

IN THE SUPREME COURT OF IOWA

KEITH PUNTENNEY, LAVERNE
JOHNSON, RICHARD R. LAMB,
Trustee of the RICHARD R. LAMB
REVOCABLE TRUST, MARIAN D.
JOHNSON by her Agent VERDELL
JOHNSON, NORTHWEST IOWA
LANDOWNERS ASSOCIATION, IOWA
FARMLAND OWNERS ASSOCIATION,
INC., and the SIERRA CLUB IOWA
CHAPTER,

Petitioners-Appellants,
and

HICKENBOTTOM EXPERIMENTAL
FARMS, INC., PRENDERGAST
ENTERPRISES, INC.,

Petitioners,

v.

IOWA UTILITIES BOARD, A
DIVISION OF THE DEPARTMENT OF
COMMERCE, STATE OF IOWA,

Respondent-Appellee,
and

OFFICE OF CONSUMER ADVOCATE,
Intervenor-Appellee,

and

DAKOTA ACCESS, LLC,

Indispensable Party-Appellee.

SUPREME COURT
NO. 17-0423

Polk County Case Nos.
CVCV051987
CVCV051990
CVCV051997
CVCV051999

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. FARRELL

FINAL BRIEF OF APPELLEE-INTERVENOR
OFFICE OF CONSUMER ADVOCATE

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November 7, 2017

OFFICE OF CONSUMER
ADVOCATE-99AG50114

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STATEMENT OF THE ISSUES

I. DID THE IOWA UTILITIES BOARD DETERMINE THAT THE PIPELINE WOULD PROMOTE THE PUBLIC CONVENIENCE & NECESSITY IN ACCORDANCE WITH IOWA CODE SECTION 479B.9 (2017)?

Applicable Authorities:

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

Broadlawns Medical Ctr. v. Sanders, 792 N.W.2d 302 (Iowa 2010)

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

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Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996)

South East Iowa Co-op. Elec. Ass'n v. Iowa Utilities Board, 633 N.W.2d 814 (Iowa 2001)

Thomson v. Iowa State Commerce Comm'n, 15 N.W.2d 603 (Iowa 1944)

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Iowa Code Section 6A.22 (2017)

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II. DID THE BOARD PROPERLY CONSTRUE IOWA CODE CHAPTER 479B AND SECTIONS 6A.21 AND 6A.22 (2017)?

Applicable Authorities:

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

Meyer v. IBP, Inc., 710 N.W.2d 213 (Iowa 2006)

Office of Consumer Advocate v. Iowa Utils. Bd., 663 N.W.2d 873 (Iowa 2003)

NextEra Energy Resources LLC v. Iowa Utilities Board, 815 N.W.2d 30 (Iowa 2012)

Iowa Code Section 6A.21 (2017)

Iowa Code Section 6A.21(1)(c) (2017)

Iowa Code Section 6A.21(2) (2017)

Iowa Code Section 6A.22 (2017)

Iowa Code Section 6A.22(1) (2017)

Iowa Code Section 17A.19 (2017)

Iowa Code Section 476.53(4)(c)(2) (2017)

Iowa Code chapter 479B (2017)

Iowa Code Section 479B.9 (2017)

Iowa Code Section 479B.16 (2017)

ROUTING STATEMENT

This case should be retained by the Supreme Court of Iowa under the criteria set forth in Iowa R. App. P. 6.1101(2)(d) because it presents fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by this court.

STATEMENT OF THE CASE

Dakota Access, LLC (Dakota Access) filed its Petition for Hazardous Liquid Pipeline Permit with the Iowa Utilities Board (Board) on January 20, 2015. (Petition at 1; App. 34). The Board convened an evidentiary hearing regarding the Petition beginning on November 16, 2015. (Final Decision and Order at 10; App. 979).

The Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, is empowered to represent the interests of consumers and the public generally in proceedings before the Board and state and federal courts pursuant Iowa Code Section 475A.2 (2017). The OCA submitted prefiled testimony and fully participated in the underlying proceeding before the Board.

The Board approved Dakota Access' Petition in its March 10, 2016 "Final Decision and Order." (Final Decision and Order at 153; App. 1122). The Board's decision was appealed to Polk County District Court by Sierra Club and by landowners represented by the lead petitioner, Richard Lamb, (Landowners). Affected property owners Keith Puntteney and Lavern Johnson also filed petitions with the Polk County District Court. (Ruling on Judicial Review at 6, February 15, 2017; App. 1523).

The petitions were consolidated and heard by the Polk County District Court sitting in an appellate capacity under Iowa Code Section 17A.19 (2017). (Ruling on Judicial Review at 6, February 15, 2017; App. 1523). OCA participated in the judicial review proceeding before the Polk County District Court. (Ruling on Judicial Review at 3; App. 1520). The district court denied the Petitions for Judicial Review. (Ruling on Judicial Review at 38; App. 1555). Appellants appeal from the decision of the district court affirming the Board's decision. (Notices of Appeal filed by Sierra Club, Landowners, Punttenney and Johnson).

STATEMENT OF FACTS

The proposed pipeline through Iowa is part of a 1,168 mile pipeline starting at the Bakken area near Stanley, North Dakota and ending at Patoka, Illinois. (Final Decision and Order at 4; App. 973). The Board convened what would become an eleven day hearing on November 16, 2015. (Final Decision and Order at 10; App. 979).

In addition to the permit, Dakota Access also requested the right of eminent domain over property for which right-of-way had not been acquired through voluntary easements. (Petition, Exhibit H; App. 41). According to Dakota Access, construction of the pipeline in

Iowa would require right-of-way across approximately 1,295 parcels of land. (Dakota Access Exhibit RLH Direct at 2; App. 235). At the time of the hearing, Dakota Access witness Joey Mahmoud indicated that Dakota Access had acquired approximately 75 percent of the parcels by voluntary easements, leaving 316 parcels subject to Dakota Access' request for eminent domain. (Tr. 2234; App. 538). Dakota Access asked the Board to approve 50-foot wide permanent easements and temporary easements for construction workspace of up to an additional 100 feet in width. (Final Decision and Order at 83; App. 1052).

During the course of the proceeding, OCA witnesses provided testimony and evidence regarding several issues, including, but not limited to the need for unconditional parental financial guarantees, environmental impact of the pipeline, and land restoration. (OCA Exhibit Bodine Direct at 4; OCA Exhibit Nickel Direct at 2-3; OCA Exhibit Thommes Direct at 3; OCA Exhibit Flo Direct at 3; OCA Exhibit Timpson Direct at 3; App. 62, 264-265, 311, 107, 317). OCA offered the testimony of four environmental experts. (OCA Exhibit Nickel Direct at 2-3; OCA Exhibit Thommes Direct at 3; OCA Exhibit Flo Direct at 3; OCA Exhibit Timpson Direct at 3; App. 264-265, 311,

107, 317). OCA's environmental experts recommended that if the Board were to approve the pipeline it should impose a number of conditions on construction. These conditions were intended to protect the Iowa environment by minimizing the potential for environmental harm and damage to agricultural land. Dakota Access agreed to accept the majority of OCA's recommendations. (Dakota Access Exhibit MH Reply at 6-24; App. 209-227). OCA's remaining recommendations which were not voluntarily accepted by Dakota Access were made conditions of the permit by the Board. (Final Decision and Order at 69-71; App. 1038-1040).

ARGUMENT

I. THE IOWA UTILITIES BOARD INTERPRETED AND APPLIED THE PUBLIC CONVENIENCE AND NECESSITY STANDARD IN ACCORDANCE WITH IOWA CODE SECTION 479B.9 (2017).

A. Issue Preservation, Standard And Scope Of Review.

OCA does not dispute error preservation of this issue.

The scope of review encompasses the entire record before the agency and is not limited to the agency's findings. Judicial review of final agency action is governed by the standards set forth in Iowa Code § 17A.19 (2017). The court functions in an appellate capacity to

correct errors at law. (*City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 527 (Iowa 2008)).

The applicable standard of review depends upon the nature of the error claimed. If the alleged error is with the agency's findings of fact, the proper question on review is whether there is substantial evidence in the record when it is viewed as a whole to support the agency's findings of fact. Substantial evidence is defined in Iowa Code Section 17A.19(10)(f)(1) (2017) as 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."

The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's decision is not supported by substantial evidence. (*Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996)). Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the court must give appropriate deference to the agency's findings. (*Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992)). The ultimate question is not whether

there is evidence that supports a different finding, but whether the evidence supports the findings actually made. (*Broadlawns Medical Ctr. v. Sanders*, 792 N.W.2d 302, 306 (Iowa 2010)).

If the alleged error involves a question of law, the question on review is whether the agency's interpretation was erroneous. The court is not bound by the agency's legal conclusions and may substitute its interpretation for that of the agency to correct a misapplication of the law. (*Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)). While courts need to give only limited deference to an agency interpretation of law, an "agency's determination of a question of law is given careful consideration in areas of the agency's expertise." (*Office of Consumer Advocate v. Iowa Utils. Bd.*, 663 N.W.2d 873, 875 (Iowa 2003)). The amendments to the Iowa Administrative Procedures Act of 1998 were intended to confirm and clarify that "interpretation is normally a judicial function, except when the legislature has delegated the discretionary authority to the agency." (*OCA v. IUB*, 663 N.W.2d at 875, citing *Locate.Plus.Com v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 613 (Iowa 2003)).

The Iowa Supreme Court recently reviewed the applicable standard of review for decisions of the Board and concluded that the

general assembly did not delegate to the Board interpretive power with the binding force of law. (*NextEra Energy Resources LLC v. Iowa Utilities Board*, 815 N.W.2d 30, 38 (Iowa 2012)). Accordingly, the Iowa Supreme Court determined in *NextEra* that it was appropriate to examine the Board's interpretation of Iowa Code Section 476.53(4)(c)(2) (2017) for correction of errors at law. (*Id.*)

This issue presents a mixed question of law and fact. If the claim of error is a mixed question of law and fact, the reviewing court must apply the substantial evidence test to the agency's fact findings and the appropriate deferential standard in assessing the agency's legal conclusions and application of law to the facts. (*Meyer v. IBP*, 710 N.W.2d at 218-219 (Iowa 2006)).

B. The Board's Interpretation Of The Public Convenience And Necessity Standard Is Consistent With Applicable Precedent And Complies With Iowa Law.

The Board concluded that the public convenience and necessity determination set forth in Iowa Code § 479B.9 (2017) required the Board to apply a balancing test, "weighing the public benefits of the proposed project against the public and private costs or other detriments as established by the evidence in the record." (Final

Decision and Order at 16; App. 985). The Board also explained that it was permitted to consider benefits of the pipeline accruing to people living outside of Iowa, particularly public safety benefits. (Final Decision and Order at 18-20; App. 987-989).

The Board’s application of the public convenience and necessity standard as a balancing test was proper and consistent with Iowa law. Iowa precedent supports the Board’s application of the Public Convenience and Necessity standard as a balancing test. The Iowa Supreme Court approved of the Board’s balancing test approach in *South East Iowa Co-op. Elec. Ass’n v. Iowa Utilities Board*.¹ This case involved an electric transmission line under Iowa Code chapter 478 (2017), where the test was whether the proposed line is “necessary to serve a public use” and “represents a reasonable relationship to an overall plan of transmitting electricity in the public interest”. Other court decisions directly addressing the public convenience and necessity standard are consistent with the use of a balancing approach.²

¹ 633 N.W.2d 814, 821 (Iowa 2001) (approving of Board’s balancing approach in a case applying test for electric transmission line franchise under Iowa Code Section 478.4 (2017)).

² See *Application of National Freight Lines*, 40 N.W.2d 612, 616 (Iowa 1950) (stating that application of the public convenience and necessity test is a “legislative” function); *Thomson v. Iowa State Commerce Comm’n*, 15 N.W.2d 603, 606 (Iowa 1944).

In addition, the Board lawfully determined that it could consider public safety benefits to people living outside of Iowa who would be made safer if crude were transported via pipeline. (See Final Decision and Order at 18-21; App. 987-990). Landowners' argument that an agency may not consider public safety benefits accruing to persons outside of Iowa is inconsistent with our federal system. Concern for public safety should not end at the state line. (See Final Decision and Order at 18-21; App. 987-990).

In any event, the Board based its public convenience and necessity finding on far more than just benefits to persons outside of Iowa. The Board also based its decision on safety benefits for people inside of Iowa as well as economic benefits to the state. (Final Decision and Order at 32-33; App. 1001-1002 ("if it is built, this pipeline will reduce the overall risk of crude oil spills, *both in Iowa and elsewhere*") (emphasis added); Final Decision and Order at 41-47; App. 1010-1016) (finding that construction of the line will lead to "significant economic benefits to Iowa").

Under Landowners' interpretation, no oil pipeline would provide a "public use" in Iowa unless someone in Iowa shipped oil on or received oil from the pipeline. This could not have been the intent

of the legislature when it enacted the provisions in Iowa Code chapter 479B (2017) because then, like now, there were not any oil fields or refineries in Iowa. (Dakota Access Ex. DRD Direct at 13–14; App. 297-298). As the Board explained, Iowans depends on out-of-state refineries “because Iowa neither produces nor refines crude oil.” (Final Decision and Order at 20; App. 989).

C. The Board Never Determined That The Pipeline Constituted A “Private Development Purpose” Under Iowa Law.

Landowners’ claim that the Board “acknowledged” that the pipeline was a “private development purpose as defined by Iowa law” is not accurate and takes Board statements out of context. (See Landowners’ Brief at 34). The Board did agree that the pipeline would constitute a “private development purpose” pursuant to Iowa Code Section 6A.21(1)(b) (2017). However, as explained below, this was part of the Board’s consideration of whether Iowa Code Sections 6A.21 and 6A.22 (2017) applied to the pipeline in which the Board correctly concluded that those provisions did not apply to this pipeline. (Final Decision and Order at 119-121; App. 1088-1090).

II. THE BOARD PROPERLY CONSTRUED IOWA CODE CHAPTER 479B AND PROPERLY CONCLUDED THAT SECTIONS 6A.21 AND 6A.22 (2017) DID NOT APPLY.

A. Issue Preservation, Standard And Scope Of Review.

OCA does not dispute error preservation of this issue.

The scope of review encompasses the entire record before the agency and is not limited to the agency's findings. Judicial review of final agency action is governed by the standards set forth in Iowa Code § 17A.19 (2017). The court functions in an appellate capacity to correct errors at law. (*City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 527 (Iowa 2008)).

This issue relates to a question of law. If the alleged error involves a question of law, the question on review is whether the agency's interpretation was erroneous. The court is not bound by the agency's legal conclusions and may substitute its interpretation for that of the agency to correct a misapplication of the law. (*Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)). While courts need generally give only limited deference to an agency interpretation of law, an "agency's determination of a question of law is given careful consideration in areas of the agency's expertise." (*Office of Consumer*

Advocate v. Iowa Utils. Bd., 663 N.W.2d 873, 875 (Iowa 2003)). The amendments to the Iowa Administrative Procedure Act (1998) were intended to confirm and clarify that “interpretation is normally a judicial function, except when the legislature has delegated the discretionary authority to the agency.” (*OCA v. IUB*, 663 N.W.2d at 875, citing *Locate.Plus.Com v. Iowa Dep’t of Transp.*, 650 N.W.2d 609, 613 (Iowa 2003)).

The Iowa Supreme Court recently reviewed the applicable standard of review for decisions of the Board and concluded that the general assembly did not delegate to the Board interpretive power with the binding force of law. (*NextEra Energy Resources LLC v. Iowa Utilities Board*, 815 N.W.2d 30, 38 (Iowa 2012)). Accordingly, the Iowa Supreme Court determined in *NextEra* that it was appropriate to examine the Board's interpretation of Iowa Code § 476.53(4)(c)(2) (2017) for correction of errors at law. (*Id.*)

B. Iowa Code Chapter 479B (2017) Authorizes The Board To Grant The Power Of Eminent Domain.

Iowa Code Section 479B.16 (2017) provides that:

A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, to the extent necessary and as prescribed and approved by the board

The Board read this provision to require that it vest pipelines which satisfy the public convenience and necessity permit requirement with the power of eminent domain. (Final Decision and Order at 117-119; App. 1086-1088).

After considering recent case law and the provisions of Iowa Code chapter 479B (2017), the Board concluded that the public convenience and necessity requirements of Iowa Code § 479B.9 (2017) include the constitutional “public use” determination. The Board stated that:

In enacting chapter 479B, the Iowa legislature made the determination that those pipelines that meet the statutory requirements for a permit also meet the public use requirement such that eminent domain is proper to the extent determined by the Board.

(Final Decision and Order at 119; App. 1088).

OCA believes the Board’s interpretation is legally correct.

C. The Board Properly Concluded That Iowa Code Sections 6A.21 And 6A.22 (2017) Do Not Apply To This Case.

Iowa Code Section 6A.21(1)(c) (2017) prohibits condemnation of agricultural land for “private development purposes.” Landowners

argued that this applies to the pipeline and prohibits condemnation of agricultural land by Dakota Access. (Landowners' Brief at 56-72).

The Board considered Landowners' arguments and concluded that the prohibition on condemnation of agricultural land under Iowa Code § 6A.21 (2017) did not apply to the pipeline. Iowa Code § 6A.21(1)(c) (2017) prohibits the exercise of the right of eminent domain over agricultural land for private development purposes. However, the Board noted that Iowa Code Section 6A.21(2) (2017) provides exemptions to the restriction imposed by Iowa Code § 6A.21(1)(c) (2017). Specifically, the Board focused on the provision of Iowa Code § 6A.21(2) (2017) which states that "[t]his limitation also does not apply to utilities, persons, companies, or corporations under the jurisdiction of the [Board] ..." (Final Decision and Order at 119-120; App. 1088-1089). The Board concluded that Iowa Code § 6A.21 (2017) did not preclude it from granting Dakota Access the right of eminent domain because Dakota Access is a company under the jurisdiction of the Board by virtue of Iowa Code chapter 479B (2017). (Final Decision and Order at 119-122; App. 1088-1091).

The Court should also reject Landowners' argument that Iowa Code § 6A.22 (2017) prohibits condemnation in this case. Iowa Code

§ 6A.22(1) (2017) provides that the restrictions on condemnation authority set forth therein are “[i]n addition to the limitations in section 6A.21.” Since the Board correctly concluded that Iowa Code § 6A.21 (2017) does not apply to this pipeline, Iowa Code § 6A.22 (2017) is not applicable.

CONCLUSION

The court should affirm the decision of the district court.

Respectfully submitted this 7th day of November, 2017.

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REQUEST FOR NONORAL SUBMISSION

The Office of Consumer Advocate does not request oral argument in this matter.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-
STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,862 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in Georgia, 14-point font.

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CERTIFICATE OF SERVICE

The undersigned certifies that this Final Brief of Appellant-Intervenor Office of Consumer Advocate was electronically filed using the Electronic Document Management System, which will send notification to all parties of record.

Respectfully submitted this 7th day of November, 2017.

/s/ John S. Long
John S. Long