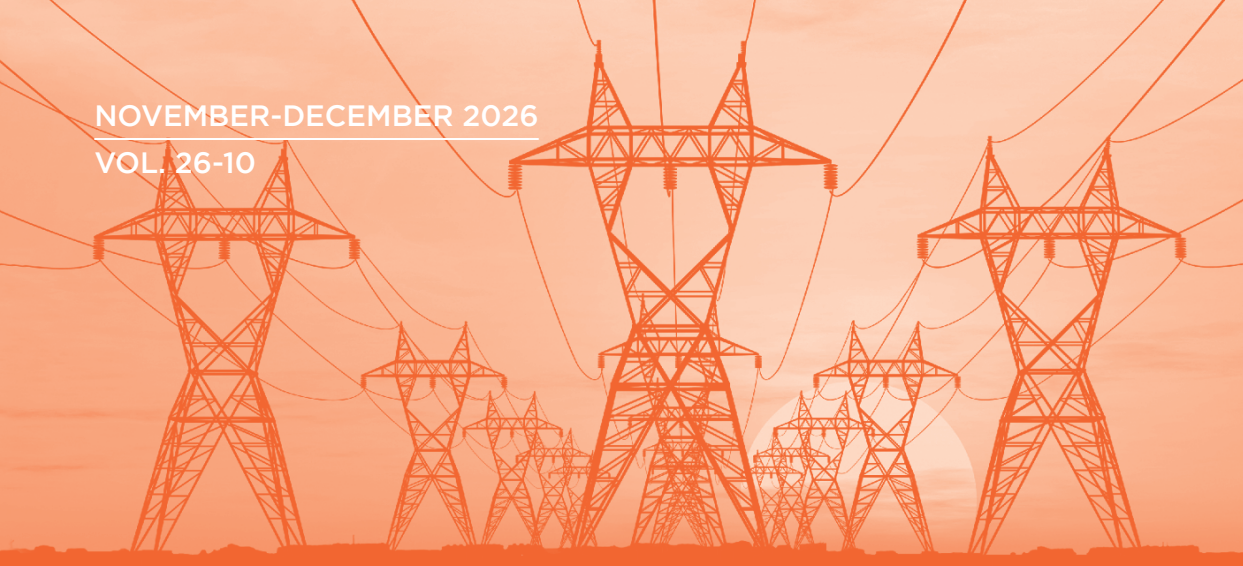
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Carbon Capture Pooling Statutes After North Dakota Rulings: Lessons for Regulators and Developers

By Samuel Pickerill, Sarah Grey and Ethan G. Shenkman*

In this article, the authors examine two recent North Dakota court decisions that struck down the application of amalgamation to carbon capture and storage (CCS), holding that forced unitization of pore space is a taking, and that the state's CCS statutes did not provide for "just compensation" under North Dakota's state constitution. The authors summarize those rulings and the pending appeals, and assess how similar reasoning may impact existing CCS statutes.

State litigation over carbon capture and storage (CCS) is testing a core element in many existing statutory CCS frameworks: whether a legislature may allow nonconsenting landowners to be forced to provide their pore space for an operator's CCS facility through amalgamation procedures (sometimes referred to as unitization or pooling) similar to mechanisms used for the extraction of oil and gas interests. Two recent North Dakota decisions struck down the application of amalgamation to CCS, holding that forced unitization of pore space is a taking, and that the state's CCS statutes did not provide for "just compensation" under North Dakota's state constitution. This article summarizes those rulings and the pending appeals, and assesses how similar reasoning may impact existing CCS statutes, using Louisiana and Indiana as illustrative examples, as well as the regulatory process currently underway in California[1] to address unitization. Drawing on learnings from these North Dakota decisions, the California rulemaking process gives project proponents an opportunity to encourage the adoption of a durable unitization mechanism that can withstand legal challenge and be reliably applied to projects in the state.

NORTH DAKOTA COURTS HOLD PORE SPACE AMALGAMATION IS A TAKING

In December 2025 and March 2026, two North Dakota district courts struck down the pore space amalgamation provisions of the state's CCS statute, N.D.C.C. § 38-22, which had provided storage operators a mechanism to combine nonconsenting owners' pore space interests into a storage facility unit

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[1] https://ww2.arb.ca.gov/resources/documents/concepts-potential-regulations.

upon a finding that they "will be" equitably compensated.[2] They found this mechanism to be unconstitutional under the takings clause of the state constitution.[3]

Both courts followed the same analytical path, drawing on federal Fifth Amendment jurisprudence. First, they held that amalgamation is a taking: landowners hold a property interest in their pore space, and the permanent physical presence of injected carbon dioxide is a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*[4] Under *Loretto*, a permanent physical occupation is a taking however important the public interest or slight the intrusion.[5] In applying *Loretto*, neither court considered whether carbon dioxide injected deep below the surface interfered with the landowners' enjoyment of their land in finding a taking.

Second, they held that the "correlative rights doctrine" does not reach carbon storage. That doctrine treats pooling oil and gas interests for extraction as a permissible, non-compensable regulation rather than a taking. The courts distinguished sharing a common, migrating resource (i.e., subsurface oil and gas) from injecting and storing a foreign substance in another landowner's pore space, warning that a contrary rule could justify forced storage of nuclear waste, industrial waste, or flood waters beneath the land of nonconsenting property owners.[6]

Third, they held that the statute failed to provide the "just compensation" the state constitution demands, on two independent grounds. First, Article I, § 16, the state's takings clause, requires just compensation to be paid before possession, whereas the CCS statute permits amalgamation upon a finding that owners "will be" paid. Second, § 16 requires a jury, not the commission, to determine just compensation.[7]

The state has appealed both rulings. In the *Swenson* appeal, a motion to stay awaits resolution of an attorney's fees issue still before the trial court. Opening

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[2] N.D.C.C. §§ 38-22-08(14), 38-22-10.

[3] Swenson Living Trust v. NDIC, No. 08-2025-CV-00095 (N.D. Dist. Mar. 9, 2026); Northwest Landowners Ass'n v. State, No. 05-2023-CV-00065 (N.D. Dist. Dec. 2, 2025). The state takings clause is N.D. Const. art. I, § 16.

[4] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); see Swenson at ¶¶ 85, 90; NWLA at ¶ 14.

[5] Loretto, 458 U.S. at 434-35, 441.

[6] NWLA at ¶ 33; see Swenson at ¶ 101; NWLA at ¶ 34. The doctrine's application to extraction traces to Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900).

[7] Swenson at ¶¶ 104, 114-15; NWLA at ¶¶ 22, 24-25.

briefs filed in the *NWLA* appeal only whether amalgamation is a taking; none of them defend the statute's compensation scheme.[8]

The appellants in *NWLA* argue amalgamation is not a taking under two theories.

First, they argue the courts should have applied *United States v. Causby* and required landowners to show "direct and immediate interference" with surface use, rather than *Loretto*'s *per se* rule for physical invasions.[9] They point out that not every authorized intrusion is a taking. In *Causby*, the Supreme Court recognized practical limits on airspace rights to accommodate the advent of air travel, requiring landowners to show that overhead flights posed a "direct and immediate interference" with the enjoyment of their land before it would find a taking.

Some courts, like *Chance v. BP Chemicals*, similarly treat subsurface property rights as less than absolute, requiring more than mere physical occupation to find a taking.[10] These courts reason that just as air travel far overhead warranted reasonable limits on air rights, injection wells too deep underground to disturb surface use warrant reasonable limits on subsurface rights. Following this reasoning, the North Dakota appellants urge the court to apply *Causby* in place of *Loretto*.

Second, appellants argue that amalgamation is consistent with the correlative rights doctrine, a "longstanding background restriction" on property rights.[11] The correlative rights doctrine is rooted in the state's police power to prevent waste of shared natural resources.[12] Under the doctrine, a legislature may limit property rights in a common pool to prevent waste without effecting a taking.[13]

The doctrine plays a prominent role in oil and gas unitization as a limit on the "rule of capture."[14] Under the "rule of capture," a landowner does not own migratory resources, such as subsurface oil and gas, until the landowner physically takes possession of the resource (e.g. through extraction). However,

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[8] See Northwest Landowners Ass'n v. State, No. 20260199 (N.D.), Dkt. Nos. 32, 35, 55, 57.

[9] United States v. Causby, 328 U.S. 256, 266 (1946).

[10] See Chance v. BP Chems., Inc., 670 N.E.2d 985, 993 (Ohio 1996); see Kerns v. Chesapeake Expl., L.L.C., 762 F. App'x 289, 297 (6th Cir. 2019).

[11] Cedar Point Nursery v. Hassid, 594 U.S. 139, 160 (2021).

[12] Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900).

[13] Id.; see Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 185 (1950). On the rule of capture, see Texaco Inc. v. Indus. Comm'n of N.D., 448 N.W.2d 621, 623 n.2 (N.D. 1989).

[14] Id.

unrestricted "rule of capture" incentivizes a wasteful drilling race for each landowner to maximize the amount of oil and gas they can claim ownership over.[15] To address this waste, states enacted pooling and unitization statutes to curtail individual drilling rights for the protection of the common reservoir. Courts have consistently held that the restriction of rights necessary to accomplish that pooling is an exercise of police power — not a compensable taking.[16]

Appellants argue an analogous correlative rights doctrine should be applied to the use of pore space as a subsurface resource. The state trial courts in *NWLA* and *Swenson* each rejected this reasoning by distinguishing between migratory oil and gas resources, to which rule of capture applies, and stationary pore space resources, to which, they concluded, neither rule of capture — nor correlative rights doctrine as a limit to rule of capture — could apply.

CONSIDERATIONS FOR CALIFORNIA'S RULEMAKING

Although North Dakota caselaw of course is not binding outside of that state, courts in other states may find the reasoning persuasive as some of the first cases to directly address this issue. This presents significant risk across the country as 18 other states have enacted CCS amalgamation mechanisms similar in some respects to the now-stricken North Dakota statute. As California regulators grapple with how to design that state's forthcoming framework, they may consider looking to other states' approaches to bolstering the legal durability of their rules.

As one example, Louisiana's CCS unitization statute is currently facing a constitutional due process challenge in *Save My Louisiana, Inc. v. State*.[17] From 2009 to 2024 Louisiana's CCS statutes effectuated combination of pore space through eminent domain, subject to the state's general eminent domain procedures.[18] That scheme entitled a party to jury determination of just compensation, and required either deposit or direct payment of compensation as a condition precedent to the transfer of ownership.[19] In 2024 the state shifted away from these eminent domain procedures to a new unitization framework that more closely mirrors the state's oil and gas unitization process.[20] However, the statute would explicitly revert back to the prior eminent domain

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[15] Id.

[16] Id.

[17] Save My Louisiana, Inc. v. State, Case No. C-770744, La. 27th Judicial Dist. Ct.

[18] La. R.S. 19:2.

[19] La. Stat. Ann. §§ 19:4, 19:10.

[20] La. R.S. 30:1104.2.

framework if a court finds the unitization statute unconstitutional.[21] Although the current challenge takes aim at both the eminent domain and unitization frameworks, this built-in contingency plan provides a potential avenue for the state to prevail on the more established eminent domain procedures even if the Louisiana court adopts *NWLA* and *Swenson*'s reasoning with respect to unitization.

Another example, Indiana, utilizes a belt-and-suspenders approach to address takings risks. There, the regulatory regime predicates an amalgamation order upon a finding that the order is consistent with state authority to prevent waste, protect correlative rights, and promote efficient use of natural resources, and constitutes a public use serving the public interest.[22] But the regulations also set forth a detailed structure for determining the equitable compensation to be provided to the landowner based on the "weighted average of consideration paid to consenting pore space owners in the same project,"[23] while allowing nonconsenting pore space owners to submit evidence of fair market value of pore space, including an appraisal, and to contest equitable compensation amounts both at a hearing before the agency and through judicial review under the state's administrative appeals procedure.[24] Thus, even if a court finds that the correlative rights doctrine does not apply and amalgamation is a taking, the enumerated procedural protections for landowners help reinforce the defense that the compensation provided is consistent with the state's constitutional requirements.

Turning to California, the state's skeleton CCS amalgamation statute sets forth certain minimum requirements, but leaves considerable leeway for the California Air Resources Board (CARB) to build out the details of the program.[25] That rulemaking is now underway with the issuance of Concepts for Potential Regulations[26] in May 2026. The rulemaking provides an opportunity for CARB to ensure consistency with California's constitutional takings clause which is among the most protective and similar to North Dakota's. Like North Dakota, California explicitly requires both payment before possession and a jury determination of just compensation as of right.[27]

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[21] La. R.S. 30:1104.2(K).

[22] 312 IAC § 30-55-3.

[23] 312 IAC 30-5.5-4.

[24] 312 IAC § 30-55-2; Id. § 30-55-4; IC § 4-21.5.

[25] Cal. Health & Safety Code §§ 39741.1, 39741.2.

[26] https://ww2.arb.ca.gov/resources/documents/concepts-potential-regulations.

[27] Cal. Const. art. I, § 19.

Challengers may therefore argue that a North Dakota-style framework, which neither pays before possession nor guarantees a jury, is inconsistent with California's specific constitutional requirements. California does, however, carve out quick-take statutes in its takings clause. The state's constitution permits the government to take possession upon a deposit — set initially by a qualified expert, not a jury — that is promptly released to the owner, with final compensation determined later.[28] California has an opportunity to build its CCS program on that quick-take footing and to borrow from Louisiana's and Indiana's belt-and-suspenders structure. Like Indiana, regulations can ground administrative authority in the protection of correlative rights to protect against a threshold takings determination, while also affording procedural protections to landowners to support that the compensation provided is just, even if a taking occurs. Like Louisiana, CARB can also incorporate fallback provisions to explicitly invoke more established compensation procedures, such as a jury-determined process, if the amalgamation mechanism is held unconstitutional. For example, drawing from quick-take statutes, the agency could value the pore space, deposit that amount, and take possession — constitutionally deferring the jury's just-compensation determination while keeping projects on track, and insulating the program from constitutional challenges.

CONCLUSION

The recent court decisions in *NWLA* and *Swenson* are among the first judicial decisions to directly address the constitutionality of state CCS unitization frameworks, which have proliferated to at least 18 states. Though the decisions are only binding within North Dakota and are subject to ongoing appeals, project proponents and regulators should take notice of these courts' reasoning when designing and implementing future regulatory frameworks to be durable and insulated from legal challenge.

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[28] Med. Acquisition Co. v. Superior Court, 228 Cal. Rptr. 3d 654, 659 (Cal. Ct. App. 2018).