Issues and concerns with SB 2344

- Page 2, lines 6-11 (Section 1, subsection 5)
    - This policy statement is an expansion of existing law, and refers to the implied easement as recognized by the North Dakota case *Hunt Oil Co. v. Kerbaugh*. In that case, the ND Supreme Court said that "the rights of the owner of the mineral estate are limited to so much of the surface and such use thereof as are reasonably necessary to explore, develop, and transport the minerals. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979)
    - The problem with the language is that the implied easement applies to the surface of the land being developed, or lands pooled with those lands. In other words, an operator can use so much of the surface as is reasonably necessary to produce the minerals underneath that land. Pooling and unitization expand this to the relevant pool or unitized field. The language in lines 6-11 encourages the expansion of this right beyond any given spacing unit or pool, so that an Operator could drill a disposal well or store gas in pore space belonging to a surface owner on land that is 100 miles away from the minerals actually being produced. It is fair to burden to the surface of the land on top of the minerals being produced, but not to burden totally unrelated lands that could be miles away and more importantly owned by entirely different people.
- Page 2, lines 12-23 (Section 1, subsection 6)
    - The problem with the first and last sentence of this subsection (lines 12-17 and 22-23) is the same as explained above.
    - One of the most significant issues with the Bill is the following sentence: "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 formation for temporary storage of natural gas, unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, or any other operation conducted under this chapter."
        - First, in certain circumstances such as off-unit disposals, or for e.g., if an operator were going to store gas in an area miles away from the wells from which the gas is produced, the surface owner *could* say no to this use of his pore space. The Bill is taking this right away, and this is an impermissible taking of his private property.
        - Second, if a surface owner allowed such a use of pore space, he could require compensation. This takes away the ability to demand payment for use of the pore space for any purpose if it is related to operations under NDCC 38-08. That is a taking of private property in violation of the Constitution.
    - The taking of these rights is significant enough to give rise to an inverse condemnation claim under the North Dakota Constitution, and would open the State of North Dakota up to lawsuits for these uses. In other words, this Bill might save the Operators from some lawsuits, but the lawsuits would not go away, they would simply be brought against the State of North Dakota instead.
- Page 3, lines 1-6 (Section 2, subsection 1)
    - This additional language is unnecessary even for the stated purposes of the Bill's supporters. NDCC ch. 38-11.1 is a statute passed to ensure that surface owners are compensated for oil and gas development, and it was passed to protect surface owners.

It is completely unnecessary to add this language in and it only muddies the waters. NDCC ch. 38-08 is the chapter of the Century Code aimed at promoting oil and gas development, and this language belongs there. It is only being added here in order to dilute the legislative intent of the law protecting surface owners.

- Page 3, lines 24-25 & page 4, lines 1-2
    - The federal court in one of the Mosser v. Denbury cases referred to the language being proposed for the definition of land, and said that the phrase "solid material of the earth" is "clearly a relative description in that all soil and gravel, as well as many rock formations, have some interstitial space, and there is no reason to believe that the reference to soil, rock, or other substance in Section 47–01–04 was meant to exclude the space encapsulated within that material. *See Mosser v. Denbury Res., Inc.*, 2017 ND 169, ¶ 23, 898 N.W.2d 406. Two federal judges and the North Dakota Supreme Court disagree with the attorneys making this argument, so they are now attempting to convince the ND Legislative Assembly to simply change the law because they were wrong.
    - And this issue is not new, as the Bill's backers claim. In 2011, the Montana Supreme Court has recently came to the same conclusion regarding its own law, which is very similar to North Dakota's, and it "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." *Burlington Res. Oil & Gas Co., LP v. Lang and Sons Inc.*, 361 Mont. 407, 259 P.3d 766 (2011)
- Page 4, line 6
    - This is another attempt to limit surface owners from recovering for migration into their pore space, but again it goes way too far. If operations are not conducted on a surface owners land, but a spill leaves an adjacent site and damages their crops, this language would prevent them from recovering damages. That is not the intent of the law nor is it fair to that surface owners.
- Page 4, lines 12-15
    - There *are* times when injection and migration can constitute trespass, nuisance, or other tort. Pore space is not limited to deep formations. This part of the Bill is saying that if a well on adjacent property has a spill and enters the neighbor's property, he cannot bring an action for trespass or nuisance. This is clearly not the intent, but it is poorly written. Additionally, as explained above, there *are* times when a surface owner has a right to say no to off-unit operations, and this section attempts to remove those rights and is therefore a taking.

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