Bond Case Briefs

Municipal Finance Law Since 1971

EMINENT DOMAIN - NORTH DAKOTA

Northwest Landowners Association v. State

Supreme Court of North Dakota - August 4, 2022 - N.W.2d - 2022 WL 3096724 - 2022 ND 150

Landowners association brought action against State seeking a declaration that senate bill relating to subsurface pore space violated the state and federal takings clauses, and oil and gas company intervened as a defendant.

The District Court granted summary judgment for association. State and company appealed.

The Supreme Court held that:

- Portions of senate bill were a facially unconstitutional per se taking based on physical invasion of property;
- Unconstitutional portions of senate bill were severable from the remainder;
- Trial court acted within its discretion in denying further discovery as to value of pore space before ruling on summary judgment motion; and
- Association was entitled to attorney's fees as prevailing party pursuant to § 1988.

Portions of senate bill relating to subsurface pore space, allowing a third-party oil and gas operator to use subsurface pore space, eliminating the right to compensation for "use of or lost value" to a surface owner's pore space, and stating that injection or migration of substances into pore space for disposal operations, by itself, did not constitute trespass, nuisance, or other tort, constituted a per se taking that facially violated state and federal takings clauses based on physical invasion of property; those portions allowed oil and gas operators to physically invade a landowner's property by injecting substances into the landowner's pore space, restricted landowners from having any control over the timing, extent, or nature of the invasion, and prohibited the right to compensation for use of pore space.

The dominant mineral estate principle, arising from a severance of mineral rights from the surface creating an implied easement in favor of a mineral owner to use the surface estate as reasonably necessary to find and develop minerals, did not save portions of senate bill relating to subsurface pore space from facially violating state and federal takings clauses as a per se taking via physical invasion of property, where portions authorized subsurface disposal of waste by third-party oil and gas operators beyond scope of any implied easement and also barred surface owners from bringing a tort action for a trespass from disposal operations that were beyond scope of any implied easement.

Portions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights, was an exercise of the State's police power which was limited by the state and federal takings clauses as a physical invasion of property, despite argument that landowners took title to pore space with an expectation that their title was limited by police power; landowners' takings claims were not premised on a regulation of what they could do with their property, and they did not take title subject to possibility that their property could be actually

occupied or taken away without just compensation.

Facially unconstitutional provisions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights in violation of state and federal takings clauses, were severable from remaining provisions, which included sections designating use of carbon dioxide as acceptable for enhanced recovery of oil, gas, and other minerals, granting North Dakota Industrial Commission (NDIC) authority to adopt and enforce rules and orders, and limiting application of certain other provisions in the context of existing contracts; remaining provisions were sufficiently distinct to operate independently from the unconstitutional provisions.

Landowners association's failure to expressly plead §§ 1983 and 1988 in its complaint seeking a declaration that a state senate bill relating to subsurface pore space was facially unconstitutional did not preclude an award of attorney fees to association as a prevailing party pursuant to § 1988 upon trial court's determination that the senate bill was a facially unconstitutional taking; attorney's fees could be awarded under § 1988 even if complaint did not expressly plead §§ 1983 and 1988, and complaint alleged a deprivation of a property right in violation of the Fifth and Fourteenth Amendments.

Landowners association that prevailed on its challenge to state senate bill relating to subsurface pore space as being a facially unconstitutional taking was entitled to attorney's fee pursuant to § 1988, despite argument that association lacked standing to assert its members' rights under § 1983; all that was required under § 1988 to award fees was that association prevail on a claim within scope of § 1983.

Copyright © 2026 Bond Case Briefs | bondcasebriefs.com