

## The “Top 10” Ag Law and Tax Developments of 2025: Number 9

Roger McEowen ([roger.mceowen@washburn.edu](mailto:roger.mceowen@washburn.edu)) – Washburn University School of Law  
Ag Law and Taxation Blog: <https://agriculturallaw.lawprofessorsblogs.com/>  
January 2026

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### North Dakota CO<sub>2</sub> Storage Law Struck Down: A Property Rights Victory

In a landmark decision on December 2, 2025, a North Dakota District Court ruled that a key provision of the state’s carbon dioxide storage law is unconstitutional. The ruling in *North Dakota Landowners Association v. North Dakota, et al.*,<sup>1</sup> represents a major win for property owners against the forced use of underground "pore space" for carbon capture and storage (CCS) projects.

The controversy centered on a mechanism called amalgamation. This allowed the North Dakota Industrial Commission to authorize carbon storage projects even if they lacked unanimous consent from landowners. If 60 percent of affected owners agreed, the remaining 40 percent could be forced to participate in the storage facility.

The court found this provision violated both state and federal Takings Clauses for several reasons:

- **Pore Space is Property:** North Dakota law recognizes a surface owner’s right to the underlying pore space as a protected property interest.
- **Physical Invasion:** Injecting CO<sub>2</sub> into a non-consenting owner's land constitutes a "government-authorized physical invasion," or a *per se* taking.
- **Right to Exclude:** The law stripped owners of their fundamental right to exclude others from their land.
- **No Just Compensation:** The law failed to provide for "just compensation" as determined by a jury, a requirement under the North Dakota Constitution.

If upheld on appeal, this ruling creates significant hurdles for the CCS industry:

1. **Project Roadblocks:** Major initiatives, such as Summit Carbon Solutions and Project Tundra, may see their storage orders voided. Without amalgamation, developers must secure 100% voluntary participation or utilize the traditional (and more costly) eminent domain process.
2. **The "Holdout" Problem:** Critics argue this gives a small minority of landowners the power to stall projects. However, from a free-market perspective, the "holdout problem" is simply the market at work. If a project is truly viable, developers should be able to offer a price high enough to secure the land voluntarily.

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<sup>1</sup> No. 05-2023-CV-00065, Bottineua Co. N.D. Dist. Ct. (Dec. 2, 2025).

3. **Market Efficiency:** The court's decision reinforces that property rights are the foundation of economic freedom. Forcing a property transfer to benefit private companies is a market distortion, not a solution to market failure.

The state is expected to appeal to the North Dakota Supreme Court. If the ruling stands, the legislature must return to the drawing board to create a framework that respects jury-determined compensation and strictly defines "public use." This case sets a powerful national precedent, signaling that the burgeoning carbon capture industry cannot bypass constitutional property protections in the name of climate infrastructure.

The ruling affirms that the right to exclude and the right to market-based compensation remain paramount. For CCS developers, the path forward must now rely on negotiation and consent rather than state-authorized coercion.

The ruling serves as a critical "canary in the coal mine" for the carbon capture industry. Because North Dakota was a pioneer in CCS legislation, its legal framework has been a template for other states.

The implications for other states fall into three primary categories:

### **(1) Threat to Similar "Amalgamation" Laws**

Several other energy-producing states have enacted "compulsory pooling" or "amalgamation" laws that mirror North Dakota's 60 percent threshold. This ruling creates an immediate legal target for landowner groups in:

- **Nebraska and Wyoming:** Both have similar statutes that allow projects to proceed with majority consent (often 60 percent to 80 percent).
- **Indiana and Kentucky:** These states have recently clarified that pore space belongs to surface owners but have also introduced "integration of interests" (pooling) mechanisms that could now be challenged as unconstitutional takings.
- **Alabama and Pennsylvania:** Both passed CCS laws in 2024–2025 with unitization procedures (requiring 66 percent to 75 percent consent) that are now vulnerable to the "lack of just compensation" argument used in North Dakota.<sup>3</sup>

### **(2) Redefining "Just Compensation"**

The North Dakota decision emphasizes that compensation for pore space must be determined by a jury, not an administrative body or a state commission.



- **Administrative Vulnerability:** Many states (like West Virginia and Louisiana) use state commissions to set "fair market value" for forced storage. This ruling suggests that such administrative shortcuts may not survive a constitutional challenge.
- **Shift to Eminent Domain:** States may be forced to abandon "amalgamation" altogether and require developers to use traditional eminent domain. This is a much higher bar, as it requires proving a "public use" and involves lengthy, expensive litigation for every non-consenting parcel.

### (3) Increased Project Risk and Costs

For multi-state projects like the Summit Carbon Solutions pipeline, a legal "wall" in one state can derail the entire network.

- **The "Holdout" Power:** If landowners in one state (e.g., Iowa or South Dakota) see their neighbors in North Dakota successfully blocking projects, they are more likely to demand "exorbitant" compensation, significantly increasing the capital required for CCS infrastructure.
- **Investor Caution:** The "legal risk profile" for CCS has spiked. Investors may hesitate to fund projects in states with "American Rule" pore-space ownership (where the surface owner owns the underground cavities) unless those states have ironclad, constitutionally tested compensation frameworks.

### Comparison of State Pore Space Consent Requirements

State	Consent Threshold for Amalgamation	Primary Owner of Pore Space
North Dakota	60% (Struck Down)	Surface Owner
Wyoming	80%	Surface Owner
Alabama	66.7%	Surface Owner
Pennsylvania	75%	Surface Owner
Indiana	Varies/Integration	Surface Owner

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K-State Agricultural Economics | 342 Waters Hall, Manhattan, KS 66506-4011 | 785.532.1504

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