# 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

## APPELLANTS' REPLY BRIEF

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## STATEMENT OF THE FACTS

Dakota Access has presented a "Statement of Facts" in its Brief that is more akin to marketing hype than a statement of facts. We are confident the Court will review the record to determine the facts. However, a clarification of the statements in the Dakota Access Brief may be helpful to the Court.

Dakota Access claims that "without interstate transportation facilities like pipelines, Iowa's tractors and trucks would come to a stop" (Brief, p. 21). On the contrary, as explained in Appellants' Brief, p. 29, the needed oil is being supplied by existing transportation. And as further

explained in Appellants' Brief, p. 27-31, the demand for oil nationally is declining and the output from the Bakken region is declining.

Next, Dakota Access asserts that the United States imports oil from other countries (Brief, p. 21). But we also export to other countries (Hrg. Tr. p. 201)(App. v. I p. 481). If this country can export petroleum products, while we are also importing oil, it is solely a matter of where the oil companies can sell the oil at the best price. That has nothing to do with public convenience and necessity.

Perhaps the most distressing statement in Dakota Access' Brief, p. 22, is the description of the Appellants as a "small but vocal minority" arguing "not in my backyard."

The 1st Amendment to the U.S. Constitution and Article 1, Section 7 of the Iowa Constitution are designed to protect and encourage small vocal minorities. That is also supposed to be the mission of the courts. The landowners who continue to resist the taking of their land by Dakota Access should be applauded for their courage and dedication, not disparaged. The Iowa state motto is, "Our liberties we prize, and our rights we will maintain." The Appellants in this case are making that sentiment a reality.

As for the Sierra Club, it is a misrepresentation to call it a small vocal minority. The Iowa Chapter has over

6,000 members throughout Iowa. Those members advocate for clean water and air, protection of natural areas and wildlife, and the halt of climate change. Environmental protection is an important goal in Iowa. The Iowa Legislature has eloquently described the importance of protecting Iowa's fragile environment, in § 455A.15 of the Iowa Code:

> The general assembly finds that:
>
> 1. The citizens of Iowa have built and sustained their society on Iowa's air, soils, waters, and rich diversity of life. The well-being and future of Iowa depend on these natural resources.
>
> 2. Many human activities have endangered Iowa's natural resources. The State of Iowa has lost ninety-nine and nine-tenths percent of its prairies, ninety-eight percent of its wetlands, eighty percent of its woodlands, fifty percent of its topsoils, and more than one hundred species of wildlife since settlement in the early 1800's. There has been a significant deterioration in the quality of Iowa's surface waters and groundwaters.
>
> 3. The long-term effects of Iowa's natural resource losses are not completely known or understood, but detrimental effects are already apparent. Prevention of further loss is therefore imperative.
>
> 4. The air, waters, soils, and biota of Iowa are interdependent and form a complex ecosystem. Iowans have the right to inherit this ecosystem in a sustainable condition, without severe or irreparable damage caused by human activities.

Dakota Access then purports to represent as facts the findings of the IUB as set out in its Final Order (Dakota Access Brief, p. 23-24). But that is just using the IUB's

self-serving justifications for its decision to masquerade as facts.

In the end, the record is the only accurate source for the Court to determine the facts.

## ARGUMENT

### I. SIERRA CLUB HAS STANDING AND MR. PUNTENNEY'S AND MR. JOHNSON'S CLAIMS ARE NOT MOOT.

The Iowa Supreme Court has said that a plaintiff alleging environmental injury has standing if the plaintiff is concerned that aesthetic or recreational interests will be adversely affected. Bushby v. Washington Co. Conservation Bd., 654 N.W.2d 494 (Iowa 2002). The Bushby court relied on the U.S. Supreme Court decision in Friends of the Earth v. Laidlaw, 528 U.S. 167, 120 S.Ct. 693 (2000).

In Laidlaw the plaintiff organization had members who were concerned about pollution in a river into which Laidlaw had been discharging pollutants. The Laidlaw decision emphasized that the concerns expressed by the plaintiff members were injuries to persons who use and enjoy an area for whom the aesthetic and recreational values will be adversely affected.

The Laidlaw court also emphasized that the plaintiffs' reasonable concern that pollution in the Tyger River would adversely impact their use and enjoyment of the river and its

environs was not the general conclusory allegations that were alleged in Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177 (1990), nor the speculative "'some day' intentions" proffered in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992).

In this case, Sierra Club member Mark Edwards submitted an affidavit (App. v. I p. 1433) in which he said that he regularly kayaks in the Des Moines and Skunk Rivers and that the Dakota Access pipeline crosses under those rivers. Mr. Edwards further stated that he knows that crude oil pipelines going under rivers have ruptured and spilled oil into the rivers. Mr. Edwards then explained that his use and enjoyment of the rivers would be adversely affected by a spill from the pipeline. This is exactly the type of injury that conferred standing in Laidlaw.

Mr. Edwards also notes in his affidavit his experience and interest in Native American archaeology and culture. He further explains that there are numerous Native American burial grounds and cultural sites along the Des Moines River and that a spill from the pipeline would adversely impact these resources and the value that Mr. Edwards places in them. Again, this is exactly the type of injury that conferred standing in Laidlaw.

Sierra Club member Carolyn Raffensperger also submitted an affidavit (App. v. I p. 1429) in which she described her basis for standing. Ms. Raffensperger described her background and interest in archaeology and Native American culture. She further explained that a spill from the pipeline would adversely impact the value that Ms. Raffensperger places in these cultural resources. More specifically, Ms. Raffensperger explained that she was personally involved in protecting cultural resources in the Big Sioux River Wildlife Management Area from impacts from the pipeline.

Ms. Raffensperger also explained that the pipeline cuts within a mile from her house so a spill from the pipeline would definitely impact the use and enjoyment of her property.

It must also be emphasized that the Sierra Club members' concerns about a spill from the pipeline are not unreasonable or speculative. The evidence presented to the IUB was that there have been numerous spills from crude oil pipelines that have resulted in massive damage requiring millions, or even billions, of dollars to clean up. Even if Dakota Access has taken reasonable steps to reduce the risk of a spill, the IUB obviously felt that the risk was real enough to require Dakota Access to post $ 25 million of liability insurance and financial guarantees from Dakota Access' parent companies.

In her testimony before the IUB, Ms. Raffensperger quoted from Energy Transfer Partners' annual report as follows:

> We [ETP] may incur substantial environmental costs and liabilities because of the underlying risk inherent to our operations. Although we have established financial reserves for our estimated environmental remediation liabilities, additional contamination or conditions may be discovered, resulting in increased remediation costs, liabilities for natural resource damages that could substantially increase our costs for site remediation projects. Accordingly, we cannot assure you that our current reserves are adequate to cover all future liabilities, even for currently known contamination.

(Hrg Tr. p. 2844-2845)(App. v. I p. 546-547).

So ETP, parent company of Dakota Access, acknowledged that the risks of environmental damage from a pipeline spill are very real.

A decision from the Court vacating the permit issued by the IUB would eliminate this risk and provide relief to the Sierra Club and its members.

Ms. Raffensperger and Mr. Edwards both explain in their affidavits that they are concerned about the impact of climate change. They further describe the immediate impacts of climate change and how those impacts affect them personally. Finally, they state that the Dakota Access pipeline will contribute to climate change and that is one reason they have opposed the IUB granting a permit for the pipeline. Even though the pipeline has now been constructed, a ruling from

the Court would stop its transport of crude oil and thus eliminate the pipeline's contribution to climate change.

The United States Court of Appeals for the Eighth Circuit has further explained standing in environmental cases. In Sierra Club v. Corps of Engineers, 446 F.3d 808 (8th Cir. 2006), the Sierra Club contended that the plan to construct a levee on the Missouri River required the preparation of an environmental impact statement. The Sierra Club's standing was challenged because there was allegedly no assurance that the levee would be built, and thus, no injury to the Sierra Club or its members. The Eighth Circuit said that the claim was against the failure to prepare an EIS, not the eventual construction of the levee. The court concluded that, "the injury-in-fact is increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making." Id. at 816.

Applying the Eighth Circuit's analysis to this case, it is the decision-making of the IUB, in issuing a permit for the Dakota Access pipeline, that is the action being challenged and the injury-in-fact is the "increased risk of environmental harm stemming from the agency's . . . decision-making." Challenging the IUB permitting process is the only opportunity the Sierra Club has to address the risk of

environmental damage from the pipeline before there is an actual spill.

One other case, Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972), merits a comment. Contrary to the implication made by Dakota Access, Sierra Club did not "lose" that case. It may fairly be said that Sierra Club lost the battle, but won the war. The court held that as long as at least one member of the organization had standing, the organization had standing. More importantly, Morton was the first case of environmental standing, affording standing to plaintiffs whose aesthetic and recreational values would be impacted. So, all Sierra Club had to do was have some of its members aver that they used and enjoyed the Mineral King Valley and that the proposed development would adversely impact their use and enjoyment. That is exactly what Iowa Sierra Club members are alleging in this case.

The U.S. Supreme Court decision in Massachusetts v. EPA, 549 U.S. 497, 127 S.Ct. 1438 (2007), presents a further perspective on standing that is relevant here. In Massachusetts the plaintiffs challenged the EPA's failure to address climate change through the Clean Air Act. In finding that the plaintiffs had standing, the court first quoted from Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691 (1962), that the basis of standing is whether plaintiffs have "such a

personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." In Massachussetts, the court noted that a party to whom the legislature has granted a procedural right to protect its concrete interests, such as the right to challenge agency action, has standing without meeting all the normal standards for redressability and immediacy.

Applying that analysis to this case, the Sierra Club has the right granted by the legislature to challenge the IUB's denial of the permit pursuant to Iowa Code § 17A.19. That statute says that any party who has exhausted all administrative remedies and who is aggrieved or adversely affected by the agency action may seek judicial review. In this case, the Sierra Club intervened and established standing in the IUB proceeding, fully participated in the litigation of the permit application, presented specific claims, and the IUB ruled against the claims and interests presented by the Sierra Club. Sierra Club's participation in the IUB proceeding provided the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." This is exactly the type of procedural standing described in the Massachusetts decision.

This Court's decision in Bushby and the federal authorities cited above are not inconsistent with other standing decisions of this Court. A review of Iowa cases follows.

In Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470 (Iowa 2004), the plaintiffs challenged the proposed issuance of revenue bonds by the defendant city that would be used to partially finance a recreational lake and public park for which eminent domain would be used to take the plaintiffs' land. The opinion of the court contains only a brief discussion of the standing issue, but it is clear that the reasons the plaintiffs did not have standing was because the case was not ripe. The revenue bonds had not been issued; there were procedural remedies still available to the plaintiffs before the bonds could be issued; and even then the issuance of the bonds did not mean that the recreational facilities would be built and the plaintiffs' property condemned. In this case, however, the permit from the IUB is the only administrative or procedural step available to the Sierra Club and its members to stop the pipeline from carrying oil and causing the damage described in the affidavits of Mark Edwards and Carolyn Raffensperger. This is not the tenuous nexus that precluded standing in Citizens.

In Alons v. Iowa District Court, 698 N.W.2d 858 (Iowa 2005), the plaintiffs sought a writ of certiorari to challenge a ruling by the district court to dissolve the marriage of a lesbian couple. The denial of standing in that case boiled down to the fact that the plaintiffs were not parties to the action they were challenging; the district court decision did not affect the plaintiffs personally; and the basis for the action was just that the plaintiffs had a philosophical opposition to same-sex marriage. Simply put, the plaintiffs were inserting themselves into a proceeding that had nothing to do with them.

Thus, the facts and decision in Alons are a perfect example of a case where plaintiffs do not have standing. Here, the Sierra Club was a party with standing in the IUB proceedings and the Sierra Club members have more than just a philosophical opposition to the pipeline. The affidavits of Mr. Edwards and Ms. Raffensperger clearly show the kind of injury routinely presented in environmental cases where standing is afforded.

In Godfrey v. State, 752 N.W.2d 413 (Iowa 2008), the plaintiff was challenging an act passed by the Iowa legislature. In discussing the issue of standing, the court clarified the elements of standing. First, the court reiterated that there are two elements to standing: having a

legal interest in the litigation and being injuriously affected. The first element, a specific personal or legal interest, means that the plaintiff must have a special interest as distinguished from a general interest. The second element, injuriously affected, means that the plaintiff has a direct stake in the outcome of the litigation rather than just a mere interest in the problem. Id. at 419.

The court, in Godfrey, went on to say:

> We no longer require the litigant to allege a violation of a private right and do not require traditional damages to be suffered. Instead, we require the litigant to allege some type of injury different from the population in general.

The court then cited Alons as an example where the plaintiffs only identified a general interest in the issue, rather than an injury in fact. Further clarifying the injury-in-fact element, the Godfrey court said that only a likelihood or possibility of injury is necessary for standing. The injury just cannot be conjectural or hypothetical, but must be concrete and actual or imminent. As an example, the court cited to Iowa Bankers Ass'n. v. Iowa Credit Union Dep't., 335 N.W.2d 439 (Iowa 1983), in which the banks claimed that agency rules gave a competitive advantage to credit unions. The Godfrey court said standing was shown in Iowa Bankers because:

> The likelihood of injury was demonstrated by allegations that some banks had actually lost business in the past as a result of the agency rules. . . . Importantly, the

> prior loss of business supported the likelihood of an imminent injury to support standing.

Godfrey, 752 N.W.2d at 444-445.

Applying the lessons of Godfrey to this case, it is clear that Sierra Club members have interests affected by the IUB decision and the pipeline different from the public generally. As explained above, Sierra Club members have the same kind of specific personal interest that afforded standing in Bushby and Laidlaw. Furthermore, the injury alleged by Sierra Club is concrete and real, not just conjectural. The pipeline goes under and through rivers and archaeological sites. And just as in the Iowa Bankers case, past experience (in this case, pipeline spills) raises the likelihood of spills from the Dakota Access pipeline that would damage the water and archaeological resources. Also, as set forth in the affidavits of Mr. Edwards and Ms. Raffensperger, Dr. James Hansen and Dr. Gene Takle presented testimony to the IUB that climate change is real, is occurring now, and has adverse consequences for Iowa's environment and human activity. That is not some remote possibility in the future.

It is clear from the foregoing review of the law of standing that the essence of standing is that a plaintiff has a sufficient stake in the case to ensure that the facts and

issues are properly litigated. As the court said in Godfrey v. State, 752 N.W.2d at 425:

> [S]tanding exists to ensure litigants are true adversaries, which theoretically allows the case to be presented to the court in the most effective manner. . . . Similarly, standing helps ensure that the people most concerned with an issue are in fact the litigants of the issue. . . . Standing also ensures that a real, concrete case exists to enable the court to feel, sense, and properly weigh the actual consequences of its decision.

There can be no doubt that the facts and issues were thoroughly and effectively litigated before the IUB and the district court by the Sierra Club. That is why the IUB and the district court concluded that Sierra Club had standing. Those conclusions should not be abandoned now.

It is also significant that Dakota Access never objected to or questioned Sierra Club's standing until Dakota Access' responsive brief in the district court. Although subject matter jurisdiction can usually be raised as an issue at any time, standing is an exception to that rule. Richards v. Iowa Dep't of Revenue, 414 N.W.2d 344 (Iowa 1987)(Richards I). Standing must be raised at the earliest possible opportunity. Id. In this case, the earliest opportunity was at the agency level, when Sierra Club first had to establish standing.

This Court has said that a person may be a proper party to agency proceedings, but not have standing to seek judicial review, Richards v. Iowa Dep't of Revenue, 454 N.W.2d 573

(Iowa 1990)(Richards II). However, the court in Richards II did not define the contours of that statement. It is possible that a person or entity could be a party to other agency action, not a contested case, where the party would not have standing to seek judicial review. In a contested case before an agency where a party has to prove standing in order to even be a party, that party is certainly aggrieved or adversely affected by an adverse ruling from the agency. It would be strange indeed if a party who established standing as Sierra Club was required to do before the IUB and who fully participated in the agency proceedings could not seek judicial review of the agency's ruling. Such a situation would defeat the purpose of Chapter 17A.

Section 17A.23(1), in fact, states that the provisions of Chapter 17A, including judicial review, "shall be construed broadly to effectuate its purposes." The purpose of § 17A.19 on judicial review 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).

Judicial review of agency action is not an original action in the district court. It is an appeal from the agency action and the district court has only appellate jurisdiction. Ft. Dodge Sec. Police, Inc. v. Iowa Dep't. of Revenue, 414 N.W.2d 666 (Iowa 1987). It has been held that standing cannot be raised for the first time on appeal. Richards I, supra. In this case, where the agency action was a contested case proceeding where Sierra Club was required to establish standing and no objection was made, it would defeat the purpose of judicial review to deny Sierra Club standing at this point.

With respect to the environmental issues that the IUB had to address regarding the Dakota Access pipeline, the Sierra Club and its members were uniquely poised to provide the adversarial role that is the essence of standing.

Keith Puntenney and LaVerne Johnson are part of what Dakota Access refers to as the "Lamb Group." As such, they are challenging the IUB decision to grant Dakota Access eminent domain authority. Mr. Puntenney and Mr. Johnson also sought judicial review individually to challenge the IUB denial of their request to have the pipeline rerouted around their property. In support of their individual claims, Mr. Puntenney and Mr. Johnson join in the arguments made by the Lamb Group regarding the issue of mootness.

Mr. Puntenney's and Mr. Johnson's claims are not moot because Dakota Access could still be required to move the pipeline. Or as suggested in the arguments of the Lamb Group, Mr. Puntenney and Mr. Johnson could obtain damages for trespass.

Thus, Mr. Puntenney's and Mr. Johnson's claims are not moot.

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

In order to grant a permit to Dakota Access the IUB had to properly find that the pipeline would promote public convenience and necessity. A lack of a legislative definition of that term does not mean that the IUB can decide for itself what the term means. Doe v. Ia. Bd. of Med. Examiners, 733 N.W.2d 705 (Iowa 2007); NextEra Energy Res. LLC v. IUB, 815 N.W.2d 30 (Iowa 2012). The court defers interpretation of a term to an agency only if the legislature clearly vested authority in the agency to interpret the term. Doe, supra.

The Iowa Supreme Court has said:

> In sum, in order for us to find the legislature clearly vested the Board with authority to interpret [a statutory provision], we
>
> > must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the

> agency interpretive power with the binding force of law over the elaboration of the provision in question.

NextEra, supra, at 37. (emphasis added).

In other words, "agencies are not given deference by this court to an interpretation of law without some clear indication that the general assembly intended this result." SZ Enterprises v. IUB, 850 N.W.2d 441 (Iowa 2014). Although a specific definition by the legislature of a statutory term is one factor weighing in favor of not giving deference to the agency, lack of a statutory definition does not mean that the agency is given deference. For example, in NextEra, supra, the terms under consideration were not legislatively defined and the court held that the agency was not delegated interpretive authority.

The IUB cites Application of National Freight Lines, 241 Iowa 179, 40 N.W.2d 612 (1950), for the proposition that the lack of a statutory definition indicates the legislature's intent to vest interpretive authority in the IUB. However, a close reading of National Freight Lines does not even offer a hint that supports the IUB's argument.

Dakota Access has cited the case of City of Marion v. Ia. Dept. of Rev & Fin., 643 N.W.2d 205 (Iowa 2002), also for the proposition that lack of a legislative definition means that the agency has been given authority to interpret a

statute. However, the operative fact in City of Marion was that Iowa Code § 422.68(1) gave the agency "the power and authority to prescribe all rules not inconsistent with the provisions of this chapter, necessary and advisable for its detailed administration and to effectuate its purposes." So the agency rule defining the term at issue was clearly pursuant to a broad grant of authority to adopt such rules. Chapter 479B gives the IUB no such broad grant of authority.

Nor, as suggested by Dakota Access, does Iowa Code § 474.9 confer broad authority on the IUB to the extent that its interpretation of a statute must be given deference. That section simply says that the IUB has general supervision of all pipelines and similar utilities. That is not the broad authority as existed in City of Marion or in Iowa Code § 476.2. And if § 474.9 were that broad, there would be no need for the expressly broad powers set forth in § 476.2.

The Appellees, as they have throughout, place great weight on the decision in S.E. Iowa Coop. Elec. Assn. v. IUB, 633 N.W.2d 814 (Iowa 2001). That case was discussed at some length in Sierra Club's opening Brief, but apparently, further clarification may be needed.

The Appellee's reliance on S.E. Iowa Coop. seems to be that the case allows the IUB to balance any and all factors as it sees fit. That was not the holding in that case. The

court described the proper considerations that the IUB could balance in that case as cost savings to customers, comparable service from the new provider, risk of power outages, and adequate and efficient service at a reasonable rate. Id. at 820-821. Furthermore, the court found that certain considerations were properly excluded from the IUB's consideration. Id. at 821-822. All of these factors, even those properly not considered in balancing the factors, pertained to the service to be provided by the new transmission lines.

So, the proper analysis in determining public convenience and necessity is to first make a finding whether the proposed project provides a needed service to members of the public who will be served at reasonable cost. If it will not provide such service, that ends the analysis and a permit should not be granted. Only if a finding of needed service is made does the analysis then require a balancing of the benefits to the public who will be served with the risks and damages that will result from the project.

Historically, five rationales have been developed to justify the purpose of a certificate of public convenience and necessity:

1. Prevention of "wasteful duplication" of physical facilities;

2. Prevention of "ruinous competition" among public service enterprises;
3. Preservation of service to marginal customers, so a new company entering the field would not skim off the most profitable customers;
4. Protection of investments and a favorable investment climate in public service industries;
5. Protection of the community against social costs (externalities), e.g., environmental damage or misuse of eminent domain.

W.K. Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Columbia L. Rev. 426, 428 (1979). These rationales give some perspective on the factors that should inform the determination of public convenience and necessity.

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

The first point is that much of Dakota Access' Brief is irrelevant. Dakota Access' argument is based on the contention that Sierra Club has argued that the service provided by the pipeline must serve Iowans. However, Sierra Club has never argued that the service that would determine public convenience and necessity must be limited to Iowans. Our argument is that the IUB did not properly determine if

there was needed cost-effective service to any members of the public.

It is also important to remember that the IUB did not discuss or give any weight to the issues that did relate to the service alleged to be provided by the pipeline. This was all explained in Sierra Club's opening Brief, p. 25-42. Although Dakota Access claims that its witnesses were "extraordinarily credible," Sierra Club's opening Brief explains why they were not credible.

Finally, the Appellees attempt to rely on the substantial evidence standard as a refuge to support the IUB decision. But Sierra Club has not asserted lack of substantial evidence. The IUB's errors go beyond simply the lack of substantial evidence, as explained in our opening Brief. Even so, the substantial evidence standard does not leave the Court as helpless as the Appellees infer. The Court's review for substantial evidence is fairly intensive and the Court does not simply rubber stamp the agency's finding of fact. Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493 (Iowa 2003). Substantial evidence is what a reasonable mind would accept as adequate to reach a given conclusion. Titan Tire Corp. v. Employment Appeal Bd., 641 N.W.2d 752 (Iowa 2002). So the Court can determine for itself, with a reasonable mind, if the evidence was adequate to reach a conclusion.

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

In responding to this issue the IUB largely relies on its own Final Decision and Order for the proposition that Dakota Access purportedly took extensive steps in designing the route of the pipeline. It is clear from the context of the argument that the reference was to environmental considerations. The only evidence it cites is Exhibit 5 (App. v. I p. 762) presented by Monica Howard, Dakota Access' environmental person. But Mr. Puntenney's claim has nothing to do with environmental considerations. So the IUB's argument is irrelevant.

Contrary to the IUB's argument, Mr. Puntenney's claim that the pipeline could be moved from his property could not be made by every landowner. Not every landowner was subject to a deliberate diversion of the route across their property. Nor could every landowner point to adjacent property where Dakota Access already had a voluntary easement.

The bottom line is that Mr. Puntenney has an extremely unique situation where Dakota Access veered from a straight line to make a deliberate diversion across Mr. Puntenney's property without any justification being presented in the record.

In the interests of efficiency and judicial economy, Mr. Puntenney joins in and incorporates by reference the reply brief, 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.

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

The IUB, in its Brief, relies on the condition it imposed regarding the requirement that Dakota Access install the pipeline under Mr. Johnson's deepest drainage tile. However, the IUB fails to mention the testimony recited in Mr. Johnson's opening Brief, p. 46-49, that just installing the pipeline under his deepest tile would not address his concerns. The IUB failed to address this testimony in its Final Decision and Order.

Mr. Johnson presented evidence that his tiling situation was unique and there was no evidence to the contrary.

In the interests of efficiency and judicial economy, Mr. Johnson joins in and incorporates by reference the reply brief, 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

The briefs of the Appellees demonstrate their attitude that Dakota Access had a right to a permit and that the IUB decision cannot be challenged. That is clearly not the legislative intent of Chapter 479B or Chapter 17A of the Iowa Code.

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**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 636 lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

___ November 4, 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 Reply Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

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