IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KEITH PUNTENNEY, Petitioner, vs. IOWA UTILITIES BOARD and DAKOTA ACCESS LLC, Respondents.	LAW NO. CVCV051987
LAVERNE JOHNSON, Petitioner, vs. IOWA UTILITIES BOARD and DAKOTA ACCESS LLC, Respondents.	LAW NO. CVCV051990
RICHARD R. LAMB, ET AL., Petitioners, vs. IOWA UTILITIES BOARD, ET AL., Respondents.	LAW NO. CVCV051997
SIERRA CLUB IOWA CHAPTER, Petitioner, vs. IOWA UTILITIES BOARD and DAKOTA ACCESS LLC, Respondents.	LAW NO. CVCV051999

RULING ON JUDICIAL REVIEW

STATEMENT OF THE CASE

The Iowa Utilities Board (the board) is a state agency created pursuant to Iowa Code section 474.1. One of the board's responsibilities is to implement controls over hazardous liquid pipelines.[1] Iowa Code § 479B.1. The board's charge under the statute is to protect landowners and tenants from environmental or economic damages, to approve the location and route of such pipelines, and to grant rights of eminent domain where necessary. Iowa Code § 479B.1. The statute provides standards that the board must use when considering an application for permit to build a pipeline. The board has adopted administrative rules that also set standards and govern the application process. *See* 199 IAC chapter 13.

Prior to constructing a pipeline in Iowa, the pipeline company must hold informational meetings in each county in which real property or property rights will be effected. Iowa Code § 479B.4; 199 IAC 13.3. The informational meetings shall be held not less than 30 days nor more than two years prior to the filing of a petition for pipeline permit. 199 IAC 13.3. A member of the board or designee shall preside over each informational meeting. Iowa Code § 479B.4. The pipeline company shall provide notice of the informational meeting to each landowner affected by the proposed project. *Id*.

On October 29, 2014, Dakota Access, LLC (Dakota), a pipeline company, filed documents with the board expressing its intent to start the application process by conducting informational meetings in compliance with section 479B.4. The proposed notices expressed Dakota's intent to construct a pipeline from North Dakota to Patoka, Illinois. The notices stated that the proposed pipeline would cover approximately 343 miles in eighteen Iowa counties. The

[1] Any reference in this decision to a "pipeline" shall mean a "hazardous liquid pipeline" unless otherwise stated.

informational meetings were scheduled in each of the eighteen counties during the month of December, 2014. Designees from the board attended each meeting.

On January 20, 2015, Dakota filed a petition for hazardous liquid pipeline permit. The petition identified the length of the pipeline, the proposed route, the impacted counties, and other information as required by the statute. The petition requested the right to use eminent domain to secure rights of way for the project, to the extent eminent domain was needed.

On June 8, 2015, the board issued an order setting a procedural schedule. That order established three issues that would be considered by the board a) whether the proposed pipeline will "promote the public convenience and necessity," b) whether the location and route of the propose pipeline should be approved , and c) whether and to what extent the power of eminent domain should be granted.

The June 8, 2015, order established a deadline for parties to intervene into the action. The board set July 27, 2015, as the deadline for intervention. Thirty-eight parties filed timely motions to intervene. The board granted intervention to five additional parties even though their motions were filed after the board's deadline.

The June 8, 2015, order informed the parties of the board's intent to take evidence via pre-filed testimony and submission of exhibits. The order required Dakota and the parties who supported the application for permit to file prepared direct testimony and exhibits by September 8, 2015. The Office of Consumer Advocate (OCA)[2] and parties who opposed the application for permit were required to file prepared direct testimony and exhibits by October 12, 2015. The order required the parties to file any rebuttal testimony and exhibits by October 26, 2015. The

[2] OCA is a state agency charged with representing the interests of consumers in actions that come before the board. See Iowa Code § 475A.2.

board expressed its expectation that this schedule would allow the case to proceed to hearing in the month of November, 2015.

The board filed an additional order on September 16, 2015, to set rules regarding the presentation of evidence. The order informed the parties that the board would not hear direct testimony beyond the pre-filed direct testimony. The board stated it would allow cross-examination of witnesses who provided pre-filed written testimony, but "succeeding cross-examiners shall not engage in repetitive cross-examination[.]" (*citing* Iowa Code §17A.14(1)). The order prohibited "[f]riendly cross-examination," which was defined as the examination of a witness on the same side of the party conducting the cross-examination. The order allowed a party to petition the board for relief if the procedures would result in injustice.

On November 2, 2015, the Sierra Club Iowa Chapter (Sierra Club) filed a motion for clarification of cross-examination of witnesses. Sierra Club claimed that the prohibition of friendly cross-examination violated due process. Sierra Club argued that an attorney from one party has not control over the written testimony filed by a second party. Two intervening parties joined Sierra Club's motion. Dakota resisted. Dakota claimed that Sierra Club's motion was not supported by legal authority, that due process does not always require cross-examination, and the number of parties and witnesses in the case justified limits on examination of witnesses.

On November 9, 2015, the board issued an order denying Sierra's motion. The board noted that it had received pre-filed testimony from more than 80 witnesses as of the date of the order. If determined that limiting friendly cross-examination was an "administrative necessity" to completing the hearing in the scheduled ten day timeframe. The order allowed any party to make a motion to allow friendly cross-examination of a witness if needed during the course of that witnesses' testimony during the hearing.

On November 12, 2015, the board received public comments on the proposed pipeline; over 200 public comments were received on both sides of the application. The evidentiary hearing began on November 16, 2015. Sixty-nine witnesses testified over the course of eleven days. On December 18, 2015, the board established a briefing schedule allowing the parties to file initial briefs by January 19, 2016, and reply briefs by February 2, 2016. The order provided an outline of issues to be addressed in briefs, although it did not require all parties to address all issues.

On March 10, 2016, the board issued a 159 page final decision and order. The board found that the proposed pipeline would promote the public convenience and necessity, subject to terms and conditions that were set forth in the order. Two factors weighed heavily in the decision: 1) the pipeline represents a "significantly safer way to move crude oil" than the primary alternative of rail transport, and 2) there were considerable economic benefits associated with the construction, operation and maintenance of the pipeline. The board noted the potential environmental impact as the primary factor weighing against the application, but found that the risk of harm was minimized by the terms and conditions imposed by the board in its decision, voluntary safety measures offered by Dakota, and regulatory review by other state and federal agencies. The board made clear that the terms and conditions in the order were important, as the evidence would not support approval of the permit without the terms and conditions imposed.

The board also reviewed the proposed route of the pipeline and considered disputes between Dakota and landowners regarding the right to take land by eminent domain pursuant to Iowa Code section 479B.16. The board found the route to be reasonable. Most of the objections to eminent domain were rejected, but the board granted Dakota eminent domain over some of the

parcels subject to conditions set forth in the order, granted eminent domain subject to modifications over some parcels, and denied Dakota's request as to others.

Following post-hearing motions before the board, several parties filed petitions for judicial review on May 26 and 27, 2016. Four of the petitions were consolidated and set for hearing.[3] Richard Lamb is the lead petitioner in case number CVCV051997. The petitioners in the *Lamb* case are landowners who claim they are impacted by the proposed pipeline. Keith Puntenney and Lavern Johnson are landowners who filed separate actions (case numbers CVCV051987 and 51990 respectively). Sierra Club filed a petition for judicial review in case number CVCV051999. Sierra Club claimed its interest in the proceedings was as a grassroots environmental organization. It sought protection of wildlife and natural areas, protection of water resources, and to prevent the impact of climate change caused by the use of fossil fuels. All of the petitioners were granted intervention in the action before the board.

On August 9, 2016, petitioners in the *Lamb* case filed an emergency motion to stay enforcement of the board's order. At that point, Dakota had put considerable work into construction of the pipeline. Petitioners sought to stay any work impacting their parcels pending resolution of this appeal. On August 22, 2016, the court denied the stay because petitioners failed to first file the motion with the agency. Petitioners returned the board, who denied the motion for stay. The court then considered a renewed request for stay. On August 29, 2016, the court denied petitioners' motion for stay on its merit.

On August 23, 2016, the court established a briefing schedule and set oral argument. The parties filed extensive briefs. Mr. Lamb filed an opening brief that was eighty-one pages and a reply brief that was thirty-one pages. Sierra Club filed an opening brief that was forty-six pages

[3] A fifth case, *Gannon v. Iowa Utilities Board*, Polk County No. CVCV051882, was voluntarily dismissed prior to briefing.

and a reply brief that was fifty-two pages. Dakota's brief was one hundred and thirty-four pages. The board's brief was a concise thirty-eight pages. Other parties filed briefs as well.[4] Oral argument was held as scheduled on December 15, 2016.

Rather than providing a factual summary, the court will discuss facts as necessary and pertinent to the relevant claims raised by the parties.

CONCLUSIONS OF LAW

I. Preliminary issues

A. Friendly cross-examination

At the hearing before the board, the chair limited parties from cross-examining witnesses of other parties who were nominally on the "same side" of the case and restricted parties from questioning adverse witnesses more than once. This has been characterized as a limitation on "friendly cross-examination" or "friendly cross." Petitioners argued that limiting friendly cross-examination was a violation of due process. Respondents argued that due process does not require the opportunity for cross-examination of adverse persons in some cases and that the board is allowed to exclude repetitious evidence.

The board reasoned that, with over eighty witnesses scheduled to testify over the course of ten days, the restriction on friendly cross-examination was an administrative necessity. While Sierra Club argued that the board's restriction was a ban, it was not a total ban. The board issued an order clarifying that the restriction on cross-examination was not absolute:

> [i]f the witness has offered testimony that is truly adverse to the party's interests, then cross-examination of that witness by counsel for the party will be allowed. If this situation should occur, the [b]oard expects counsel for the party desiring to engage in cross-examination to make an appropriate motion, explaining why it should be allowed to cross-examine the witness in a particular situation, how the witness's testimony is adverse to the party's interests and what beneficial purpose cross-examination may serve.

[4] OCA filed a brief opposing the petitions for judicial review.

(Clarification Order, pp. 5-6).

The first issue concerns waiver. Parties can waive objections to evidentiary issues in administrative proceedings in the same way they can in district court proceedings. *See Christiansen v. Iowa Board of Educational Examiners*, 831 N.W.2d 179, 192 (Iowa 2013) (failure to object to hearsay); *Bonds v. State,* 447 N.W.2d 135, 136 (Iowa 1989) (failure to present evidence on issue raised on appeal). Sierra Club contested the board's decision to limit friendly cross-examination prior to the hearing, but it did not petition the board to cross-examine a friendly witness during the hearing itself. If Sierra Club had made such a request, it would have allowed the board the opportunity to allow the proposed examination based on the context of the evidence presented at the hearing. Sierra Club did not make any such requests during the hearing. This argument has been waived.

Nonetheless, the court will also consider the issue on the merits. A contested case proceeding before an administrative agency is an adversarial hearing with the presentation of evidence and cross-examination of witnesses. *Lunde v. Iowa Bd. of Regents*, 487 N.W.2d 357, 359 (Iowa App. 1992). Iowa Code section 17A.12(4) grants all parties to a contested case proceeding, the right to present evidence on all issues involved in the proceeding.

The statute also allows an agency to control the presentation of evidence. For example, "when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be required to be submitted in verified written form." Iowa Code § 17A.14(1). "Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party *as necessary* for a full and true disclosure of the facts. Iowa Code § 17A.14(3) (emphasis added). When evaluating the evidence, the agency's experience, technical competence, and specialized

knowledge may be utilized in determining which evidence is irrelevant, immaterial, or unduly repetitious. Iowa Code § 17A.14(5). This section conforms with the general rule that administrative agencies are not bound by technical rules of evidence. *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262 (Iowa 1991) (ruling in an employment discrimination case before the Iowa Civil Rights Commission).

Moreover, even under the stricter evidentiary standards of a civil case, the trial courts have considerable discretion in directing the course of a trial. *Spitz v. Iowa Dist. Court for Mitchell Cty.*, 881 N.W.2d 456, 467 (Iowa 2016). In *Spitz*, the court found no due process violation when the court limited a contempt case to one hour and refused to allow a parent to call her minor children as witnesses. In *United States v. Runge*, the court found no due process violation when the trial court in a criminal case involving multiple defendants prevented an attorney from cross-examining two witnesses who had already been cross-examined by multiple attorneys. *United States v. Runge*, 593 F.2d 66, 72 (8th Cir. 1979).

The board had valid grounds to limit friendly cross-examination. The case included forty-three intervening parties, not including Dakota and OCA. The board received pre-filed written direct testimony from more than eighty witnesses. The board set aside ten days to conduct the hearing. The administrative record contains nine boxes of documents. It was critical for the board to maintain control over the proceeding to prevent repetition and cumulative testimony. The limit on cross-examination only applied to parties who were on the same side of the permit application. Those parties had the opportunity to consult with each other to ensure that any needed testimony would be included in the pre-filed direct testimony or supplements to the direct testimony. The board agreed to entertain motions during the hearing to allow friendly cross-examination if needed. This was a reasonable and pragmatic approach to managing an

unusually large and complicated case. The board did not violate the due process rights of Sierra Club or any other party by limiting friendly cross-examination.

B. Standing

Dakota claimed that Sierra Club cannot show standing to bring its petition for judicial review. In the context of judicial review, standing is defined as the right of a person to seek judicial relief from an alleged injury. *Clark v. Iowa State Commerce Comm'n*, 286 N.W.2d 208, 210 (Iowa 1979). If an objection is raised to standing, the burden is on the plaintiff "to show (1) a specific, personal, and legal interest in the litigation, and (2) injury." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001); *see also Bushby v. Washington Co. Conservation Board*, 654 N.W.2d 494, 496 (Iowa 2002). In *Bushby*, the Iowa Supreme Court adopted the United States Supreme Court's application of standing in regards to cases involving "environmental concerns." The court held that cases involving environmental concerns establish standing if "they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id*. (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183, (2000); (*Sierra Club v. Morton*, 405 U.S. 727, 735, (1972)) (internal citations omitted).

Sierra Club has alleged sufficient facts to confer standing under the *Bushby* standard. Sierra Club pled that its members use and enjoy the rivers and streams, natural areas, and other environmental amenities. They asserted concerns that construction and operation of the proposed pipeline may cause environmental harm to those areas. In *Bushby*, several citizens filed an action against a local conservation board to prevent a tree-clearing project in a county park. *Bushby*, 654 N.W.2d at 495. The petitioners' interests in *Bushby* are not distinguishable from the petitioners' interests in this case. Sierra Club has standing.

Moreover, Sierra Club was a party to the contested case hearing before the board. Any party who is aggrieved or adversely affected by any final agency action is entitled to judicial review. Iowa Code § 17A.19(1); *See also Pub. Employment Relations Bd. v. Stohr*, 279 N.W.2d 286, 291 (Iowa 1979). Sierra Club fully participated in the hearing and in pre-hearing and post-hearing activities. The board ruled against the arguments Sierra Club made during the hearing. Sierra Club filed its petition for judicial review in response to the adverse ruling. Sierra Club is a party who is aggrieved and adversely affected by the board's decision. Sierra Club has standing to proceed under judicial review.

C. Mootness

Dakota also claimed that the petitions are now moot because the vast majority of the pipeline has been completed. The courts typically do not entertain cases unless there is a live dispute. *See Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005). A case is moot if it no longer presents a justiciable controversy because the underlying issue is no longer existent. *In the Matter of M.T.*, 625 N.W.2d 702, 704 (Iowa 2001). If an opinion rendered by the court would be of no force or effect in the underlying controversy, the issue is considered moot. *Id.*

The Iowa Supreme Court has also delineated a "public interest" exception to the mootness doctrine, allowing consideration if certain conditions are present. *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983). The factors the court considers to determine whether a moot action will be reviewed are: (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review. *In the Matter of T.S.*, 705 N.W.2d 498, 502 (Iowa 2005) (*citing State v. Hernandez–Lopez*, 639 N.W.2d 226, 234 (Iowa 2002)).

There is no need to consider the public interest exception because this issue can be decided under the primary standard. The parties objected to the proposed pipeline not just based on the construction of the pipeline, but also based on its operation. The pipeline may be fully constructed, or close to it, but it has yet to transport any oil. Petitioners have claimed a harm caused by the potential for an oil spill by the transportation of oil through the pipeline. Even if oil was being transported, the case would not be moot because there is an ongoing risk of an oil spill. The case is not moot.

II. Public Convenience and Necessity

A. Standard of Review

Petitioners first argue that the board's interpretation of law should not to be granted deference by the court. The courts apply the standards in Iowa Code section 17A.19(10) when reviewing agency action. When the legislature has clearly vested an agency with authority to interpret an act, the court reviews the agency's findings by using the "irrational, illogical, or wholly unjustifiable interpretation of a provision of law" standard in section 17A.19(10)(c). *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). When the legislature has not clearly vested an agency with authority to interpret the act, the courts are free to substitute their own judgment by using the "erroneous interpretation of a provision of law" standard in section 17A.19(10)(l). *Id*. The legislature need not expressly vest discretion with the agency. Rather, the court shall consider the following:

> [T]he reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

Id. at 11 (*quoting* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998)).

In a recent decision, the Iowa Supreme Court, held that the legislature did not clearly vest the board with deference to interpret the terms "public utility" and "electric utility" as used in Iowa Code chapter 476. *See SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 451-52 (Iowa 2014). The court first noted that those terms had already been defined by the legislature in the statute, which the court considered to be "significant factor weighting against requiring deference." *Id*. at 451. Second, the court found that the terms in question are not complex and are used elsewhere in the code, so they were not uniquely within the subject matter expertise of the agency. *Id*. at 452. The court found it notable that the term "public utility" is used in some statutes that the board has no role enforcing. *Id*.

However, even as the court denied giving the board's interpretations of law discretion in *SZ Enterprises*, it held open that it may in other cases:

> We do not conclude that these principles mean that the [board] will never be granted deference. We focus on the particular statutory provision at issue in a given case. Even where definitions have been supplied by the legislature and the terms are not terms of art, we leave open the possibility that the structure or subject matter of the legislation is of sufficient complexity to require that this court defer to agency legal interpretations. We do believe, however, that parties seeking to require this court to defer to legal determinations of the [board] face an uphill battle where, as in this case, the legislature has provided definitions of terms that do not on their face appear to be technical in nature. (cites omitted).

Id. at 451. The question whether an agency should be granted deference is not always an easy question – even the supreme court has noted that the standards are "not conducive to the

development of bright-line rules." *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 208 (Iowa 2014) (cite omitted).

Based on a review of the statutory language in chapter 479B, the court finds that the board's interpretation of "public convenience and necessity" should be given deference for several reasons. First, the legislature did not define the term "public convenience and necessity" in chapter 479B, nor did it borrow a definition from another statute. Therefore, the most critical factor in *SZ Enterprises* does not apply here.

Second, the legislature has stated that the purpose of chapter 479B was to give the board authority to implement controls over pipelines to protect landowners or tenants from damages that might result from the construction, operation, or maintenance of a pipeline. Iowa Code § 479B.1. This is a broad grant of authority to the board. The statute further gives the board authority to grant a permit, "in whole or in part," and authorizes the board to condition the grant of a permit to terms, conditions, and restrictions as to location and route that it determines are just and proper. Iowa Code § 479B.9. This likewise is a broad grant of authority. The structure of the statute as a whole shows an intent to defer to the board's interpretation of "public convenience and necessity" as part of the determination whether to grant a permit and, if so, what terms and conditions to place on the permit.

Third, the terms "convenience" and "necessity" may appear common, but the combined term "public convenience and necessity" is somewhat archaic and has historically been used by the legislature when granting discretion to agencies dealing in complex decision-making. *See e.g. Appeal of Beasley Bros.*, 206 Iowa 229, 220 N.W. 306, 308 (1928) (reviewing a decision by the State Railroad Commission whether a bus line promoted the public convenience and necessity). The legislature has used the same standard when granting the board authority to grant

permits in other contexts, so it has expertise in evaluating that term. *See e.g.* Iowa Code § 476.29 (telephone utilities); Iowa Code § 479.12 (gas pipelines).

Finally, the courts have held on a number of occasions that a determination whether a service will "promote the public convenience and necessity" is a legislative, not a judicial, function to which the agency should be given greater discretion. *Application of Nat'l Freight Lines*, 241 Iowa 179, 186, 40 N.W.2d 612, 616 (1950); *Beasley Bros.*, 220 N.W.2d at 310. The board made its decision in this case following a contested case hearing, which is a judicial proceeding. However, there is some logic in harmonizing the prior case law to allowing the board discretion under section 17A.19(10)(c) to interpret the same term, even though the board made its decision as part of a contested case rather a quasi-legislative process.

Judicial review of the finding of "public convenience and necessity" also involves a review of factual findings made by the board. Factual findings must be accepted if supported by substantial evidence. *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting Iowa Code § 17A.19(10)(f)). A district court's review "is limited to the findings that were actually made by the agency and not other findings that the agency could have made." *Id.* "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

> Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotation marks omitted).

B. Legal Analysis

The board may only approve a permit to a pipeline company after it determines that "the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9. The board may grant a permit in whole or in part, and it may impose terms, conditions, and restrictions as to location and route as it determines is "just and proper." In this case, the board found that Dakota's proposed pipeline will promote the public convenience and necessity. It imposed several terms and conditions and required some adjustments as to the route.

The term "public convenience and necessity" is not defined in chapter 479B. The board determined that the term "necessity" does not have its ordinary dictionary meaning of "indispensable." (Board order, p. 15 (*citing Wabash, C. & W. Ry. Co. v. Commerce Comm'n*, 309 Ill. 412, 141 N.E. 212, 214 (1923)). The board reasoned that if "necessity" was given its ordinary meaning, a permit would never be granted. Rather, citing to *Wabash*, the board found that "necessity" is more appropriately defined to mean "needful, requisite, or conducive" to meet the intent of section 479B.9. The board's definition is supported by *Thomson v. Iowa State Commerce Comm'n*, 235 Iowa 469, 475, 15 N.W.2d 603, 606 (1944), which held:

> The word "necessity" has been used in a variety of statutes . . . . It has been generally held to mean something more nearly akin to convenience than the definition found in standard dictionaries would indicate. So it is said the word will be construed to mean not absolute, but reasonable, necessity.

See also Weiss v. City of Denison, 491 N.W.2d 805, 807 (Iowa App. 1992) (interpreting "necessity" as a "reasonable necessity" as opposed to an "absolute necessity"); *Mann v. City of*

Marshalltown, 265 N.W.2d 307, 314 (Iowa 1978) (same); *Vittetoe v. Iowa Southern Utilities*, 255 Iowa 805, 123 N.W.2d 878, 881 (Iowa 1963) (same).

The board applied a test that balanced the various public interests, including the public use, public benefits, and public and private costs and detriments. (Board order, p. 16 (*citing to South East Iowa Co-pp Elec. Ass'n v. Iowa Utilities Board*, 633 N.W.2d 814, 821 (Iowa 2001)). In *South East Iowa*, the court reviewed a decision by the board to approve construction of an electric transmission line pursuant to Iowa Code chapter 478. The test under chapter 478 is whether the proposed line is "necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." The court focused its attention on the question of "necessity." *See id*. at 818-19 (*citing* Iowa Code § 478.4). The court approved the board's analysis, which balanced the costs of the proposed line with the expected benefits to utility customers, and found the proposed lines necessary to serve the public use. *Id*. at 821.

Petitioners argued that economic impact should not be a factor to decide whether a proposed pipeline will promote the public necessity and convenience. However, the supreme court held the opposite in *South East Iowa*, at least as applied to electric transmission lines. *Id*. at 819. Moreover, in *South East Iowa*, the court cited to the board's consideration of economic benefits in decisions to grant gas pipeline permits under Iowa Code section 479.12 "as a sufficient basis" to approve the permits. *Id*. The standard for granting a gas pipeline under section 479.12 is the same "promote the public convenience and necessity" standard that the board is required to use in this case under section 479B.9. There is no question that economic impact may be considered as a factor.

Petitioners also argued that Dakota must show "service to the public" in Iowa. In essence, petitioners argue that the pipeline must provide a direct product or service to Iowans. The proposed pipeline does not ship oil from Iowa, nor does it ship oil into Iowa. Rather, it ships from North Dakota to a refinery in Illinois on a route that crosses Iowa. The board found that it may consider the application notwithstanding that the proposed pipeline does not have a beginning or end point in Iowa.

The board's determination is supported by the law and evidence. While the board must consider the public interest of Iowans as part of its balancing test, there is no indication in the statute that the board cannot approve the permit unless product is shipped to or from the state. In fact, the statute defines a "pipeline" as "an *interstate* pipe or pipeline[,]" so it is clear that the legislature understood that the pipeline would be crossing state lines. *See* Iowa Code § 479B.2(3) (emphasis added). Moreover, the board made a finding that Iowa does not produce any crude oil and there are no crude oil refineries doing business within the state. (Board decision, p. 20). As a result, a pipeline used to ship crude oil must necessarily start and stop in other states without supplying product directly to the state of Iowa. The board correctly found that the governing legal standard does not require a finding that product is shipped to or from the state.

C. Factual Analysis

The parties presented evidence regarding several factors that they felt to be important to the board's consideration whether Dakota's application for permit will promote the public convenience and necessity. The board found that some of the factors carried little weight in its balancing test. The board ultimately found the following to be significant factors to consider when reviewing Dakota's application for a permit: 1) the increased safety of transporting crude

oil by pipeline rather than rail, 2) economic benefits to the state, 3) environmental issues, 4) safety risks, and 5) oil spill remediation. (Board decision, pp. 31-33, 46-47, 51-54, 57-58, 62-63). The board found the first two factors to weigh heavily in favor of granting a permit. (Board decision, pp. 109-10). The board also found that the proposed pipeline would serve a market with a clear demand for oil. (Board decision, pp. 110). The board found that the other three factors weighed against granting the permit, but the risk of harm had been reduced by safety measures. (Board decision, pp. 110-12). The board also considered the burden that the pipeline would place on private interests, particularly those along the proposed route. (Board decision, p. 113). The board ultimately concluded that the benefits outweighed the public and private costs, particularly when considering the safety measures put into place by Dakota and imposed by the board. (Board decision, p. 114).

1. Increased Safety in Transporting Oil by Pipeline

The parties presented varying information regarding the safety of shipping crude oil by pipeline versus shipping crude oil by rail, which is the primary alternative. The challenge was to find an apples-to-apples comparison. For example, Sierra Club presented evidence from 2013 to show that more than 800,000 gallons of oil spilled from railroad cars but 5,000,000 gallons of hazardous liquids spilled from pipelines. The board discounted that evidence because the pipeline numbers included hazardous liquids of all types and not just oil. Additionally, Sierra Club's numbers did not consider the relative volume of oil transported by both methods, nor did it consider the distance traveled. (Board decision, pp. 29-31).

After considering the evidence presented, the board found that data from the United States Department of Transportation (USDOT) provided the most reliable evidence to determine the relative safety of both methods of transportation. (*Id.; citing to* Exhibit GC). The USDOT

data considered the volume of oil carried and the distance transported when comparing the two methods of transportation. Based on that data, the board found that transportation of oil by pipeline has one-third to one-fourth of the incident rate of transportation of oil by railway. The same exhibit reported that, by any measure, pipelines are the safest form of energy transportation.[5] (Board decision, pp. 28-29, 32).

The board's finding is supported by substantial evidence. It may be that there is other evidence in the record that could support another conclusion. However, the standard of review prevents the court from substituting its judgment for that of the agency when deciding fact questions. The board sat through the lengthy hearing, listened to the witnesses, and considered the evidence that was presented. The board reasonably relied on data from an objective governmental source as part of its decision-making as to the safety aspects of the application.

2. Economic Benefits to the State

The board found that construction of the pipeline would economically benefit the state by various means. The economic benefits from the construction of the pipeline were estimated to be between $787,000,000 and $1.11 billion. The board determined the project would employ 3,100 to 4,000 workers. The board found the economic benefits to the state to be significant, even if the lower estimates were considered. The pipeline was expected to result in approximately 25 long-term jobs by direct and indirect means. The board also found that Dakota would pay approximately $27 million in property taxes each year. The overall economic benefit from the construction, operation, and maintenance of the proposed pipeline weighed significantly in favor of granting the permit. (Board decision, pp. 41-47).

[5] Petitioners argued that USDOT has established new standards that will improve the safety of transportation of oil by rail. The new standards were not referenced during the contested case hearing even though they had been promulgated at the time. The court agrees with the board's argument that the impact of the new regulations is too speculative to be considered at this time.

The board's findings are supported by reliable evidence in the record. There were disputes as to the total number of constructions jobs and costs. There were also some disputes as to the other figures relied on by the board. However, there was no disagreement that there would be a significant amount of money spent on construction, that thousands of workers would be employed, and that the state would benefit in the future through property taxes and some long-term jobs. There was unquestionably substantial evidence to support the finding that the project would provide economic benefit to the state.

The economic benefits cited by the board are distinct from those considered in other cases involving the board. For example, in *South East Iowa*, the board considered the economic benefit that might be received by consumers through lower energy costs over the long-term. *South East Iowa*, 633 N.W.2d at 820. The board considered some evidence that the price of oil may drop due to the decrease in costs of transportation after the pipeline was built, but the board did not appear to use that as part of its finding of economic benefits. (Board decision, pp. 42, 46-47). Rather, the primary economic benefit considered by the board was the short-term benefits resulting during the construction phase of the project.

It may be reasonable to question whether these short-term benefits should play a major role in the analysis. Any pipeline project will include construction costs, so any pipeline project will bring the resulting economic benefits associated with construction jobs. Still, there is no distinction in the case law between short-term and long-term economic benefits. The court cannot find as a matter of law that the board cannot consider the significant amount of money spent during a major construction project. There is no question that this is a major project. There is likewise no question that the pipeline brings some economic benefits that will continue

in the future. The board's findings as to the economic benefits of the project were supported by substantial evidence and were not erroneously entered.

3. Environmental Issues, Safety Risks, and Oil Spill Remediation (Safety Issues)

The board commenced its evaluation of the safety issues by reiterating the legislative purpose to "protect landowners and tenants from environmental or economic damages which may result from the construction, operation or maintenance of the proposed pipeline." (Board decision, p. 51 (*citing* Iowa Code § 479B.1)). The board noted that the environmental considerations of the pipeline are "numerous," but also stated that "[i]t is impossible to build and operate a pipeline without having any environmental impact at all[.]" (Board decision, p. 52). The board ultimately concluded that sufficient steps had been taken to minimize the potential adverse impact of the pipeline. (Board decision, p. 53).

The board `cited to several rationales, as supported by portions of the record, to support its conclusion. For example, the board cited to the testimony of Jeff Thommes, a witness called by OCA. Mr. Thommes has worked for 17 years as a biologist for the oil and gas industry helping clients comply with rules and laws protecting threatened and endangered species. (Thommes direct, p. 2). Mr. Thommes recommended a number of conditions that Dakota should be required to follow during the construction, operation, and maintenance of its proposed pipeline. (*Id*., pp. 13-18). Dakota voluntarily agreed to comply with many of those recommendations, and the board made specified rulings as to other recommendations that were in dispute. (Board decision, pp. 91-100). The board ordered many of the recommendations to be included among the terms and conditions of the permit.

The board discussed at length the agricultural impact mitigation plan (AIMP) required by Iowa Code section 479B.20. (Board decision, pp. 47, 52, 74-83). Dakota proposed an AIMP,

which was modified by the board to add a number of requirements suggested by North Iowa Landowner's Association (NILA). The modifications to the AIMP provided landowners greater protection from economic or environmental harm.

Other factors were considered as well. The board found that Dakota picked a route that was near other existing infrastructure and avoided problematic environmental features. Dakota also agreed to designs and testing that exceeded federal regulatory requirements, including additional inspections of mainline girth welds, additional hydrostatical testing, and implementation of a cathodic protection system. This shows an intent to provide greater protections than provided by the several regulatory schemes that apply to Dakota's pipeline. These findings by the board are supported by evidence presented during the case. (*See e.g.* Board decision, p. 48 (*citing* Howard exhibit 13)).

Petitioners argue that the board should have ordered an environmental report to provide more details regarding potential environmental concerns. Sierra Club made a pretrial motion to that extent. On October 5, 2015, the board issued an order denying the request. The board stated that it has considered many permits in the past without requiring an environmental impact report. It found that it could consider environmental issues by using its standard hearing procedures. The board is not required by law to order an environmental impact study as requested by Sierra Club. The board provided sufficient opportunity for the parties to present evidence as to their concerns through exhibits, reports, the pre-filed testimony, and the testimony offered during the hearing.

Petitioners also raised a concern about remediation should a spill occur. Chapter 479B contains a financial responsibility requirement, but only requires that the pipeline owner hold property with a value of $250,000 that is subject to execution in Iowa. Iowa Code § 479B.13.

The parties agreed that a major spill could result in damages greatly exceeding that amount. Dakota committed to maintaining a $25 million general liability policy. (Transcript, pp. 2184-86). Further, the board required Dakota to file parental corporate guarantees pledging resources to address emergencies. (Transcript, pp. 2495-96). The market capitalization of Dakota's parent companies was over $60 billion as of the date of the hearing.[6] Petitioners argued that the owners may change over time, but as pointed out by the board, it retains jurisdiction to require updated guarantees. The board found that the likelihood of a spill is unlikely based on the remediation efforts discussed in its decision, but there was evidence of sufficient resources to respond to any spill. The evidence relied upon by the board was supported by substantial evidence. (Board decision, pp. 58-63).

It seems clear that the decision on this project turned on the resolution of the environmental concerns. Any pipeline carrying crude oil carries risks, but the legislature has made a policy decision to allow such pipelines if approved by the board. The board carefully analyzed the safety issues raised by the parties and considered the various risks incurred by the proposed project. Dakota voluntarily agreed to safety measures not otherwise required by law. The board imposed other safety measures based on proposals made by the parties and on its own initiative. In each instance, the board's factual findings were supported by substantial evidence. The board balanced the pros and cons of the project and entered a reasonable decision based on the evidence presented. The decision is supported by substantial evidence.

[6] As of the time of hearing, the parent companies included Energy Transfer Partners, Sunoco Logistics, and Phillips 66. (Transcript, pp. 2177-78).

III. Eminent Domain

A. Standard of Review

Petitioners also argued that the board's interpretation of law as to its findings of eminent domain should not to be granted deference by the court. The court views this issue differently than the deference to be granted the board to interpret "public convenience and necessity" for purposes of deciding whether to grant a permit. Admittedly, the two provisions of law are tied together, but there are independent grounds to give greater scrutiny to the legal interpretation of the eminent domain claims.

Petitioners' primary arguments against eminent domain rely on Iowa Code chapter 6A. There is no indication that the legislature gave the board vested authority to interpret chapter 6A.[7] Many of the terms from that statute are common in the law and not within the specialized expertise of the board. Moreover, statutes that delegate the power of eminent domain are "strictly construed and restricted to their expression and intention," thus requiring greater review by the courts. *See Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 208 (Iowa 2014). Accordingly, review on the eminent domain questions shall be for errors of law.

B. Review of the Statutory Scheme

The legislature clearly gave the board authority to grant rights of eminent domain to pipeline companies. The very purpose of the governing statute, as stated by the legislature, is:

> to grant the utilities board the authority to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and *to grant rights of eminent domain where necessary*.

[7] This is likely due to reasons that are discussed in the legal review of this decision.

Iowa Code § 479B.1 (emphasis added). The power to grant eminent domain is described in more detail in Iowa Code section 479B.16. That section vests the right of eminent domain with any pipeline company that is granted a permit by the board, to the extent necessary as approved by the board and subject to other limitations set forth in the statute. The statute authorizes the board to grant additional eminent domain rights if the pipeline company can show that a greater area is needed for the property construction, operation, and maintenance of the pipeline.

Notwithstanding the clarity of the board's duties and powers to grant eminent domain pursuant to chapter 479B, petitioners claim that the board was prohibited from doing so based on Iowa Code chapter 6A, which is the state's general eminent domain statute. Chapter 6A grants authority of eminent domain to the state, to the federal government (through the state), counties, cities, and private parties. There is no indication in the code that the provisions in chapter 6A are intended to limit the authority of eminent domain granted in chapter 479B. In fact, there is language in chapter 6A showing the legislative intent to defer to other statutes granting eminent domain to entities under the jurisdiction of the board. Based on the language used in both chapters, the court finds no basis for belief that the provisions in chapter 6A are intended to limit the rights to eminent domain granted in chapter 479B.

Petitioners first cite to Iowa Code section 6A.21, which limits the ability to condemn "agricultural land" by defining a "public use," "public purpose," and "public improvement" to exclude agricultural land unless the owner of the land consents. Iowa Code §6A.21(1). However, the section goes on to state that:

> This limitation also does not apply to utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce or to any other utility conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain.

Iowa Code § 6A.21(2).

Dakota is clearly a company or corporation under the jurisdiction of the board. Dakota is subject to the jurisdiction of the board pursuant to the permit process established in chapter 479B. That chapter clearly anticipated that proposed pipelines would cross agricultural land, as section 479B.20 set out standards applying to land restoration of agricultural lands. The legislature granted the board express authority to adopt rules establishing standards for restoration of agricultural lands, as well as the ability to impose civil penalties for any person who violates the board's rules or orders in that regard. Iowa Code §§ 479B.20-21. Therefore, the limitation in section 6A.21(1) does not apply based on the express language in the statute. Moreover, the exception for entities under the jurisdiction of the board shows the intent to exclude grants of eminent domain under other statutory schemes from the generalized provisions of chapter 6A.

Petitioners next argued that an additional limitation established in Iowa Code section 6A.22 applies to this case. Section 6A.22 also limits the use of eminent domain via the definitions of "public use," "public purpose," and "public improvement." The section defines those terms to include possession, occupation, and enjoyment of property by the general public or governmental entities, the acquisition of an interest in property necessary for the function of a public or private utility, common carrier, or airport, for redevelopment under conditions set forth in the code, and for other purposes delineated in the statute. Iowa Code § 6A.22(2)(a). Petitioners claim that Dakota does not fit any categories within the definitions of "public use," "public purpose," and "public improvement."

The language used in section 6A.22, in combination with the legislative history, shows that it was not intended to impact the right of eminent domain granted in chapter 479B. Section

6A.22 was adopted in 2006 during the legislative session immediately following the United States Supreme Court's decision in to *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). *See* Iowa Acts ch. 1001, § 3. In *Kelo*, the court considered whether a city's use of eminent domain to revitalize a blighted area violated the public use clause of the fifth amendment. The court found no constitutional violation, but noted that state legislatures have "broad latitude" to determine what public needs justify use under the takings clause. *Id*. at 483. The adoption of section 6A.22 was clearly responsive to the invitation laid out in *Kelo*. The bulk of the 2006 amendment sets standards for the acquisition of property to "eliminate slum or blighted conditions," which was exactly the issue in *Kelo*. See Iowa Code § 6A.22(2)(5).

There is no indication in the 2006 amendments that the legislature intended to modify the board's duties and authority to grant the right of eminent domain under chapter 479B. The history and language shows that the focus of the section 6A.22 was to manage issues relating to urban renewal efforts, and not the pre-existing standards relating to pipelines. The 2006 act did not amend any provision in chapter 479B nor did it even reference 479B. The only amendment of note to this case was an amendment to section 6A.21(2) relating to the exception to entities under the jurisdiction of the board. Previously, the exception only applied to "utilities or persons." The 2006 act amended the provision to add "companies" or "corporations" under the jurisdiction of the board. 2006 Iowa Acts ch. 1001, § 2. Accordingly, the 2006 legislation actually broadened (or at least clarified) the exception for entities under the jurisdiction of the board. This shows that the legislature had no intent to interfere with the rights previously granted under chapter 479B.

Notwithstanding this finding, the court can still find that eminent domain is allowed under section 6A.22 if it finds Dakota is a "common carrier," as the board so found. A "common

carrier" is not defined in section 6A.22 or otherwise in chapter 6A. Iowa law has defined a common carrier as "one who undertakes to transport, indiscriminately, persons and property for hire." *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996) (cites omitted). A common carrier holds itself out to the public as a carrier of all goods and persons for hire. However, a common carrier need not serve all the public all the time. *Id*.

Dakota is a common carrier under this definition. It has entered into contracts with nine third-party shippers to transport oil via the pipeline. Dakota has reserved ten percent of the pipeline's capacity for walk-up shipping. While there may be times that the pipeline capacity is full, Dakota does not cease to be a common carrier if it cannot accommodate a shipper at all times, just like an airline does not cease to be a common carrier if flights are booked at times. This finding is consistent with definitions under federal law that pipelines are common carriers. *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 639 (1978) (referring to pipelines as common carriers under the Interstate Commerce Act); *W. Ref. Sw., Inc. v. F.E.R.C.*, 636 F.3d 719, 724 (5th Cir. 2011) (same).

Both parties cite *Mid-American Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 114 N.W.2d 622 (1962) to support their positions on the common carrier issue. In *Mid-American*, the pipeline company proposed building a pipeline from Pacific Junction to Des Moines. *Id*. at 623. The court acknowledged that the pipeline may be considered a common carrier under federal law, but was not a common carrier under state common law because the pipeline company only intended to ship its own products. *Id*. at 624-25. In this case, the record shows that the pipeline will transport product for several producers and reserve room for walk-up producers. This case is distinguishable from *Mid-American.*

For the reasons stated above, the board correctly determined that it had the duty and authority pursuant to Iowa Code sections 479B.1 and 479B.16 to grant rights of eminent to domain to Dakota after awarding a permit.

C. Individual Claims

1. Keith Puntenney

. Keith Puntenney raised three issues: a) he argued that the board failed to consider potential impacts to his drain tile system; b) the board could have moved the pipeline route to other properties; and c) he was not afforded ample opportunity to present his case and was denied due process. The first two claims are primarily substantial evidence claims.

a. Impact to Tile System: Mr. Puntenney first argued that the board violated Iowa Code section 479B.1 by not protecting his land from environmental and economic damages. He contended the board failed to consider the potential impacts to the drain tile system on his property and that the board could have moved the pipeline route to other property.

The board heard considerable evidence on this issue from Mr. Puntenney, professional drain tile installers, the AIMP, and numerous questions asked of both non-expert and expert drain tile witnesses at the hearing. Additionally, the board heard testimony that Dakota would install the pipeline a minimum of two feet from existing drain tile, despite the fact that federal law allowed for a clearance of two inches, that its contractors had experience executing thousands of tile repairs, and that all drain tile could and would be repaired to its pre-construction or better condition. When viewing the record as a whole, there is substantial evidence supporting the board's determination that Mr. Puntenney's land and tiling system would not be harmed environmentally or economically from the construction, operation, or maintenance of a liquid pipeline.

b. Rerouting: Mr. Puntenney next claimed that he intended to install three wind turbines on the land on or around the proposed path of the pipeline. He asked that the route be changed to accommodate his plans. The board found that Mr. Puntenney was only in discussions with a neighbor to "put together a proposal." (Final decision, p. 149). No plans were in place. Further, the board found that the evidence did not show that the pipeline would interfere with future plans to install wind turbines. The board's decision is supported by substantial evidence.

Mr. Puntenney also made arguments under other provisions of Iowa Code section 17A.19(10). These other arguments can be summarized as claiming that the decision was arbitrary, capricious, and unreasonable. Agency action may be challenged as arbitrary or capricious, but only when the decision was made "without regard to the law or facts." *Doe v. Iowa Board of Medical Examiners*, 733 N.W.2d 705, 707 (Iowa 2007) (*quoting Greenwood Manor v. Iowa Dep't of Public Health*, 641 N.W.2d 823, 831 (Iowa 2002)). Agency action is unreasonable if the agency acted "in the face of evidence as to which there is no room for difference of opinion among reasonable minds[.]" *Id*. The court typically defers to an agency's informed decision as long as it falls within a "zone of reasonableness." *S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 818 (Iowa 2001) (cite omitted). When considering claims under the unreasonableness standard, the courts generally affirm the informed decision of the agency, and refrain from substituting its less-informed judgment. *Al-Khattat v. Eng'g & Land Surveying Examining Bd.*, 644 N.W.2d 18, 23 (Iowa 2002).

The court rejects Mr. Puntenney's claims under the other provisions of section 17A.19(10). The board carefully considered the evidence regarding Mr. Puntenney's concerns as to his tile system and possible installation of wind turbines. It considered his claims in light of the evidence presented by Dakota and the other parties as to the proposed route. The board

considered the competing interests in coming to a reasonable decision. (Final decision, p. 149). It followed the applicable law. The decision is certainly within a zone of reasonableness. There is no violation of the other cited provisions in Iowa Code § 17A.19(10).

Mr. Puntenney also claimed the decision was arbitrary and capricious because he was treated different than Patrick Lenhart and William and Anne Smith. The decision and record shows that the board identified rational differences between Mr. Puntenney's claim and those of Mr. Lenhart and the Smiths.

Mr. Lenhart owns a farming operation including four existing turkey barns on the impacted property. (Final decision, p. 131). Mr. Lenhart and Tyson Foods, who own the birds, had been in discussion for two years about expanding the facility to add three more buildings. Mr. Lenhart was able to testify where the buildings would be, the overall space, as well as the size of each building. The board determined Mr. Lenhart's plans were well developed and re-routed the pipeline. The board granted Mr. Lenhart's request based on the certainty and reliability of the evidence he submitted. There are rational differences between his circumstances and those of Mr. Puntenney.

The Smiths owned four parcels and did not object to the pipeline crossing their land. (Final decision, p. 134). They offered an alternative that would allow one of the parcels to be missed and another to be minimally impacted, while allowing greater impact on the other two. Dakota believed it could work with the Smiths to accommodate their concerns. The board found the Smiths concerns to be reasonable and directed Dakota to continue to work with them. Once again, the circumstances involving the Smiths were distinct from those involving Mr. Puntenney.

c. Due Process: Finally, Mr. Puntenney argued he was denied due process and did not have an opportunity to present evidence on the issues he raised. The requirements of due

process are well established as: 1) notice; and 2) a meaningful opportunity to be heard. *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W. 2d 255, 264 (Iowa 2001). Upon review of the record, Mr. Puntenney was provided notice and given an opportunity to present his case. He filed an objection, was added as an intervening party, presented filed testimony, cross-examined witnesses, admitted thirty exhibits into the record, and testified live at the hearing. Mr. Puntenney was granted due process.

2. LaVerne Johnson

LaVerne Johnson's claim is reviewed under the same standards set forth in Iowa Code Section 17A.19 and as discussed in Mr. Puntenney's claim. Mr. Johnson argued that the board failed to consider potential impacts to his drain tile system situated on his property. The board clearly considered his claim, but found that the evidence did not support his request. The board imposed a condition on the pipeline to be bored under Mr. Johnson's 24-inch tile main. (Final decision, p. 127). This condition taken together with the board's consideration of multiple lay and expert witnesses, company representatives, professional engineers, agronomists, and its own staff engineers, shows substantial evidence to support their conclusion.

IV. Constitutional Claims

Petitioners claim that the board's decision to grant Dakota eminent domain over their land violated the public use clause of the United States Constitution. *See* U.S. Constitution, Amend. 5; *see also* Iowa Constitution, Art. I, § 18. The parties cite to *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), in which the United States Supreme Court narrowly approved a governmental taking pursuant to the public use clause.

In *Kelo*, a city sought to excise imminent domain over a number of properties in a blighted area with the goal to revitalize the area to promote jobs and tax revenue. *Kelo*, 545 U.S.

at 473-75. The plaintiffs, who owned non-blighted properties within the area proposed for economic development, claimed the action violated the public use clause of the fifth amendment.

The court framed the discussion by stating the following:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

Kelo, 545 U.S. at 477. The court noted that the interests of society vary across the country and have changed over time. *Id*. at 482. The court further noted that prior decisions have given legislatures broad latitude in determining what public needs justify use under the takings clause. *Id*. at 483. In *Kelo*, the city's action was authorized by statute, was "carefully formulated," and was expected to provide appreciable benefits to the community. *Id*. The court found that the public use clause was not violated, holding that the comprehensive plan setting forth the public interest prevailed over the individual interests of the landowners (who would be paid just compensation for their land). *Id*. at 484.

The court declined to adopt a bright-line rule holding that economic development does not qualify as a public use. *Id*. at 484. Rather, the court held that "promoting economic development is a traditional and long-accepted function of government." *Id*. The court rejected a claim that the city prove a "reasonable certainty" that the expected public benefits would actually accrue. *Id*. at 487. The court found that such a claim, as a constitutional rule, would impose a "significant impediment to the successful consummation" of condemnation plans. *Id*. at 488.

The court emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." *Id*. at 489. In fact, it recognized that many states imposed public use requirements "stricter than the federal baseline." *Id*.

The taking in this case is much less intrusive than that in *Kelo*. In *Kelo*, the city took the property of long-time landowners – they had to give up their property entirely. In this case, the landowners keep their land. The board acted pursuant to statutory authority set forth in Iowa Code chapter 479B, which specifically includes the authority to grant eminent domain following the issuance of a hazardous liquid pipeline permit. *See* Iowa Code § 479B.16. The legislature did not amend the board's authority to grant eminent domain under chapter 479B when it amended other statutes granting the right to eminent domain in 2006 following the *Kelo* decision. The board put into place a number of terms and conditions that Dakota must meet. Those terms and conditions should minimize the impact on land during construction and reduce the risk of future harm. Petitioners have not shown a constitutional taking based on the legal principles set forth in *Kelo*.

Petitioners cite the Iowa Supreme Court's decision in *Clarke County Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015).[8] Six agencies located in Clarke County filed an agreement under Iowa Code chapter 28E to create the Clarke County Reservoir Commission (the commission). *Id*. at 168. The commission attempted to use eminent domain to take properties as part of a proposed lake/water project. The court rejected the plan because no statute allows a chapter 28E entity the power of eminent domain. *Id*. at 176. The court distinguished *Weiss v. City of Denison*, 491 N.W.2d 805, 807-08 (Iowa App. 1992), in which a city, which was a party

[8] *Clarke County* cited the United States and Iowa constitutional provisions limiting takings of private property, but it was not decided on constitutional grounds. Rather, the court cited the constitutional provisions as part of its longstanding practice of requiring strict compliance with statutory requirements for exercise of eminent domain. *Id*. at 172.

to a 28E agreement, used its power of eminent domain to acquire land and then transferred that land to the 28E entity. In *Weiss*, the city clearly had the power to use eminent domain, so the use was lawful. The supreme court confirmed that *Weiss* remained good law.

Clarke County is distinguishable from the present case. The board unquestionably has the power of eminent domain under the statutory provisions discussed earlier in this decision. The board utilized eminent domain as envisioned by the statute. *Weiss* is actually a closer call than this case because the end result was to transfer the property to the 28E entity, which did not have the power of eminent domain outside its agreement with the city. In this case, a statute provides a clear line for the board to grant eminent domain to Dakota.

The court found no other controlling authority that would change the analysis as set forth in *Kelo*. There likewise is no indication that the Iowa Supreme Court would interpret the Iowa Constitution provision differently than the federal statutory provision. The board's action did not violate the United States or Iowa Constitutions.

Petitioners cite to recent out-of-state cases to attempt to show a trend of courts limiting the authority of states to grant eminent domain to pipeline companies. One of those cases, *Mountain Valley Pipeline, LLC v. McCurdy*, 238 W. Va. 200, 793 S.E.2d 850, 855 (2016), involved a company seeking to build a natural gas pipeline that would ship natural gas from producers within the state to buyers out of the state. The governing statute granted a company the power of eminent domain to construct, maintain, and operate natural gas "when for public use." *Id*. (*citing* West Virginia Code § 54–1–2). The West Virginia courts had used a "fixed and definite use test" to interpret "public use" for more than 130 years. In order to meet the fixed and definite use test required a proponent to prove that:

> [the] general public must have a right to a certain definite use of a private property on terms and for charges fixed by law; and the

> owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice, that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another, or to a corporation to be used by such other or by such corporation as its private property uncontrolled by law as to its use. Such supposed indirect advantage to the community is not in contemplation of law a public use. *Id*. at 256.

In the West Virginia case, the pipeline company could not show that any consumers in West Virginia would benefit from the pipeline. *Id*. at 860-61. Accordingly, the court found under its long-standing legal test that eminent domain could not be granted to the pipeline because the only public benefit would be to people outside the state. *Id*. at 862.

There are distinctions between the West Virginia case and this case. Iowa has not adopted the fixed or definite use test. Iowa has not strictly confined any definition of public use solely to consumers in Iowa. As discussed earlier in this decision, section 479B.2(3) specifically defines the term "pipeline" to mean an "interstate pipe or pipeline." This shows the legislature's intent that the pipelines subject to regulation under chapter 479B will be shipping across state lines. There is no indication in the statute that the legislature restricted approval of permits to companies that only shipped hazardous liquids into Iowa to be directly used by Iowa consumers. The West Virginia decision does not impact the reasoning of this case.

Petitioners also cited a recent Kentucky case involving a pipeline that was intended to ship product out of state. *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386, 392 (Ky. App. 2015). In Kentucky, the relevant test to grant eminent domain is whether the pipeline is "in public service." *Id*. However, the court found that eminent domain could only be granted under Kentucky law if the pipeline company was regulated by the state's Public Service Commission (PSC). *Id*. The applicant was not regulated by the PSC, so the court could not grant eminent domain. *Id*. Secondarily, the court

noted that the pipeline would not meet the definition of "in public service" because the product was being shipped to the Gulf of Mexico and not reaching Kentucky consumers.

The Kentucky case is distinguishable for similar reasons as the West Virginia case. Dakota's pipeline is clearly regulated by the board under the provisions of chapter 479B. Iowa's test is not restricted to only allowing eminent domain for pipelines that provide product for consumers in Iowa. These cases do not impact the reasoning under established Iowa law.

RULING

The petitions for judicial review are denied. The decision of the Iowa Utilities Board is affirmed. Petitioners are responsible to pay all court costs.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV051997	RICHARD LAMB ET AL VS IOWA UTILITIES BOARD

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa