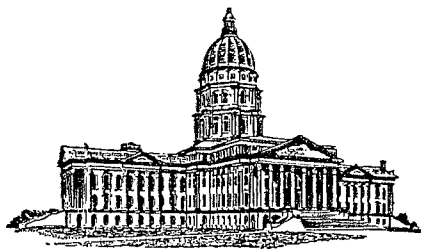


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MEMORANDUM

To: Joint Committee on Energy and Environmental Policy
From: Matt Sterling, Assistant Revisor of Statutes
Date: October 18, 2011
Subject: Underground Pore Space Legislation

As the use of underground pore space for sequestration of carbon dioxide has developed, the question of who owns and is responsible for the pore space has arisen. While the majority of states have not yet addressed this issue, Montana, North Dakota and Wyoming have addressed ownership of pore space through legislation. The resulting legislation has shared some similarities and some differences in approach concerning ownership and severance of title of pore space.

Wyoming's pore space ownership statute vests ownership of pore space in the surface owner¹. Montana's pore space ownership statute similarly provides that, "if 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 reservoir²." Like Wyoming and Montana, North Dakota's pore space act vests ownership of pore space in the owner of the overlying surface estate³.

While these states have essentially all vested ownership of pore space with the surface owner, they have approached severance of the pore space in different ways. North Dakota expressly forbids the severance of pore space from the surface⁴, while continuing to permit

¹W.S. 34-1-152.

²M.C.A. 82-11-180(3).

³N.D.C.C. 47-31-03.

⁴N.D.C.C. 47-31-05.

leasing of pore space⁵. 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 instrument⁶. Montana's act is silent as to the validity of any attempt to sever the pore space from the surface, but does not expressly forbid severance.

Kansas has not yet addressed ownership of pore space, but there has been legislation introduced. During the 2011 Session, HB 2164 was heard in the House Committee on Energy and Utilities. The bill took a different approach towards ownership as it would vest title to pore space with the owner of the mineral rights. The bill would prohibit the severance of pore space from title to the mineral rights or instrument, but would not prohibit leasing of pore space.

⁵N.D.C.C. 47-31-06.

⁶W.S. 34-1-152(c),(g).