STATE OF NORTH DAKOTA
COUNTY OF BOTTINEAU

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Northwest Landowners Association, Mike Dresser, Sandra Short, The Swanson Living Trust, and North Dakota Farm Bureau, Inc.,

Plaintiffs,

vs.

State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota and as the Chairman and a member of the North Dakota Industrial Commission, and Hon. Drew Wrigley in his official capacity as Attorney General of North Dakota and as a member of the North Dakota Industrial Commission, and Hon. Doug Goehring in his official capacity as Agricultural Commissioner of North Dakota and as a member of the North Dakota Industrial Commission,

Defendant,

and

SCS Carbon Transport LLC, Minnkota Power Cooperative, Basin Electric Power Cooperative, and Dakota Gasification Co.,

Intervenor-Defendants.

Memorandum Opinion and Order Granting Summary Judgment to Defendant and Intervenor-Defendants

Case Number: 05-2023-CV-00065

[¶1] This action involves constitutional challenges to certain state statutes raised by Plaintiffs Northwest Landowner's Association and individual Northwest Landowner Association members (collectively "NWLA" hereafter) and the North Dakota Farm Bureau, Inc. ("NDFB" hereafter). The statutes include N.D.C.C. §§ 38-22-10 (amalagating CO2 storage), 38-25-08 (amalagating oil and gas storage), 38-22-03(7) (giving the North Dakota Industrial Commission, also referred to as "NDIC," the authority to grant exceptions), and 32-15-06 and 24-05-09 (allowing survey entry and/or right of ways).

[¶2] On April 12, 2024, Defendant filed a Motion for Summary Judgment, with a brief and six exhibits. *Index* at 183-190. That same date, NWLA filed their own Motion for Summary Judgment, with a brief, declaration and four exhibits. *Index* at 193-199. Each party thereafter filed their own similar motions. The Court will not list all motions, briefs, responses and replies filed, but notes all pleadings were timely. *Index* at 183-238.

[¶3] A Notice of Supplemental Authority was also filed on May 30, 2024, informing this Court of the North Dakota Supreme Court decision in SCS Carbon Transp. LLC v. Malloy, Tr. of Harry L. Malloy Tr. No. 2 Dated May 25, 2008, 2024 ND 109, 7 N.W.3d 268. *Index* at 240-241.

[¶4] **Enactment of Challenged Statutes.** At the outset, the Court notes Plaintiffs did not refute the enactment dates laid out in ¶ 44 and footnote 4 of State Defendant's Brief in Support of Summary Judgment. *Index* at 184. The amalgamation for CO2 storage statute, N.D.C.C. § 38-22-10, and the statute giving NDIC authority to grant exceptions, N.D.C.C. § 38-22-03(7), were enacted in 2009. The survey statutes, N.D.C.C. § 32-15-06 and 24-05-09, were last amended in 1985 and 2007 respectively. The amalgamation for oil and gas storage statute, N.D.C.C. § 38-25-08, was enacted in 2021.

[¶5] Having considered the motions, briefs, responses, replies and oral arguments of the parties, as well as the record and pleadings, the Court now enters this Memorandum Opinion and Order Granting Summary Judgment to Defendant and Intervenor-Defendants.

MEMORANDUM OPINION

Summary Judgment Legal Standards.

[¶6] A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of a claim. N.D.R.Civ.P. 56(a). Our standard of review for summary judgments is well established:

> Summary judgment is a procedural device under N.D.R.Civ.P. 56(c) for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party seeking summary judgment must demonstrate there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, we view the evidence in the light most favorable to the opposing party, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact.

> When reasonable persons can reach only one conclusion from the evidence, a question of fact may become a matter of law for the court to decide.

N.D. Private Investigative & Sec. Bd. v. TigerSwan, LLC, 2019 ND 219, ¶ 8, 932 N.W.2d 756 (citations omitted). The Court analyzes the competing motions for summary judgment by these standards.

Statute of Limitations Analysis

[¶7] Whether To Apply a Statute of Limitations. Plaintiffs argue constitutional challenges of this nature have no statute of limitations, citing landmark cases such as Marbury v. Madison and civil rights era litigation. Plaintiffs argue a Court must, at any time, strike down a law on the book that contradicts or violates the Constitution. Plaintiffs argue the key distinction is cases applying a statute of limitations were for a determination of a monetary sum of just compensation, not claims to actually enforce the constitutional right to just compensation where a statute took it away.

[¶8] Defendant and Intervenor-Defendants argue constitutional challenges to three of the four statutes are barred by the statute of limitations, based on the length of time since their enactment. The Court finds more persuasive various cases that did apply a statute of limitations to suits making a facial "taking" constitutional challenge, on both the state and federal level.

[¶9] The holding in Hager v. City of Devils Lake, 2009 ND 180, ¶ 38, 773 N.W.2d 420 (internal citations omitted), discussed the rationale behind applying statute of limitations even in cases with "taking" constitutional underpinnings:

> The purpose of a statute of limitations is to prevent plaintiffs from sleeping on their legal rights and bringing stale claims to the detriment of defendants. We have noted it is "highly unusual" to have a cause of action without a limitation period . . .

The Hagar court, at ¶ 34 (emphasis added), held that a statute of limitations did apply:

> **For either a taking case or a non-taking case**, an inverse condemnation action under N.D. Const. art. I, § 16, is premised upon the governmental entity's implied promise to compensate the owner of property taken or damaged for public use. Therefore, the action is one "upon a contract, obligation, or liability, express or implied," and the six-year statute of limitations under N.D.C.C. § 28–01–16(1) governs.

[¶10] There is case law applying a statute of limitations in constitutional challenges that do not seek a determination of a monetary sum of just compensation. The unreported case of Twardowski v. Bismarck Police Dept., 2017 WL 8791103 (D.N.D. 2017), alleging an unconstitutional deprivation of rights, privileges or immunities, also applied a six-year statute of limitations: "North Dakota's six-year statute of limitations outlined in N.D.C.C. § 28-01-16(5) applies to all Section 1983 actions arising in North Dakota." In Owens v. Okure, 488 U.S. 235, 249–50, 109 S. Ct. 573, 582 (1989),

the Court held "[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."

[¶11] In a case heavily cited by the parties, Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez, 659 F.3d 42, 50–52 (1st Cir. 2011), the plaintiff alleged a regulation on its face violated the Takings Clause, but plaintiff did not sue immediately. The court explained that the facial challenge was untimely: a takings claim brought under § 1983 accrues "when the purportedly unconstitutional statute or regulation is enacted or becomes effective . . . because, in such cases, the plaintiff alleges that the mere enactment of a statute constitutes a taking." Id. Even though the plaintiff did not know the dollar amount they would lose at the time the regulation was enacted, the court found the enactment of the rule was "a single harm, measurable and compensable when the statute is passed." Id.

[¶12] In contrast, this Court could not find, nor did Plaintiffs provide, any holdings which clearly indicate there is no statute of limitation for certain constitutional claims and specifically, constitutional claims of this nature. This Court concludes a statute of limitations applies to Plaintiffs' facial taking constitutional claims.

[¶13] Date of "Taking" for Statute of Limitations Purposes. The Court next concludes the date from which a statute of limitations should be analyzed is the date the statute was enacted. There are cases supporting this conclusion. See Chippewa Indians of M.N. v. U.S., 305 U.S. 479, 481-83 (1939) (enactment of statute was date of taking, not date it became apparent government appraisal of timber was too low) and Fallini v. U.S., 56 F.3d 1378 (Fed. Cir. 1995) (enactment of statute forbidding ranchers from preventing wild horse access was date of taking, not date a wild horse actually intrudes on ranchers' land).

[¶14] Again, the Asociacion holding, *supra* ¶ 11, at 50–51 (emphasis added) reinforces this:

> It is true that the question of "ripeness" of a takings claim is analytically distinct from the question of when a takings claim accrues for statute of limitations purposes. [citations omitted] And none of the Supreme Court takings cases we have cited are concerned with the accrual of claims for statute of limitations purposes.
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> . . . Nevertheless, it is clear that **a facial takings challenge accrues at the time the offending statute or regulation is enacted or becomes effective.** A facial challenge also becomes ripe at that time.
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> . . . While the ripeness and accrual questions are conceptually distinct, as a functional matter, given the way the Court has formulated the Williamson County ripeness requirements, and the takings law on facial attacks, **a facial takings challenge generally both ripens and accrues for statute of limitations purposes at the same moment in**

time. *See, e.g., Suitum*, 520 U.S. at 736 n. 10, 117 S.Ct. 1659 (noting that "'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed" (quoting *Keystone Bituminous*, 480 U.S. at 495, 107 S.Ct. 1232)).

[¶15] Six or Ten-Year Statute of Limitations. The Court finds, even if the six-year statute of limitations under N.D.C.C. § 28-01-16 (used in Hagar and Twardowski holdings, *supra* ¶¶ 9-10) is not used here, a ten-year statute of limitations under N.D.C.C. § 28-01-22 applies to "[a]n action for relief not otherwise provided." Under either statute of limitations, Plaintiffs clearly did not timely raise their constitutional challenges to all but one of the statutes outlined in ¶ 4, *supra*. Only the constitutional challenge to N.D.C.C. § 38-25-08, enacted in 2021, is not barred by either a six or ten-year statute of limitations.

[¶16] Conclusion. This Court hereby grants Summary Judgment to Defendant and Intervenor-Defendants as to Plaintiffs' facial constitutional challenges to N.D.C.C. §§ 38-22-10, 38-22-03(7), 32-15-06 and 24-05-09. All claims regarding these statutes are dismissed based upon Plaintiffs' failure to bring the challenges within the statute of limitations period.

Facial Challenge to N.D.C.C. § 38-25-08 (Amalgamation for Oil and Gas Storage)

[¶17] Standing. "[A]n organization may have associational standing to sue on its members' behalf, if: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" First Int'l Bank & Tr. v. Peterson, 2011 ND 87, ¶ 12, 797 N.W.2d 316 (internal citation omitted). "An association has standing when at least some of its members would have standing to bring the action in their own right." Id. at ¶ 13. Further, "an injury can be actual or threatened . . . Plaintiffs have standing to challenge the facial validity of a law when they allege an 'actual, well-founded fear the law will be enforced against them.'" North Dakota Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900, 911 (D.N.D. 2018) (internal citations omitted).

[¶18] Certain members of both NWLA and NDFB have standing to sue in their own right as landowners in areas where projects are currently planned. Additionally, Summit admits it is "currently seeking approval from the Industrial Commission for three geologic storage facilities." *Index* at 218, ¶ 9. The record contains statements by Defendant and Intervenor-Defendants that undoing N.D.C.C. § 38-25-08 would stymie future development of oil and gas storage in North Dakota. Those assertions simply could not be true unless there is an actual or threatened injury, i.e. actual plan to develop storage infrastructure. Thus, there are likely many more members who own

land where those future projects are possible and face an "actual, well-founded fear" of the law being applied to them. The Court concludes NWLA and NDFB have standing.

[¶19] Exhaustion of Administrative Remedies. "Whether the exhaustion of remedies requirement applies in each case depends on a mixed bundle of considerations, including, but not limited to, expertise of administrative bodies, statutory interpretation, pure questions of law, constitutional issues, discretionary authority of the courts, primary, concurrent, or exclusive jurisdiction, inadequacies of administrative bodies, etc." Garaas as Co-Trustees of Barbara Susan Garaas Family Tr. v. Petro-Hunt, L.L.C., 2024 ND 34, ¶ 11, 3 N.W.3d 156 (citation omitted). The Garaas case involved a request for factual determinations of correlative rights and royalties in an oil unit and the Court held the NDIC should have made factual findings before the court was to rule upon issues.

[¶20] In this case, the parties agreed at the outset there are no factual determinations to be made, only constitutional issues and questions of law. There is no record which, if developed, would assist in the determination to be made.

[¶21] It is also clear the NDIC could not grant adequate relief regardless of its decision-making under N.D.C.C. § 38-25-08. NDIC cannot hold a jury trial regarding compensation nor does it have any authority to assign a matter to a district court for the same. This case fits squarely in the exception to exhausting administrative remedies, based on the "mixed bundle of considerations."

[¶22] Facial Challenge Analysis. NWLA argues the statute is a constitutional violation on its face as it provides for a taking without just compensation determined by a jury. Defendant and Intervenor/Defendants argue this statute is not amenable to a facial challenge, which has a higher bar than an as-applied challenge.

[¶23] "A claim that a statute on its face violates the constitution is a claim that the Legislative Assembly exceeded a constitutional limitation in enacting it, and the practical result of a judgment declaring a statute unconstitutional is to treat it 'as if it never were enacted." Sorum v. State, 2020 ND 175, ¶ 21, 947 N.W.2d 382. A facial challenge to a statute presents a higher bar than an as-applied challenge because under N.D. Const. art. VI, § 4, it requires four votes in this court to declare a legislative enactment unconstitutional. Id. A facial challenge is purely a question of law because the violation, if any, occurs at the point of enactment by virtue of the Legislative Assembly enacting a law prohibited by the constitution. Id. A violation that occurs at the time of enactment does not depend on any facts or circumstances arising later. Id.

[¶24] The Sorum decision was discussed extensively in Northwest Landowners Ass'n v. State, 2022 ND 150, ¶¶ 14-15, 978 N.W.2d 679 (hereafter referred to as NWLA I) (emphasis added):

> This facial challenge asserts a violation of the constitution by the Legislative Assembly when it enacted N.D.C.C. § 38-25-08. In *Aamodt*, we applied the *Salerno* "no set of circumstances" standard to a facial constitutional challenge. 2018 ND 71, ¶ 38, 908 N.W.2d 442. However, since *Salerno*, other courts have declined to apply that standard to facial challenges. *Utah Pub. Emps. Ass'n v. State*, 2006 UT 9, ¶¶ 20–25, 131 P.3d 208 (rejecting application of *Salerno* in a facial takings challenge and collecting supporting cases). The Supreme Court has also declined to apply *Salerno* in subsequent decisions considering facial challenges. *City of Chicago v. Morales*, 527 U.S. 41, 55, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."). No consideration of circumstances is necessary to resolve a facial challenge because the claim is that upon enactment, the legislation has an immediate unconstitutional legal effect. In *Sorum*, we held that if legislation requires an unconstitutional act (a prohibited gift in that case), the statute does not avoid a facial challenge "merely because the statute includes constitutional applications along with potentially unconstitutional applications." 2020 ND 175, ¶¶ 22–24, 947 N.W.2d 382.
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> Here, the Association claims the enactment of S.B. 2344 by itself completed a taking of constitutionally protected property rights without compensation. **As presented, the constitutional claim does not depend on future action by a government official or consideration of various factual circumstances to which the legislation may be applied.** To resolve the claim, we need only interpret the enacted language of S.B. 2344 and the relevant constitutional provisions to determine whether there is a conflict. We conclude that *Sorum* provides the correct framework for this facial challenge.

[¶25] The statute in NWLA I stripped surface owners of their rights to exclude others or demand compensation without any further action or process required. See ¶ 27 ("[B]ecause S.B. 2344 deprives surface owners from demanding compensation for physical occupation of their property, S.B. 2344 is an unconstitutional taking on its face."). This Court concludes the same is not true of N.D.C.C. § 38-25-08. The statute itself has to provide the unconstitutional act and taking. Unlike in NWLA I, the statute impact here is not immediate. It depends on the future acts of government officials (the NDIC). The statute uses different language, including that the NDIC "may" (not "shall"), then outlines the process to take place. The constitutional claim here depends on future action and also involves consideration of various factual circumstances, including the percentage of consent obtained and facts regarding the compensation for a particular project.

[¶26] While S.B. 2344 had similar "may" language, that language was applied to a person conducting unit operations, not to a government official's future actions. In other words, S.B. 2344 depended on a future action but by someone other than a government official. The distinction here is that N.D.C.C. § 38-25-08 does depend "on future action by a government official" and does

require "consideration of various factual circumstances to which the legislation may be applied." See Sorum, *supra* ¶ 24.

[¶27] While S.B. 2344 essentially immediately granted private companies the right to use pore space, here future acts by a government official "may" take place if certain factual circumstances occur. This important distinction leads this Court to conclude N.D.C.C. § 38-25-08 is not amenable to a facial constitutional challenge under the Sorum framework.

[¶28] Plaintiffs have not met the high bar set for a facial challenge, which is different from and not a comment upon the viability of as-applied challenges which may arise in the future once the government official (i.e. NDIC) does act in its discretion under N.D.C.C. § 38-25-08 as written.

Due Process Challenge to N.D.C.C. § 38-25-08 (Amalgamation of Oil and Gas Storage)

[¶29] The Court has reviewed the due process arguments by Plaintiffs and agrees the due process claims are directly premised on and rooted in Plaintiffs' takings claims. The Court concludes that if the statute of limitations bars the takings claims themselves, due process claims are likewise time-barred as they are rooted entirely in takings allegations (i.e. no enactment process, unequal application, or other "nontaking" allegations). Likewise, if the due process claims to N.D.C.C. § 38-25-08 are directly rooted in the facial takings challenge and the takings claim cannot proceed under the Sorem framework, the due process claim cannot proceed either.

[¶30] The 8th Circuit seems to agree: "True, the right to exclude is 'one of the most fundamental elements of property ownership' . . . The landlords, however, **do not cite any authority that the right to exclude is a fundamental right for the purposes of substantive due process. The Supreme Court has indicated otherwise.**" 301, 712, 2103 & 3151 LLC v. City of Minneapolis, 27 F.4th 1377, 1384–85 (8th Cir. 2022). The 9th Circuit similarly held in Madison v. Graham, 316 F.3d 867, 872 (9th Cir. 2002): "The right to exclude others from private property is a property right addressed by the Takings Clause of the Fifth Amendment. Under the principles adopted in *Armendariz* and its progeny, **the appellants cannot bring a substantive due process claim for the harms they alleged.**"

[¶31] The holding in Mountain Home Flight Serv., Inc. v. Baxter Cnty., Ark., 2012 WL 2339722, (W.D.Ark. 2012) (emphasis added) (affirmed by Mountain Home Flight Serv., Inc. v. Baxter Cnty., Ark., 758 F.3d 1038 (8th Cir. 2014)) also seems to support use of the takings statute of limitations for due process claims rooted in takings-type allegations by applying a tort statute of limitations for due process claims that are rooted in tort-type allegations:

Similarly, Plaintiff's due process claims arising from allegations of tortious interference cannot survive because, as described above, the state statute of limitations on torts is three years, and Plaintiff's tort claims either did not accrue within the limitations period or failed to state a claim. See A.C.A. § 16–56–105. Therefore, **as Plaintiff's underlying tort claims have been dismissed, its due process claims stemming from the same tort allegations must be DISMISSED** WITH PREJUDICE.

Correlative Rights, Policing Power, Delegation of Powers and Other Arguments

[¶32] The Court will not address other legal arguments raised in the summary judgment pleadings, as all are disposed of by the Court's determinations outlined *supra*. "Courts should 'not issue advisory opinions on questions for which no meaningful relief can be granted.'" Richland Cnty. Water Res. Bd. v. Pribbernow, 442 N.W.2d 916, 918 (N.D. 1989) (citation omitted).

Conclusion

[¶33] Claims made by Plaintiffs NWLA and NDFB pertaining to statutes N.D.C.C. §§ 38-22-10, 38-22-03(7), 32-15-06 and 24-05-09 are dismissed as these claims are barred by application of either the six or ten-year statute of limitations found in N.D.C.C. §§ 28-01-16 and 28-01-22.

[¶34] Plaintiffs' facial challenges to N.D.C.C. § 38-25-08 are not barred by a statute of limitations but are not viable under the Sorem analysis, supra ¶¶ 17-31. The claims are dismissed as this Court concludes N.D.C.C. § 38-25-08 is not amenable to a facial takings challenge.

ORDER

[¶35] Summary judgment is GRANTED in favor of Defendant and Intervenor/Defendants based on the above analysis. Plaintiffs' motions for summary judgment are likewise DENIED. Plaintiff's claims are Dismissed.

[¶36] SO ORDERED.

Dated this 27 day of August, 2024.

BY THE COURT:

Anthony Swain Benson
District Court Judge