IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RICHARD R. LAMB, trustee of the RICHARD R LAMB REVOCABLE TRUST, et al., **Petitioners,** **v.** **IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,** **Respondent,** **and** **DAKOTA ACCESS, LLC,** **Indispensable Party.**	**Case No. CVCV 051997** **RULING ON PETITIONERS' MOTION FOR STAY**

STATEMENT OF THE CASE

Procedural history: Petitioners are a number of Iowa agricultural landowners who appeal a decision by the Iowa Utilities Board (the board) to approve a petition for hazardous liquid pipeline permit filed by Dakota Access, LLC (Dakota). The board's final decision was issued on March 10, 2016. Following post-hearing motions, petitioners filed a petition for judicial review in this case on May 27, 2016. The court scheduled final hearing on the judicial review for December 15, 2016.

On August 9, 2016, petitioners filed an emergency motion to stay enforcement of the board's March 10, 2016 decision, as to the 15 parcels held by petitioners. The motion was filed as an emergency because Dakota started work on the pipeline following the board's approval. Work on the pipeline has nearly reached some of the petitioners' properties and digging will commence soon absent a stay. The court set the motion for hearing on August 19, 2016 after

consulting the parties. Dakota and intervener MAIN Coalition (Main) filed resistances. The board did not take a position on the motion. The court heard arguments for approximately three hours.

On August 22, 2016, the court issued an order denying the request for stay for failure to comply with Iowa Code section 17A.19(5). That statute requires a party to first request a stay from the agency before going to the court. The court denied the stay without prejudice to file a motion with the board. Later that day, petitioners filed an emergency motion for stay before the board. The board heard oral argument on August 25, 2016.

On August 26, 2016, the board issued a written decision denying the request for stay. The board considered the following four factor test set out in Iowa Code section 17A.19(5)(c) and well-established by Iowa law:

> (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
>
> (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
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> (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
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> (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

The board found that the first factor weighed against granting the stay, and the fourth factor marginally weighed against petitioners. The board found petitioners showed harm in the sense that they would lose the remedy they seek if a stay is not granted, but the harm is not irreparable. The board weighed the harms claimed by petitioners against the harms claimed by Dakota, and found that Dakota showed substantial harm if a stay is granted and work on the pipeline had to stop when it reached each of the petitioner's properties.

Petitioners filed a second emergency motion for stay with this court following the board's decision. Petitioners provided a copy of the board's decision and affidavits that were submitted to the board. The court can reach a decision on the renewed motion without any additional oral argument.

Factual summary: The court will not repeat all facts stated in its August 22, 2016 order, but some recitation may be helpful. Dakota seeks to build a 1,168 mile pipeline to transport crude oil from the Bakken oil production area in North Dakota to a hub in Patoka, Illinois. Approximately 346 miles of the proposed pipeline would be built in the State of Iowa.

Dakota began construction on the pipeline in Iowa in June of 2016. According to Joey Mahmoud, Vice President for Engineering for Dakota, the company has surveyed the entire route in Iowa. Dakota has staked nearly the entire route, cleared approximately 75 percent of the route, and graded approximately 50 percent of the route. The company has fully trenched the route in several counties and trenched half of the route in several others. Approximately 22 percent of the pipe has been physically welded and lowered into the ditch where "restoration activities" are occurring. The board previously ordered Dakota to comply with a land restoration plan (known as an Agricultural Impact Mitigation Plan) to minimize the harm to property owners.

Dakota will incur costs if forced to stop work at petitioners' 15 parcels and move equipment and employees around the parcel to continue work. Mr. Mahmoud estimated the cost to Dakota at $535,000 for each move. The basis for this estimate was a contractual agreement with the general contractor that required payment in that amount for each move. The company will also incur costs of approximately $1.3 million per day pursuant to its contract with its general contractor for days in which no work is done. Dakota will also incur the costs of

foregone revenue if completion of the pipeline is delayed. Mr. Mahmoud estimated that cost at $83.3 million per month. The pipeline is expected to cross 1,295 parcels in Iowa, so petitioners' 15 parcels represent a very small percentage of the land track of the pipeline.

CONCLUSIONS OF LAW

A. Likelihood of success on the merits.

The first factor considers the extent the applicant for the stay is likely to prevail on the merits of the judicial review. *Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008). This factor does not describe the degree of likelihood of prevailing, but only requires the court to consider and balance the extent or range of the likelihood of success. *Id*. (cite omitted). The degree of likelihood of success required to be shown to obtain a stay will necessarily vary with the assessment of the other three factors. *Id*. As a result, the court may grant a stay when the likelihood of success "is not high," but the balance of factors favors the applicant. *Id*.

When considering this element, the court must remain mindful of the legal standards governing agency discretion to retain the proper perspective when considering the legal challenges actually made by petitioner. Agencies are granted authority to interpret statutory terms within its area of expertise. As stated by Professor Arthur Bonfield:

> Where the General Assembly clearly delegates *discretionary* authority to an agency to interpret or elaborate a statutory term based on the agency's own special expertness, the court may not simply substitute its view as to the meaning or elaboration of the term for that of the agency but, instead, may reverse the agency interpretation or elaboration only if it is arbitrary, capricious, unreasonable, or an abuse of discretion –a deferential standard of review.
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> . . .
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> It would be improper for a court to simply substitute, without any deference to the agency's view of the meaning of a statutory term, the court's own view of the meaning of a statutory term that the General Assembly had clearly delegated to the discretion of any agency to elaborate, because in that situation the court would be violating the statute delegating that discretionary authority to the agency.

Arthur Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government*, pp. 61-62 (1998) (emphasis in text); *See also Locate.Plus.Com., Inc. v. Iowa Dep't of Transportation*, 650 N.W.2d 609, 613 (Iowa 2002) (citing to Bonfield while noting that Iowa courts have "given deference to agency interpretation of broad vague statutory terms").

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.; see also Citizen's Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 819 (Iowa 1990). 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).

Factual findings by the agency 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).

> When reviewing a finding of fact for substantial evidence, we judge the finding in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it. Our review of the record is fairly intensive, and we do not simply rubber stamp the agency finding of fact.
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> 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).

Most of petitioners' claims are made under these standards, all of which are deferential to the agency. The agency decision, which is 159 pages, explains in great detail the board's evaluation and analysis as to each legal and factual factor considered. The court sees no glaring errors in the board's analysis that would require reversal under the legal standards it will be required to use when finally deciding its claims. The board clearly had jurisdiction over the matter pursuant to Iowa Code chapter 479B. It considered the statutory factors as set forth in Iowa Code § 479B.9. It authorized eminent domain pursuant to Iowa Code § 479B.16. The legislature has imposed some limits on condemnation of agricultural land, but excepted companies under the jurisdiction of the board. See Iowa Code § 6A.21(2). The board made extensive factual findings that are supported by evidence. Based on an initial review, it does not appear likely that the court will find the board's decision to be without regard to law or facts.

The court will take a more diligent review of each claim made when it fully considers the case on judicial review. However, the stay analysis does not require the court to make a final

decision on the judicial review at the time it considers the likelihood of success factor – if it did, the process would simply be an expedited final review.

Petitioners' constitutional claims require some additional discussion because constitutional claims are considered *de novo* by the court. *ABC Disposal Systems, Inc. v. Dep't of Natural Resources*, 681 N.W.2d 596, 605 (Iowa 2004). In this case, 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. Both 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. 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 *Kelo* 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 board put into place a plan that Dakota must follow to remove or at least reduce any impact on the land. Based on a cursory review of United States Supreme Court case law, it appears petitioners are not likely to prevail on the merits of their constitutional claim.

Petitioners cite the Iowa Supreme Court's recent decision in *Clarke County Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015), but that case is distinguishable. In *Clarke County*, an entity created under Iowa Code chapter 28E 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 a prior case in which a city, which was part of a 28E agreement, used its power of eminent domain to acquire land that it transferred to the 28E entity. *See Weiss v. City of Denison*, 491 N.W.2d 805, 807–08 (Iowa App. 1992). In *Weiss*, the city clearly had the power to use eminent domain, so the use was lawful. In the present case, the board unquestionably has the power of eminent domain, so *Clarke County* does not control.

For these reasons, the court agrees with the board that the first element regarding likelihood of success on the merits favors Dakota.

B. Extent to which petitioners will suffer irreparable harm.

Petitioners claim two forms of irreparable harm. First, petitioners will lose their constitutional right to be heard. Second, they claim they will suffer an irreparable harm of losing "a unique interest in their real property" which cannot be adequately compensated with money damages.

The *Grinnell* court heard a similar argument as to the first claim. In *Grinnell*, the petitioners claimed that their due process rights would be violated if required to pay a workers' compensation award before the district court had an opportunity to review the award on judicial review. *Id*. 751 N.W.2d at 399-400. The court noted that petitioners' argument in favor of the stay was "based almost entirely on the inherent unfairness of satisfying a judgment prior to a

final decision on judicial review." 751 N.W.2d at 404. The court rejected the argument and denied the stay.

Grinnell is somewhat distinguishable in that petitioners' ultimate complaint is not about money, but about disturbing their land by putting a pipeline underneath the soil. However, that supports their second argument, not the first.

As to the second argument, the courts have typically taken a strict view of irreparable harm. For example the courts have long-held that the loss of revenue, even if substantial, does not amount to irreparable damage. *Grinnell*, 751 N.W.2d at 402. An applicant may show that extreme circumstances of financial loss, although recoverable, could amount to irreparable injury. *Id*. This factor is "meant to impose a strong showing on the applicant." *Id*. As an example, the petitioner in *R & V, Ltd. v. Iowa Dep't of Commerce, Alcoholic Beverages Div.*, 470 N.W.2d 59, 63 (Iowa App. 1991) was able to show irreparable harm, but only after putting on evidence that a 45 day liquor license suspension would act to close the business.

Petitioners have not shown irreparable harm under this standard. It is true that the moving of dirt to put a pipeline under the soil carries some risk that the land will not be exactly the same after the process is complete. However, the board's order requires Dakota to follow its regulations and the Agricultural Impact Mitigation Plan. Dakota must comply with the plan, which requires the company to replace the soil in the same or similar condition it was in before the work was done. Further, this is not the first time that land has been moved to put pipes or utilities under the ground in Iowa. In fact, each of the parcels at issue in this case have drainage tile that was put in place by the landowners. Petitioners have not met the showing of irreparable harm such as was shown in *R & V*. Their showing is much more vague and uncertain. They have not met their burden.

C. Extent to which other parties will suffer substantial harm.

The court must also consider whether other parties will suffer substantial harm. Dakota has submitted specific details regarding the harm it would suffer if forced to stop work on the pipeline. Petitioners claim this harm is largely of Dakota's own making, in that the company entered into liquidated damages contracts with its general contractor that they now use to resist the motion to stay against petitioners. In doing so, petitioners criticize the court's prior characterization of the "emergency" as caused by petitioners by filing their request for stay too late. They claim that the emergency is one of Dakota's making. Petitioners ask the court to essentially reconsider and rescind its prior finding.

The court declines this invitation and finds Dakota would suffer substantial harm if forced to stop work at each of petitioners 15 parcels, move its equipment and workers around the parcels, and begin work again on the other side. Dakota's estimate of the cost of moving equipment and workers around each parcel may be based on a liquidated damages provision of the contract with its general contractor, but that does not mean that the stay would not impose costs. The contractual provision is there for a reason and it is unrebutted that Dakota would incur a significant cost to move its equipment and workers around each of petitioners' 15 parcels. Even petitioners seem to accept that the most efficient means to construct the pipeline is in a linear method. (See Petitioners' brief, p. 4). While the actual cost of each may not arise to $535,000, it would be significant.

The real problem with petitioners' argument is that Dakota started building the pipeline with the expectation that there was no legal impediment for it to do so. The board granted its' application for the permit and there was no stay to prevent it from proceeding. Dakota jumped on the project quickly, but it cannot be blamed for that. It performed considerable physical work

on the project, including surveying, clearing, trenching, and laying pipe, before petitioners moved for a stay. Petitioners only moved for a stay when the crews approached their properties.

Petitioners' arguments would carry more force if they had applied for a stay before any work had been done. If that had occurred, Dakota could only blame itself for any stoppage costs that might occurred by starting the project with the knowledge that the court might stay further work. However, Dakota legitimately started work with the expectation it could legally proceed. Once it started in earnest, the costs of any stoppage must be considered as part of the third factor.

This would not be the first time a court has weighed a filing delay against a party seeking a stay. *See Teleconnect Co. v. Iowa State Commerce Commission*, 366 N.W.2d 511, 514 (Iowa 1985). In *Teleconnect*, the company sought a stay to prevent the agency's temporary rules from going into effect, but only did so just prior to the implementation of the rules. The court noted that "[t]he crisis, in point of the press of time before their effective date, was in great part brought about by Teleconnect's failure to act until the eleventh hour. . . . [r]eview should have been sought when time was not such a pressing matter." *Id.* The court denied the request for stay.

The court agrees with some aspects of petitioners' argument. Dakota would suffer foregone revenues for any delays in completion in the pipeline. However, Dakota knew there could be long delays in the legal process when it filed its permit with the board.[1] The real harm that would be imposed by the stay is the additional costs and expenses the company would incur by having to stop and start work at petitioners' parcels during the course of its ongoing work on the pipeline. This aspect of Dakota's argument is supported by the record and meets the element of substantial harm.

[1] *Although see Grinnell*, 751 N.W.2d at 403 (section 17A.19(5) requires the court to consider how the additional delay in a judicial review decision will impact the respondent).

D. The extent of the public interest.

The final factor considers the public's interest. This factor helps distinguish stays involving agency action from stays or injunctions involving purely private parties. *Grinnell*, 751 N.W.2d at 403. This means the interest of private litigants in agency action may need to ultimately yield to the greater public interest. *Id*. As once stated by our supreme court:

> In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Teleconnect, 366 N.W.2d at 513.

The court notes that this is not a case like *Farmers State Bank, Kanawha v. Bernau*, 433 N.W.2d 734 (Iowa 1988), in which the courts refused to stay an action by the Superintendent of Banking to protect the interests of the public by taking over a failing bank. In *Bernau*, immediate action was necessary and a stay would have interfered with regulators' efforts to protect the public. There is no immediate risk of harm to the general public in this case like there was in *Bernau*.

However, the board considered the greater public interest when it issued its decision. The legislature authorized the board to review applications for permits for hazardous liquid pipeline. The legislature expected the board to consider the public interest, as guided by the statutory language, when making decisions on applications for permits. The board made its decision after conducting eleven days of hearings and issuing a 159 page decision. The agency has no other stake in the case other than complying with its statutory responsibilities. The board's decision carefully considered the public interest as well as the interests of the competing parties. Over 98 percent of the other landowners are not contesting this matter in court and work is proceeding on

those properties. The public interest, as evaluated by the board in its decision, must be granted some weight and favors denial of the stay.

RULING

All four of the statutory factors weigh against the granting of a stay. Accordingly, petitioners' motion for stay is denied. Petitioners' subsequent motion for intermediate stay (filed on August 29, 2016) is denied as moot.

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