In the Supreme Court of Iowa

NO: 17-0423

SIERRA CLUB IOWA CHAPTER, KEITH PUNTENNEY,LAVERNE JOHNSON,

Petitioners-Appellants,

vs.

IOWA UTILITIES BOARD,

Respondent-Appellee,

and

OFFICE OF CONSUMER ADVOCATE,

Intervenor-Appellee,

and

DAKOTA ACCESS LLC,

Indispensable Party-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE JEFFREY FARRELL, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

WALLACE L. TAYLOR AT0007714
Law Offices of Wallace L. Taylor
118 3rd Ave. S.E., Suite 326
Cedar Rapids, Iowa 52401
319-366-2428;(Fax)319-366-3886
e-mail: wtaylorlaw@aol.com

ATTORNEY FOR PETITIONERS-APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

II. STATUTES AND RULES

III. OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT APPLIED AN INCORRECT STANDARD OF REVIEW ON JUDICIAL REVIEW FROM AGENCY ACTION.

Appeal of Beasley Bros., 206 Iowa 229, 220 N.W. 306 (1928)

Application of National Freight Lines, 241 Iowa 179, 40 N.W.2d 612 (1950)

Application of Thomson, 143 Neb. 52, 8 N.W.2d 552 (1943)

City of Coralville v. IUB, 750 N.W.2d 523 (Iowa 2008)

Doe v. Ia. Bd. of Med. Examiners, 733 N.W.2d 705 (Iowa 2007)

Gartner v. Ia. Dept. of Pub. Health, 830 N.W.2d 335 (Iowa 2013)

In re Ag Processing Inc., Docket No. P-835

In re Sioux City Brick & Tile Co., Docket No. P-834

In re United States Gypsum Co., Docket No. P-833

Lunde v. Ruigh, 356 N.W.2d 566 (Iowa 1984)

NextEra Energy Res. LLC v. IUB, 815 N.W.2d 30 (Iowa 2012)

Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8 (Iowa 2010)

S.E. Iowa Coop. Elec. Assn., 633 N.W.2d 814 (Iowa 2001)

State v. Ary, 877 N.W.2d 686 (Iowa 2016)

SZ Enterprises LLC v. IUB, 850 N.W.2d 441 (Iowa 2014)

Thomson v. Ia. State Commerce Comm., 235 Iowa 469, 15 N.W.2d 603 (1944)

W. K. Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Columbia L. Rev. 426 (1979)

199 IAC § 13.2(1)(f)(1)

Iowa Code § 17A.19(10)

Iowa Code § 17A.19(10)(c)

Iowa Code § 469A.6

Iowa Code Chapter 476

Iowa Code § 476.2

Iowa Code § 476.29

Iowa Code § 476.103

Iowa Code § 477A.3

Iowa Code § 479B

Iowa Code § 479B.1

Iowa Code § 479B.9

Iowa Code § 479.12

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE CRUDE OIL PIPELINE IN THIS CASE PROMOTED PUBLIC CONVENIENCE AND NECESSITY.

Burton v. Hilltop Care Ctr., 813 N.W.2d 250 (Iowa 2012)

Gartner v. Ia. Dep't. of Pub. Health, 830 N.W.2d 335 (Iowa 2013)

Iowa Code § 17A.19(10)

Iowa Code § 17A.19(10)(b)

Iowa Code § 17A.19(10)(c)

Iowa Code § 17A.19(10)(j)

Iowa Code § 17A.19(10)(n)

www.transportation.gov/sites/dot.gov/files/docs/final-rule-flammable-liquids-by-rail_0.pdf

III. THE IUB VIOLATED MR. PUNTENNEY'S SUBSTANTIAL RIGHTS BY GRANTING DAKOTA ACCESS EMINENT DOMAIN AUTHORITY OVER HIS PROPERTY.

Doe v. Ia. Bd. of Medical Examiners, 733 N.W.2d 705 (Iowa 2007)

Hawkeye Land Co. v. IUB, 847 N.W.2d 199 (Iowa 2014)

Iowa Code § 479B.1

IV. THE IUB VIOLATED MR. JOHNSON'S SUBSTANTIAL RIGHTS BY GRANTING DAKOTA ACCESS EMINENT DOMAIN AUTHORITY OVER HIS PROPERTY.

Hawkeye Land Co. v. IUB, 847 N.W.2d 199 (Iowa 2014)

Iowa Code § 479B.1

Iowa Code § 479B.20

Chapter 9 of the IUB rules

STATEMENT OF THE CASE

1. Nature of the Case

The Iowa Utilities Board (IUB) issued an Order on March 10, 2016, granting a permit to Dakota Access LLC for the construction of a crude oil pipeline through Iowa (Final Decision)(App. v. I p. 970).

Sierra Club, Keith Puntenney, and LaVerne Johnson were intervenors in the IUB case and filed petitions for judicial

review of the IUB Order to the Iowa District Court for Polk County (Sierra Club, Puntenney, and Johnson Petitions for Judicial Review)(App. v. I p. 1158, 1184, 1179).

The district court issued a Ruling on February 15, 2017, denying the Sierra Club's, Mr. Puntenney's, and Mr. Johnson's Petitions (Ruling)(App. v. I p. 1518).

The Sierra Club, Mr. Puntenney, and Mr. Johnson filed Notices of Appeal on March 16, 2017 (Sierra Club, Puntenney, and Johnson Notices of Appeal)(App. v. I p. 1557, 1561, 1559).

2. Statement of the Facts

On January 20, 2015, Dakota Access LLC filed with the IUB a petition to construct a hazardous liquid pipeline through Iowa, pursuant to Chapter 479B of the Iowa Code. The proposed pipeline would carry crude oil from the Bakken Region of North Dakota to a terminal in Patoka, Illinois, and then on to refineries in Nederland, Texas, according to public announcements made by Dakota Access in 2014 (Sierra Club Hrg. Ex. 24, 25)(App. v. I p. 822, 824).

Section 479B.1 of the Iowa Code states:

> It is the purpose of the general assembly in enacting this law 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. (emphasis added).

Section 479B.9 then says, "a permit shall not be granted to a pipeline company unless the board determines that the proposed pipeline will promote public convenience and necessity." (emphasis added).

The Dakota Access pipeline slices through 18 counties in Iowa. (Dakota Access Map)(App. v. I p. 42) It crosses through or under numerous rivers and streams. Dakota Access has obtained easements, either negotiated with landowners or through eminent domain, through private property, mostly farmland, including land owned by Mr. Puntenney and Mr. Johnson's Century Farm.

The IUB held an evidentiary hearing from November 16, 2015 to December 7, 2015. After the filing of post-hearing briefs the IUB issued a Final Decision and Order on March 10, 2016, granting the permit to construct the pipeline, subject to certain conditions, and granting eminent domain to most of the requested parcels of land, including land owned by Mr. Puntenney and Mr. Johnson's Century Farm (Final Decision)(App. v. I p. 970).

The IUB did not discuss in its ruling any alleged need for the pipeline nor any alleged benefit to the public from the services to be provided by the pipeline. The IUB mentioned

only the alleged construction jobs and general economic impact and the alleged safety of pipelines compared to rail transport as the beneficial factors that carried any weight in its decision.

The IUB claimed that the legislature had given the IUB the authority to define for itself what public convenience and necessity means and that public convenience and necessity includes factors other than service to the public. This claim was contrary to Iowa Supreme Court precedent.

Mr. Puntenney owns land in Webster County that is agricultural land, planted in corn and soybeans (Hrg. Tr. p. 3486)(App. v. I p. 737). As shown in Exhibit A, attached to Mr. Puntenney's Petition for Judicial Review (Ex. A) (App. v. I p. 1190), the pipeline makes a deliberate diversion from a direct path to cross a corner of Mr. Puntenney's property.

By straightening the route to the south, the pipeline would cross a parcel where there is a voluntary easement and then cross a parcel where Dakota Access was already requesting eminent domain (Final Decision, p. 148)(App. v. I p. 1117). The IUB decision made no mention of the diversion of the pipeline route onto Mr. Puntenney's property, nor did the IUB discuss why that diversion would be reasonable and necessary.

Mr. Puntenney also objected that the pipeline would damage his drainage tile system. The IUB's Final Decision and

Order did not even mention the issue of Mr. Puntenney's drainage tile.

Finally, Mr. Puntenney testified that he planned to install wind turbines on his property and that the pipeline would preclude him from installing those wind turbines (Hrg. Tr. p. 3487-3491)(App. v. I p. 738-742). The IUB said the installation of the wind turbines was hypothetical and did not justify relocating the pipeline (Final Decision, p. 148-149)(App. v. I p. 1117-1118). But the IUB required Dakota Access to reroute the pipeline around the property of Patrick Lenhart, where Mr. Lenhart said he might someday expand his turkey raising operation on land that was on the original pipeline route (Final Decision, p. 131)(App. v. I p. 1100).

Mr. Puntenney had given Dakota Access clear notice of the impact the pipeline would have on his tiling system and his plans to install wind turbines on his property in a letter to Dakota Access dated January 13, 2015 (Puntenney Ex. 30)(App. v. I p. 796). Mr. Puntenney's letter to Dakota Access also detailed his plans for further tiling his property.

Mr. Johnson owns property in Boone County. His land is cultivated farmland with extensive drainage tile installed (Johnson Direct Testimony, p. 2-3, Rasmussen Direct Testimony, p. 2)(App. v. I p. 238-239, 313). The tiles are various sizes, located at various depths, and in a pattern

that would make it impossible to install the Dakota Access pipeline without coming into conflict with the tiles. Mr. Johnson described why the construction of the Dakota Access pipeline would adversely impact his tiling system (Hrg. Tr. p. 3027, 3032-3035; Johnson Direct Testimony, p. 3-5)(App. v. I p. 559, 560-563, 239-241).

The evidence also showed that the building in which Mr. Johnson resides is approximately 40 feet from the construction easement and 143 feet from the centerline of the pipeline (Final Decision, p. 126)(App. v. I p. 1095). This is easily within the danger zone of a pipeline spill or explosion. There is also a well on Mr. Johnson's property very near the pipeline path (Hrg. Tr. p. 3050)(App. v. I p. 570).

Mr. Johnson also explained how the pipeline route could be moved from his property (Hrg. Tr. p. 3041, 3046-3047)(App. v. I p. 567, 568-569). Mr. Johnson's neighbors have already given Dakota Access voluntary easements, so the pipeline could easily be rerouted across those neighbors' properties.

In its Final Decision and Order, at p. 126-127 (App. v. I p. 1095-1096), the IUB acknowledged Mr. Johnson's tiling system and the impacts of the pipeline to that tiling system. However, the IUB incorrectly found that "there appears to be

no reasonable alternative to granting eminent domain along the route proposed by Dakota Access . . . .”

ROUTING STATEMENT

The Iowa Supreme Court should retain this appeal under the criteria set forth in Iowa Rule of Appellate Procedure 6.1101(2)(c) and (d).

The Iowa legislature enacted Chapter 479B of the Iowa Code to control the permitting of hazardous liquid pipelines, recognizing that hazardous liquid pipelines have a serious impact on Iowa’s environment and its people. That is why § 479B.9 requires that the pipeline must promote public convenience and necessity in order to be granted a permit. However, the Iowa Supreme Court has never specifically defined the term “public convenience and necessity.”

In this case, the IUB determined that it could consider construction jobs and general economic development, and the alleged safety of pipelines compared to rail transport, rather than the nature and benefits of the service to consumers from the pipeline, in finding public convenience and necessity.

The IUB has seized on the lack of a clear definition to abrogate unto itself the authority to define public convenience and necessity. The IUB in this case, and ultimately in future cases, has and will base its

determination of public convenience and necessity on factors wholly unrelated to the service to be provided by the pipeline.

This case is a prime example of why the Supreme Court needs to define public convenience and necessity in order to provide guidance to the IUB, project developers, and the people of Iowa.

For these reasons, the Iowa Supreme Court should retain this appeal in the first instance.

ARGUMENT

I. THE DISTRICT COURT APPLIED AN INCORRECT STANDARD OF REVIEW ON JUDICIAL REVIEW FROM AGENCY ACTION.

A. Preservation of Issue for Review

This issue was preserved for review because it was raised in the Sierra Club's brief to the district court.

B. Standard of Review

A claim that the district court applied an incorrect standard of review is reviewed on appeal for legal error. State v. Ary, 877 N.W.2d 686 (Iowa 2016); Lunde v. Ruigh, 356 N.W.2d 566 (Iowa 1984).

C. Argument

Iowa Code § 479B.9 requires that a permit for a hazardous liquid pipeline can be granted only if the pipeline will promote public convenience and necessity. In this case, the

only factors accorded any weight by the IUB in finding public convenience and necessity were the alleged temporary construction jobs in building the pipeline and the allegation that pipelines are a safer way than railroads to transport crude oil. The district court upheld the IUB's analysis.

Pursuant to Iowa Code § 17A.19(10), a court must reverse, modify, or grant other relief from agency action if the agency action is found to be in violation of any of the grounds listed in that section.

The issue here is whether the court or the IUB has the authority to interpret the meaning of the statutory term "public convenience and necessity."

Statutory interpretation is normally a judicial function. Doe v. Ia. Bd. of Med. Examiners, 733 N.W.2d 705 (Iowa 2007). However, Iowa Code § 17A.19(10)(c) states that the court may defer to an agency's interpretation of a statute only if the legislature has clearly vested the agency with the authority to interpret the statute. The fact that an agency has been given rule-making authority does not give the agency authority to interpret all statutory language. NextEra Energy Res. LLC v. IUB, 815 N.W.2d 30 (Iowa 2012). Broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority. Id.

The Iowa Supreme Court has further said:

> First, "when the statutory provision being interpreted is a substantive term within the special expertise of the agency, . . . the agency has been vested with the authority to interpret the provisions." . . . Second, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretive authority." . . .

Id. at 37.

Nor does the fact that the legislature vested an agency with broad general powers to carry out the purposes of a chapter of the Iowa Code mean that the agency was clearly vested with the authority to interpret any provision in that chapter. Id. In addition, the Iowa Supreme court has explicitly said, "the agency's own belief that the legislature vested it with interpretive authority is irrelevant." Gartner v. Ia. Dept. of Pub. Health, 830 N.W.2d 335, 343 (Iowa 2013).

In this case, the district court incorrectly accorded to the IUB the authority to define public convenience and necessity.

The district court first relied on the decision in SZ Enterprises LLC v. IUB, 850 N.W.2d 441 (Iowa 2014). In that case the Iowa Supreme Court granted the IUB no deference in determining what is a public utility. One of the factors the district court considered from SZ Enterprises was whether the

legislature had statutorily defined public utility. In this case, although the legislature did not specifically define public convenience and necessity, prior court decisions, which will be discussed below, have always applied the term in connection with the nature and quality of the service to be provided by the proposed project.

In Thomson v. Ia. State Commerce Comm., 235 Iowa 469, 15 N.W.2d 603 (1944), the Commerce Commission denied an application to add trucking to a company's rail service. The court reversed the decision because the additional service would promote public convenience and necessity.

Even though the court in Thomson said that the terms "public convenience" and "necessity" were not absolute, the decision of the Commission was still reversed. The court quoted with approval the following language from Application of Thomson, 143 Neb. 52, 53, 8 N.W.2d 552, 554 (1943):

> The prime object and real purpose of Nebraska state railway commission control is to secure adequate, sustained service for the public at minimum cost and to protect and conserve investments already made for this purpose. In doing this, primary consideration must be given to the public rather than to individuals.

Thus, it is clear that the focus of public convenience and necessity is on service to the public.

In Application of National Freight Lines, 241 Iowa 179, 40 N.W.2d 612 (1950), an application for a certificate of

public convenience and necessity was granted for a competing freight route. Public convenience and necessity was determined by service to the public, just as in the Thomson case.

In Appeal of Beasley Bros., 206 Iowa 229, 220 N.W. 306 (1928), a permit was granted to operate a bus line. On appeal the Iowa Supreme Court said:

> Public convenience and necessity are concerned in the operation and maintenance of existing electric railroads and in their ability to furnish the service for which they were constructed. Capital is invested in them, as well as in the equipment of motor carriers; valuable properties, such as warehouses, are built on the line of the electric railroad, in reliance upon its permanent operation.

Id., 206 Iowa at 237, 220 N.W. at 309-310. So, just as in the other cases, the court made it clear that public convenience and necessity focuses on the service to be provided by the proposed project.

The foregoing Iowa court decisions are also consistent with the history of the concept of public convenience and necessity. This history gives public convenience and necessity an independent legal definition. W. K. Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Columbia L. Rev. 426 (1979)(Jones).

The primary focus was on preventing competition that would dilute the services offered to the public. So even if a public service company fulfilled all the requirements for a license or permit, the application could be denied if the proposed additional service was already available in the market. The essence of the certificate of public convenience and necessity, therefore, was the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences, or might actually have harmful consequences.

Therefore, the history of public convenience and necessity is consistent with the application of the concept by the Iowa Supreme Court in the cases described above. It is certainly in the context of this history and precedent that the Iowa Legislature used the term in § 479B.9.

The district court, as well as the IUB and Dakota Access, relied heavily on the decision in S.E. Iowa Coop. Elec. Assn., 633 N.W.2d 814 (Iowa 2001). But that case actually supports the Sierra Club's position. In that case the City of Mt. Pleasant decided to discontinue buying electric power through the coop and to instead buy power directly from an investor-owned utility. The coop argued that it was already providing adequate service to the city so there was no public benefit

from switching to the other utility. However, the investor-owned utility was providing the service at a lower rate. The Supreme Court held that the economic factor of the lower rate was a proper consideration in evaluating the service being provided.

It is important to note that the standard being considered in the S.E. Iowa Coop. case was limited to electric transmission and was whether the proposed transmission line was "necessary to service the public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." Id. at 819. It is an open question as to whether this standard bears any relationship or similarity to the standard of public convenience and necessity. The S.E. Iowa Coop. court did refer to some IUB cases permitting natural gas pipelines using the public convenience and necessity standard. The court acknowledged that those cases had no precedential value when considering electric transmission lines, but felt that those cases were a helpful analogy.

The three IUB cases referred to by the S.E. Iowa Coop. court, In re Ag Processing Inc., Docket No. P-835, In re United States Gypsum Co., Docket No. P-833, and In re Sioux City Brick & Tile Co., Docket No. P-834, all addressed the same issue. That issue was whether a short natural gas

pipeline that carried gas to just one industrial facility satisfied public convenience and necessity. In each case the IUB found that it did. And in each case, public convenience and necessity was analyzed in terms of the service provided by the gas pipeline.

The S.E. Iowa Coop. case does not stand for the proposition, as argued by the IUB in the district court, that any and all economic benefits are relevant to public convenience and necessity. The economic benefits referred to in S.E. Iowa Coop. were reduced rates for the customers of the municipal utility. In other words, the reduced rates were relevant to the service provided to the customers. That is exactly what public convenience and necessity is all about. There was absolutely no discussion of jobs and economic development in that case, which is what the IUB relied upon in finding public convenience and necessity in this case. Nor was there even any hint in the S.E. Iowa Coop. decision that jobs and economic development would ever be relevant to the consideration of public convenience and necessity. And, of course, public convenience and necessity was not even the standard applied in that case, since it was about electric transmission, not pipelines.

Furthermore, the evidence presented by the testimony of Dakota Access vice president Joey Mahmoud was that the

pipeline would not make the oil less expensive for the public (Hrg. Tr. p. 2421)(App. v. I p. 542). So Dakota Access could not even show that there would be an economic benefit to the public from the service to be provided by the pipeline.

Finally, with respect to the S.E. Iowa Coop. case, the IUB has claimed that the Iowa Supreme Court in that case approved the IUB's use of a balancing test and that the IUB can balance any and all criteria it wants to determine public convenience and necessity. What the Supreme Court approved in that case was the IUB's consideration of the economic factor of beneficial rates to the utility's customers. Id., 633 N.W.2d at 820. So, the consideration of factors undertaken by the IUB in S.E. Iowa Coop. was focused on service to the public, as it should have been.

Back to the district court's reliance on SZ Enterprises, the court noted that in SZ Enterprises the terms in question were not complex and were used elsewhere in the Iowa Code so they were not uniquely within the expertise of the agency. Those same factors are present in this case.

Public convenience and necessity is not a substantive term within the special expertise of the IUB. The term appears in several Iowa statutes, Iowa Code §§ 469A.6, 476.29, 476.103, 477A.3, and 479.12. It is significant that the term as used in § 469A.6, regarding the construction and operation

of hydroelectric plants, is to be applied by the Iowa Executive Council, not the IUB. It seems obvious that permitting hydroelectric plants is no more technical in nature than permitting pipelines. So the term is not within the special expertise of the IUB.

Nor does the term public convenience and necessity in the permitting of a pipeline involve the usual technical details of public utility regulation. There is no evaluation of cost of service studies, ratemaking principles, return on investment, calculating avoided costs, or similar utility regulation issues for which the courts typically defer to the IUB's expertise.

Frankly, the Iowa Department of Transportation or the Iowa Department of Natural Resources could just as easily address the issues in permitting a hazardous liquid pipeline. In fact, in Georgia the Commissioner of the Georgia Department of Transportation has the responsibility and authority to grant or deny an oil pipeline permit on the basis of public convenience and necessity. As an example, district court Exhibit A (App. v. I p. 1164) is the decision of the Commissioner of the Georgia DOT denying a permit for the Palmetto oil pipeline.

The district court also claimed that the grant of authority to the IUB in Iowa Code § 479B.1 is a broad grant

of authority to the IUB. But broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority. NextEra Energy Res. LLC v. IUB, 815 N.W.2d 30 (Iowa 2012). In City of Coralville v. IUB, 750 N.W.2d 523 (Iowa 2008), the court held that Iowa Code § 476.2 specifically gave the IUB broad general authority to effect the purposes of Chapter 476. The IUB therefore had authority to interpret terms necessary to carry out that general authority. The holding in City of Coralville does not support Dakota Access' argument in this case, however. There is no provision in Chapter 479B specifically granting the IUB broad general authority to carry out the provisions of that chapter.

Dakota Access attempted to equate Iowa Code § 479B.1 with § 476.2, but that is a false equivalency. Section 479B.1 does not grant broad general authority to the IUB. It grants the IUB only the authority to "implement certain controls" over hazardous liquid pipelines. This is not a distinction without a difference. The City of Coralville court was very explicit that its decision was based upon the broad provisions of § 476.2. A review of the language of § 476.2 reveals just how broad its grant of authority to the IUB is:

> The Board shall have broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth.

If every statute implementing a regulatory agency's authority could be the basis for saying the legislature clearly vested interpretive authority in the agency, an agency would always have clearly vested authority. Each situation must be examined carefully. In Renda v. Ia. Civil Rights Comm., 784 N.W.2d 8, 11-14 (Iowa 2010), the court said:

> However, because the legislature does not usually explicitly address in legislation the extent to which an agency is authorized to interpret a statute, most of our cases involve an examination of the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency. This sort of analysis has not proven conducive to the development of bright-line rules. It must always involve an examination of the specific statutory language at issue, as well as the functions of and duties imposed on the agency.
>
> **********
>
> Our review of authorities on this subject has confirmed our belief that each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes. It is generally inappropriate, in the absence of any explicit guidance from the legislature, to determine whether an agency has the authority to interpret an entire statutory scheme. As we have seen, it is possible that an agency has the authority to interpret some portions of or certain specialized language in a statute, but does not have the authority to interpret other statutory provisions. Accordingly, broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority.

Also § 476.2 says, "The Board . . . shall establish all meaningful just and reasonable rules . . . to govern the exercise of its powers and duties." There is no such specific grant of rulemaking authority in § 479B.1, related to hazardous liquid pipelines. But, in accordance with the general rulemaking authority of an agency, the IUB has promulgated rules related to hazardous liquid pipelines. Significantly, 199 IAC § 13.2(1)(f)(1), in setting out the requirements for an application for a permit, states that the application shall contain, "a statement of the purpose of the project and a description of how the services rendered by the pipeline will promote the pubic convenience and necessity." This phraseology complies exactly with Sierra Club's argument that public convenience and necessity relates to the service provided by the pipeline. So, to the extent that the IUB has defined the term, it has been defined in conformance with Sierra Club's position that a pipeline company must show that the service to be provided will promote public convenience and necessity.

In summary, the history of the concept of public convenience and necessity and the application of the term in prior Iowa court decisions clearly establish that the term applies to the benefits from the service alleged to be provided by a proposed project. The Iowa legislature surely

had this history and precedent in mind when it used public convenience and necessity in § 479B.9. Throughout the IUB proceedings and the proceedings below in the district court, neither the IUB nor Dakota Access has identified a court case, either in Iowa or elsewhere, in which construction jobs or economic development were considered to promote public convenience and necessity.

It is also important to note that § 479B.9 provides that a pipeline, to be permitted, must "promote" public convenience and necessity. It is not enough, then, for a pipeline company to merely show that the proposed pipeline is in accordance with public convenience and necessity, but must show clearly that the operation will materially promote public convenience and necessity. The Iowa legislature used that term to express its intent that a hazardous liquid pipeline should not be permitted as a matter of course.

The IUB acted contrary to law when it took upon itself the right to define public convenience and necessity and in applying the term to the allegation that temporary construction jobs and economic development would result from the construction of the Dakota Access pipeline.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE CRUDE OIL PIPELINE IN THIS CASE PROMOTED PUBLIC CONVENIENCE AND NECESSITY.

A. Preservation of Issue for Review

This issue was preserved for review because it was raised in the Sierra Club's brief in the district court.

B. Standard of Review

A court reviewing agency action determines whether the agency action should be set aside pursuant to the criteria in Iowa Code § 17A.19(10). Burton v. Hilltop Care Ctr., 813 N.W.2d 250 (Iowa 2012).

C. Argument

1. Absence of Service to the Public

Based on the record in this case, Dakota Access did not show that its project would promote public convenience and necessity. At most, it provides convenience and necessity for Dakota Access and its shippers.

In his direct testimony (Dakota Access Ex. DRD Direct, p. 6-7)(App. v. I p. 290-291), Dakota Access employee Damon Rahbar-Daniels testified:

> I want to emphasize that the single most important fact supporting the need for the Project is that we know the decision of the market: as a result of the open seasons that have been conducted, shippers have committed to long-term transportation and deficiency contracts for committed transportation service on the Dakota Access Pipeline.

This testimony makes clear that the pipeline is for the benefit of the shippers.

To further clarify that the pipeline is for the benefit of the shippers, not the public, the following testimony was

given at the IUB hearing by Charles Frey, a Dakota Access employee:

> Q. The customers of the pipeline are the shippers, correct?
>
> A. Yes.
>
> Q. And the pipeline provides a service to those customers, correct?
>
> A. Yes.
>
> Q. And it's your position that it's those customers who are creating the demand for the pipeline, correct?
>
> A. No. The demand for the pipeline is created by the demand for consumers in the State of Iowa, as well as the rest of the United States, for their use of petroleum products.
>
> Q. Do you recall testifying before the South Dakota Public Utilities Commission I think back in September?
>
> A. I don't remember the date, but yes, I have testified in South Dakota.
>
> Q. And do you recall being asked in that proceeding by Attorney Jennifer Baker representing the Yankton Sioux tribe, "Who are the consumers when you speak about the demand for the facility?" Do you recall that question?
>
> A. I do not recall that specific question, no.
>
> Q. Would it refresh you recollection if we pulled that up on the screen?
>
> A. Yes.
>
> **********
>
> A. "Question: Okay, I'm asking who are the consumers when you speak about demand for the facility?"
>
> "Answer: The consumers of the services we'll provide are the shippers on our pipeline system."

> Q. And that was in response to a question asking you about the basis for the demand for the pipeline, correct?
>
> A. It was the question that I just read.

(Hrg. Tr. p. 1320-1321)(App. v. I p. 514-515).

In addition, Dakota Access witness Guy Caruso indicated that the purpose of the pipeline was to provide alternate shipping options for the owners of the oil (Hrg. Tr. p. 201)(App. v. I p. 481). And Joey Mahmoud, Dakota Access vice-president, testified that the pipeline would not make the oil less expensive for the public (Hrg. Tr. p. 2421)(App. v. I p. 542).

The IUB did not discuss or consider any of this evidence. There is only a passing comment in the Final Decision and Order (Final Decision, p. 110)(App. v. I p. 1079) that the "take or pay" contracts signed by the shippers show a demand for the product. But the IUB gave that allegation little weight.

The IUB, in failing to consider whether the pipeline would serve the public, failed to consider a relevant and important matter, in violation of Iowa Code § 17A.19(10)(j). The IUB decision was also unreasonable, arbitrary, capricious, and an abuse of discretion, in violation of Iowa Code § 17A.19(10)(n).

2. Lack of Demand for the Oil

The evidence presented to the IUB was that the oil extraction from the Bakken region is rapidly diminishing and that the demand for oil in this country is dropping.

Sierra Club Hearing Exhibits 22 and 26 (Sierra Club Ex. 22, 26)(App. v. I p. 821, 825) and Puntenney Hearing Exhibits 5 and 6-1 (Puntenney Ex. 5, 6-1)(App. v. I p. 766,793) show that Bakken oil production was in sharp decline over the several months prior to the IUB hearing. Sierra Club Hearing Exhibit 17 (Sierra Club Ex. 17)(App. v. I p. 817) shows that the number of active drilling rigs in the Bakken region dropped during the year ending November 8, 2015, from 193 rigs to 64. That is a breathtaking figure and surely indicates a long-term trend. And more current data from the State of North Dakota show that the number of active drilling rigs as of September 12, 2016, is 37 (Dist. Ct. Ex. B)(App. v. I p. 1169). So the reduction in oil drilling in the Bakken region is a continuing trend. If there were really a need and demand for the oil, drilling would be increasing or at least be steady, not drastically decreasing.

Just as dramatic is the number of oil companies abandoning the Bakken region. Occidental Petroleum is leaving North Dakota altogether (Sierra Club Hrg. Ex. 15)(App. v. I p. 813). Two other Bakken oil companies, Samson Resources and American Eagle Energy, have declared bankruptcy (Sierra Club

Hrg. Ex. 16)(App. v. I p. 815). In addition, Koch Pipeline Company has abandoned plans to build a 250,000 barrels/day pipeline from the Bakken region to Illinois (Puntenney Hrg. Ex. 1)(App. v. I p. 764). In November, 2012, lacking shipper interest, OKEOK Partners, cancelled plans for a 200,000 barrels/day pipeline from the Bakken area to Cushing, Oklahoma (Puntenney Hrg. Ex. 1)(App. v. I p. 764). Another Bakken-to-Cushing pipeline project, by Enterprise Products Partners, was cancelled in late 2014 (Puntenney Hrg. Ex. 2)(App. v. I p. 765). Again, if there were really a need and demand for Bakken oil, these companies would not be going out of business or abandoning projects.

The Dakota Access pipeline would be necessary to serve the public only if Bakken oil is not otherwise reaching refineries. But the oil is reaching refineries (Hrg. Tr. p. 191-192)(App. v. I p. 479-480). Commenters have noted that there already exists more transportation capacity for the crude oil produced in the Bakken region of North Dakota than is required to transport current production (Gannon Ex. MI-6, p. 1-2)(App. v. I p. 150-151).

The foregoing shows that the demand for oil and oil products has declined. The IUB commented in passing that because the shippers signed "take or pay" contracts with Dakota Access, there must be a demand for the oil (Final

Decision, p. 110)(App. v. I p. 1079). That comment ignores the fact that the contracts were signed when oil was selling for more than $100/barrel. It is now below $50/barrel because of the drop in demand.

The IUB claimed to the district court that it made findings that oil production in the Bakken region is not declining. In the "board analysis" portion of the Final Decision and Order (Final Decision, p. 38-39)(App. v. I p. 1007-1008), the IUB claimed that the reduction in Bakken oil production was a short-term dip.

The fact is, as shown by Sierra Club Hearing Ex. 22 and 26 (Sierra Club Hrg. Ex. 22, 26)(App. v. I p. 821,825), there was a significant drop in production beginning in the summer of 2015 and continuing up to the time of the IUB hearing. Obviously, there was no evidence at the time of the hearing as to whether the drop in Bakken oil production would continue. Updated information presented to the district court, however, confirms that the drop in production has continued through October of 2016 (Dist. Ct. Ex. C, D)(App. v. I p. 1172,1173). Therefore, it is not fair for the IUB to attempt to convince the Court that the reduction in Bakken oil production was a short-term dip when the drop in production continues a year later.

The record and the IUB's Order must be reviewed in light of Dakota Access' burden to prove a need or demand for the pipeline.

In the end, the IUB gave the decline in Bakken oil production little weight in its determination of public convenience and necessity (Final Decision, p. 39)(App. v. I p. 1008), when that should have been the most important factor.

Based on the foregoing, the IUB, in failing to consider whether there was a demand for the pipeline to serve the public, failed to consider a relevant and important matter, in violation of Iowa Code § 17A.19(10)(j). The IUB decision was also unreasonable, arbitrary, capricious, and an abuse of discretion, in violation of Iowa Code § 17A.19(10)(n).

3. Safety of Pipelines vs. Rail

One of the issues on which the IUB placed significant weight was the argument that shipping oil by pipeline is safer than shipping by rail. This issue does not pertain to service to the public, i.e., public convenience and necessity. Therefore, the IUB was wrong in giving this issue significant weight in determining public convenience and necessity. The IUB was relying on its incorrect interpretation of public convenience and necessity. But because the IUB placed

significant weight on the alleged safety of pipelines, this issue will be discussed.

With respect to the substance of the issue, the IUB relied heavily on a Dakota Access exhibit (Ex. GC-1)(App. v. I p. 76) and a quote from a report relied upon by Dakota Access witness Guy Caruso (Final Decision, p. 32)(App. v. I p. 1001). That report, Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities, contains only a conclusory statement that pipelines are safer than rail, with no discussion to support that statement. The report does contain a chart stating that rail shipments of hazardous liquids had an average of 49.6 spill incidents per year from 2005-2009 (Chart)(App. v. I p. 77). That same chart shows, however, that pipelines carrying hazardous liquids had an average of 339.6 incidents per year.

The IUB completely rejected information that did not support the argument of the safety of pipelines. The evidence regarding the relative safety of pipelines and rail is inconclusive at best. It appears that both modes of transportation are equally unsafe. Another report upon which Mr. Caruso relied, Delivering the Goods (Sierra Club Hrg. Ex. 27)(App. v. I p. 860), states in footnote 1:

> There is an ongoing debate about the relative safety merits of shipping crude oil by rail versus pipeline. . . . Comparisons between the two modes are difficult

> because of different reporting requirements. All sides agree, however, that safety is paramount.

That report goes on to say, at p. 25 (App. v. I p. 861):

> Recent significant crude oil pipeline incidents (most prominently in Arkansas in March 2013 and an October 2013 spill in North Dakota) demonstrate the continued need for vigilance by industry and regulators. . . . The National Transportation Safety Board (NTSB), an investigative body with no regulatory authority, listed enhancing pipeline safety on its annual top ten "most wanted" list in both 2013 and 2014. . . .

In the economic assessment submitted by Strategic Economics Group on behalf of Dakota Access (Dakota Access Ex. MAL Direct)(App. v. I p. 260), at p. 49, it is stated that during 2013 more than 800,000 gallons of oil was spilled from railroad cars. In that same year 119,290 barrels, or slightly over 5,000,000 gallons, of hazardous liquids were spilled from pipelines. While this may not be a completely apples-to-apples comparison because it refers to pipeline spills of hazardous liquids, not just oil, it certainly shows that there is no substantial evidence that pipelines are safer than rail for transporting oil. It is also significant that Mr. Caruso, on whose testimony the IUB exclusively relied, also did not separate oil from hazardous liquids in general in evaluating pipeline spills (Ex. GC-1)(App. v. I p. 76). So the IUB's dismissal of Sierra Club's reference to Dakota Access Ex. MAL Direct as not being an "apples-to-apples" comparison was arbitrary and unreasonable in light of its blind reliance on

Mr. Caruso's use of the same method of comparison. Iowa Code § 17A.19(10)(n).

The evidence also showed that new stronger regulations were adopted in 2015 to make rail transport safer (Sierra Club Hrg. Ex. 27, p. 28)(App. v. I p. 864):

> PHMSA and FRA's draft rule attempts to address nearly all outstanding safety issues. It does so by creating a new regulatory category: the high-hazard flammable train (HHFT), defined as a train comprised of 20 or more carloads of flammable liquids. When the rule becomes effective, HHFT's will have additional regulatory requirements related to operations. In addition, the rule requires enhanced tank cars for carrying crude, expands requirements around testing and classification for crude before it is shipped, and codifies standards for information sharing between railroads and state emergency planning committees.

See, www.transportation.gov/sites/dot.gov/files/docs/final-rule-flammable-liquids-by-rail_0.pdf.

Furthermore, safety regulations for pipelines have been an issue of concern (Sierra Club Hrg. Ex. 27, p. 25)(App. v. I p. 861): "The National Transportation Safety Board (NTSB) an investigative body with no regulatory authority, listed enhancing pipeline safety on its annual top ten "most wanted" list in both 2013 and 2014."

The Iowa Farmland Owners Association called as an expert witness Rebecca Wehrman-Andersen, an expert in risk management and safety with hazardous materials. She was not cross-examined by Dakota Access or any of the intervenors supporting Dakota Access, so her prepared testimony was

unchallenged. Ms. Wehrman-Andersen testified as follows (Rebecca Wehrman-Anderson Prepared Direct Testimony, p. 3-4)(App. v. I p. 319-320):

> The Dakota Access experts argue that Iowa has a choice between either sending Bakken crude by rail or by pipeline through Iowa. That argument relies on the logical fallacy of the false dichotomy or false choice and is not borne out by the facts. The Iowa Department of Transportation estimates that approximately 40,000 rail cars of crude oil flow through Iowa annually. Divided into 100-car unit trains, this amounts to little more than one train per day traveling through Iowa. Yet, these figures were generated during the height of the Bakken crude production. If the choice demanded by Dakota Access' witnesses was real, then Iowa would already be flooded with rail cars carrying crude oil. Also, the testimony of Dakota Access confuses conjectural relative risk with absolute risk. The installation of the Dakota Access pipeline will create a new risk that is not currently present in Iowa. A new, large-diameter pipeline in Iowa will create an absolute risk based on the presence of that pipeline. As shown on Chart 1 on Iowa Exhibit Iowa Farmland Owners Association – Wehrman-Andersen – 1, the gross number of hazardous liquid pipeline incidents has been increasing every year since 2004 according to the U.S. DOT's Pipeline and Hazardous Materials Safety Administration. Even if that number is broken down by incidents per mile in order to account for the increasing number of miles of pipelines being built in the U.S., the increase in incidents continues to increase over 2004 figures. Chart 2 on Exhibit Farmland Owners Association – Wehrman-Andersen – 1 shows the increase in graphical form.
>
> Chart 3 on Exhibit Iowa Farmland Owners Association – Wehrman-Andersen – 1 addresses claims made in Caruso's testimony and his Exhibit GC-1, that attempt to argue that pipelines are safer than railroads and trucks. Mr. Caruso uses ton-miles in lieu of miles of pipeline, highway, or railroad to support his position. He has to try this argument because based on the "average incidents per year," without any reference to mileage or tons, pipelines create more incidents per year than trucking, rail, or even natural gas pipelines. In fact,

> pipelines are even more dangerous when comparing incidents per mile. According to Mr. Caruso, there are 190,000 miles of hazardous materials pipelines in the U.S. According to the Federal Rail Administration, there are 140,000 miles of Class I railroad in the U.S. Therefore, if we take the number of incidents per 10,000 miles, then railroads generate 3.543 incidents per 10,000 miles and hazardous liquid pipelines generate 17.874 incidents per 10,000 miles. Therefore, based on an absolute risk analysis, pipelines are 5.3 times more likely to spill over a given distance than are railroads. Again, the only thing that matters to an Iowan living in close proximity to the railroad or a pipeline is the chances that the pipeline or railroad whether there is a risk of a spill from the mile next to that Iowan. How much of any given commodity actually traverses the line is not relevant. While there may be a lower relative risk of one compares railroad ton-miles with pipeline ton-miles, the absolute risk posed by a pipeline is much greater.

So, based on Ms. Wehrman-Andersen's testimony, let's evaluate Mr. Caruso's testimony, on which the IUB completely relied. The IUB gave great weight to the volume of material carried by pipelines (Final Decision, p. 32)(App. v. I p. 1001). But the volume would have nothing to do with the number or frequency of spills. The only relevant factor in assessing the risk from pipeline spills vs. rail would be the number of miles traveled. As shown by Ms. Wehrman-Andersen's Chart 3, using Mr. Caruso's numbers, there are 3.543 railway incidents/10,000 miles and 17.874 pipeline incidents/10,000 miles. That is a dramatic difference that the IUB completely ignored. Iowa Code § 17A.19(10)(j).

Moreover, the rail v. pipeline debate is a red herring because the evidence was that the Dakota Access pipeline would not necessarily reduce the number of shipments of oil by rail in any event. Dakota Access vice-president Joey Mahmoud testified to that (Hrg Tr. p. 2201)(App. v. I p. 537). Also, MAIN Coalition witness Michael Ralston testified that rail shipments of oil may not be reduced even if the pipeline is built (Hrg. Tr. p. 3075)(App. v. I p. 574). So, if the number of rail shipments will not be reduced, the risk from oil shipments by rail will not be reduced, and as Ms. Wehrman-Andersen said, all Dakota Access is doing is adding another risk to Iowa. The IUB ignored this evidence. Iowa Code § 17A.19(10)(j).

Based on the foregoing, it is clear that the IUB relied solely on part of the testimony of Guy Caruso, even when that testimony was contradicted by his own reference material. And the IUB ignored the unchallenged testimony of Rebecca Wehrman-Andersen that directly contradicted Mr. Caruso's testimony. This was arbitrary, capricious and unreasonable. Iowa Code § 17A.19(10)(n).

The IUB argued to the district court, with no justification provided, that the volume of oil shipped is more relevant than the miles shipped as between pipelines and rail. This was an attempt to justify the IUB's exclusive

reliance on Guy Caruso's testimony, while ignoring the testimony of Rebecca Wehrman-Andersen. What is significant is that Mr. Caruso did not respond to Ms. Wehrman-Andersen's written direct testimony in his written reply testimony. So her testimony was not rebutted. Perhaps even more significant, when Mr. Caruso was cross-examined at the IUB hearing about the safety issues for pipelines versus rail he repeatedly said he was not a safety expert, didn't know the issue, and instead referred this issue to Dakota Access witness Stacey Gerard (Hrg. Tr. p. 213, 233, 235, 236, and 254)(App. v. I p. 482, 483, 484, 485, 486). Ms. Wehrman-Andersen, on the other hand, specifically and thoroughly rebutted Mr. Caruso's testimony. What this means is that the IUB had absolutely no basis for relying on Mr. Caruso's testimony concerning the relative safety of pipelines and rail.

Since Mr. Caruso deferred the issue of pipeline versus rail safety to Stacey Gerard, it is significant that the IUB made absolutely no reference in its Final Decision, p. 28-33 (App. v. I p. 997-1002), to Ms. Gerard's testimony, except in a brief acknowledgement of the MAIN Coalition's argument (Final Decision, p. 28)(App. v. I p. 997). In fact, the only statement Ms. Gerard made in her written direct and reply testimony was "the U.S. Department of Transportation

statistics show that pipelines have a better safety record than other modes of transportation for hazardous liquids." (Dakota Access Ex. SG Direct, p. 4, and Ex. SG Reply, p. 6)(App. v. I p. 159,181). In her written testimony Ms. Gerard gave no citation to the alleged statistics nor did she present an exhibit showing those statistics. And at the IUB hearing Ms. Gerard testified that she had not provided any statistics or exhibits to the IUB (Hrg. Tr. p. 782)(App. v. I p. 502). That is the only testimony from Ms. Gerard about her assertion that DOT statistics support the allegation that pipelines are safer than rail. There were no questions from the IUB members asking her to back up her statement and there was no redirect questioning from Dakota Access asking her to substantiate her statement.

So, given that Mr. Caruso, on whose testimony the IUB exclusively relied, could not support his assertion that pipelines are safer than rail, and that Ms. Gerard, to whom Mr. Caruso deferred, could not substantiate the assertion that pipelines are safer than rail, the IUB's exclusive reliance on Mr. Caruso's testimony was arbitrary, capricious, unreasonable, and an abuse of discretion. Iowa Code § 17A.19(10)(n).

4. Jobs and Economic Impact

According to the IUB, this was one of the two primary factors weighing in favor of granting the permit (Final Decision, p. 109)(App. v. I p. 1078). However, in terms of public convenience and necessity, it is irrelevant. It has nothing to do with service of the pipeline to the public. Whatever short-term jobs and economic impact there might be from the construction and operation of the pipeline are irrelevant to the alleged purpose of the pipeline.

The IUB was wrong in using jobs and economic benefit as a factor in determining public convenience and necessity. It must be remembered that the IUB cannot determine for itself the definition of public convenience and necessity. Gartner v. Ia. Dep't. of Pub. Health, 830 N.W.2d 335, 343 (Iowa 2013). So the IUB's reliance on jobs and economic benefit was beyond the authority delegated to the agency and based upon an erroneous interpretation of the law. Iowa Code § 17A.19(10)(b) and (c).

Furthermore, the IUB completely ignored the externalized costs of the pipeline project, such as environmental harm, landowner impacts, and damages from pipeline spills. Those costs are not ever mentioned in the IUB's description of the economic issues or the IUB's analysis of those issues (Final Decision, p. 41-47)(App. v. I p. 1010-1016). This omission was in spite of Dakota Access economic witness Michael Lipsman

admitting in cross-examination that it is important to consider the costs, but that his IMPLAN model does not do that (Hrg. Tr. p. 1096-1098)(App. v. I p. 506-508). Mr. Lipsman also said that "[s]omebody else, you know, may want to look at that or probably should look at that." (Hrg. Tr. p. 1098)(App. v. I p. 508).

Neither the IUB, Dakota Access, nor the district court has cited any authority demonstrating that jobs and economic development are relevant to the determination of public convenience and necessity.

So, aside from placing great weight on an issue that was irrelevant to public convenience and necessity, the IUB completely ignored the costs that must be considered in any valid economic analysis. Iowa Code § 17A.19(10)(j).

5. Adverse Impacts from the Pipeline

The IUB placed significant weight on several adverse impacts from the pipeline: risks of a pipeline spill, financial responsibility, and impacts to environmental resources. None of these issues, however, support a finding that the pipeline will promote public convenience and necessity. On the contrary, they are all dangers that must be adequately addressed and militate against a finding of public convenience and necessity.

The IUB apparently thought that it could impose conditions on the permit to address the adverse impacts and that those conditions would satisfy the requirements of public convenience and necessity. But that strategy ignores the fact that public convenience and necessity first requires a benefit to the public from the service to be provided by the pipeline. As discussed previously herein, there was no benefit shown from the proposed service to be provided by the pipeline, and the IUB certainly made no finding as to any benefit from the service.

III. THE IUB VIOLATED MR. PUNTENNEY'S SUBSTANTIAL RIGHTS BY GRANTING DAKOTA ACCESS EMINENT DOMAIN AUTHORITY OVER HIS PROPERTY.

A. Preservation of Issue for Review

This issue was preserved for review because it was raised in Mr. Puntenney's brief to the district court.

B. Standard of Review

The district court reviews the agency's decision in an appellate capacity. The appellate court reviews the district court's decision to determine whether it correctly applied the law. Hawkeye Land Co. v. IUB, 847 N.W.2d 199 (Iowa 2014).

C. Argument

1. The Pipeline Can Avoid Mr. Puntenney's Property

It is clear from a review of the map of the pipeline route (Puntenney Ex A)(App. v. I p. 1190) that the pipeline makes a deliberate diversion from a straight line in order to cross a corner of Mr. Puntenney's property. There is nothing in the record to explain why this diversion was made. There is certainly nothing to explain that the diversion was reasonable or necessary.

The record shows that if the pipeline were constructed in a straight line, it would avoid Mr. Puntenney's property, and would go through property over which Dakota Access already had a voluntary easement or was already seeking eminent domain authority (Final Decision, p. 148)(App. v. I p. 1117). Therefore, there is no reason for the pipeline to cross Mr. Puntenney's property and to take his property by eminent domain.

The IUB may grant eminent domain for a hazardous liquid pipeline only "where necessary." Iowa Code § 479B.1. It is clear in this case that it was not necessary to grant eminent domain over Mr. Puntenney's property when there was a more sensible alternative. This is especially true when there is no justification in the record for diverting the path of the pipeline across Mr. Puntenney's property and when the IUB did not even address this issue in its decision.

In fact, the Dakota Access testimony was that the pipeline route had to be a straight line as much as possible (Hrg. Tr. p. 2404)(App. v. I p. 539). The IUB failed in its duty to "protect landowners . . . from environmental and economic damages" and to grant eminent domain only "where necessary." Iowa Code § 479B.1.

It is also significant that the IUB required Dakota Access to change its route to avoid the property of other landowners. Dakota Access was required to move the pipeline from the Lenhart property to accommodate hypothetical expansion of a turkey operation (Final Decision, p. 131)(App. v. I p. 1100). Also, Dakota Access was required to relocate the pipeline from the Smith property (Final Decision, p. 135)(App. v. I p. 1104). It was arbitrary, capricious, unreasonable, and discriminatory for the IUB to accommodate some landowners and not Mr. Puntenney.

2. The Impact on Mr. Puntenney's Drainage Tile Was Not Considered by the IUB.

Mr. Puntenney raised the issue of the impact of the pipeline on his drainage tile in an objection to the IUB dated November 5, 2015, and in his Petition to Intervene in the IUB proceeding (Puntenney Ex. 30 and Petition)(App. v. I p. 796). However, Mr. Puntenney was not allowed to testify about the impact on his drainage tile at the IUB hearing. He was simply

allowed to respond to several specific narrow questions from the IUB Chair. Other landowner witnesses had been asked if they had anything they wanted to say beyond answering those narrow questions from the Chair. Mr. Puntenney was not given that opportunity. This is likely because Mr. Puntenney was the last witness of the hearing at approximately 10:00 at night on the last hearing day that had started at 8:30 that morning, and the IUB wanted to end the hearing. But that is no reason to deny Mr. Puntenney his right to testify.

In his objection filed November 5, 2015 (Puntenney Ex. 30)(App. v. I p. 796), Mr. Puntenney explained that the pipeline would impact his tiling plans. The tiling was to begin in 2015.

Because the pipeline route could easily be moved as described in the previous section of this Brief, the IUB should have considered Mr. Puntenney's objection. After all, the IUB's duty is to protect landowners from environmental and economic damage. Iowa Code § 479B.1.

3. The Pipeline Will Impact Mr. Puntenney's Plans to Install Wind Turbines on His Property.

Mr. Puntenney testified at the IUB hearing that he had definite plans to install wind turbines on his property, and that the pipeline crossing his property would impact those plans (Hrg. Tr. p. 3487-3491)(App. v. I p. 738-742).

Mr. Puntenney also explained his concerns in this regard in his November 5, 2015 objection (Puntenney Ex. 30)(App. v. I p. 796). The IUB discounted Mr. Puntenney's concerns because his plans were allegedly hypothetical (Final Decision, p. 149)(App. v. I p. 1118). This was an arbitrary decision on the part of the IUB. A decision is arbitrary if it is made "without regard to the law or facts." Doe v. Ia. Bd. of Medical Examiners, 733 N.W.2d 705, 707 (Iowa 2007).

The decision was arbitrary because another landowner, Patrick Lenhart, testified that he might want to expand his turkey raising operation on his property (Hrg. Tr. p. 3169-3172)(App. v. I p. 591-594) and that such expansion would be impeded by the construction of the pipeline. Mr. Lenhart further testified that he had not taken any steps toward an expansion plan and that the company he grows turkeys for might not even approve an expansion (Hrg. Tr. p. 3184)(App. v. I p. 606). Therefore, his future plans to develop his property were just as hypothetical and speculative as Mr. Puntenney's. Yet, the IUB required Dakota Access to move the pipeline to avoid impacting Mr. Lenhart's hypothetical expansion of his turkey operation (Final Decision, p. 131)(App. v. I p. 1100).

The IUB decision is especially arbitrary when one considers the intentional diversion of the pipeline route from a straight line through Mr. Puntenney's property.

Mr. Puntenney was represented by separate counsel at the District Court level on arguments unique to his land parcel, as opposed to the constitutional and statutory arguments made on behalf of all Appellant-Landowners. On appeal, Mr. Puntenney is represented by Wallace Taylor, the counsel that represented his individual interests. In the interests of efficiency and judicial economy, Mr. Puntenney joins in and incorporates by reference: the Statement of Issues Presented for Review, the entirety of the Argument (Sections I – IV), and the Statement of Requested Relief, as filed in the brief by the Davis Brown law firm as counsel for the Landowners. The present brief addresses arguments unique and solely applicable to Mr. Puntenney.

IV. THE IUB VIOLATED MR. JOHNSON'S SUBSTANTIAL RIGHTS BY GRANTING DAKOTA ACCESS EMINENT DOMAIN AUTHORITY OVER HIS PROPERTY.

A Preservation of Issue for Review

This issue was preserved for review because it was raised in Mr. Johnson's brief to the district court.

B. Standard of Review

The district court reviews the agency's decision in an appellate capacity. The appellate court reviews the district court's decision to determine whether it correctly applied the law. Hawkeye Land Co. v. IUB, 847 N.W.2d 199 (Iowa 2014).

C. Argument

One of the IUB's primary duties is to protect landowners from environmental and economic damage. Iowa Code § 479B.1. That would certainly include damage to a farmer's tiling system.

Mr. Johnson explained how the pipeline would impact his tiling system. There was no evidence to the contrary and Mr. Johnson was not cross examined on the issue. He was simply cross examined on whether he would sign a voluntary easement if Dakota Access would bore under his 24-inch main tile line (Hrg. Tr. p. 3027)(App. v. I p. 559). Mr. Johnson testified that boring under the main tile would not solve the problem because of the consistency of the soil at that depth (Hrg. Tr. p. 3027)(App. v. I p. 559). Mr. Johnson's testimony that the pipeline would adversely impact his tiling system was unchallenged.

Dan Rasmussen, Mr. Johnson's tiling contractor, testified that the Dakota Access pipeline could damage Mr. Johnson's large 24 inch main tile (Rasmussen Direct Testimony, p. 3)(App. v. I p. 314). Mr. Rasmussen also said that the pipeline would prevent the tiling system from allowing proper drainage (Rasmussen Direct Testimony, p. 4)(App. v. I p. 315). Mr. Rasmussen was not cross examined on any of these points. So his testimony is unchallenged.

The IUB ignored this testimony. The IUB further ignored the testimony that the pipeline route could be moved to the Ferrari property to the north and avoid Mr. Johnson's tiling system and avoid eminent domain of his property (Hrg. Tr. p. 3041, 3046-3047)(App. v. I p. 567, 568-569). A voluntary easement had been given to Dakota Access on the Ferrari property. IUB chair Geri Huser even said, "What I'm curious of is why it's not simply over onto the voluntary [Ferrari] easement." (Hrg. Tr. p. 3047)(App. v. I p. 569). The IUB has a duty to authorize eminent domain only "where necessary." Iowa Code § 479B.1.

The IUB argued to the district court that it gave Mr. Johnson substantial relief by requiring Dakota Access to bore under his deepest drainage tile. Mr. Johnson testified that this would not address all of the problems caused to his tiling system by the pipeline (Hrg. Tr. p. 3027, 3033-3038)(App. v. I p. 559, 561-566). The IUB did not address Mr. Johnson's concerns in its decision (Final Decision, p. 126-127)(App. v. I p. 1095-1096).

Dakota Access argued to the District Court that Iowa Code § 479B.20 and Chapter 9 of the IUB rules provide Mr. Johnson all the protection he is entitled to with respect to damage to his tiling system, i.e., repairing damaged tile. However, the IUB's duty, pursuant to Iowa Code § 479B.1, is

to "protect landowners . . .from environmental or economic damages." Protection means avoiding damage if a reasonable alternative is available. Protection does not mean intentionally causing damage with the requirement to repair the damage that could have been avoided. Joey Mahmoud admitted that Dakota Access had no plan to explore alternatives to going through Mr. Johnson's property and damaging his tiling system (Hrg. Tr. p. 2410-2411) (App. v. I p. 540-541). Mr. Mahmoud said, "We're going to go through the tiles." (Hrg. Tr. p. 2411)(App. v. I p. 541).

The IUB did not discuss any of this in its Final Decision and Order.

Mr. Johnson was represented by separate counsel at the District Court level on arguments unique to his land parcel, as opposed to the constitutional and statutory arguments made on behalf of all Appellant-Landowners. On appeal, Mr. Johnson is represented by Wallace Taylor, the counsel that represented his individual interests. In the interests of efficiency and judicial economy, Mr. Johnson joins in and incorporates by reference: the Statement of Issues Presented for Review, the entirety of the Argument (Sections I – IV), and the Statement of Requested Relief, as filed in the brief by the Davis Brown law firm as counsel for the

Landowners. The present brief addresses arguments unique and solely applicable to Mr. Johnson.

CONCLUSION

Iowans have never been confronted with a pipeline project as massive as the Dakota Access pipeline, nor one with such dangerous adverse impacts. This circumstance required that the IUB take special care to ensure that the project would promote public convenience and necessity before issuing a permit.

But rather than take that special care, the IUB failed to properly interpret the concept of public convenience and necessity and failed to consider facts that weighed against public convenience and necessity.

It is therefore incumbent on the Court to set aside the granting of the permit to Dakota Access. Section 17A.23(1) states that the provisions of Chapter 17A, including § 17A.19, "shall be construed broadly to effectuate its purposes." The purpose of § 17A.19 is to give parties affected by agency action a meaningful review by the court of that agency action. As Professor Bonfield has said, "This scope of review provision [in § 17A.19] is calculated to ensure that judicial review is an effective check on illegal agency action." Bonfield, Amendments to Iowa Administrative Procedure Act (1998).

Iowa Code § 479B.1 makes clear that the primary duty of the IUB in considering a permit for a hazardous liquid pipeline is to "protect landowners and tenants from environmental and economic damages." Article I, Section 1 of the Iowa Constitution states, "All men and women are, by nature, free and equal, and have certain inalienable rights – among which are . . . acquiring, possessing and protecting property, ..."

In Mr. Puntenney's case the IUB failed to address two of Mr. Puntenney's objections to the pipeline – that the pipeline route makes an intentional diversion over his property, and that the pipeline would damage his tiling system. In addition, the IUB failed to protect his plans to install wind turbines on his property, when the IUB required the pipeline route to be changed for another property owner to accommodate his hypothetical possibility of expanding his turkey operation. Mr. Puntenney had a unique situation with an intentional diversion of the pipeline route over his property. That fact made it imperative that the IUB consider that unique situation. The IUB completely failed to make that consideration. It is apparent from reading the Final Decision and Order that the IUB, rather than placing the burden of proof on Dakota Access as it should have, placed the burden on Mr. Puntenney (Final Decision, p. 149)(App. v. I p. 1118).

In Mr. Johnson's case the IUB did not consider the evidence presented by Mr. Johnson regarding the impact to his drainage tile from construction of the pipeline and the feasibility of moving the pipeline to neighboring land where Dakota Access already had voluntary easements. Mr. Johnson had a unique situation with his tiling system and the difficulty of constructing the pipeline without impacting his tile. That fact made it imperative that the IUB consider that unique situation. The IUB completely failed to make that consideration.

Based on the foregoing, the decision of the IUB was:

a. In violation of the limitation in § 479B.1 on the IUB's authority to authorize eminent domain. Iowa Code § 17A.19(10)(b).

b. Not supported by substantial evidence. Iowa Code § 17A.19(10)(f).

c. Illogical so as to render it irrational. Iowa Code § 17A.19(10)(i).

d. Made without considering relevant and important information. Iowa Code § 17A.19(10)(j).

e. Not required by law and having a negative impact on private rights so grossly disproportionate to the benefits that it lacked any foundation in rational agency policy. Iowa Code § 17A.19(10)(k).

f. Unreasonable, arbitrary, capricious, and an abuse of discretion. Iowa Code § 17A.19(10)(n).

The Court should reverse the decision of the district court, vacate the IUB decision to issue a permit for the construction of the Dakota Access pipeline, and order the IUB to properly apply the requirement of public convenience and necessity to the Dakota Access permit application. Further, Dakota Access should be required to reroute its pipeline around Mr. Puntenney's and Mr. Johnson's properties.

/s/ *Wallace L. Taylor*

WALLACE L. TAYLOR AT0007714
Law Offices of Wallace L. Taylor
118 3rd Ave. S.E., Suite 326
Cedar Rapids, Iowa 52401
319-366-2428;(Fax)319-366-3886
e-mail: wtaylorlaw@aol.com

ATTORNEY FOR SIERRA CLUB IOWA CHAPTER, KEITH PUNTENNEY, LAVERNE JOHNSON

REQUEST FOR ORAL ARGUMENT

The Petitioners-Appellants respectfully request oral argument on all of the issues in this appeal.

/s/ *Wallace L. Taylor*
WALLACE L. TAYLOR AT0007714
ATTORNEY FOR PETITIONERS-APPELLANTS

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs.App.P.6.903(1)(d) and 6.903 (1)(d) and 6.903(1)(g)(1) or (2) because:

this brief has been prepared in a monospaced typeface using Microsoft Word 2000 in Courier New font, size 12 and contains 1297 lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

___ November 5, 2017_____ /s/ *Wallace L. Taylor*
DATE WALLACE L. TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2017, I electronically filed the Appellant's Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

William E. Hanigan
Davis, Brown, Koehn, Shors & Roberts, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309-3993
ATTORNEY FOR APPELLANTS RICHARD R. LAMB, TRUSTEE OF THE RICHARD R. LAMB REVOCABLE TRUST, MARIAN D. JOHNSON BY HER AGENT VERDELL JOHNSON, NORTHWEST IOWA LANDOWNERS ASSOCIATION AND THE IOWA FARMLAND OWNERS ASSOCIATION, INC.

Mark Schuling
John Stewart Long
1375 East Court Avenue, Rm 63
Des Moines, Iowa 50319-0063
ATTORNEYS FOR INTERVENOR OFFICE OF CONSUMER ADVOCATE

Matthew C. McDermott
Espnola F. Cartmill
666 Walnut Street
2000 Financial Center
Des Moines, Iowa 50309-3989
ATTORNEYS FOR INTERVENOR THE MAIN COALITION

Benjamin John Flickinger
David Jay Lynch
1375 East Court Avenue, Room 69
Des Moines, Iowa 50319-0069
ATTORNEYS FOR RESPONDENT IOWA UTILITIES BOARD

Bret A. Dublinske AT00002232
Brant M. Leonard AT0010157
FREDRIKSON & BYRON, P.A.
505 East Grand Avenue, Suite 200
Des Moines, Iowa 50309

ATTORNEYS FOR DAKOTA ACCESS, LLC

Scott Long
5907 Grand Avenue
Des Moines, IA 50312
ATTORNEY FOR AMICUS CURIAE NISKANEN CENTER

Further, a copy of the Brief was sent via email to David Bookbinder at dbookbinder@niskanencenter.org, ATTORNEY FOR AMICUS CURIAE NISKANEN CENTER.

/s/ *Wallace L. Taylor*
WALLACE L. TAYLOR