tort to protect their subsurface property rights, and also prohibits surface estate owners from demanding compensation for invasion of their subsurface property rights.

178. Owners of mineral rights, however, have no such bar on bringing actions for subsurface trespass, nuisance, or other tort in instances of subsurface drainage of their minerals, for example, and are not prohibited from demanding compensation for invasion of their subsurface property rights in such situations. There is no reason that the rights of the surface estate should be limited based on the depth of a trespass, either.

179. Senate Bill 2344 creates two classes of citizens, surface estate owners and mineral estate owners. In passing Senate Bill 2344, the Legislative Assembly has privileged mineral estate owners above surface estate owners and afforded them rights and privileges that it has prohibited to and barred from surface estate owners.

180. Senate Bill 2344 therefore violates the equal protection provisions of the Constitution of North Dakota (art. 1, §§ 21 & 22) and should be declared void.

**COUNT VIII**  
**Senate Bill 2344 Violates Article X, Section 18 of the Constitution of North Dakota**  
**because it Impermissibly Provides a Gift and Violates the Public Trust Doctrine**

181. The allegations of the preceding paragraph are incorporated herein by reference.
182. Through Senate Bill 2344, the Legislative Assembly takes the private property rights of Landowners in the pore space with one hand, and with the other hand it gives those rights to “person[s] conducting unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation authorized by the commission under [N.D.C.C. ch. 38-08 (Mining and Gas and Oil Production)]” and to any “person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes.” While the taking of this property from Landowners is unconstitutional, it is also unconstitutional to subsequently gift this property to the energy industry for its free use without compensation of any kind.
183. Additionally, the Board of University and School Lands of the State of North Dakota owns significant rights in surface estates in the State of North Dakota, including the pore space. The Legislative Assembly has impermissibly gifted the pore space of this land to “person[s] conducting unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation authorized by the commission under [N.D.C.C. ch. 38-08 (Mining and Gas and Oil Production)]” and to any “person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes.”
184. The failure to protect the property managed by Board of University and School Lands of the State of North Dakota and the gift of the Board’s property rights violates the Public Trust Doctrine, and Senate Bill 2344 should therefore be declared void.

185. Senate Bill 2344 is an impermissible and unconstitutional gift to private entities under art. X, § 18 of the Constitution of North Dakota, and Senate Bill 2344 should therefore be declared void.

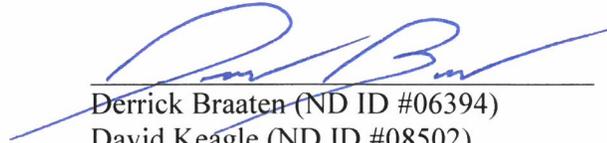
### **PRAYER FOR RELIEF**

WHEREFORE, Northwest Landowners Association requests judgment against Defendants as follows:

1. Declaring that Senate Bill 2344 (inclusive of newly enacted section 47-31-09 of the North Dakota Century Code, relating to injection or migration of substances into pore space; and amended and reenacted sections 38-08-25, 38-11.1-01, and 38-11.1-03 of the North Dakota Century Code, relating to pore space and oil and gas production) is unconstitutional and void, and of no effect;
2. Enjoining the State of North Dakota, the Hon. Doug Burgum, and the Hon. Wayne Stenehjem from further implementation or enforcement of Senate Bill 2344, enjoining the appropriate defendants from authorizing or enacting any administrative rules pursuant to Section 1, subsection 6 of Senate Bill 2344, enjoining the appropriate defendants from authorizing any impermissible and unconstitutional gifts of surface property rights by entering into any contractual obligations that fail to require compensation for use of pore space as would be required prior to enactment of Senate Bill 2344;
3. For other such relief as the Court deems just and equitable, together with costs and disbursements, and attorneys' fees allowed by law.

Dated this 29<sup>th</sup> day of July, 2019.

**BRAATEN LAW FIRM**



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