



Montana and North Dakota Pass Carbon Storage Laws

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North Dakota and Montana recently joined Wyoming in adopting legislation to facilitate the development of geologic carbon sequestration (GCS). North Dakota Governor John Hoeven signed into law Senate Bills 2095 (Carbon Dioxide Geologic Storage) and 2139 (Subsurface Pore Space Ownership) on April 8, while Governor Brian Schweitzer of Montana signed into law Senate Bill 498 (Establishing Laws Governing Carbon Sequestration) (“Montana’s Act”) on May 6. Both states provide an ownership and regulatory framework for prospective activities centering around GCS in a climate of burgeoning international interest in carbon mitigation technologies. Importantly, both states establish an ownership scheme for subsurface storage spaces, considered a crucial step toward advancing commercial GCS applications.

Both North Dakota’s and Montana’s new laws echo some of the major provisions of Wyoming’s carbon storage-related statutes, originally enacted in 2008 and amended this past session. Wyoming’s pore space ownership statute vests ownership of all subsurface pore space, defined as “subsurface space which can be used as storage space for carbon dioxide or other substances” in the surface owner or owners. W.S. 34-1-152. Under Montana’s pore space ownership provision, “[i]f the ownership of the geologic storage reservoir cannot be determined from the deeds or severance documents related to the property by reviewing statutory or common law, it is presumed that the surface owner owns the geologic storage reservoir.”

Montana’s Act defines “Geologic storage reservoir” as “a subsurface sedimentary stratum, formation, aquifer, cavity, or void, whether natural or artificially created, including vacant or filled reservoirs, saline formations, and coal seams suitable for or capable of being made suitable for injecting and storing carbon dioxide,” not to include a natural gas storage reservoir. The

Act allows a natural gas reservoir to be converted into a geologic storage reservoir pursuant to Title 82, chapter 11, parts 1 and 2, although a 2009 amendment to Montana's Eminent Domain statutes (Chapter 70-30) provides that any sand, stratum, or formation used as a geologic storage reservoir may not be taken for use as an underground natural gas storage reservoir.

North Dakota's pore space act, to be codified under Title 47, vests ownership of pore space in the owner of the overlying surface estate. "Pore space" is defined as "a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum." Unlike Wyoming, North Dakota expressly forbids the severance of pore space from the surface: "An instrument or arrangement that seeks to sever title to pore space from title to the surface is void as to the severance of the pore space from the surface interest." Leasing of pore space is not considered a severance and is therefore allowed. Any severance that was achieved prior to the effective date of the act (July 1, 2009) remains valid. In contrast, Wyoming's statute allows that any conveyance of the surface conveys the pore space unless an express reservation is made, and an express transfer of pore space can similarly sever the pore space estate from the surface, subject to the requirement that the exact location of the pore space transferred or reserved be specifically described in the instrument. W.S. 34-1-152(c),(g). Montana's act is silent as to the validity of any attempt to sever the pore space from the surface, although the act does not expressly forbid severance.

Both North Dakota and Montana follow Wyoming in maintaining the dominance of the mineral estate over both the surface and subsurface, with all minerals development activities to remain unimpaired. North Dakota's provision expressly "does not change or alter the common law as of the effective date of this chapter as it relates to the rights belonging to, or the dominance of, the mineral estate," while Montana's Act allows minerals development activities to continue even if near or through a storage reservoir "provided that the drilling, production, and related activities . . . preserve the storage reservoir's integrity." Montana's language recalls Wyoming's § 30-5-501 (Oil and gas activities at geologic sequestration sites): "[n]othing in W.S. 35-11-313 [addressing carbon sequestration permitting requirements] shall be deemed to affect the otherwise lawful right of a surface or mineral owner to drill or bore through a geologic sequestration site as defined by W.S. 35-11-103(c)(xxi), if done in accordance with the commission rules for protecting the geologic sequestration site against the escape of carbon dioxide."

Both Montana and North Dakota attempt to establish a liability scheme for CO₂ storage, expanding on Wyoming's 2008 liability provisions. Montana's

Act initially places the burden with the geologic storage operator during the injection phase and for up to 30 years after CO2 injections end. Liability for the stored CO2 may then be transferred to the state, subject to the satisfaction of a number of compliance obligations and approval by Montana's Board of Oil and Gas Conservation. If liability is not transferred it may remain with the operator indefinitely, with a possibility for transfer after a subsequent review period. This differs from Wyoming's liability scheme (as amended) which places all liability for injected substances including CO2 with the operator, subject to rebuttal by a preponderance of the evidence in an action to establish ownership, W.S. 34-1-153(a), although Wyoming's law does insulate pore space and surface interest owners from any liability for the effects of injected or stored CO2, regardless of whether those owners consented to injection. W.S. 34-1-153 (b).

North Dakota's carbon storage law, to be codified as Chapter 38-22, gives authority over all carbon sequestration activities to the North Dakota Industrial Commission (NDIC). Liability for injected substances during injection rests with the operator, where it remains for a minimum ten years until a certificate of completion may be issued. Once the completion certificate is issued liability transfers to the state, subject to the satisfaction of compliance obligations and NDIC approval (in consultation with the state health department).

The permitting provisions of Montana's Act (Sections 2-26) will be effective as of the date EPA grants primacy to Montana's Board of Oil and Gas Conservation (BOGC) to administer CO2 sequestration well activities, while all other provisions, including the geologic storage space provision are effective as of May 6, 2009. North Dakota's new law is effective as of July 1 of this year, as are the approved amendments to Wyoming's carbon storage-related statutes.