# APPENDIX

# APPENDIX

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## APPENDIX A

**IN THE SUPREME COURT OF IOWA**

**No. 17–0423**

**[Filed May 31, 2019]**

**[Amended July 30, 2019]**

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|---|---|
| KEITH PUNTENNEY; LAVERNE I. 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, | ) |
| Appellants, | ) |
| and | ) |
| HICKENBOTTOM EXPERIMENTAL FARMS, INC. and PRENDERGAST ENTERPRISES, INC, | ) |
| Petitioners, | ) |
| vs. | ) |
| IOWA UTILITIES BOARD, A Division | ) |

of the Department of Commerce, State of Iowa,

Appellee,

and

OFFICE OF CONSUMER ADVOCATE and THE MAIN COALITION,

Intervenors-Appellees,

and

DAKOTA ACCESS, LLC,

Appellee.

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Appeal from the Iowa District Court for Polk County, Jeffrey D. Farrell, Judge.

Landowners appeal a district court decision denying a petition for judicial review of a decision by the Iowa Utilities Board authorizing a company to use eminent domain to build a crude oil pipeline. **AFFIRMED.**

William E. Hanigan and Jason R. Lawrence of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellants Richard R. Lamb; Marian D. Johnson by Agent, Verdell Johnson; Northwest Iowa Landowners Association; and Iowa Farmland Owners Association, Inc.

Wallace L. Taylor of Law Offices of Wallace L. Taylor, Cedar Rapids, for appellants Keith Puntenney, LaVerne I. Johnson, and Sierra Club Iowa Chapter.

Bret A. Dublinske and Brant M. Leonard of Fredrikson & Byron, P.A., Des Moines, for appellee Dakota Access, LLC.

David J. Lynch (until withdrawal), Cecil I. Wright II, and Benjamin J. Flickinger, Des Moines, for appellee Iowa Utilities Board.

Mark R. Schuling and John S. Long, Des Moines, for intervenor-appellee Office of Consumer Advocate.

Matthew C. McDermott and Espnola F. Cartmill of Belin McCormick, P.C., Des Moines, for intervenor-appellee The Main Coalition.

David Bookbinder, Washington, D.C., and Scott L. Long of Long & Gilliam, Des Moines, for amicus curiae Niskanen Center.

**MANSFIELD, Justice.**

The Bakken Oil Field has made North Dakota the second leading oil-producing state in our country. Almost all of America's oil-refining capacity, however, is located elsewhere in the nation. For this reason, an underground crude oil pipeline was proposed that would run from western North Dakota across South Dakota and Iowa to an oil transportation hub in southern Illinois. Following a lengthy administrative proceeding, the Iowa Utilities Board (IUB) approved the construction of this pipeline in Iowa and approved

the use of eminent domain where necessary to condemn easements along the pipeline route.

Several landowners and an environmental organization sought judicial review. They contended the pipeline did not serve the "public convenience and necessity" as required by law, *see* Iowa Code § 479B.9 (2016); did not meet the statutory standard required for a taking of agricultural land, *see id.* §§ 6A.21(1)(*c*), .22(1); and did not meet the constitutional definition of "public use" set forth in article I, section 18 of the Iowa Constitution and the Fifth Amendment to the United States Constitution. Two of the landowners also raised claims personal to them. The district court denied the petitions for judicial review, and the petitioners have appealed.

On appeal, we conclude that the IUB's weighing of benefits and costs supports its determination that the pipeline serves the public convenience and necessity. We also conclude that the pipeline is both a company "under the jurisdiction of the [IUB]" and a "common carrier," and therefore is not barred by Iowa Code sections 6A.21 and 6A.22 from utilizing eminent domain. *See id.* §§ 6A.21(2), .22(2)(*a*)(2). In addition, we conclude that the use of eminent domain for a traditional public use such as an oil pipeline does not violate the Iowa Constitution or the United States Constitution simply because the pipeline passes through the state without taking on or letting off oil. Lastly, we determine that the IUB's resolution of the two individual landowner claims was supported by the law and substantial evidence. For these reasons, we affirm the district court's judgment.

## I. Background Facts and Proceedings.

In October 2014, Dakota Access, LLC (Dakota Access) filed documents with the IUB disclosing its intent to construct an underground crude oil pipeline from western North Dakota to Patoka, Illinois, an oil transportation hub. The pipeline would traverse Iowa from the northwest corner to the southeast corner of the state, passing through eighteen counties over a distance of approximately 343 miles.

In December 2014, as required by law, Dakota Access held informational meetings, attended by IUB representatives, in each of the eighteen counties. *See id.* § 479B.4. The following month, Dakota Access filed a petition with the IUB for authority to construct the pipeline. *See id.* §§ 479B.4–.5. In the petition, Dakota Access sought "the use of the right of eminent domain for securing right of way for the proposed pipeline project." *See id.* § 479B.16. Various parties requested and were granted permission to intervene, including landowners, trade unions, business associations, and environmental groups.

On June 8, the IUB filed a procedural schedule for the case in which it identified three issues for consideration:

> (a) whether the proposed pipeline will promote the public convenience and necessity, (b) whether the location and route of the proposed pipeline should be approved, and (c) whether and to what extent the power of eminent domain should be granted . . . .

The hearing on Dakota Access's application took place in November and December 2015. On the first day, the IUB received public comments from over 200 people both in support of and against the pipeline. An eleven-day evidentiary hearing followed. During that hearing, sixty-nine witnesses testified. After the conclusion of the hearing, the IUB received posthearing briefs.

On March 10, 2016, the IUB issued a 159-page final decision and order. First, it addressed whether the pipeline would promote the public convenience and necessity. The IUB concluded that the public convenience and necessity test should be treated "as a balancing test, weighing the public benefits of the proposed project against the public and private costs or other deteriments as established by the evidence in the record." It also concluded that it could consider "public benefits outside of Iowa" for an interstate oil pipeline. In addition, the IUB noted that climate change is "a very important issue," but that the pipeline "represents, at most, a change in the method of crude oil deliveries that are already taking place and that will continue to take place regardless of whether this pipeline is built." The IUB further found that "the increased safety associated with pipeline transport of crude oil is significant" as compared to existing rail transportation of that oil.

Continuing, the IUB also found overall economic benefits to Iowa from the construction and operation of the pipeline. And while it observed that it would be impossible to build and operate a pipeline without any environmental impact, it found that the route was

"selected in a manner intended to minimize adverse environmental impacts" and specifically "to minimize the possibility of leaks." It added that "Dakota Access has taken reasonable steps to reduce the safety risks associated with the proposed pipeline."

The IUB required that the parent companies of Dakota Access provide unconditional financial guarantees of the pipeline's liabilities and made a series of modifications to the agricultural impact mitigation plan. Among other things, the IUB required that the pipeline be installed at a minimum depth of forty-eight inches where reasonably possible, that all tiling be repaired and restored, and that Dakota Access provide a GPS map to the landowner of any tiling found during construction.

Ultimately, the IUB found that the pipeline would promote the public convenience and necessity. It did so primarily for two reasons:

> First, the proposed pipeline represents a significantly safer way to move crude oil from the field to the refinery when compared to the primary alternative, rail transport. The most credible evidence in this record, based on data from the U.S. Department of Transportation, shows that the spill incident rate for transport of crude oil by rail transport is three to four times higher than the incident rate for pipeline transport on a ton-mile basis. The oil is going to be produced and shipped as long as the market demands it; given that reality, shipping by the safest available method makes sense.

Second, in the IUB's view, there would be considerable economic benefits "associated with the construction, operation, and maintenance of the proposed pipeline."

On the other side of the ledger, the IUB noted that there were potential adverse environmental and agricultural impacts from the pipeline as well as effects on the landowners whose land would be trenched. Yet, with certain precautionary measures in place, it found that the benefits outweighed the costs associated with the project.

Regarding the pipeline's route through Iowa, the IUB observed that Dakota Access had used a software program that evaluated alternative routes and "developed a route that would avoid those land areas where the pipeline could impact critical structures or habitat." It found that a zigzag route that contained right angles and followed division lines (as proposed by some landowners) would create additional safety issues.

The IUB then turned to the eminent domain issues. It found that sections 6A.21 and 6A.22 gave authority to a pipeline company under the IUB's jurisdiction to condemn an easement for "public use." It concluded that this statutory public-use requirement had been met. In addition, it determined that constitutional objections to the exercise of eminent domain were resolved by the statutory public-use determination.

The IUB also considered a series of objections by landowners to the exercise of eminent domain over their specific properties. In several instances, it sustained the objections in whole or in part. Thus, in

one case, it required that the route be relocated to avoid additional buildings that were being constructed for a turkey farm. In response to another landowner's plea, the IUB directed the preservation of certain fruit trees that were roosting places for several species of bats. The IUB also refused, on legal grounds, to allow the condemnation of property that was owned by governmental entities such as counties.

The IUB was not persuaded, however, by landowner Keith Puntenney's objection. Puntenney requested that the pipeline's path be diverted because he wanted to install three wind turbines on his property in the area of the proposed route. But the IUB concluded that there was no "firm plan" to install wind turbines and "it has not been shown that the pipeline would necessarily interfere with the possible future installation of wind-driven turbine generators." As to landowner LaVerne Johnson, the IUB did not agree that the pipeline could not cross his tiling system, although it did require that the pipeline be bored under his tiling system including the main concrete drainage line.

Following the IUB's final decision and order, several motions for clarification and rehearing were filed. On April 28, the IUB issued an order denying these motions.

On May 26 and May 27, several petitions for judicial review were filed in the Polk County District Court. The petitioners included Puntenney, Johnson, the Sierra Club, and a group of landowners known as the Lamb petitioners. The petitions were later consolidated for hearing.

Meanwhile, in June, Dakota Access began construction of the pipeline in Iowa. On August 9, the Lamb petitioners asked the district court to stay any construction activity on their property. The stays would have been limited to construction on the fifteen parcels of land owned by the Lamb petitioners and would not have extended statewide. In their expedited relief request, the Lamb petitioners argued, "Until the pipeline trench is actually dug, petitioners' claims are not moot," and added that "if they do not receive a stay before [Dakota Access's] pipeline trench is dug, any remedy will be inadequate."

On August 21, the district court denied the request for stay because the Lamb petitioners had failed to seek relief first from the IUB. *See id.* § 17A.19(5)(*c*). The Lamb petitioners returned to the IUB, which denied the stay. On August 29, the district court denied the Lamb petitioners' renewed request for a stay. No request was made to this court for interlocutory review of the denial of the stay.

On February 15, 2017, following briefing and argument, the district court denied the petitions for judicial review. Regarding the question of public convenience and necessity, the court concluded that the IUB had "balanced the pros and cons of the project and entered a reasonable decision based on the evidence presented." It added that the decision was "supported by substantial evidence."

On the eminent domain question, the district court reasoned that Iowa Code sections 6A.21 and 6A.22 conferred condemnation authority on common-carrier pipelines under the jurisdiction of the IUB. It also

found that the condemnations were for a public use, thus meeting the requirements of the Fifth and Fourteenth Amendments and article I, section 18 of the Iowa Constitution. Finally, it overruled the specific claims advanced by Puntenney and Johnson as to the exercise of eminent domain over their properties.

Puntenney, Johnson, the Sierra Club, and the Lamb petitioners appealed. We retained the appeal.

## II. Standard of Review.

When an administrative review proceeding is before us, we "apply the standards set forth in section 17A.19(10) and determine whether our application of those standards produce[s] the same result as reached by the district court." *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 207 (Iowa 2014) (alteration in original) (quoting *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 589 (Iowa 2004)).

Accordingly, "we review constitutional issues in agency proceedings de novo." *Id.* at 208 (quoting *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 44 (Iowa 2012)); *see also* Iowa Code § 17A.19(10)(*a*).

Regarding an agency's interpretation of a statute:

> If the legislature clearly vested the agency with the authority to interpret specific terms of a statute, then we defer to the agency's interpretation of the statute and may only reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." If, however, the legislature did not clearly vest the agency

> with the authority to interpret the statute, then our review is for correction of errors at law.

*NextEra*, 815 N.W.2d at 37 (citations omitted) (quoting *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 857 (Iowa 2010)); *see also* Iowa Code § 17A.19(10)(*c*), (*l*).

Here, we think the legislature clearly vested the IUB with the authority to interpret "public convenience and necessity" as used in Iowa Code section 479B.9. We reach this conclusion for several reasons.

First, we believe "public convenience and necessity" is a term of art within the expertise of the IUB. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) (referring to "a substantive term within the special expertise of the agency").

In addition, the Iowa Code itself indicates that the legislature wanted the IUB to have leeway in determining public convenience and necessity. Section 479B.9 states,

> The board may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper. A permit shall not be granted to a pipeline company *unless the board determines* that the proposed services will promote the public convenience and necessity.

(Emphasis added.) The phrase "unless the board determines" seemingly affords the IUB deference. Otherwise, if the matter were to be left to judicial determination, the statute would say something like,

"unless the proposed services will promote the public convenience and necessity."

Additionally, we have previously held that it is not a judicial function to determine whether a service will promote the public convenience and necessity. *See Application of Nat'l Freight Lines*, 241 Iowa 179, 186, 40 N.W.2d 612, 616 (1950) ("We have held several times that the determination whether the service proposed will promote the public convenience and necessity is a legislative, not a judicial, function. . . . It is not for the district court or this court to determine whether the commission has acted wisely nor to substitute its judgement for that of the commission.")

On the other hand, we do not defer to the IUB's interpretation of Iowa Code sections 6A.21 and 6A.22. Chapter 6A is a general eminent domain law that applies to all state agencies, and the term "public use" is not "uniquely within the subject matter expertise of the agency"—here the IUB. *Renda*, 784 N.W.2d at 14.

Lastly, we review the IUB's factual findings under a substantial evidence standard. *See* Iowa Code § 17A.19(10)(*f*). "The agency's decision does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion." *NextEra*, 815 N.W.2d at 42 (quoting *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 603 (Iowa 2004)).

### III. Standing of the Sierra Club.

We must first consider two threshold matters—standing and mootness. Dakota Access challenges the standing of the Sierra Club. The Sierra Club is a

nonprofit environmental organization. The Sierra Club is asserting the interests of two of its members—Mark Edwards and Carolyn Raffensperger. Edwards lives in Boone and worked for the Iowa Department of Natural Resources as a trail coordinator for thirty years. He submitted an affidavit expressing concern that the pipeline will damage Iowa's waterways, contribute to climate change, and destroy Native American burial grounds and cultural sites.

Raffensperger lives in Ames. Her home sits about one mile from the pipeline. She submitted an affidavit voicing concern for her own safety and the immediate environment around her property as well as her belief that the pipeline will contribute to climate change, damage Native American cultural sites, and pollute Iowa waterways.

Dakota Access does not dispute that the Sierra Club can assert the interests of its members for standing purposes. *See Citizens for Wash. Square v. City of Davenport*, 277 N.W.2d 882, 886 (Iowa 1979). However, Dakota Access points out that Sierra Club has not shown that any of its members owns property on the pipeline route. Accordingly, Dakota Access maintains that the Sierra Club lacks standing.

We disagree. In *Bushby v. Washington County Conservation Board*, we adopted the United States Supreme Court's standard for standing in environmental disputes. 654 N.W.2d 494, 496–97 (Iowa 2002) ("The United States Supreme Court has held that plaintiffs in cases involving environmental concerns establish standing if 'they aver that they use the affected area and are persons "for whom the

aesthetic and recreational values of the area will be lessened" by the challenged activity.' " (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000))).

Here, Sierra Club met the *Bushby* standard. Sierra Club members Raffensperger and Edwards submitted affidavits describing their use and enjoyment of the rivers, streams, soil, and other natural areas and aesthetics. They described their concerns that the construction and operation of the pipeline would have adverse environmental impacts on those areas that they use and enjoy.

Raffensperger's and Edwards's concerns are not entirely speculative, remote, and in the uncertain future as Dakota Access suggests. Sierra Club presented the IUB with actual evidence of pipeline accidents that have resulted in millions of dollars in cleanup and damages.

Nothing in the Iowa Code limits standing in pipeline proceedings to individuals whose property is in the direct path of the pipeline. Section 479B.7 allows any person "whose rights or interests may be affected by the proposed pipeline" to file objections. Iowa Code § 479B.7. Section 17A.19 authorizes any "person or party whose is aggrieved or adversely affected by agency action" to seek judicial review. *Id.* § 17A.19. The Sierra Club has standing.

**IV. Mootness.**

Dakota Access next argues that the appeal is moot. This presents a closer issue. The pipeline was actually completed two years ago in May 2017 at a cost of

approximately $4 billion. Since then it has been regularly carrying crude oil from North Dakota to Illinois. Its capacity is 450,000 barrels of oil per day. The record does not indicate how much Dakota Access actually paid for easements to bury the pipeline underground in Iowa, but the projected cost was $85 million. Where the pipeline was buried during construction, land restoration has already taken place.

Iowa Code section 17A.19 states in part, "The filing of the petition for review does not itself stay execution or enforcement of any agency action." *Id.* § 17A.19(5)(*a*). In short, it places the burden on the party contesting agency action to obtain a stay. As noted above, the Lamb petitioners' application for a stay from the district court was denied nearly three years ago. They did not seek a stay from this court, nor did they ask to expedite this appeal when it was filed over two years ago.[1]

Ninety years ago, this court ruled that an eminent domain appeal challenging the taking of the plaintiff's twenty-tree apple orchard was moot once the road in question had been built. *Welton v. Iowa State Highway Comm'n*, 208 Iowa 1401, 1401, 227 N.W. 332, 333 (1929). We explained,

> It is substantiated by uncontroverted affidavit that, *subsequent to the decision of the district court in this case, and in the absence of an order staying appellees' actions, the road in controversy was established*, and the land in question,

[1] Filing an appeal does not result in an automatic stay of a trial court ruling. *See* Iowa R. App. P. 6.601(1).

> including the claimed orchard, was taken and used by the appellees for primary road purposes, and that the road has been fully constructed and paved through the premises involved in this action; that the appellant has perfected an appeal to the district court of Mahaska county, from the award of the condemnation commissioners, as to the amount of his damages, by reason of the taking of the identical property involved in this action, and which cause was assigned for trial in the district court of Mahaska county, to begin on the very day of the submission of this cause to this court. It will thus be observed that, *during the pendency of the appeal, the defendant did not obtain a restraining order from this court*, as was done in the Hoover Case, supra. This court has the power, upon application being made, to grant a restraining order to maintain the status quo of the parties during the pendency of an appeal, and, when no other means of protection is afforded by the law, there is no hesitancy in granting the order.
>
> It is apparent from the uncontroverted affidavit that the orchard has been taken for highway purposes and the paving laid. No order which we can now make can preserve to appellant his orchard.

*Id.* (emphasis added) (citations omitted).

*Welton* arguably should control here. As in *Welton*, the petitioners lost on the merits and then did not try

to obtain a stay from this court while a substantial construction project went forward. *See id.*

Similarly, in *Porter v. Board of Supervisors*, we held it was too late for us to enjoin condemnation proceedings once a drainage ditch had been installed:

> We call attention also to the fact that it was stated in oral argument, and not denied, that the construction had already taken place and that the canal or ditch was in operation. There was no stay of proceedings nor application in this court for an order to stay construction. Under these circumstances the construction of the ditch became an established fact before the case was submitted to us for decision.

238 Iowa 1399, 1404, 28 N.W.2d 841, 844 (1947).

On the other hand, in *Lewis Investments, Inc. v. City of Iowa City*, we held that an appeal from an order condemning a property as a nuisance so the city could rehabilitate it was *not* moot, because the only thing that had happened was that the city had paid its deposit and taken possession of the property. 703 N.W.2d 180, 184 (Iowa 2005). We observed that

> the city's ultimate goal—transfer of the property to a private individual for rehabilitation or demolition—has not become an accomplished fact like the road in *Welton*. There is nothing in the record to show that the property has been transferred or that substantial improvements have been made to the property that would place it beyond the power of this court to restore the

> parties to their former positions. Therefore, we hold the appeal is not moot.

*Id.* In short, *Lewis Investments* was distinguishable from *Welton* because no work had been performed on the property.

The petitioners counter that the case is not moot because the courts could order relief other than a tear-out of the entire pipeline. For example, the pipeline could be partially removed and rerouted around the petitioners' properties. Another possibility is that the petitioners could obtain trespass damages. It is noteworthy that most property owners along the route chose to make voluntary easement agreements with Dakota Access to allow the pipeline to go underneath their farmland; hence, their rights and status might not be affected by a decision in this case. The petitioners also counter that a lawsuit of these constitutional and practical dimensions should not become moot simply because Dakota Access chose to proceed with construction while the petitioners' judicial review proceeding was still pending.

One case worth considering is *Grandview Baptist Church v. Zoning Board of Adjustment*, 301 N.W.2d 704 (Iowa 1981). In *Grandview Baptist*, a church obtained a permit from the building commissioner to build a steel storage building. *Id.* at 706. Within days, a contractor built the building and several neighboring property owners appealed the granting of the permit to the zoning board of adjustment. *Id.* The board ruled that the structure was not proper and had to be removed. *Id.* Both the district court and our court upheld the board's action. *Id.* at 708–09.

In our decision, we rejected the church's argument that it was too late for our court to do anything about the building. *Id.* at 709. We elaborated,

> The objectors timely appealed to the board, but before their appeal was heard the building had been constructed. The Church claims the objectors are estopped because the Church has vested rights in the building.
>
> Under such circumstances the Church cannot successfully invoke the doctrine of vested rights so as to deprive the objectors of the fruits of their appeal. Otherwise the right of appeal would be meaningless.

*Id.*

We are not persuaded that *Grandview Baptist* controls here. There the contractor put up the storage building based on an administrator's go-ahead before any hearing could occur. *Id.* at 706. The church then lost at the board of adjustment and at every subsequent stage of the proceedings. *Id.* The "right of appeal" referred to in *Grandview Baptist Church* was the right to appeal an individual's granting of a permit to the board of adjustment, not the right to appeal an agency action to the district court or a district court ruling to the Iowa Supreme Court. *See id.* at 709.

Iowa Code section 414.11 governs city board of adjustment appeals and states that an appeal from the city administrative officer to the board of adjustment

> stays all proceedings in furtherance of the action appealed from, unless the officer from whom the

> appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with the officer that by reason of facts stated in the certificate a stay would in the officer's opinion cause imminent peril to life or property.

This is different from section 17A.19(5)(*a*), which provides that an appeal does not stay administrative action.

Nonetheless, after careful consideration, we do not believe the present appeal is moot. "The key in assessing whether an appeal is moot is determining whether the opinion would be of force or effect in the underlying controversy." *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 64 (Iowa 2001). We are not persuaded that a decision in this case would lack force or effect. Although dismantling of the pipeline would not be feasible, the IUB still has authority to impose other "terms, conditions, and restrictions" to implement a ruling favorable to the petitioners. Iowa Code § 479B.9; *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 61–64 (D.D.C. 2018) (dismissing National Historic Preservation Act claims as mooted by the construction of the Dakota Access pipeline, but proceeding to determine other claims on the merits).

## V. Public Convenience and Necessity.

Section 479B.9 gives the IUB authority to issue a permit for a pipeline that "will promote the public convenience and necessity." Iowa Code § 479B.9. Chapter 479B begins,

> 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.

*Id.* § 479B.1.

Regarding the meaning of "public convenience and necessity," our court has held,

> The words are not synonymous, and effect must be given both. The word "convenience" is much broader and more inclusive than the word "necessity." Most things that are necessities are also conveniences, but not all conveniences are necessities. . . . The word "necessity" has been used in a variety of statutes . . . . It has been generally held to mean something more nearly akin to convenience than the definition found in standard dictionaries would indicate. So it is said the word will be construed to mean not absolute, but reasonable, necessity.

*Thomson v. Iowa State Commerce Comm'n*, 235 Iowa 469, 475, 15 N.W.2d 603, 606 (1944) (quoting *Wis. Tel. Co. v. R.R. Comm'n*, 156 N.W. 614, 617 (Wis. 1916)). In its order, the IUB looked to *Thomson* for guidance as

well as an Illinois case construing the same phrase, which held,

> The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute. No definition can be given that would fit all statutes. The meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found.

*Wabash, Chester & W. Ry. v. Commerce Comm'n ex rel. Jefferson Sw. R.R.*, 141 N.E. 212, 215 (Ill. 1923). The IUB also relied on our decision in *S.E. Iowa Cooperative Electric Association v. Iowa Utilities Board*, which approved the IUB's use of a balancing test in a related context and its determination that "the substantial benefits [of the project] outweighed the costs." 633 N.W.2d 814, 821 (Iowa 2001).

In our view, the IUB's balancing approach to public convenience and necessity should be upheld because it is not "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l*). The approach is consistent with our prior caselaw and is supported by legal authority elsewhere. *See Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 23, 81 S. Ct. 435, 447 (1961) (indicating that " 'public convenience and necessity' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination").

Puntenney, Johnson, and the Sierra Club challenge the IUB's determination of public convenience and

necessity on several grounds. First, they urge that the pipeline does not serve the public because shippers wanted it. But shippers wanted it as a way of reducing transportation costs. Given that petroleum products are commodities sold in a competitive market, lower costs for crude oil transportation tend to keep prices of crude oil derivatives lower than they otherwise would be.

Iowa is a heavy user of petroleum products. Iowa consumes the equivalent of 85.2 million barrels of oil per year but produces no oil itself. Iowa is fifth in the country in per capita energy use. Iowa ranks eighth in the country in per capita gasoline consumption. Iowa's percentage of gross domestic product from manufacturing ranks near the top in this country, and Iowa ranks sixth highest nationally in energy consumption per capita in its industrial sector. The record indicates that the Dakota Access pipeline will lead to "longer-term, reduced prices on refined products and goods and service dependent on crude oil and refined products." We agree with the IUB that these are public benefits, even though the pipeline also provides benefits to the shippers of crude oil. *See S.E. Iowa Coop. Elec.*, 633 N.W.2d at 820 (stating that "cost savings are a legitimate consideration").[2]

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[2] The Sierra Club makes a forceful environmental argument against the Dakota Access pipeline. But this environmental argument *against* the pipeline to a degree bolsters the economic argument *for* the pipeline. That is, the Sierra Club criticizes the pipeline for making it "easier" to bring Bakken Oil Field oil to the market. Another way of saying "easier" is "cheaper" or "more economical."

Next, Puntenney, Johnson, and the Sierra Club contend that drilling in the Bakken Oil Field has declined, demonstrating a reduced need for pipeline transportation. But according to the evidence before the IUB, actual crude oil production from the Bakken Oil Field has only declined about 10%, from approximately 1.2 million barrels per day to approximately 1.1 million barrels per day. At the time of the hearing, the demand for the pipeline was still there. As the IUB pointed out, shippers had executed long-term "take or pay" contracts, committing to pay for pipeline use whether they shipped oil or not.

Additionally, Puntenney, Johnson, and the Sierra Club maintain that rail transportation is safer than the pipeline transportation that would replace it. Various data were presented to the IUB on this issue. However, the IUB found, and the data support, that on a volume-distance basis (i.e., per barrel-mile), pipeline transportation of oil is safer than rail transportation of oil.

Lastly, Puntenney, Johnson, and the Sierra Club challenge the IUB's reliance on secondary economic benefits resulting from the construction and operation of the pipeline in Iowa. For example, the IUB observed that the pipeline would result in at least 3100 construction jobs in Iowa, at least twelve long-term jobs for Iowans, and more than $27 million annually in property tax revenue. As the Puntenney petitioners point out, Dakota Access, the IUB, and the district court cited no authority that these types of benefits can be taken into account in making a public-convenience-and-necessity determination. Yet the Puntenney

petitioners cited no authority that these benefits *cannot* be considered. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1094–95 (9th Cir. 2011) (noting that the Surface Transportation Board considered "new jobs created by the construction and operation of the new rail line"); *Pliura Intervenors v. Ill. Commerce Comm'n*, 942 N.E.2d 576, 585 (Ill. App. Ct. 2010) (considering, among other things, "increased revenues for local economies" resulting from a pipeline extension); *Accokeek, Mattawoman, Piscataway Creeks Cmtys. Council, Inc. v. Md. Pub. Serv. Comm'n*, 133 A.3d 1228, 1240 (Md. Ct. Spec. App. 2016) (treating "monetary benefits from construction employment and longer-term tax payments" as benefits relevant to the public-convenience-and-necessity determination). We are not persuaded that the IUB acted improperly in factoring these benefits into the public-convenience-and necessity determination.

For the foregoing reasons, upon our review of the record, we conclude the IUB's legal determinations with respect to public convenience and necessity were not "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law" and its factual determinations were supported by "substantial evidence." Iowa Code § 17A.19(10)(*f*), (*l*).

## VI. Statutory Limits on the Exercise of Eminent Domain.

The Lamb petitioners argue that Dakota Access's exercise of eminent domain over farmland would violate Iowa Code sections 6A.21 and 6A.22. Section 6A.21(1)(*c*) limits the authority to condemn agricultural lands by defining "public use," "public purpose," or

"public improvement" in a way that requires landowner consent. *Id.* § 6A.21(1)(*c*). Hence, section 6A.21(1)(*c*) reads, " '*Public use*' or '*public purpose*' or '*public improvement*' does not include the authority to condemn agricultural land for private development purposes unless the owner of the agricultural land consents to the condemnation." *Id.*

But section 6A.21 also carves out exceptions. *See id.* § 6A.21(2). One of them is that "[t]his limitation also does not apply to utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board." *Id.*

The Lamb petitioners argue vigorously that Dakota Access is not a "utility." That, however, is not the full wording of the exception. We agree with the IUB and the district court that Dakota Access is a "compan[y] . . . under the jurisdiction of the [IUB]," *id.*, via the permit process laid out in chapter 479B. Therefore, landowner consent is not required by section 6A.21 prior to condemnation.

The Lamb petitioners urge us to apply the canon of *ejusdem generis* to section 6A.21(2). Hence, they ask us to interpret "persons, companies, or corporations" as related to the immediately preceding word, "utilities." Their argument is difficult to follow. If the Lamb petitioners are saying that the phrase "persons, companies, or corporations" refers to *kinds* of utilities, then the word "utilities" would be sufficient by itself and the remaining language would become unnecessary. That would contravene an established principle of statutory construction. *See id.* § 4.4(2) (setting forth the presumption that "[t]he entire statute

is intended to be effective"). On the other hand, if the Lamb petitioners are saying that the phrase "persons, companies, or corporations" refers to entities *other than* utilities that are nonetheless under the jurisdiction of the IUB, then Dakota Access seemingly falls in that category.

The IUB also advances an alternative ground for rejecting the Lamb petitioners' argument. It notes that section 6A.22(2) authorizes "[t]he acquisition of any interest in property necessary to the function of . . . a common carrier." *Id.* § 6A.22(2)(*a*)(2). In the IUB's view, Dakota Access qualifies as a common carrier.

There is no dispute that most of the pipeline capacity has been contracted to shippers in advance; however, 10% is required to be made available for walk-up business. That is all the Federal Energy Regulatory Commission requires of a common carrier. *See, e.g.*, *Navigator BSG Transp. & Storage*, 152 F.E.R.C. ¶ 61,026, at 61,127 (July 10, 2015); *Shell Pipeline Co.*, 146 F.E.R.C. ¶ 61,051, at 61,238 (Jan. 29, 2014). The IUB maintains it is enough here.

Based on the record before us, and our own common-carrier precedents, we agree with the IUB. It would be unrealistic to require a $4 billion pipeline to depend entirely on walk-up business, just as it would be unrealistic to require an airline to refuse all advance bookings for a flight. The key is whether spot shippers have access, and the federal agency with expertise in the matter has concluded that 10% is sufficient. We have said that "a common carrier need not serve all the public all the time." *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996) (per

curiam). A common carrier may combine "other vocations" and still be considered a common carrier. *Id.* at 811. Long ago we held that a trucker who transported films and advertising for members who had signed an alleged association agreement was still a common carrier where he also transported films and advertising for theaters that had not signed the agreement. *State ex rel. Bd. of R.R. Comm'rs v. Rosenstein*, 217 Iowa 985, 989–93, 252 N.W. 251, 254–55 (1934). Significantly, Dakota Access does not involve a situation where service "has been *limited* to those under contract." *State ex rel. Bd. of R.R. Comm'rs v. Carlson*, 217 Iowa 854, 857, 251 N.W. 160, 161 (1933) (emphasis added).[3]

The Lamb petitioners insist that the Dakota Access pipeline is not a common carrier because it does not serve "the Iowa public." Yet adding the modifier "Iowa" would be a gloss on the statute for which there is no basis in the statute itself. For these reasons, we find no violation of sections 6A.21 and 6A.22.

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[3] In *Mid-American Pipeline Company v. Iowa State Commerce Commission*, we said that a grant of eminent domain authority to a private company to construct a pipeline exclusively for its own use was "for a strictly private purpose" and "beyond legislative authority." 253 Iowa 1143, 1146–47, 114 N.W.2d 622, 624 (1962) (noting that "Northern intends to handle only its own products by pipe line and is not a common carrier of such products"). Those are not the facts here. Again, Dakota Access serves a variety of customers and 10% of pipeline capacity is available on a walk-up basis. *See also Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 922–24 (Tex. App. 2013) (determining that a pipeline would be a common carrier because there was a "reasonable probability" it would ship crude petroleum for one or more customers who would retain ownership of the oil).

## VII. Constitutional Authority for the Exercise of Eminent Domain.

This brings us to the most significant issue in the case, whether the use of eminent domain for the Dakota Access pipeline as authorized by Iowa Code section 479B.16 violates article I, section 18 of the Iowa Constitution or the Fifth and Fourteenth Amendments to the United States Constitution.

Section 479B.16 addresses the use of eminent domain for pipelines. It provides in part,

> 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, not exceeding seventy-five feet in width for right-of-way and not exceeding one acre in any one location in addition to right-of-way for the location of pumps, pressure apparatus, or other stations or equipment necessary to the proper operation of its pipeline.

Iowa Code § 479B.16.

Article I, section 18, the takings clause in the Iowa Constitution, states in part,

> Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on

> account of the improvement for which it is taken.

Iowa Const. art. I, § 18. The Fifth Amendment to the United States Constitution similarly provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

We have said that we consider federal cases interpreting the Federal Takings Clause "persuasive in our interpretation of the state provision," but "not binding." *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006); *see also Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005).

The Lamb petitioners deny that the Dakota Access pipeline furthers a constitutionally valid public use. They contend that the indirect economic benefits of an infrastructure project, such as jobs created or tax revenues generated, cannot be considered in determining public use. They also contend that an oil pipeline that crosses Iowa but does not pick up or drop off oil within the state does not constitute a public use. We will address these arguments in order.

We begin by considering the United States Supreme Court's interpretation of the Fifth Amendment in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005). In *Kelo*, the Court addressed the question of "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." *Id.* at 477, 125 S. Ct. at 2661. There, an economic development plan was intended to remedy decades of economic decline that led to the City of New London being

designated a "distressed municipality." *Id.* at 473–75, 125 S. Ct. at 2658–60. A majority of the Court found that the City of New London could compel private homeowners to turn over their homes to a private developer because the city's plan served a "public purpose." *Id.* at 484, 125 S. Ct. at 2665. The Court noted, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 483, 125 S. Ct. at 2664.

Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. *Id.* at 494, 125 S. Ct. at 2671 (O'Connor, J., dissenting). She characterized the majority as holding

> that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure.

*Id.* at 501, 125 S. Ct. at 2675. In her view, a secondary benefit alone was not enough for a governmental transfer of property from one private entity to another to qualify as a taking for a public purpose. *Id.* She reasoned that almost any lawful use of private property will generate some secondary benefit and, thus, if "positive side effects" are sufficient to classify a transfer from one private party to another as "for

public use," those constitutional words would not "realistically exclude *any* takings." *Id.*

Although she did not agree that economic development alone could justify a taking, Justice O'Connor did acknowledge there were three categories of legitimate public use:

> Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

*Id.* at 497–98, 125 S. Ct. at 2673 (citations omitted).

The *Kelo* decision has proved controversial, not least because the development that justified the taking of Ms. Kelo's home never occurred. *See* Alberto B. Lopez,

Kelo-*Style Failings*, 72 Ohio St. L.J. 777, 779–80 (2011). Several state supreme courts have held that public use must mean something more than indirect economic benefits. *See, e.g.*, *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10–11 (Ill. 2002); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006); *Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 647 (Okla. 2006).

Thus, in *Southwestern Illinois*, the Illinois Supreme Court held that a regional development authority could not exercise eminent domain to take a recycling facility's property and convey it to a private racetrack for a parking lot. 768 N.E.2d at 4, 11. The court concluded the purported benefit of positive economic growth in the region was not enough to satisfy public use as required under the Illinois Constitution. *Id.* at 10–11. The court also found shorter lines to enter parking lots and the fact that pedestrians might be able to cross from parking areas to event areas in a safer manner unpersuasive as sufficient factors to satisfy the public use requirement. *Id.* at 9.

In *Southwestern Illinois*, the racetrack estimated the condemned land, which was to be used for open-field parking, would lead to an increase of $13 to $14 million in revenue per year. *Id.* at 10. The Illinois court recognized that such profit could trickle down and bring revenue increases to the region. *Id.* Yet it reasoned, "[R]evenue expansion alone does not justify an improper and unacceptable expansion of the

eminent domain power of the government." *Id.* at 10–11.

Similarly, in *Hathcock*, the Michigan Supreme Court held a private entity was not entitled to exercise eminent domain to build a business and technology park. 684 N.W.2d at 783–84. The Michigan court determined that something beyond economic benefits was required to show public use under the Michigan Constitution. *Id.* at 783. The court there relied on its own jurisprudence and its interpretation of the Michigan constitutional founders' intent. *Id.* at 785–87. The court, tracking O'Connor's dissent in *Kelo*, concluded,

> [T]he transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.

*Id.* at 783. While the Michigan Constitution's takings clause is not identical to ours, it resembles ours in prohibiting takings of private property "for public use without just compensation therefore being first made." Mich. Const. art. X, § 2 (1963) (amended in 2006, after *Hathcock*, to define "public use" as more than "for the

purpose of economic development or enhancement of tax revenues").

Adopting *Hathcock*'s reasoning, the Ohio Supreme Court held that economic factors could be considered in determining whether property may be appropriated but could not alone satisfy the public-use requirement of the Ohio Constitution. *Norwood*, 853 N.E.2d at 1123. In *Norwood*, a struggling city (much like New London in *Kelo*) entered into a contract with a private developer to redevelop a neighborhood. *Id.* at 1124. The plans called for over 200 apartments and condominiums, over 500,000 square feet of office and retail space, and two large public-parking facilities. *Id.* at 1124. The city estimated the redeveloped area would bring in $2 million in annual revenue to the city. *Id.*

Several property owners, however, refused to sell for the planned development, and the city therefore tried to exercise eminent domain to take the properties. *Id.* at 1124–26. The Ohio Supreme Court declined to follow the majority opinion in *Kelo*, stating that the *Hathcock* opinion and the dissenting opinions in *Kelo* were better models for interpreting the Ohio Constitution. *Id.* at 1140–41.

> Though the Ohio Constitution may bestow on the sovereign a magnificent power to take private property against the will of the individual who owns it, it also confers an "inviolable" right of property on the people. When the state elects to take private property without the owner's consent, simple justice

> requires that the state proceed with due concern for the venerable rights it is preempting.

*Id.* at 1137–38.

Along the same lines, the Oklahoma Supreme Court determined that economic development alone was not a public purpose to justify the exercise of eminent domain under the Oklahoma Constitution. *See Bd. of Cty. Comm'rs of Muskogee Cty.*, 136 P.3d at 647. In *Board of County Commissioners*, the city wanted to install three water pipelines, two of which would serve only a proposed privately-owned electric generation plant and which would improve and expand existing public service. *Id.* at 642–43. The private energy company had agreed to build the third public pipeline only if the company first obtained all rights-of-way to construct the energy plant and the accompanying first two water pipelines. *Id.* at 643.

The court reasoned that although one pipeline would serve the public, the purpose of the takings was for the construction and operation of the privately owned energy company. *Id.* at 649. Further, the court said that although the construction of the energy plant would enhance economic development through taxes, jobs, and investment, those economic benefits alone would not suffice to satisfy the public use requirement. *Id.*

These state constitutional decisions would not necessarily have disappointed the *Kelo* majority. The *Kelo* majority themselves noted that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." *Kelo*,

545 U.S. at 489, 125 S. Ct. at 2668 (majority opinion). It added that "many States already impose 'public use' requirements that are stricter than the federal baseline," and "[s]ome of these requirements have been established as a matter of state constitutional law." *Id.*

Since *Kelo* was decided, we have twice quoted from Justice O'Connor's dissent. In *Clarke County Reservoir Commission v. Robins*, we noted,

> Justice O'Connor underscored the constitutional necessity that any taking be for a "public use" with "just compensation":
>
> > These two limitations serve to protect the security of Property, which Alexander Hamilton described to the Philadelphia Convention as one of the great obj[ects] of Gov[ernment]. Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

862 N.W.2d 166, 171–72 (Iowa 2015) (alteration in original) (quoting *Kelo*, 545 U.S. at 496, 124 S. Ct. at 2672 (O'Connor, J., dissenting)). We went on to state, "The public-use requirement is to prevent abuse of the power for the benefit of private parties." *Id.* And in *Star Equipment, Ltd. v. State*, we observed,

> Four dissenters noted in the context of the Federal Takings Clause: "We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."

843 N.W.2d 446, 459 n.11 (Iowa 2014) (quoting *Kelo*, 545 U.S. at 497, 125 S. Ct. at 2673).

Like our colleagues in Illinois, Michigan, Ohio, and Oklahoma, we find that Justice O'Connor's dissent provides a more sound interpretation of the public-use requirement. If economic development alone were a valid public use, then instead of building a pipeline, Dakota Access could constitutionally condemn Iowa farmland to build a palatial mansion, which could be defended as a valid public use so long as 3100 workers were needed to build it, it employed twelve servants, and it accounted for $27 million in property taxes.[4]

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[4] In fairness to the *Kelo* majority, they did not say that any economic development benefit would meet the public-use test. If the economic benefits of merely building a project qualified as a public use, then the legislature could empower A to take B's house just because A planned to erect something new on the lot. Even the *Kelo* majority did not go that far. *See Kelo*, 545 U.S. at 487, 125 S. Ct. at 2667 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."). But as Justice O'Connor noted in dissent, it is problematic to have a fact-based public-use test that allows economic development benefits to suffice in some cases, depending on whether the economic development benefit derives from "a

Having said that, this case is not that one. Instead, this case falls into the second category of traditionally valid public uses cited by Justice O'Connor: a common carrier akin to a railroad or a public utility. *See Kelo*, 545 U.S. at 498, 125 S. Ct. at 2673. This kind of taking has long been recognized in Iowa as a valid public use, even when the operator is a private entity and the primary benefit is a reduction in operational costs.

Back in 1870, when our constitution was only thirteen years old, this court held that a taking for a private railroad was a taking for a public use within the meaning of article I, section 18. *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 19–21 (1870). We said this proposition was "elementary and unquestionable." *Id.* at 21. We quoted with approval "the leading American case," where it was written:

> The right of *eminent domain* does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, *where the public interest will be in no way promoted by such transfer*. But if the *public interest can be in any way* promoted by the taking of private property, *it must rest in the wisdom of the legislature*, to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to interfere with the private rights of individuals for that purpose. . . . *In all such*

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multipart, integrated plan rather than . . . an isolated property transfer." *Id.* at 503–04, 125 S. Ct. at 2676.

> *cases* the object of the legislative power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of *corporate bodies, or of individual enterprise.*

*Id.* (quoting *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45, 73 (N.Y. Ch. 1831)). More recently, in *S.E. Iowa Cooperative Electric Association*, we held that cost savings alone were a sufficient statutory "public use" to justify the construction of a new electrical transmission line. 633 N.W.2d at 820. We explained that "the public is served" when they can "obtain service at a lower cost." *Id.*[5]

In sum, because we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickle-down benefits of economic development are not enough to constitute a public use. To the extent that Dakota Access is relying on the alleged economic development

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[5] The 1857 Constitutional Convention turned down language that would have expressly allowed the use of eminent domain for "private roads." 1 *The Debates of the Constitutional Convention of the State of Iowa* 207 (W. Blair Lord rep., 1857), www.statelibraryofiowa.org/services/collections/law-library/iaconst. A private road, though, was defined by a member of the convention as "a way leading from a public highway to a person's dwelling for his convenience merely." *Id.* That is not analogous to the Dakota Access pipeline. Notably, our legislature has long given private property owners the ability to use eminent domain to connect their land-locked lands to existing public roads so long as the resulting road is open to the public, *see* Iowa Code § 6A.4(2), and we have upheld the constitutionality of that legislation. *See In re Luloff*, 512 N.W.2d 267, 273–74 (Iowa 1994).

benefits of building and operating the pipeline, we are unmoved. But here there is more. While the pipeline is undeniably intended to return profits to its owners, the record indicates that it also provides public benefits in the form of cheaper and safer transportation of oil, which in a competitive marketplace results in lower prices for petroleum products. As already discussed, the pipeline is a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans.

The Lamb petitioners assert that even these benefits are not enough, because no Iowa business or consumer will actually use the pipeline to deliver or receive crude oil. This approach is too formalistic. Iowa has some of the most advanced and productive farming in the world. But our economy, including our agricultural economy, depends on other states to produce crude oil and refine that crude oil into petroleum products. If our consideration of public use were limited as the Lamb petitioners propose, it would be very difficult ever to build a pipeline across Iowa carrying any product that isn't produced in Iowa. Yet Iowa is crisscrossed with pipelines.[6]

In *Enbridge Energy (Illinois), L.L.C. v. Kuerth*, the Illinois Appellate Court took a more nuanced view, which we find persuasive. 99 N.E.3d 210, 218 (Ill. App. Ct. 2018). There the court rejected an appeal by certain

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[6] As we have previously noted, the Dakota Access pipeline is intended to replace transportation of crude oil through Iowa by rail. If those railroads are a valid public use, then why would a pipeline not be a public use when it serves the same function?

landowners and upheld a grant of eminent domain authority for an oil pipeline project. *Id.* at 213–14, 218. The court reasoned, "The fundamental flaw of landowners' argument is that they focus entirely upon who *uses* the pipeline rather than who *benefits* from it." *Id.* at 218. The court added,

> Oil, natural gas, and other energy sources are essential to modern American life and must be transported from production facilities to refineries and ultimately to consumers. Pipelines are necessary for this transportation and are often safer and more efficient than transportation by train or truck.

*Id.* Further, the court noted, "[T]he public use requirement can still be met even if the public does not have the right to enter or use the condemned property." *Id.* The court went on,

> In this case, despite landowners' arguments to the contrary, the trial court was not required to examine who would be using the pipeline, the extent of any particular company's use of the pipeline, whether those companies were part of the public, or who would financially benefit from the proposed pipeline. This is because the legislature has determined that pipelines are in the public interest and that it is efficient for private companies, rather than the government, to construct and maintain these pipelines. . . .
>
> . . . .
>
> [T]he only evidence landowners presented was evidence showing that private companies

> would own and benefit from a proposed pipeline. However, as we emphasize again, who owns or benefits from a proposed pipeline is not relevant evidence to rebut the applicable presumptions. Because landowners did not introduce any relevant evidence to show that the public, in the aggregate, would not be the primary beneficiary of the pipeline, they utterly failed to meet their burden to rebut the presumptions of public use and necessity.

*Id.* at 220–21 (citations omitted).

This reasoning applies here. The record indicates that the Dakota Access pipeline will lead to "longer-term, reduced prices on refined products and goods and service dependent on crude oil and refined products."

In a similar vein, the Ohio Court of Appeals confronted and then ultimately rejected the following argument from a landowner:

> She claims the pipeline has no "off ramps" in Ohio, which means 100% of the product will be shipped and consumed outside of Ohio. Ohio will only get an economic benefit, which is insufficient to satisfy public use. Furthermore, there is no indication the propane or butane shipped to Marcus Hook will come back to Ohio for heating or gasoline use. Appellant asserts the benefit to Appellee, a private company, is certain while the benefit to Ohio is speculative. Appellant also argues the intended purpose of allowing private companies to appropriate land when they are a common carrier was to build

> intrastate energy infrastructure, not to authorize the building of interstate infrastructure or interstate transportation of Ohio's resources.

*Sunoco Pipeline L.P. v. Teter*, 63 N.E.3d 160, 171–72 (Ohio Ct. App. 2016). Notwithstanding *Norwood*, the court found this argument unpersuasive. *Id.* at 172–73. It reasoned,

> Appellee is a common carrier, not a megastore or a private enterprise that would only be providing economic benefit to Ohio. The reason the General Assembly gave common carriers a rebuttable presumption is because common carriers, as defined by statute, provide our citizens with necessities such as electricity and water. The products, propane and butane, being transported are used to heat homes and as an additive to gasoline. Propane and butane are also used in the production of many products our society uses every day. Thus, the transportation of propane and butane provides more than economic benefit to Ohio, it provides some of the necessities of life.

*Id.* at 173–74. Oil is, if anything, more of a necessity than the hydrocarbons that were involved in *Sunoco Pipeline*.

The Lamb petitioners rely on *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W. Va. 2016). There a company sought to build a natural gas pipeline to carry almost exclusively natural gas produced by its own affiliates from West Virginia to a

terminus in Virginia. *Id.* at 852. The West Virginia Supreme Court found that this was not a public use within the meaning of a West Virginia statute. *Id.* at 855, 862–63. The court explained,

> MVP has been unable to identify even a single West Virginia consumer, or a West Virginia natural gas producer who is not affiliated with MVP, who will derive a benefit from MVP's pipeline. . . . MVP is a private company seeking to survey property for the ultimate purpose of exercising the right of eminent domain. . . . In fact, the only benefit to West Virginia that has been asserted by MVP in this appeal is the benefit to producers and shippers of the natural gas that is located in West Virginia. Significantly, however, the owners of that natural gas are affiliates of MVP.

*Id.* at 860–61 (footnotes omitted).

The *Mountain Valley Pipeline* court cited *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.* 478 S.W.3d 386 (Ky. Ct. App. 2015). 793 S.E.2d at 862. In *Bluegrass Pipeline*, the Kentucky Court of Appeals concluded that a pipeline transporting natural gas liquids through Kentucky on the way to the Gulf of Mexico was not in "public service" and could not exercise eminent domain. 478 S.W.3d at 388, 391–92. Among other things, the court took note that

> the NGLs in Bluegrass's pipeline are being transported to a facility in the Gulf of Mexico. If these NGLs are not reaching Kentucky

> consumers, then Bluegrass and its pipeline cannot be said to be in the public service of Kentucky.

*Id.* at 392.

These cases can be distinguished. The West Virginia case involved a private pipeline, not a common carrier. *See Mountain Valley Pipeline*, 793 S.E.2d at 860–61. The Kentucky case turned in part on the court's view that "the legislature only intended to delegate the state's power of eminent domain to those pipeline companies that are, or will be, regulated by the [Kentucky Public Service Commission]." *Bluegrass Pipeline Co.*, 478 S.W.3d at 392. But more importantly, we have a different view of "public use" under the Iowa Constitution. We do not believe a common carrier of a raw material that is essential to Iowa's economy but isn't produced or processed in Iowa is prohibited from exercising eminent domain when so authorized by the general assembly. The public use concept is not that restrictive. *See Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 511 S.E.2d 671, 676 (N.C. Ct. App. 1999) ("The concept is flexible and adaptable to changes in society and governmental duty."). The Iowa Constitution does not hang on the presence of spigots and on-ramps.

Accordingly, we hold that there was no violation of article I, section 18 of the Iowa Constitution. For the reasons already stated, we also find no Fifth Amendment violation. We recognize that a serious and warranted concern about climate change underlies some of the opposition to the Dakota Access pipeline. Maybe, as a matter of policy, a broad-based carbon tax that forced all players in the marketplace to bear the

true cost of their carbon emissions should be imposed. The revenues from this broad-based tax could be used to offset other taxes. But policy making is not our function, and as a legal matter we are satisfied that the Dakota Access pipeline meets the characteristics of a public use under the Iowa and United States Constitutions.

## VIII. Puntenney's and Johnson's Individual Claims.

Puntenney lives in Boone and owns farmland in Webster County, which is used for growing soybeans and corn. Before the IUB, Puntenney submitted a map showing that the pipeline route was going to cut through the very southwest corner of his property and that it could be rerouted, without becoming any less "straight," so as not to go through his property. Puntenney contends the pipeline should have been rerouted around his property, especially in light of his plans to install wind turbines.

The record shows that the pipeline generally runs on a straight line from northwest Iowa to southeast Iowa but is not entirely straight because of the software employed by Dakota Access to account for environmental features (such as critical habitat, fault lines, state parks, national forests, and historic sites), engineering considerations (such as existing pipelines and power lines), and land use considerations (such as homes, other buildings, dams, airports, cemeteries, and schools).

Puntenney contends that by not requiring Dakota Access to go around his property, the IUB violated Iowa

Code section 479B.1, which only confers "rights of eminent domain *where necessary*." (Emphasis added). According to Puntenney, it was not necessary for the pipeline to traverse his property.

We do not read the statute that way. Obviously, with a pipeline that bisects the entire state, it is never going to be strictly "necessary" for that pipeline to cut across *any particular landowner's property*. Diversions will always be possible. In our view, the demands of this statute are met if the pipeline company demonstrates that the pipeline requires the exercise of eminent domain and demonstrates why the particular route it has proposed is superior. Both criteria were met here. *See Green v. Wilderness Ridge, L.L.C.*, 777 N.W.2d 699, 704 (Iowa 2010) (deciding in a private condemnation action that the legislature intended a flexible approach and that "it is unlikely that the legislature intended to mandate that the land to be condemned must always be the shortest route").

Puntenney also contends the IUB acted arbitrarily in not relocating the proposed pipeline to accommodate his plans to install wind turbines, even as it directed a rerouting for the benefit of a turkey farmer. But the IUB explained why. The turkey farmer was further along. He was talking turkey about putting up new buildings. Puntenney, on the other hand, had merely conceived the idea of installing wind turbines and had no specific plan. Moreover, the record did not show that the pipeline would interfere with any later plans to

erect wind turbines, especially when it only ran under the very southwest corner of Puntenney's property.[7]

Lastly, Puntenney contends that he was not allowed to testify to his concerns about the impact of the pipeline on his drainage tile. However, Puntenney was allowed to file written objections that detailed his tiling concerns. He was also asked specifically about tiling in his live testimony. And he was asked open-ended questions in his live testimony. For example, the chairperson of the IUB asked Puntenney, "Can you tell the Board exactly what you're looking for in terms of relief beyond moving the pipeline off of your property?" Puntenney did not request the chance to testify further.

Johnson is a corn and soybean farmer in Boone County, who like Puntenney sought the rerouting of the pipeline to avoid his property. Johnson said he feared the pipeline would destroy the drainage tile and concrete pipe he had installed on his land. The IUB did not order rerouting, but it did grant relief to Johnson: it directed Dakota Access to install the pipeline below Johnson's entire drainage system, including the twenty-four-inch concrete main that was already buried up to twenty-two feet deep. A Dakota Access witness explained that it would not be feasible to divert the line as Johnson had requested because in the area of proposed diversion there were a forest, a creek, and

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[7] Puntenney also compares his situation to that of another landowner who was granted relief. But that landowner was only granted partial relief. Dakota Access was directed to negotiate with that landowner to avoid one parcel that it had conceded it could avoid and to relocate the route over three other parcels (without avoiding them entirely).

a county drain line. Dakota Access would have to cut out trees, cross a creek, and encumber another drain line. The IUB concluded, "[T]here appears to be no reasonable alternative to granting eminent domain along the route proposed by Dakota Access and boring under the 24-inch main appears to be the least intrusive alternative." This finding is supported by substantial evidence.

## IX. Conclusion.

For the foregoing reasons, we affirm the judgment of the district court.

**AFFIRMED.**

All justices concur except Wiggins, J., who concurs in part and dissents in part, joined by Appel, J., and McDonald, J., who dissents.

**WIGGINS, Justice (concurring in part and dissenting in part).**

I dissent from the majority's conclusion that the use of eminent domain does not violate the Iowa Constitution. I agree with the majority that incidental economic benefits alone are not enough for a taking to qualify as "for public use" under article I, section 18. However, I disagree that the Dakota Access pipeline fits within the "common carrier exception" for purposes of the Iowa Constitution. I also find fault in Dakota Access's use of eminent domain because it is unrelated to the purpose of the applicable eminent-domain-authorizing statute.

One way a taking complies with article I, section 18's public use requirement is where "the sovereign . . . transfer[s] private property to private parties, often common carries, who make the property available for the public's use." *Kelo v. City of New London*, 545 U.S. 469, 497–98, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting). Inherent in this "use-by-the-public" method of compliance is that the condemning sovereign's public be able to use the taken property. Various courts have recognized that

> [t]he sovereign's power of eminent domain, whether exercised by it or delegated to another, is limited to the sphere of its control and within the jurisdiction of the sovereign. A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be

> condemned for the sole purpose of serving a public use in another state.

*Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850, 862 (W. Va. 2016) (quoting *Clark v. Gulf Power Co.*, 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967)); *accord, e.g.*, *Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) (noting "no state is permitted to exercise or authorize the exercise of the power of eminent domain except for a public use within its own borders" and collecting cases); *Square Butte Elec. Coop. v. Hilken*, 244 N.W.2d 519, 525 (N.D. 1976) ("[A]lthough other states may also be benefited, the public in the state which authorizes the taking must derive a substantial and direct benefit . . . , something greater than an indirect advantage . . . ."); *see Gralapp v. Miss. Power Co.*, 194 So. 2d 527, 531 (Ala. 1967).

Recently, other states have relied on that principle when considering whether a pipeline running across the state constituted a public use. *See Mountain Valley Pipeline*, 793 S.E.2d at 860–62 (West Virginia high court finding a natural gas pipeline was not for a public use because *West Virginians* could not use and did not directly benefit from the pipeline or the natural gas it was to transport); *see also Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386, 392 (Ky. Ct. App. 2015) (finding pipeline was not "in the public service of Kentucky" because the product in the pipeline was being transported to a facility in the Gulf of Mexico and not reaching Kentucky consumers); *cf. In re Condemnation by Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1019 (Pa. Commw. Ct. 2016) (upholding finding of public benefit

of pipeline because the *intrastate* pipeline would enhance delivery options for natural gas and liquids *in Pennsylvania*).

Additionally, I would find Dakota Access's takings do not qualify as "for public use" because the primary purposes of the takings and their incidental economic and public safety benefits are unrelated to the purpose of the statute authorizing the use of eminent domain.

In this case, the statute authorizing the use of eminent domain is not Iowa Code chapter 6A but rather chapter 479B. The purpose of chapter 479B is "to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline." Iowa Code § 479B.1 (2016).

The primary purported purposes of Dakota Access's pipeline are (1) so a private business can build a private pipeline to "transport crude oil from sources in North Dakota to a hub in Illinois" and (2) to answer the oil industry's desire for a pipeline. However, the purpose of chapter 479B is neither to facilitate private transportation of crude oil (or other hazardous liquids) nor to acquiesce to a particular industry's desire for a particular method of transporting its product. Thus, the primary purported purposes of the pipeline are unrelated to the purpose of exercising eminent domain as contemplated in chapter 479B.

Likewise, the Iowa Utility Board's (IUB) finding that the pipeline promotes public safety does not correspond with the purpose of chapter 479B. The IUB found the pipeline promotes public safety because the

risk of an oil spill is lower when the oil is transported by pipeline than when it is transported by rail. But the public safety purpose of chapter 479B is not to lower the risk of damages resulting from the transportation of oil generally. It is to protect against damages resulting "from the construction, operation, or maintenance" of an oil pipeline. *Id.*

In sum, I conclude the Dakota Access pipeline does not fit within the common carrier exception for purposes of the Iowa Constitution because the Iowa public cannot use and does not derive a direct benefit from it. Further, even taking into account the purported incidental and secondary benefits to Iowans, the use of eminent domain in this case does not accord with the purpose for which eminent domain may be exercised as stated in the pertinent statute authorizing the use of eminent domain. I would hold the Dakota Access's takings violate article I, section 18 of the Iowa Constitution.

Appel, J., joins this concurrence in part and dissent in part.

**McDONALD, Justice (dissenting).**

The Iowa Utilities Board (IUB) approved construction of the pipeline. The IUB authorized Dakota Access to use the eminent domain power to condemn easements. Dakota Access exercised the eminent domain power as granted. The appellants accepted the condemnation awards. Dakota Access built the pipeline. Oil is flowing through the pipeline. No further relief is available. What's done, is done. The case is moot.

The leading case is *Welton v. Iowa State Highway Commission*, 208 Iowa 1401, 227 N.W. 332 (1929). In *Welton*, we concluded a challenge to the construction of a highway was moot when construction was completed:

> [S]ubsequent to the decision of the district court in this case, and in the absence of an order staying appellees' actions, the road in controversy was established . . . [. T]he appellant has perfected an appeal to the district court of Mahaska county, from the award of the condemnation commissioners, as to the amount of his damages . . . . [D]uring the pendency of the appeal, the defendant did not obtain a restraining order from this court . . . .
>
> It is apparent from the uncontroverted affidavit that the orchard has been taken for highway purposes and the paving laid. No order

> which we can now make can preserve to appellant his orchard.

*Id.* at 1402–03, 227 N.W. at 333.

Similarly, in *Porter v. Board of Supervisors*, we concluded the completion of a drainage ditch was an established fact that precluded relief:

> We call attention also to the fact . . . that the construction ha[s] already taken place and that the canal or ditch [i]s in operation. There was no stay of proceedings nor application in this court for an order to stay construction. Under these circumstances the construction of the ditch became an established fact before the case was submitted to us for decision.

238 Iowa 1399, 1404, 28 N.W.2d 841, 844 (1947).

As in *Welton* and *Porter*, the construction and operation of the pipeline is an established fact—what's done cannot be undone. The appellants previously conceded their claims were moot once the pipeline was completed and placed into service. In the district court, the appellants sought a stay. In support of their application for stay, the appellants conceded "if they d[id] not receive a stay before [Dakota Access's] pipeline trench [wa]s dug, any remedy w[ould] be inadequate." The district court denied the application for stay. The appellants did not seek interlocutory appeal, did not seek a stay from this court, and did not seek to expedite the appeal. In the meantime, the "trench [was] actually dug."

The completion of the pipeline and the appellants' acceptance of the condemnation awards are established facts that render their claim moot. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, ___, 136 S. Ct. 663, 669 (2016) ("If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S. Ct. 1523, 1528 (2013))); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 63 (D.D.C. 2018) ("The specter of mootness raised in Standing Rock's earlier filings has now come to pass—construction is complete and oil is flowing through the pipeline."); *Gunnar v. Town of Montezuma*, 228 Iowa 581, 584, 293 N.W. 1, 3 (1940) (stating a case is moot if "the threatened action has become an accomplished fact"). For these reasons, I would dismiss the appeal.

[SEAL]
State of Iowa Courts

| **Case Number** | **Case Title** |
|---|---|
| 17-0423 | Puntenney v. Iowa Utilities Board |

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## APPENDIX B

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

**[Filed February 15, 2017]**

**LAW NO. CVCV051987**

KEITH PUNTENNEY,

Petitioner,

vs.

IOWA UTILITIES BOARD and DAKOTA ACCESS LLC,

Respondents.

**LAW NO. CVCV051990**

LAVERNE JOHNSON,

Petitioner,

vs.

IOWA UTILITIES BOARD and DAKOTA ACCESS LLC,

Respondents.

**LAW NO. CVCV051997**

| | |
|---|---|
| RICHARD R. LAMB, ET AL., | ) |
| | ) |
| Petitioners, | ) |
| | ) |
| vs. | ) |
| | ) |
| IOWA UTILITIES BOARD, ET AL., | ) |
| | ) |
| Respondents | ) |
| | ) |

**LAW NO. CVCV051999**

| | |
|---|---|
| SIERRA CLUB IOWA CHAPTER, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| vs. | ) |
| | ) |
| IOWA UTILITIES BOARD and DAKOTA ACCESS LLC, | ) |
| | ) |
| Respondents. | ) |
| | ) |

**RULING ON JUDICIAL REVIEW**

**STATEMENT OF THE CASE**

The Iowa Utilities Board (the board) is a state agency created pursuant to Iowa Code section 474.1. One of the board's responsibilities is to implement

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

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

On October 29, 2014, Dakota Access, LLC (Dakota), a pipeline company, filed documents with the board expressing its intent to start the application process by conducting informational meetings in compliance with section 479B.4. The proposed notices expressed Dakota's intent to construct a pipeline from North

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

Dakota to Patoka, Illinois. The notices stated that the proposed pipeline would cover approximately 343 miles in eighteen Iowa counties. The informational meetings were scheduled in each of the eighteen counties during the month of December, 2014. Designees from the board attended each meeting.

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

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

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

The June 8, 2015, order informed the parties of the board's intent to take evidence via pre-filed testimony and submission of exhibits. The order required Dakota

and the parties who supported the application for permit to file prepared direct testimony and exhibits by September 8, 2015. The Office of Consumer Advocate (OCA)[2] and parties who opposed the application for permit were required to file prepared direct testimony and exhibits by October 12, 2015. The order required the parties to file any rebuttal testimony and exhibits by October 26, 2015. The board expressed its expectation that this schedule would allow the case to proceed to hearing in the month of November, 2015.

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

On November 2, 2015, the Sierra Club Iowa Chapter (Sierra Club) filed a motion for clarification of cross-examination of witnesses. Sierra Club claimed

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

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

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

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

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

The board also reviewed the proposed route of the pipeline and considered disputes between Dakota and landowners regarding the right to take land by eminent domain pursuant to Iowa Code section 479B.16. The board found the route to be reasonable. Most of the objections to eminent domain were rejected, but the board granted Dakota eminent domain over some of the parcels subject to conditions set forth in the order, granted eminent domain subject to modifications over some parcels, and denied Dakota's request as to others.

Following post-hearing motions before the board, several parties filed petitions for judicial review on

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

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

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

On August 23, 2016, the court established a briefing schedule and set oral argument. The parties filed extensive briefs. Mr. Lamb filed an opening brief that was eighty-one pages and a reply brief that was thirty-one pages. Sierra Club filed an opening brief that was forty-six pages and a reply brief that was fifty-two pages. Dakota's brief was one hundred and thirty-four pages. The board's brief was a concise thirty-eight pages. Other parties filed briefs as well.[4] Oral argument was held as scheduled on December 15, 2016.

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

## CONCLUSIONS OF LAW

### I. Preliminary issues

#### A. Friendly cross-examination

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

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

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

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

(Clarification Order, pp. 5-6).

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

opportunity to allow the proposed examination based on the context of the evidence presented at the hearing. Sierra Club did not make any such requests during the hearing. This argument has been waived.

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

The statute also allows an agency to control the presentation of evidence. For example, "when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be required to be submitted in verified written form." Iowa Code § 17A.14(1). "Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party *as necessary* for a full and true disclosure of the facts. Iowa Code § 17A.14(3) (emphasis added). When evaluating the evidence, the agency's experience, technical competence, and specialized knowledge may be utilized in determining which evidence is irrelevant, immaterial, or unduly repetitious. Iowa Code § 17A.14(5). This section conforms with the general rule that administrative agencies are not bound by technical rules of evidence. *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262 (Iowa 1991) (ruling in an

employment discrimination case before the Iowa Civil Rights Commission).

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

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

examination if needed. This was a reasonable and pragmatic approach to managing an unusually large and complicated case. The board did not violate the due process rights of Sierra Club or any other party by limiting friendly cross-examination.

**B. Standing**

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

Sierra Club has alleged sufficient facts to confer standing under the *Bushby* standard. Sierra Club pled that its members use and enjoy the rivers and streams, natural areas, and other environmental amenities.

They asserted concerns that construction and operation of the proposed pipeline may cause environmental harm to those areas. In *Bushby*, several citizens filed an action against a local conservation board to prevent a tree-clearing project in a county park. *Bushby*, 654 N.W.2d at 495. The petitioners' interests in *Bushby* are not distinguishable from the petitioners' interests in this case. Sierra Club has standing.

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

**C. Mootness**

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

the underlying controversy, the issue is considered moot. *Id.*

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

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

## II. Public Convenience and Necessity

### A. Standard of Review

Petitioners first argue that the board's interpretation of law should not to be granted deference

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

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

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

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

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

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

> to defer to legal determinations of the [board] face an uphill battle where, as in this case, the legislature has provided definitions of terms that do not on their face appear to be technical in nature. (cites omitted).

*Id*. at 451. The question whether an agency should be granted deference is not always an easy question – even the supreme court has noted that the standards are "not conducive to the development of bright-line rules." *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 208 (Iowa 2014) (cite omitted).

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

Second, the legislature has stated that the purpose of chapter 479B was to give the board authority to implement controls over pipelines to protect landowners or tenants from damages that might result from the construction, operation, or maintenance of a pipeline. Iowa Code § 479B.1. This is a broad grant of authority to the board. The statute further gives the board authority to grant a permit, "in whole or in part," and authorizes the board to condition the grant of a permit to terms, conditions, and restrictions as to location and route that it determines are just and proper. Iowa Code § 479B.9. This likewise is a broad

grant of authority. The structure of the statute as a whole shows an intent to defer to the board's interpretation of "public convenience and necessity" as part of the determination whether to grant a permit and, if so, what terms and conditions to place on the permit.

Third, the terms "convenience" and "necessity" may appear common, but the combined term "public convenience and necessity" is somewhat archaic and has historically been used by the legislature when granting discretion to agencies dealing in complex decision-making. *See e.g. Appeal of Beasley Bros.*, 206 Iowa 229, 220 N.W. 306, 308 (1928) (reviewing a decision by the State Railroad Commission whether a bus line promoted the public convenience and necessity). The legislature has used the same standard when granting the board authority to grant permits in other contexts, so it has expertise in evaluating that term. *See e.g.* Iowa Code § 476.29 (telephone utilities); Iowa Code § 479.12 (gas pipelines).

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

the board made its decision as part of a contested case rather a quasi-legislative process.

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

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

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

**B. Legal Analysis**

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

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

> The word "necessity" has been used in a variety of statutes . . . . It has been generally held to mean something more nearly akin to convenience than the definition found in standard dictionaries would indicate. So it is said the word will

> be construed to mean not absolute, but reasonable, necessity.

*See also Weiss v. City of Denison*, 491 N.W.2d 805, 807 (Iowa App. 1992) (interpreting "necessity" as a "reasonable necessity" as opposed to an "absolute necessity"); *Mann v. City of Marshalltown*, 265 N.W.2d 307, 314 (Iowa 1978) (same); *Vittetoe v. Iowa Southern Utilities*, 255 Iowa 805, 123 N.W.2d 878, 881 (Iowa 1963) (same).

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

Petitioners argued that economic impact should not be a factor to decide whether a proposed pipeline will promote the public necessity and convenience. However, the supreme court held the opposite in *South*

*East Iowa*, at least as applied to electric transmission lines. *Id*. at 819. Moreover, in *South East Iowa*, the court cited to the board's consideration of economic benefits in decisions to grant gas pipeline permits under Iowa Code section 479.12 "as a sufficient basis" to approve the permits. *Id*. The standard for granting a gas pipeline under section 479.12 is the same "promote the public convenience and necessity" standard that the board is required to use in this case under section 479B.9. There is no question that economic impact may be considered as a factor.

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

The board's determination is supported by the law and evidence. While the board must consider the public interest of Iowans as part of its balancing test, there is no indication in the statute that the board cannot approve the permit unless product is shipped to or from the state. In fact, the statute defines a "pipeline" as "an *interstate* pipe or pipeline[,]" so it is clear that the legislature understood that the pipeline would be crossing state lines. *See* Iowa Code § 479B.2(3) (emphasis added). Moreover, the board made a finding that Iowa does not produce any crude oil and there are

no crude oil refineries doing business within the state. (Board decision, p. 20). As a result, a pipeline used to ship crude oil must necessarily start and stop in other states without supplying product directly to the state of Iowa. The board correctly found that the governing legal standard does not require a finding that product is shipped to or from the state.

**C. Factual Analysis**

The parties presented evidence regarding several factors that they felt to be important to the board's consideration whether Dakota's application for permit will promote the public convenience and necessity. The board found that some of the factors carried little weight in its balancing test. The board ultimately found the following to be significant factors to consider when reviewing Dakota's application for a permit: 1) the increased safety of transporting crude oil by pipeline rather than rail, 2) economic benefits to the state, 3) environmental issues, 4) safety risks, and 5) oil spill remediation. (Board decision, pp. 31-33, 46-47, 51-54, 57-58, 62-63). The board found the first two factors to weigh heavily in favor of granting a permit. (Board decision, pp. 109-10). The board also found that the proposed pipeline would serve a market with a clear demand for oil. (Board decision, pp. 110). The board found that the other three factors weighed against granting the permit, but the risk of harm had been reduced by safety measures. (Board decision, pp. 110-12). The board also considered the burden that the pipeline would place on private interests, particularly those along the proposed route. (Board decision, p. 113). The board ultimately concluded that

the benefits outweighed the public and private costs, particularly when considering the safety measures put into place by Dakota and imposed by the board. (Board decision, p. 114).

1. Increased Safety in Transporting Oil by Pipeline

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

After considering the evidence presented, the board found that data from the United States Department of Transportation (USDOT) provided the most reliable evidence to determine the relative safety of both methods of transportation. (*Id.; citing to* Exhibit GC). The USDOT data considered the volume of oil carried and the distance transported when comparing the two methods of transportation. Based on that data, the board found that transportation of oil by pipeline has one-third to one-fourth of the incident rate of transportation of oil by railway. The same exhibit reported that, by any measure, pipelines are the safest

form of energy transportation.[5] (Board decision, pp. 28-29, 32).

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

2. Economic Benefits to the State

The board found that construction of the pipeline would economically benefit the state by various means. The economic benefits from the construction of the pipeline were estimated to be between $787,000,000 and $1.11 billion. The board determined the project would employ 3,100 to 4,000 workers. The board found the economic benefits to the state to be significant, even if the lower estimates were considered. The pipeline was expected to result in approximately 25 long-term jobs by direct and indirect means. The board also found that Dakota would pay approximately $27

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

million in property taxes each year. The overall economic benefit from the construction, operation, and maintenance of the proposed pipeline weighed significantly in favor of granting the permit. (Board decision, pp. 41-47).

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

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

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

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

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

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

The board discussed at length the agricultural impact mitigation plan (AIMP) required by Iowa Code section 479B.20. (Board decision, pp. 47, 52, 74-83). Dakota proposed an AIMP, which was modified by the board to add a number of requirements suggested by North Iowa Landowner's Association (NILA). The modifications to the AIMP provided landowners greater protection from economic or environmental harm.

Other factors were considered as well. The board found that Dakota picked a route that was near other existing infrastructure and avoided problematic environmental features. Dakota also agreed to designs and testing that exceeded federal regulatory requirements, including additional inspections of mainline girth welds, additional hydrostatical testing,

and implementation of a cathodic protection system. This shows an intent to provide greater protections than provided by the several regulatory schemes that apply to Dakota's pipeline. These findings by the board are supported by evidence presented during the case. (*See e.g.* Board decision, p. 48 (*citing* Howard exhibit 13)).

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

Petitioners also raised a concern about remediation should a spill occur. Chapter 479B contains a financial responsibility requirement, but only requires that the pipeline owner hold property with a value of $250,000 that is subject to execution in Iowa. Iowa Code § 479B.13. The parties agreed that a major spill could result in damages greatly exceeding that amount. Dakota committed to maintaining a $25 million general liability policy. (Transcript, pp. 2184-86). Further, the board required Dakota to file parental corporate

guarantees pledging resources to address emergencies. (Transcript, pp. 2495-96). The market capitalization of Dakota's parent companies was over $60 billion as of the date of the hearing.[6] Petitioners argued that the owners may change over time, but as pointed out by the board, it retains jurisdiction to require updated guarantees. The board found that the likelihood of a spill is unlikely based on the remediation efforts discussed in its decision, but there was evidence of sufficient resources to respond to any spill. The evidence relied upon by the board was supported by substantial evidence. (Board decision, pp. 58-63).

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

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

## III. Eminent Domain

### A. Standard of Review

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

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

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

### B. Review of the Statutory Scheme

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

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

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

Notwithstanding the clarity of the board's duties and powers to grant eminent domain pursuant to chapter 479B, petitioners claim that the board was

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

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

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

Iowa Code § 6A.21(2).

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

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

The language used in section 6A.22, in combination with the legislative history, shows that it was not intended to impact the right of eminent domain granted in chapter 479B. Section 6A.22 was adopted in 2006 during the legislative session immediately following the United States Supreme Court's decision in to *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). *See* Iowa Acts ch. 1001, § 3. In *Kelo*, the court considered whether a city's use of eminent domain to revitalize a blighted area violated the public use clause of the fifth amendment. The court found no constitutional violation, but noted that state legislatures have "broad latitude" to determine what public needs justify use under the takings clause. *Id*. at 483. The adoption of section 6A.22 was clearly responsive to the invitation laid out in *Kelo*. The bulk of the 2006 amendment sets standards for the acquisition of property to "eliminate slum or blighted conditions," which was exactly the issue in *Kelo*. See Iowa Code § 6A.22(2)(5).

There is no indication in the 2006 amendments that the legislature intended to modify the board's duties and authority to grant the right of eminent domain under chapter 479B. The history and language shows that the focus of the section 6A.22 was to manage issues relating to urban renewal efforts, and not the pre-existing standards relating to pipelines. The 2006 act did not amend any provision in chapter 479B nor did it even reference 479B. The only amendment of note to this case was an amendment to section 6A.21(2) relating to the exception to entities under the jurisdiction of the board. Previously, the exception only applied to "utilities or persons." The 2006 act amended

the provision to add "companies" or "corporations" under the jurisdiction of the board. 2006 Iowa Acts ch. 1001, § 2. Accordingly, the 2006 legislation actually broadened (or at least clarified) the exception for entities under the jurisdiction of the board. This shows that the legislature had no intent to interfere with the rights previously granted under chapter 479B.

Notwithstanding this finding, the court can still find that eminent domain is allowed under section 6A.22 if it finds Dakota is a "common carrier," as the board so found. A "common carrier" is not defined in section 6A.22 or otherwise in chapter 6A. Iowa law has defined a common carrier as "one who undertakes to transport, indiscriminately, persons and property for hire." *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996) (cites omitted). A common carrier holds itself out to the public as a carrier of all goods and persons for hire. However, a common carrier need not serve all the public all the time. *Id*.

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

Commerce Act); *W. Ref. Sw., Inc. v. F.E.R.C.*, 636 F.3d 719, 724 (5th Cir. 2011) (same).

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

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

**C. Individual Claims**

1. Keith Puntenney

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

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

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

**b. Rerouting**: Mr. Puntenney next claimed that he intended to install three wind turbines on the land on or around the proposed path of the pipeline. He asked that the route be changed to accommodate his plans. The board found that Mr. Puntenney was only in discussions with a neighbor to "put together a proposal." (Final decision, p. 149). No plans were in place. Further, the board found that the evidence did

not show that the pipeline would interfere with future plans to install wind turbines. The board's decision is supported by substantial evidence.

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

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

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

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

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

The Smiths owned four parcels and did not object to the pipeline crossing their land. (Final decision, p. 134). They offered an alternative that would allow one of the parcels to be missed and another to be minimally impacted, while allowing greater impact on the other two. Dakota believed it could work with the Smiths to accommodate their concerns. The board found the

Smiths concerns to be reasonable and directed Dakota to continue to work with them. Once again, the circumstances involving the Smiths were distinct from those involving Mr. Puntenney.

**c. Due Process**: Finally, Mr. Puntenney argued he was denied due process and did not have an opportunity to present evidence on the issues he raised. The requirements of due process are well established as: 1) notice; and 2) a meaningful opportunity to be heard. *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W. 2d 255, 264 (Iowa 2001). Upon review of the record, Mr. Puntenney was provided notice and given an opportunity to present his case. He filed an objection, was added as an intervening party, presented filed testimony, cross-examined witnesses, admitted thirty exhibits into the record, and testified live at the hearing. Mr. Puntenney was granted due process.

2. LaVerne Johnson

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

engineers, agronomists, and its own staff engineers, shows substantial evidence to support their conclusion.

## IV. Constitutional Claims

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

In *Kelo*, a city sought to excise imminent domain over a number of properties in a blighted area with the goal to revitalize the area to promote jobs and tax revenue. *Kelo*, 545 U.S. at 473-75. The plaintiffs, who owned non-blighted properties within the area proposed for economic development, claimed the action violated the public use clause of the fifth amendment.

The court framed the discussion by stating the following:

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

> the condemnation of land for a railroad with common-carrier duties is a familiar example.

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

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

The court emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." *Id.* at 489. In fact, it

recognized that many states imposed public use requirements "stricter than the federal baseline." *Id.*

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

Petitioners cite the Iowa Supreme Court's decision in *Clarke County Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015).[8] Six agencies located in Clarke County filed an agreement under Iowa Code chapter 28E to create the Clarke County Reservoir

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

Commission (the commission). *Id*. at 168. The commission attempted to use eminent domain to take properties as part of a proposed lake/water project. The court rejected the plan because no statute allows a chapter 28E entity the power of eminent domain. *Id*. at 176. The court distinguished *Weiss v. City of Denison*, 491 N.W.2d 805, 807-08 (Iowa App. 1992), in which a city, which was a party to a 28E agreement, used its power of eminent domain to acquire land and then transferred that land to the 28E entity. In *Weiss*, the city clearly had the power to use eminent domain, so the use was lawful. The supreme court confirmed that *Weiss* remained good law.

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

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

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

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

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

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

Petitioners also cited a recent Kentucky case involving a pipeline that was intended to ship product out of state. *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386, 392 (Ky. App. 2015). In Kentucky, the relevant test to grant eminent domain is whether the pipeline is "in public service." *Id.* However, the court found that eminent domain could only be granted under Kentucky law if the pipeline company was regulated by the state's Public Service Commission (PSC). *Id.* The

applicant was not regulated by the PSC, so the court could not grant eminent domain. *Id*. Secondarily, the court noted that the pipeline would not meet the definition of "in public service" because the product was being shipped to the Gulf of Mexico and not reaching Kentucky consumers.

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

## RULING

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

[SEAL]
State of Iowa Courts

**Type:** OTHER ORDER

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

So Ordered

/s/
Jeffery Farrell, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2017-02-15 08:25:24

## APPENDIX C

**STATE OF IOWA**
**DEPARTMENT OF COMMERCE**
**UTILITIES BOARD**

**DOCKET NO. HLP-2014-0001**

**[Issued March 10, 2016]**

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| IN RE: | ) |
| | ) |
| DAKOTA ACCESS, LLC | ) |
| | ) |

**FINAL DECISION AND ORDER**

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## INTRODUCTION

On October 29, 2014, the Utilities Board (Board) opened Docket No. HLP-2014-0001 so that Dakota Access, LLC (Dakota Access), could hold public informational meetings as required by Iowa Code § 479B.4 and 199 IAC 13.3. Following those meetings, on January 20, 2015, Dakota Access filed with the Board a petition for a hazardous liquid pipeline permit pursuant to Iowa Code ch. 479B. Dakota Access seeks a permit to construct approximately 346 miles of 30-inch diameter crude oil pipeline through Iowa as part of a 1,168 mile project to carry oil from the Bakken area near Stanley, North Dakota, to an oil transfer station, or hub, near Patoka, Illinois. (Petition, Paragraph II; Dakota Access Exh. DAV Direct at 2, 9.) Iowa Code § 479B.1 grants the Board 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 … to approve the location and route of hazardous liquid pipelines, and to grant eminent domain where necessary."

Iowa Code § 479B.2(3) defines a "pipeline" as "an interstate pipe or pipeline and necessary appurtenances used for the transportation or transmission of hazardous liquids." Iowa Code § 479B.2(2) defines "hazardous liquid" as including "crude oil." Thus, the proposed pipeline is subject to the requirements of Chapter 479B.

Once at the Patoka hub, the crude oil can be transported through other pipelines to refineries in the

Midwest or on the Gulf Coast. (Dakota Access Exh. DRD Direct at 18.) Initially, the proposed pipeline will have a capacity of approximately 450,000 barrels per day; this can be increased to 570,000 barrels per day. (Dakota Access Exh. DRD Direct at 4.)

## INFORMATIONAL MEETINGS

As previously noted, public informational meetings required by Iowa Code § 479B.4 and 199 IAC 13.3 were held by Dakota Access in each of the 18 counties in which real property or property rights would be affected by the proposed project. Board staff representatives attended each meeting as required by Iowa Code § 479B.4. Dakota Access gave notice to each owner of land affected by the proposed project and each person in possession of or residing on such property (hereinafter collectively referred to as "landowners") and published notice in each county as required by the statute. Copies of the published notices were filed by Dakota Access on October 29, 2014, as "Legal Notices for the 18 Counties Included in the Proposed Project" and forms showing the informational meeting notices sent to landowners were filed the same day.

## INTERVENTIONS

On June 8, 2015, the Board issued an "Order Setting Procedural Schedule," establishing (among other things) an intervention deadline of July 27, 2015. However, the Board acknowledged that "owners of land affected by the proposed pipeline may petition for, and be granted, intervention after the deadline, and up to the date of the hearing, but those who delay intervention beyond the established deadline may be

required to accept the procedural schedule as they find it." (Order at 2.) The order also established the dates for all parties to submit pre-filed testimony and other exhibits and informed the public that the Board had reserved the weekdays of November 12 through December 2, 2015, for the hearing in this matter. Board rules at 199 IAC 13.2(1)(h) prohibit scheduling the hearing until Petition Exhibit H, the condemnation filing, is in final form. That exhibit had not been filed at the time of the order, so the hearing could not actually be scheduled as part of the June 8, 2015, order.

Thirty-eight parties petitioned for intervention in a timely manner and those petitions were all granted by order issued August 19, 2015. Five late-filed petitions to intervene were granted by orders issued October 14 and November 13, 2015. In total, the following parties were granted intervention:

*Intervention granted August 19, 2015, only to monitor the filings:*

Daniel K. Hickenbottom, H. Keith Hickenbottom, Diana L. Hickenbottom, Amy K. Finchum, and Darlene J. Hickenbottom (hereinafter referred to as Hickenbottom)

Sandra Easter (Easter)

Kevin Lambert (Lambert)

Paul Berland (Berland)

*Intervention granted August 19, 2015, with full right to participate:*

Eric LeSher (LeSher)

Iowa Farmland Owners Association, Inc. (IFOA)

Midwest Alliance for Infrastructure Now (MAIN)

Keith D. Puntenney (Puntenney)

Iowa Association of Business and Industry (IABI)

Ed Fallon (Fallon)

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (AFL-CIO)

Laborers' International Union of North America, Great Plains Laborers' District Council, and Iowa Local Unions 620, 353, and 538 (LiUNA)

Science and Environmental Health Network (SEHN)

Sierra Club Iowa Chapter (Sierra Club)

Iowa Citizens for Community Improvement, Jim Stovers, and Joe Reutter (Iowa CCI)

International Brotherhood of Teamsters (Teamsters)

Laverne I. Johnson (Johnson)

Herman C. Rook (Rook)

60 Plus Association (60 Plus)

Northwest Iowa Landowners Association (NILA)

Kriss Wells (Wells)

No Bakken Here

Max E. Maggard, Trustee of the Max E. Maggard and Gloria Joyce Maggard Joint Revocable Trust (Maggard)
William J. Gannon (Gannon)

Charles Isenhart (Isenhart)

International Union of Operating Engineers Local 234 (Local 234)

Linda Sorenson (Sorenson)

Channing Dutton (Dutton)

Joseph C. Reutter PE (Reutter)

Hugh E. Tweedy (Tweedy)

John Zakrasek (Zakrasek)

Ralph C. Watts (Watts)

Albemarle Farm, LLC (Albemarle Farm)

The Iowa Farm Bureau Federation (Farm Bureau)

The National Association of Manufacturers (NAM)

Iowa State Grange (Grange)

Stephen B. Boesen II (Boesen)

Kim Triggs (Triggs)

*Intervention granted October 14, 2015, with full right to participate, subject to remaining procedural schedule:*

KEEP Farms LLC (KEEP Farms)

Kathleen Parker (Parker)

Wilma Jean Groseclose (Groseclose)

Double-D Land & Investment, LLC (Double-D)

*Intervention granted November 13, 2015, with full right to participate, subject to remaining procedural schedule:*

Richard R. Lamb, trustee of the Richard R. Lamb Revocable Trust; Marian D. Johnson by her agent Verdell Johnson; and Brent Jesse (Lamb, et al.)

On September 16, 2015, the Board issued an order taking official notice pursuant to Iowa Code § 17A.14(4) of a Staff Report indicating that Petition Exhibit H was now in final form (in the sense that it was complete and in substantial compliance with the applicable filing requirements). Accordingly, the Board scheduled the hearing in this matter to commence at 9 a.m. on Thursday, November 12, 2015.

## HEARING

The first day of the hearing in Boone, Iowa, on November 12, 2015, was for receiving public comments on the proposed pipeline. Over 200 people offered comments, both in support of and against issuance of a permit.

On the following Monday, November 16, 2015, the Board convened the evidentiary hearing. The witnesses had filed prepared direct testimony and were made available for cross-examination, Board questions, and redirect examination; 69 witnesses took the stand. The evidentiary hearing continued for 11 days, including

November 17-19, 23-24, and 30 and December 1-3 and 7, 2015. The transcript ran to just over 3,500 pages. Due to the cost of a complete copy of the transcript and the fact that several parties were appearing pro se, the Board purchased additional copies of the transcript that could be checked out by the parties for use in preparing their post-hearing briefs. ("Order Establishing Briefing Schedule and Providing Outline for Brief" issued December 18, 2015.)

## ISSUES

### I. Will the Proposed Pipeline Promote the Public Convenience and Necessity?

Iowa Code § 479B.9 governs the Board's decision when considering a petition for a permit to construct, operate, and maintain a hazardous liquid pipeline. That statute provides as follows:

> The board may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper. A permit shall not be granted to a pipeline company unless the board determines that the proposed services will promote the public convenience and necessity.

Thus, the Board must decide whether the proposed Dakota Access pipeline will "promote the public convenience and necessity."

Some of the parties have argued that "public convenience and necessity" should be defined in dictionary terms, that is, "public convenience" means

service to the public and "necessity" means it will fill a need otherwise unfulfilled. (SEHN In. Br. at 2; Sierra Club In. Br. at 4-5.) Under this analysis, the proposed pipeline is not a necessity because it is not absolutely required in order to move crude oil from the Bakken region to the market; other pipelines, railways, and trucking companies are already doing that. (Tr. 138-141.) Similarly, they argue, the proposed pipeline will not promote the public convenience of Iowans because it will not accept or deliver any crude oil in the State of Iowa and the refined products produced from the crude oil may not be delivered to Iowans. (Tr. 137.) In fact, it is possible that none of the refined products will remain in the United States. (Tr. 107-08.)

Dakota Access says that the term "public convenience and necessity" is not a high bar; "the question is whether there is a demonstrable role for the project that satisfies *any* kind of need." (In. Br. at 3, emphasis in original.) Further, the Iowa Supreme Court has held that the word "convenience" is broader and more inclusive than the word "necessity" and in this context "necessity" means "not absolute but reasonable necessity." *Thompson v. Iowa St. Commerce Comm'n*, 15 N.W.2d 603, 606 (Iowa 1944). Dakota Access argues that the need for the proposed pipeline has been verified in the open market, as shippers have signed contracts committing to use 90 percent of the planned volume of the pipeline and those contracts require the shippers to pay for that capacity even if it is not used, an arrangement known as a "take or pay" contract. (Exh. DRD Dir. 5-6; Tr. 44, 891, 916-17.)

Dakota Access says the pipeline is needed to serve this demand for transportation services. (In. Br. 8-9.)

MAIN notes that the definition of "pipeline" in Iowa Code § 479B.2(3) means "an *interstate* pipe or pipeline and necessary appurtenances used for the transportation or transmission of hazardous liquids." (Emphasis added.) MAIN concludes that for the statutory framework of chapter 479B to be effective, it must be construed to provide that an interstate oil pipeline such as the proposed Dakota Access line can "promote the public convenience and necessity" as required by Iowa Code § 479B.9. (In. Br. at 5-6.) If the public convenience and necessity standard is interpreted to require that the pipeline must provide service to the public in Iowa, then an interstate pipeline carrying crude oil across Iowa could never be approved and chapter 479B would be meaningless, according to MAIN. (*Id*. at 6-7.) Further, and as discussed below, MAIN argues that the proposed pipeline serves the public interest and the public convenience and necessity by providing additional infrastructure for transporting crude oil from the Bakken region to the market; by providing a more safe, more efficient, and more economical means of transportation; by increasing the economic well-being of the State of Iowa; and by contributing to the energy independence and security of the United States.

LiUNA says that Iowa courts have held that the determination of whether a proposed service will promote the public convenience and necessity is a legislative, not a judicial, function, citing *Application of National Freight Lines*, 40 N.W.2d 612, 616 (Iowa

1950). LiUNA suggests that a broad view should be taken of the public benefits to be provided by the proposed pipeline, as the transportation of oil from source to refinery is necessary because the citizens of Iowa and of the United States are dependent on the use of petroleum products. (In. Br. at 3.)

Sierra Club has argued that the public convenience and necessity require that there be some service provided directly to the general public. (Sierra Club Init. Br. 4.) However, Sierra Club also argues that "convenience and necessity" as a phrase is essentially a symbol that represents a determination of whether the public benefit to be derived from the proposed project justifies granting the requested permit. (*Id*. at 6-7, citing *Professional Mobile Home Transport v. Railroad Comm'n of Texas*, 733 S.W.2d 892 (Tx. App. 1987).) Sierra Club says that this broader determination requires consideration of the benefits and detriments of the proposal, including issues associated with environmental damage and eminent domain. (*Id*.)

IFOA recognizes Board precedent holding that "public convenience and necessity" is not specifically defined for a reason; instead, "the term's indefiniteness is intentional and reflects a delegation by the legislature to the Board of the power to identify for itself what factors and circumstances should bear on its determination." *In re Heartland Pipeline Co.*, Docket No. HLP-98-6, "Proposed Decision and Order Granting Permit," 1999 WL 35236260, at 5-6 (Iowa Utils. Bd. 1999), citing *Application of National Freight Lines*, 40 N.W.2d 612, 616 (Iowa 1950). IFOA also argues that

the "customary standard" and the only measure of public convenience and necessity is whether the project will ultimately provide services to Iowa businesses and customers, citing *In re MidAmerican Energy Co.*, Docket No. P-831, "Proposed Decision and Order Granting Permit," 1995 WL 70092 at 14-15 (Iowa Utils. Bd. 1995).

Ms. Sorenson cites cases holding that in interpreting the phrase at issue, "the word 'necessity' is not used in its lexicographical sense of 'indispensably requisite.'" Rather, Sorenson argues the courts have defined the term by reference to the context and to the purposes of the statute in which it is found. (Sorenson In. Br. at 6, quoting *San Diego & Coronado Ferry Co. v. Railroad Comm'n of Cal.,* 292 P. 640, 643 (Cal. 1930) (citations omitted).)

*Board analysis.* As indicated above, the Board must decide whether the proposed Dakota Access pipeline will "promote the public convenience and necessity." Public convenience and necessity is not defined in the statute; the indefiniteness of the term is intentional and reflects a delegation of authority to the Board of the power to identify for itself what factors and circumstances should bear on its determination in any specific situation. *Application of National Freight Lines*, 241 Iowa 179, 40 N.W.2d 612, 616 (1950). The Board has acknowledged this flexibility in the past; *In re: Heartland Pipeline Co.*, 1999 WL 3526260 (I.U.B. 1999), slip op. at 5.

Further, in this context the word "necessity" does not always have its ordinary meaning of "indispensable." *Wabash, C. & W. Ry. Co. v. Commerce*

*Comm'n,* 309 Ill. 412, 141 N.E. 212, 214 (1923). As the *Wabash* Court noted, if "necessity" meant "indispensably requisite" in the context of a finding of "public convenience and necessity," no such finding would ever be made. Rather, the word

> connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute. No definition can be given that would fit all statutes. The meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found.

*Id.*, citations omitted.

Much the same is true of the word "convenience" when used in § 479B.9. As the Iowa Supreme Court has held,

> The word "convenience" is much broader and more inclusive than the word "necessity." Most things that are necessities are also conveniences, but not all conveniences are necessities…the word "necessity" has been used in a variety of statutes…It has been generally held to mean something more nearly akin to convenience than the definition found in standard dictionaries would indicate. So it is said the word will be construed to mean not absolute, but reasonable, necessity.

*Thompson v. ISCC*, 235 Iowa 469, 15 N.W.2d 603, 606 (1944), citing *Wisconsin Tel. Co. v. Railroad Comm'n*, 162 Wis. 383, 156 N.W. 614, 617 (1916).

Perhaps the most instructive case for determining and understanding the applicable standard is *South East Iowa Co-Op. Elec. Ass'n v. Iowa Utilities Board*, 633 N.W.2d 814 (Iowa 2001). That case reviewed the standards applicable to an electric transmission line franchise proceeding under Iowa Code chapter 478, where the test is whether the proposed line is "necessary to serve a public use" and "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest" (*see* Iowa Code § 478.4), rather than the "promote the public convenience and necessity" test applicable in this case, but the tests are sufficiently similar that the analysis should also be similar. In each type of proceeding, the Board must consider and balance concepts relating to public use, public benefits, and public and private costs and detriments. In *South East Iowa Co-Op*, the Court approved of the Board's process, which "balanced all of these factors and determined the substantial benefits outweighed the costs…." (633 N.W.2d at 821.)

Pursuant to Iowa Code § 479B.9, the Board is applying the "public convenience and necessity" test as 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. If that evidence shows that the proposed project has public benefits that outweigh the costs, the Board will find that the project "promotes the public convenience and necessity." If the evidence does not

support such a finding, then the petition for permit will be denied.

Finally, IFOA has argued that prior agency decisions indicate that service to Iowa businesses and consumers is the only measure of public convenience and necessity. (In. Br. 4.) The Board disagrees; in each of the past decisions cited by IFOA on this point, the Board (or its administrative law judge) found that a showing that the proposed pipeline would serve Iowans was generally *sufficient* to demonstrate that the project would promote the public convenience and necessity, and was commonly relied upon for that purpose, but at no time did the Board say that service to Iowans is a requirement or that it is the only way to meet the statutory standard. See *In re MidAmerican Energy Co.,* 1995 WL 70092 at 14-15; *Heartland Pipeline Co.,* 1999 WL 35236220 at 5; *In re MidAmerican Energy Co.*, 2002 WL 31387619 at 8 (IUB 2002); *In re MidAmerican Energy Co.*, 2013 WL 1285510 at 14-15 (IUB 2013).

**a. What Benefits Can be Considered?**

Some parties have argued that the rules of statutory construction prohibit the Board from considering public benefits from the proposed pipeline if those benefits would accrue to those living outside Iowa. (Sierra Club In. Br. at 8; IFOA In. Br. at 9-10; Gannon In. Br. at 4-5.) These parties note that Iowa Code § 478.3(3), relating to franchising of electric transmission lines, specifically provides that in determining whether a proposed line is in the public interest, "the term 'public' shall not be interpreted to be limited to consumers located in this state." No such provision exists in chapter 479B. These parties argue

that when the legislature shows in one statute that it knows how to express its intent regarding a particular matter, but does not use similar language in a similar statute, then the legislature means to express a different intent. *West Virginia Univ. Hosp. v. Casey,* 499 U.S. 83, 88-92 (1991). Or, stated differently, under the rules of statutory construction legislative intent may be expressed by omission as well as by inclusion. *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008). These parties conclude that the omission in chapter 479B of language similar to that in Iowa Code § 478.3(3) indicates that the legislature does not intend that the Board should consider non-Iowa benefits when determining whether a proposed hazardous liquid pipeline will promote the public convenience and necessity.

*Board analysis.* The Board disagrees. Chapters 478 and 479B, while similar in many respects, are addressed to different types of linear infrastructure projects that have very different purposes and very different effects on public and private interests, both during and after construction. Differences between the statutes are not always legally significant; the facts and circumstances must be considered in order to determine whether the difference is intended by the legislature to be significant.

The Board's precedent is that the Board will consider all benefits of a proposed hazardous liquid pipeline, regardless of whether they are Iowa-specific benefits. For example, in *Re: The Petition of Northern Pipeline Co, etc.*, "Order Granting Pipeline Permit, etc." issued May 31, 1979, in Docket No. P-749, the Board

(then known as the Commerce Commission) issued a permit for a 24-inch pipeline for the transportation of crude oil through Iowa (from Wood River, Illinois, to Pine Bend, Minnesota) primarily on the basis of non-Iowa benefits. The refineries in Minnesota that would receive crude oil via that proposed pipeline supplied over 50 percent of Minnesota's refined petroleum requirements, but only about 6 percent of Iowa's, yet the Board found that the proposed line would promote the public convenience and necessity and issued a permit. (Slip op. at 11.) It must be presumed that the legislature was aware of this agency precedent when it enacted Iowa Code § 478.3(3), see *Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015), and concluded that chapter 479B did not require a similar provision because the Board was already considering all public benefits when determining whether a proposed interstate pipeline will promote the public convenience and necessity.

Further, the electric generation and transmission marketplace is different from the pipeline transportation system in certain important respects. In 2001, at the time that Iowa Code § 478.3(3) was enacted (H.F. 577, 79th Gen Assembly, 1st Sess.), transmission planning was shifting from a state-by-state basis to a regional basis, resulting in the creation of the Midcontinent Independent System Operator (MISO), a regional transmission organization regulated by the Federal Energy Regulatory Commission. Because of the physics of electric power transmission, electric power flows primarily along the path of least resistance regardless of where that path is physically located. It was foreseeable that regional

transmission planning might sometimes require system upgrades in Iowa that would have no discernible direct benefit in Iowa but would have significant public benefits elsewhere in the region. Under those circumstances, specific statutory instruction to consider benefits outside of Iowa made sense, and so Iowa Code § 478.3(3) was added to the statute.

Transportation of crude oil, in contrast, is readily predictable; the oil will flow through the designated pipeline, which may not have an endpoint in Iowa. The legislature recognized this in chapter 479B when it defined the word "pipeline" as "an *interstate* pipe or pipeline…" (Iowa Code § 479B.2(3), emphasis added). This definition contemplates issuance of permits for crude oil pipelines that will not have an endpoint in Iowa (because Iowa neither produces nor refines crude oil), and it follows that public benefits outside of Iowa must be a consideration in the Board's decision or else no permit could be issued for some interstate crude oil pipelines that will benefit the broader public interest if constructed.

This interpretation is further supported by other rules of statutory construction, specifically the principle that when deciding which of two statutory constructions to adopt, if one construction would raise constitutional issues then the other should prevail under the canon of constitutional avoidance. *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *Iowa Supreme Court Board of Professional Ethics and Conduct v. Visser*, 629 N.W.2d 376, 380 (Iowa 2001).

At least one state court has held that a state statute that treats proposed interstate projects differently based upon a lack of sufficient in-state benefits places a burden on interstate commerce and therefore violates the Commerce Clause of the U. S. Constitution. *Application of Nebraska Public Power District, etc.*, 354 N.W.2d 713, 718 (South Dakota 1984). Applying that principle here, the conclusion that the absence of language similar to that in Iowa Code § 478.3(3) means out-of-state benefits cannot be considered in connection with an interstate hazardous liquid pipeline could raise the same constitutional issue under the Commerce Clause. Accordingly, that interpretation should be avoided and the alternative interpretation, that the Board can consider out-of-state benefits despite the absence of specific language like that in Iowa Code § 478.3(3), should be adopted.

The Board concludes that it may consider out-of-state benefits when deciding whether the proposed pipeline will promote the public convenience and necessity.

## II. Global Issues

### a. Climate Change

Dakota Access argues that global climate change is irrelevant to this docket because the proposed pipeline, even if built, will have no meaningful effect on the use of petroleum products. (In. Br. at 9.) The pipeline will not increase the existing demand for those products and denial of a permit will not decrease that demand. Further, Dakota Access argues, the pipeline represents the most efficient way of moving crude oil from the

Bakken fields to the refineries because a pipeline ships only the product, while trains, trucks, and ships must expend energy to move large and heavy containers as well, and the containers must then return to the oil field empty to be refilled. (In. Br. at 10-11; 60 Plus Exh. MK Direct at 5.) Dakota Access concludes that the demand for oil, and the willingness of producers to meet that demand, is a reality, so anyone concerned about carbon emissions should favor shorter, more efficient ways to move oil to the market. That argues in favor of domestic oil production and pipeline transportation. (*Id*.)

Dakota Access also argues that Iowa lacks the authority to deny a permit based upon policy considerations that are beyond the jurisdiction of the Board and asserts that "the Board would likely be preempted if it tried to act on the basis of seeking to impact such extra-jurisdictional policies." (In. Br. 10.) Dakota Access says that Iowa Code chapter 479B expressly contemplates that crude oil pipelines will be constructed through Iowa and provides a path for companies like Dakota Access to do so. (*Id*.)

The opposition parties argue that climate change is the "defining issue of our time." (Sierra Club In. Br. at 11.) As Sierra Club witness Hanson testified, carbon dioxide emissions from burning fossil fuel are disrupting Earth's climate system in ways that create "risks of ecological, economic, and social collapse." (Sierra Club Exh. JH-1 at 4-5.) The opposition parties acknowledge that denying a permit in this docket will not, by itself, reduce demand for petroleum products or stop climate change, but they assert that granting a

permit for a pipeline will promote additional exploitation to some degree, which will only serve to reduce the time available to complete the necessary transition to an emission-free marketplace. (Wells In. Br. at 2; Sierra Club In. Br. at 13; Sierra Club Exh. JH-1 at 30.)

Another party argues that the proposed pipeline would facilitate and promote the production and use of fossil fuels because it would reduce shipping costs, making increased oil extraction more viable and increasing the profits of fossil fuel companies. (Zakrasek In. Br. at 5, citing Tr. 184, 194, and 258.) It should also have the effect of reducing the cost of refined petroleum products to some degree, which could promote consumption of fossil fuels. (Tr. 246.) Zakrasek argues that the result of approving the pipeline would be increased use of fossil fuel and slower adoption of clean, renewable energy sources, such that the pipeline would be detrimental to the public convenience and necessity. (Zakrasek In. Br. 4-6.)

*Board analysis.* The question before the Board is what weight should be given to this evidence and argument in the Board's application of the balancing test under Iowa Code § 479B.9. The fact is that Bakken oil is being produced and transported to market now because there is demand for it; the proposed pipeline represents, at most, a change in the method of crude oil deliveries that are already taking place and that will continue to take place regardless of whether this pipeline is built.

Some parties argue that the Board should deny the permit as a symbolic gesture, or as a way to advocate

for solutions to climate change, but Chapter 479B does not contemplate such a role for this agency. Rather, the Board is charged with the duty to weigh the evidence and apply the statutory standards to that evidence in a manner akin to a judicial proceeding, and there is no evidence in this case that denial of the permit would affect climate change to any significant degree. Climate change in general is a very important issue, but in this proceeding the potential impact of this project on climate change is a factor that merits little weight in the Board's balancing test.

**b. World Market**

During the hearing, some questions were asked about the world market for crude oil and how it might relate to this project. The MAIN Coalition argues that the purpose of the pipeline is not to deliver oil or its refined product to foreign markets but to make it available for domestic consumption. (In. Br. 15.) Sierra Club says this ignores the fact that there is no assurance the oil will remain in this country, especially now that the ban on export of crude oil has been lifted. (Sierra Club Reply Br. at 10.) Dakota Access argues that the potential export of crude oil is irrelevant to the issues before the Board when determining whether to grant a permit, but if it is to be considered, the evidence shows that even with the lifting of the ban on crude oil exports it is "highly unlikely" the oil carried by this pipeline would be exported. This is because light crude oil is in demand by refineries in the Midwest, such that they are currently importing it from the Gulf Coast area. With such demand at the local level, Dakota Access says, the Bakken oil and its

refined products will probably stay in this country. (Tr. 82, 107-09.)

*Board analysis.* While Dakota Access argued that light crude oil is currently in demand by refineries in the Midwest (In. Br. at 17), it is reasonable to expect that the local demand may change over time. During periods of lower domestic demand the oil will be more likely to be sold to foreign markets. As Sierra Club says, Dakota Access cannot give any solid assurance that the oil carried by the proposed pipeline will not be sold to foreign markets, at least from time to time. (Reply Br. 10.) But it has always been possible that the oil carried by the proposed pipeline will be sold into overseas markets in one form or another; the possibility does not affect the Board's decision in this docket. The potential impact of the proposed pipeline on the world market for crude oil is a factor that merits little weight in the Board's balancing test.

## III. National Issues

### a. Energy Independence and Security

While energy independence and security are separate concepts, they are closely related and can be considered together in this matter. Energy security is defined in terms of the number and variety of options and choices available to supply the national energy demand, while energy independence is defined in terms of reduced reliance on foreign sources of petroleum products. (Exh. GC Reply at 2-3.) Dakota Access does not believe energy independence is an appropriate goal; instead, it says its pipeline will promote better energy security for the United States and, therefore, for

Iowans, by providing an alternative means of transport for domestically-produced crude oil. (In. Br. at 11.) A strong domestic oil infrastructure reduces the sensitivity of the United States to events that affect the availability of foreign oil and provides protection against price shocks or product shortages. (In. Br. at 12.)

The Sierra Club agrees that energy independence is not the relevant question here, describing it as a "red herring" (Sierra Club In. Br. at 18), and noting that if it were the goal, no crude oil or refined petroleum products would be permitted to leave the United States. With respect to energy security, Sierra Club says if this were really a concern, the nation would be engaged in a comprehensive program involving conservation and energy efficiency, rather than relying on the market to provide more and more petroleum products. (*Id*. at 21.)

Other parties argue that true energy independence and security requires movement away from fossil fuels and toward clean, sustainable energy sources like wind-driven electric generation. (Zakrasek In. Br. 7; IFOA In. Br. 16-17.) Puntenney argues that a planned system of distributed generation based upon renewable energy sources would remove the need to ship energy from refineries to users in far-off locations. It would also provide energy security against potential man-made or weather-based disruptive events. (Puntenney In. Br. at 11, 17.)

Sorenson argues that energy security means having the capability to harness, develop, and transfer energy resources and it would be foolish for the U.S. to trade

away Bakken oil at low prices (when the world has an ample supply of oil) at a cost to the nation's fresh water supply and land productivity. (Sorenson In. Br. at 11.) Sorenson argues that the restrictions on use of land that are imposed by the Dakota Access easements represent a peril to the land and a loss of many types of security, because in the easement area trees would be forbidden and buildings prohibited. (*Id*.)

Gannon argues the proposed pipeline does not increase energy security or independence unless it is shown that the Bakken crude is not otherwise reaching the refineries. (Gannon Exh. Imerman Dir. at 11.) Gannon also argues that the recent act of lifting the ban on sales of U.S. crude oil to overseas markets indicates that the U.S. government is not concerned about U.S. oil supply, so energy security is not a significant consideration. (In. Br. 8-9.)

*Board analysis*. The parties generally agree that energy independence is not the issue here. Instead, their focus has been on energy security. In this case, the proposed pipeline would undeniably provide another method for transporting Bakken oil to market and would do so in a manner that is distinct from the alternatives (rail and trucks). Having options and alternatives is one factor tending to increase energy security. Thus, it can be said that if built, the proposed pipeline would enhance the nation's energy security to some extent. This does not mean that the project's potential contribution to increased energy security is sufficient by itself to support a finding that the pipeline will promote the public convenience and necessity; the project's potential impact on energy independence or

energy security is a factor that merits little weight in the Board's balancing test.

**b. Rail Transport vs. Pipelines**

Dakota Access argues that pipelines are a safe way to transport crude oil; over 99 percent of the product transported by pipeline is delivered safely and that record has only improved as shipping volumes have increased. (Dakota Access Exh. GC Direct at 7-8.) Dakota Access also says that pipelines have a better safety record than other modes of transportation for crude oil, including rail; in fact, data from the U.S. Department of Transportation (USDOT) show that rail transport of crude oil has over three times as many incidents per ton-mile as pipelines; according to those records, rail transport of petroleum averaged 2.08 incidents per billion ton-miles from 2005 to 2009, while hazardous liquid pipelines averaged only 0.58 incidents per billion ton-miles over the same time period. (Exh. GC-1.) On a straight per-mile transported basis, the USDOT again estimates that pipelines are much safer than rail for transporting crude oil. (Exh. GC Direct at 7-8.) Further, railroads frequently travel through population centers and tend to be closer to larger numbers of people when an incident occurs, while pipelines are generally located in more rural areas, according to Dakota Access. (In. Br. 13.)

MAIN argues that the USDOT unequivocally says pipelines are safer than other modes of transporting oil, including rail. (Exh. SG Direct at 4.) Data from PHMSA demonstrates that from 2005 to 2014, Iowa has averaged less than one significant pipeline incident per year, statewide. (*Id*. at 3-4.) PHMSA actively

regulates pipeline safety via regulations and inspections. MAIN says that railroads do not have comparable safety requirements and in recent years there have been incidents of oil tank cars crashing in metropolitan areas, causing deaths and property damage. For example, in 2013 a train carrying 72 carloads of crude oil crashed and exploded in Lac-Mégantic, Quebec, killing 47 people, destroying much of the town, and spilling 1.6 million gallons of crude oil. (Exh. TDG Dir. at 16-17.)

Other parties argue that the evidence regarding the relative safety of transporting crude oil by rail or by pipeline is not so clear. Sierra Club relies on the same report as Dakota Access for the proposition that both rail and pipeline have demonstrated improved safety records over the past two decades, even as shipping volumes have increased, and both modes deliver more than 99 percent of the product safely. (Sierra Club Exh. 27.) Sierra Club notes that the National Transportation Safety Board has identified increased pipeline safety as one of its top ten goals. (*Id.* at 25.) This may indicate that the agency is of the opinion that pipeline safety is not adequate at this time.

Sierra Club also says that during 2013, more than 800,000 gallons of oil spilled from railroad cars while over 5,000,000 gallons of hazardous liquids spilled from pipelines. Sierra Club admits this is not an apples-to-apples comparison but says it shows there is no substantial evidence that pipelines are safer than rail for transporting oil. (Sierra Club In. Br. at 23.)

IFOA says that according to the Iowa Department of Transportation, approximately 40,000 rail cars of

crude oil travel through Iowa each year, about one 100-car train per day. (Exh. Wehrman-Andersen at 4.) IFOA argues that this level of crude oil rail traffic does not represent a serious risk to Iowa, so even if pipelines are safer than rail transport on a per-ton-mile basis, there is no reason to take on the additional risks associated with the pipeline. (IFOA In. Br. at 18, citing Exh. Wehrman-Andersen at 4.) IFOA also argues that the gross number of hazardous liquid pipeline (HLP) incidents in the United States has been increasing each year since 2004, according to PHMSA. (Exh. Wehrman-Andersen 1.) Finally, IFOA argues that based on number of incidents per 10,000 miles of pipeline or railroad, pipelines have an incident rate of 17.874 per 10,000 miles of pipeline while railways have only 3.543 incidents per 10,000 miles of track. (Exh. Wehrman-Andersen at p. 4.) IFOA concludes that the absolute risk posed by a new pipeline is greater than that posed by continued use of existing rail transport. (In. Br. at 20.)

The record evidence also indicates that the effect of a hazardous liquid pipeline spill may be significantly different than the effect of a railroad spill. IFOA witness Wehrman-Andersen testified that a rail spill will typically have definitive boundaries that are readily observable by emergency responders and the amount of oil spilled can be quickly estimated by counting the damaged tank cars. Further, the tank cars bear placards showing the class of chemicals being transported. (Exh. Wehrman-Andersen at 2.) With an underground pipeline spill, there may not be anything visible from the surface to provide information to an emergency responder unless the oil reaches the surface,

and even then, accurately estimating the volume of the spill may be difficult. (*Id*.) These factors may complicate the initial response and the ensuing cleanup activities.

Gannon argues that if the proposed pipeline is built, the quantity of hazardous material being transported through Iowa will be greatly increased. He calculates that if Iowa currently has only one 100-car train of crude oil passing through each week, that translates into approximately 74,000 barrels of crude oil per week being transported by train through the state. In contrast, Dakota Access's proposed pipeline is designed to transport 570,000 barrels per day. (In. Br. at 6; Exh. Gannon MI-3, p. 7; Exh. F, p. 1.) As a result, Gannon concludes, the proposed pipeline would actually increase the potential hazards to Iowans.

*Board analysis.* The Board finds that the increased safety associated with pipeline transport of crude oil is significant. Sierra Club's comparison of the total amount of oil leaked by pipelines and railcars during 2013 is too simplistic. It compares crude oil shipments by rail to all hazardous liquids transported by pipelines and fails to consider the relative volumes of crude oil transported or the distance over which the oil was being transported. To the extent pipelines carry more oil over greater distances the Sierra Club comparison overstates the relative safety of rail transport.

Similarly, the testimony of IFOA witness Wehrman-Andersen is based upon the total miles of railroad track and pipeline in the United States (see Exh. Wehrman-Andersen 1 at p. 2) and fails to account for the amount of oil being shipped by each

transportation mode or the distance the oil is being shipped. Further, those calculations overstate the safety of shipping by railroad by including miles of railway over which crude oil is never shipped.

The most valid comparison in this record of the relative safety of rail transport versus pipeline transport considers the shipping method, the amount of crude oil shipped, and the distance it is shipped. It is clear from the USDOT data in Exhibit GC-1 that significantly more oil is shipped more miles by pipeline than by rail, so it is not surprising that the total amount of oil leaked by pipelines is higher. However, on a more equal comparison basis (accounting for both volume of oil carried and the distance it was carried) pipelines are shown to have between one-third and one-fourth the incident rate of railway transport of petroleum products. (*Id.*) As one report stated, "[b]y any measure – number of incidents, fatalities and spilled fluids recovered, pipelines are the safest and most effective form of energy transportation." (Exh. GC Direct at 8, quoting Vern Grimshaw & Dr. John Rafuse, *Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities*.)

This safety advantage is a substantial benefit of the proposed pipeline. Again, the amount of Bakken oil produced will be a function of marketplace demand, and once that oil is produced it must be shipped to the refineries, primarily by rail or by pipeline. The pipeline may or may not reduce rail shipments of crude oil, but oil that is shipped by pipeline is significantly less likely to be spilled than oil shipped by rail. Therefore, if it is built, this pipeline will reduce the overall risk of crude

oil spills, both in Iowa and elsewhere. The project's potential impact on safe shipping of crude oil is a factor that merits significant weight in the Board's balancing test.

**c. Impact on Grain Shipments**

Dakota Access argues that if constructed, the proposed pipeline will transport crude oil that might otherwise be shipped by rail, relieving rail capacity to ship other goods. Dakota Access says that rail transports 14 percent of the grains produced in Iowa (Exh. EK Dir. at 2-5) and those rail lines have experienced a growth in traffic in recent years. (*Id.*) According to Dakota Access, the result of constrained rail shipping capacity is a loss of revenue for grain producers due to higher shipping costs and, potentially, more limited shipping options. (*Id.*) Dakota Access says it would take 642 rail cars each day to ship the 450,000 barrels per day that the proposed pipeline will carry from North Dakota. (Ex. EC Direct at 6.) While those opposed to the project may disagree with the calculations offered by Dakota Access in an attempt to quantify this benefit, the company says that the basic premise of supply and demand means that the project will reduce demand for crude-by-rail shipping and therefore increase the supply of rail transportation available for other commodities. (In. Br. 16.)

Sierra Club notes that Dakota Access's own witness testified that the pipeline will not necessarily reduce rail shipments of oil. (Tr. 2201.) Sierra Club argues that crude-by-rail will continue to be attractive because rail is more flexible and can send the oil where it needs to go at any particular time. (Reply Br. 9-10.) For these

reasons, Sierra Club argues that the potential for reduced shipping of oil by rail is not a sufficient reason to grant a permit.

IFOA argues that there are many flaws in the Dakota Access analysis of the potential grain shipping benefits associated with the proposed pipeline, including lack of reliable data, use of irrelevant data, and insufficient data. (In. Br. 21-23.) For example, Dakota Access witness Kub admitted that studies show a large degree of uncertainty regarding the possible connection between railroad transportation costs and local commodity prices. (Tr. 313.) IFOA argues the claimed benefits are baseless and should be rejected by the Board. (*Id*. at 24.)

Other factors will affect the availability of rail transport for grain shipments. Zakrasek pointed out that increased production of electric energy from wind will reduce Iowa's need for coal shipments and Dakota Access witness Kub agreed that reduced coal shipments would also free up additional rail capacity. (In. Br. 8; Tr. 343.) Zakrasek asserts that to the extent additional rail capacity is a benefit, reduced coal shipments would benefit farmers without the detrimental effects of the proposed pipeline, so the focus should be on wind-driven electric generation, not a crude oil pipeline.

Gannon argues that there is no data to support Dakota Access's claim that reduced rail shipments of crude oil will affect the cost of transporting grain by rail. The study Dakota Access relies on actually shows that Iowa is much less dependent upon shipping grain by rail than other states in the region. (Exh. Babcock

Dir. 2; Exh. EG-1, p. 6.) This means that disruption or congestion of the long-haul rail networks has less impact on Iowa, so reduced rail traffic will also have less benefit. (In. Br. 9-13.)

*Board analysis.* The record indicates that crude oil and other commodities may compete for rail transportation services to some extent, although the level of that competition and its possible effect on commodity prices is not clear. If the proposed pipeline is constructed, some 450,000 barrels per day of crude oil will no longer be competing for those services. That is equivalent to over 600 rails cars per day, which may represent an incremental benefit to those other commodities. However, Dakota Access's witness acknowledged that there is no guarantee that rail transportation of crude oil will be reduced if the pipeline is built. It is possible that Bakken production will increase, instead. (Tr. 2201.) If that happens, then the impact of the proposed pipeline on the availability of rail transport may be non-existent. The project's potential impact on grain shipping by rail is a factor that merits little weight in the Board's balancing test.

**d. Sale of Crude Oil to Foreign Markets**

Dakota Access argues the question of export of crude oil is irrelevant to the issues before the Board in this permit proceeding. (In. Br. at 16.) Further, at the time of the hearing there was a national ban on exporting crude oil, which has since been lifted, but even during the hearing it was permissible to export refined oil products, so there has always been a possibility that at least some of the oil carried in the

proposed pipeline would ultimately be sold in foreign markets in some form.

Offsetting this possibility to some extent, Dakota Access witness Rahbar-Daniels also testified that light crude oil (like Bakken oil) is currently in high demand by domestic refineries, making it "highly unlikely" that Bakken crude would be exported. (Tr. 82, 107-109.) Instead, the pipeline will most likely carry the crude oil to refineries in the Midwest and beyond. (Tr. 107-09.)

Sierra Club argues the proposed pipeline would contribute to exhausting the oil supplies in the United States and once those supplies are depleted, the country would have to depend entirely on foreign sources of oil. (In. Br. at 26.)

IFOA says the true purpose of the proposed pipeline is to allow oil to be transported directly to the Gulf Coast, where it can be shipped to overseas refineries. (In. Br. 24, citing Tr. 46.) With the ban on crude oil exports lifted, IFOA argues, it is impossible for Dakota Access to show that the transportation of crude oil from the Bakken fields will have any measurable benefit to Iowans in terms of availability of refined products that can be used in Iowa. (In. Br. at 25.)

Sorenson argues that destroying the environment "to sell a product that will pollute the air - - to countries that don't like us - - for a small amount of paper dollars - - is lunacy." (In. Br. at 13.) Instead, she argues, we should create alternative energy solutions and products that can be exported with minimal (or beneficial) environmental impact. (*Id*.)

*Board analysis.* At the time of the hearing in this docket, the sale of crude oil to foreign markets was banned, but export of refined petroleum products was permitted. Thus, the recent lifting of the ban on crude oil exports is not a significant factor in the Board's decision; it has always been true that any oil carried by the proposed pipeline could be exported in some form. The lifting of the ban only means that the oil can be exported in crude form as well as refined.

Dakota Access has offered testimony that a robust global market provides additional options for energy supply, so isolation of the United States market is not desirable. (Dakota Access Exh. GC Reply at 2.) To the extent the proposed pipeline will promote that robust market by making exports more viable, it may provide some indirect public benefit. But the Board does not consider that benefit to be substantial in determining whether the proposed pipeline will promote the public convenience and necessity; it is simply too remote and indirect. The project's potential impact on sale of crude oil to foreign markets is a factor that merits little weight in the Board's balancing test.

**e. Depletion of Bakken/Three Forks Oil Reserves**

Sierra Club and other parties argue that recent trends show a decline in oil production from the Bakken region and a reduction in the number of active drilling rigs in the region. (Sierra Club Hrg. Exh. 17, 22, and 26.) Sierra Club also says that a number of oil companies have recently abandoned the Bakken region. (In. Br. at 27; Sierra Club Hrg. Exh. 15 and 16; Puntenney Hrg. Exh. 1 and 2.) From these facts, Sierra

Club concludes that the recoverable oil in the Bakken area will be depleted in the near future, meaning the proposed pipeline will only be of benefit for a short period of time, at best. (In. Br. at 27-28.) Sierra Club argues this "is not a scenario that demonstrates public convenience and necessity." (*Id*.)

Dakota Access argues there is no credible evidence in the record that the Bakken/Three Forks oil reserves have been depleted. Instead, the fact that certain shippers have executed long-term take or pay contracts to utilize the proposed pipeline to transport crude oil is evidence that sophisticated shippers believe there are significant oil reserves in the area and they are willing to back that belief with monetary commitments. (In. Br. at 17.) Dakota Access disputes Sierra Club's claim that there has been a recent sharp decline in production, saying that Sierra Club is looking at only a "slight dip" in production and ignoring the fact that the reduction is "minimal compared to the massive historic increases in output shown on the same exhibit." (In. Br. at 18; Sierra Club Exh. 26.) North Dakota continues to be the second largest producer of crude oil in the United States at over 1.1 million barrels per day. (Tr. 50-51 and 60.) Dakota Access says that when the entire record is considered, it shows that Bakken reserves and production are more than sufficient to require the transportation capacity of the proposed pipeline.

*Board analysis*. The parties opposing the permit have not offered any credible evidence that Bakken/Three Forks reserves are likely to be depleted in any relevant time frame. The recent dip in

production from the area is, as Dakota Access says, minimal compared to the historic production increases shown on the same exhibit. (Sierra Club Exh. 26.) The opposition's reliance on a short-term reduction as evidence for a long-term trend is misplaced.

The fact that some oil companies have left the Bakken fields is not as significant as the fact that other oil companies continue to produce from those fields and have, in fact, committed to ship some of that production via the proposed pipeline. Similarly, the fact that three other potential pipeline projects from the area have been cancelled is not as significant as the financial commitments certain oil producers have made to use this pipeline if it is built.

The Board finds that there is no evidence in this record to indicate that the oil reserves in the Bakken/Three Forks are insufficient to support the proposed pipeline for the foreseeable future. The possible depletion of the oil reserves is a factor that merits little weight in the Board's balancing test.

**f. National Alternatives to Crude Oil Pipelines**

Sierra Club and others opposed to issuance of a permit argue that alternative sources of energy are rapidly replacing fossil fuels and those sources represent a national alternative to crude oil pipelines. They say alternatives like solar and wind energy are becoming cost competitive with fossil fuels, represent a better path to energy independence and security, and are steadily reducing our nation's dependency on oil. (Sierra Club In. Br. 18-20; Puntenney In. Br. at 24-28;

Puntenney Exh. 17 and 18.) The transition to alternative energy sources should be made as quickly as possible, these parties argue, and the proposed pipeline would only be an excuse to delay that transition. (Sierra Club In. Br. 28.) Further, if there are viable alternatives to building this pipeline that will provide for the country's energy needs, then there is no public convenience and necessity for this project. (Sierra Club Reply Br. 11.)

Dakota Access argues there is no evidence in the record of any national alternatives that would serve a similar purpose to the proposed pipeline. (In. Br. 19.) Solar and wind are not alternatives as they cannot replace motor fuels, chemicals, and other products that rely on petroleum products as inputs. (Tr. 3480.) Moreover, as a nation we are still committed to using all of the available energy options for the foreseeable future. (Exh. GC Direct at 4.)

*Board analysis.* The increased use of alternative energy sources in this country is a valuable and beneficial trend. In fact, it is the policy of the state of Iowa to encourage the development of alternative energy production facilities, see Iowa Code § 476.41, and the Board supports development of cost-effective alternative energy sources, including wind, solar, and agricultural sources. However, alternative energy sources are not a substitute for refined oil products in many uses. Further, while the Board supports the development of alternative energy sources, that support is not identified as a factor to be considered when deciding whether to issue a permit under chapter 479B. The increasing availability of alternative energy

sources is a factor that merits little weight in the Board's balancing test.

**g. Permits and Authorizations**

This issue will be addressed in the Terms and Conditions section of this order.

## IV. State Issues

**a. Economic Benefits**

Dakota Access argues that the proposed pipeline project will bring significant economic benefits to Iowa, to the region, and to the nation, including construction jobs, permanent jobs, property taxes, and more. (In. Br. 20.) Dakota Access says that the Board has found in other pipeline permit dockets that economic benefits, including private economic benefits, are sufficient to show the project will promote the public convenience and necessity. (In. Br. 21, citing *In re Ag Processing, Inc.,* Docket No. P-835, "Proposed Decision and Order Granting Permit" (Ia. Utils. Bd. Sept. 16, 1996) and *Sioux City Brick and Tile Co.*, Docket No. P-834, "Proposed Decision and Order Granting Permit" (Ia. Utils. Bd. Dec. 1, 1995).)

Here, Dakota Access's initial estimate of the economic benefit of this project to Iowa and to Iowans is in excess of $1 billion. (Exh. MAL-1.) Dakota Access acknowledges that opponents of the project took issue with some of the estimates and inputs used to arrive at that figure, but OCA witness Bodine testified that even if the magnitude of the benefits can be disputed, it is clear that there will be economic benefits to Iowa and to Iowans. (Exh. Bodine Direct at 10.)

Dakota Access points out that even if the projected benefits are adjusted to address the arguments raised by the opponents, the project is still expected to generate $787,000,000 in construction period economic benefits in Iowa. (Gannon Exh. MI-11.)

MAIN argues that the pipeline will have a $1.11 billion economic impact on the state of Iowa, including nearly $189 million in landowner payments, construction jobs for up to 4,000 workers (more than half from Iowa), $49.9 million in sales and income taxes, and $27.4 million in annual ad valorum taxes to counties and municipalities in Iowa. (Exh. RW Direct, DB Direct, DC Direct, MR Direct, JM Direct, and KT Direct.)

In addition to the direct economic benefits described in the testimony, MAIN says the pipeline will have indirect economic benefits by reducing the cost of oil from the Bakken region by as much as $15 per barrel and by providing a reliable and efficient delivery mechanism for the oil. (Exh. MR at 4.)

LiUNA suggests that the economic benefits of constructing the pipeline are a substantial factor to be considered but they are not the sole rationale in support of granting a permit. (In. Br. at 4.) LiUNA's witness Schmidt testified that the pipeline as a whole is a $3.7 billion investment that will create 8,000 to 12,000 construction jobs overall, 4,000 of those in Iowa. (Exh. Schmidt-1 at 4.) Other LiUNA witnesses testified to the economic and professional interests their members have in the proposed pipeline. (IUOE Exh. Carter-1 at 1-9.)

Sierra Club and Gannon argue that the evidence in this case shows that any economic benefit to Iowa from the proposed pipeline will be short-lived and modest. (Sierra Club In. Br. 33; Gannon In. Br. 13-15.) Sierra Club says the evidence shows that the data Dakota Access modelled in order to calculate the projected economic benefits was "seriously flawed" (*Id*. 34) in at least four respects.

First, the company included payments for easements and damages as part of the stimulus, when these payments are merely compensation for loss, not new value. (IFOA agrees on this point, In. Br. at 10.)

Second, expenditures for materials that cannot be obtained in Iowa were included as Iowa benefits.

Third, it was improperly assumed that all employment and contracting activities will originate with expenditures in Iowa, when the evidence shows otherwise.

Fourth, there is insufficient idle construction capacity in Iowa for a project the size of the pipeline, meaning that some of that capacity would have to be supplied from outside Iowa. (Exh. Gannon-Imerman Dir. 4.)

Sierra Club witness Swenson expanded on these and other criticisms of the Dakota Access economic impact study. First, the number of jobs was calculated using the concept of "job years," which Swenson says will overstate the number of jobs that would actually be created by the project. (Exh. DS-1 at 12-19.) Second, the Dakota Access analysis reports the jobs as full-time equivalents, rather than using an annualized value,

also overstating the number of jobs that would be created. (Exh. DS-1 at 19-21.) Third, Swenson says that the Dakota Access analysis ignores the fact that most of the materials for constructing the pipeline will be manufactured outside Iowa, overstating the purchasing benefits of the project. (Exh. DS-1 at 21-24.) Fourth, Swenson says that the highly-specialized jobs required to build a crude oil pipeline will not be filled by Iowa workers, yet the Dakota Access study assumes they will be. The result is to further overstate the estimated economic benefit to Iowa from the proposed project. (Exh. DS-1 at 24-26.)

Zakrasek argues that the jobs, tax revenues, and economic activity associated with construction of the proposed pipeline could be generated by other large construction projects, such as construction of sustainable energy infrastructure. (In. Br. at 9.) He says that developing Iowa's wind and solar capacity, along with advanced, large scale storage for electric power, could generate economic benefits of $20 to $100 billion without the detrimental effects of the pipeline. (Exh. JZ Direct at 3-6.) Moreover, new electric vehicles with greater range could displace vehicles powered by fossil fuels, disrupting the demand for those fuels. (*Id.*; Tr. 266-67.) Or, a policy change such as a fee or tax on the use of fossil fuels (due to the damage caused by their use) could have the same effect, diminishing the economic benefits of the proposed pipeline. (Tr. 1114-15.) Zakrasek argues that alternative, sustainable clean energy projects avoid these risks. (In. Br. 10.)

Sorenson argues that some of the spending to build the pipeline in Iowa may not stay in Iowa. Purchases may be made in other states and work crews may come from other states, so the economic benefit to Iowa will not be as great as projected. (In. Br. at 15-16.) Sorenson says that the lack of permanent Dakota Access employees in most of the affected counties leaves those counties with the potential liability of the pipeline without any offsetting long-term economic benefits; the easement payments cannot be considered an economic benefit; the construction timeline will likely be shorter than projected, reducing economic benefits associated with the work crews; and the alleged property tax benefits are not supported by solid information. (In. Br. at 20-28.) Sorenson also says that the job benefits associated with the proposed pipeline should be offset by the potential loss of jobs as a result of reduced use of rail to transport the crude oil. (*Id*. at 29.)

In reply, Dakota Access argues that the opponents have, at best, only managed to tinker at the margins of the projected benefits; the overall magnitude of the benefits is not seriously in dispute. (In. Br. 21.) Even Sierra Club witness Swenson concedes that "there will be sizable short-term economic impact in parts of Iowa. That is undeniable." (Exh. DS-3 at 2.) Dakota Access notes that while Swenson criticizes the company's study for using job years, he admitted use of job years is common in private economic impact studies (Exh. DS Dir. 13) and in fact used job years in his own study for another project (Dakota Access Cross Exh. 6).

Dakota Access emphasizes that Gannon witness Imerman argues that the proposed pipeline would

"only" generate $787,000,000 in construction period economic benefits for Iowa, including "only" 3,100 construction period jobs. (Exh. MI-11.) Dakota Access argues these figures are too low for a variety of reasons (including the exclusion of $85 million in easement payments, failure to consider regional benefits, and other alleged errors), but even so they are sufficient to demonstrate significant economic benefits to Iowa from construction of the proposed project. (In. Br. 23.)

Dakota Access also argues there will be significant long-term economic benefits from the proposed pipeline. The company estimates the project will create 25 long-term direct, indirect, and induced jobs in Iowa, and the pipeline will pay approximately $27 million per year in property taxes in Iowa. (Dakota Access Cross Exh. 7 at 3.)

*Board analysis.* Dakota Access says the proposed pipeline will have an economic benefit for Iowa in excess of $1 billion. The opponents challenge this figure and the data used to arrive at it, but even if all of their challenges are accepted and the model is accordingly adjusted, the project still shows an economic benefit to Iowa during the construction phase alone of almost $800 million. (Gannon Exh. MI-11.) Either figure is sufficient to establish that the proposed pipeline represents a substantial economic benefit to the state of Iowa during construction.

Further, Dakota Access will pay more than $27 million in property taxes each year. (Exh. MAL Direct 10.) The project will include the direct creation of at least 12 long-term jobs and indirect creation of a similar number of long-term jobs. These are real

economic benefits for Iowa that will result from the construction and operation of the proposed pipeline.

The overall economic benefits to Iowa from the construction, operation, and maintenance of the proposed pipeline represent a factor that merits significant weight in the Board's balancing test.

**b. Environmental Issues**

Dakota Access says that the proposed pipeline project will meet or exceed all applicable environmental requirements from multiple federal and state agencies, including PHMSA's safety regulations at 49 C.F.R. parts 194 and 195, and will be protective of the environment. Other applicable regulations include, but are not limited to, the Board's land restoration rules at 199 IAC chapter 9; the U.S. Army Corps of Engineers' authority over all waters of the United States under Clean Water Act Section 404 and Rivers and Harbors Act Section 10; and the U.S. Fish and Wildlife Service authority over federally-listed threatened and endangered species that could be affected by the project, under Section 7 of the Endangered Species Act. Dakota Access is committed to meeting or exceeding these standards and requirements. (In. Br. 27-29.)

This commitment is reflected in the route development, the design of the pipeline, and agricultural impact mitigation plan (AIMP), and the company's commitment to use Best Management Practices (BMPs) in the construction and operation of the line. (In. Br. 32-40.) The proposed route was developed using a Geographic Information System (GIS) routing program that considered multiple

datasets in an attempt to avoid certain features, including environmental resources, and to locate the pipeline closer to other features, such as existing pipelines and other existing infrastructure. (IFOA Exh. 5.) The resulting route was then refined based upon desktop review, field surveys, and agency input (Exh. MH Dir. 3-4) to avoid cultural resources and other environmental factors. (*Id.*) In these ways, the proposed route was designed to minimize adverse environmental impacts.

Next, the design of the pipeline exceeds the applicable PHMSA safety requirements in certain respects in order to further limit the potential impact of the project on environmental concerns. For example, Dakota Access will test 100 percent of all mainline girth welds, which is in excess of the 10 percent requirement in federal regulations. (Howard Hearing Exh. 13 at 6.) The entire pipeline will be hydrostatically tested for eight hours at 125 percent pressure before being placed into service, even though federal regulations only require a hydrotest for four hours at 125 percent plus four hours at 110 percent (and even less for valves and aboveground equipment). (*Id.*) Dakota Access will activate a cathodic protection system, which protects the pipeline against corrosion, as the trench is backfilled, even though federal regulations do not require cathodic protection to be activated until one year after pipeline operations begin. (*Id.*) These are all examples of the ways in which the design and construction of the project exceeds or will exceed the applicable requirements, according to Dakota Access. (In. Br. 34.)

Similarly, Dakota Access argues its proposed AIMP exceeds the requirements of the Board's rules in two material respects, providing additional environmental protections. (*Id*.) First, Dakota Access proposes to use a minimum of two feet of separation between the pipeline and existing drainage tile, and second, Dakota Access will reimburse landowners for parallel drainage tile installation in advance of construction. Neither of these steps is expressly required by 199 IAC chapter 9. (In. Br. at 34-5.)

Finally, Dakota Access says it will minimize environmental impacts by implementing BMPs. For example, the company has developed a draft Storm Water Pollution Prevention Plan (SWPPP) that outlines requirements for contractors to comply with the Clean Water Act even though the Energy Policy Act of 2005 exempts certain projects, including the proposed pipeline, from the requirement to seek formal coverage under a Construction Stormwater General Permit. (Hearing Exh. Howard 13 at 3.) Dakota Access also says it has developed, or will develop, an Unanticipated Discoveries Plan, a Facilities Response Plan, an integrity management plan, an environmental training and inspection program, and will implement additional mitigation measures to protect the environment. (In. Br. 35-37.)

MAIN says that supporters of the pipeline acknowledge that there are always risks with any project of this magnitude but comprehensive state and federal regulations will minimize those risks and enhance the safety of the pipeline. (Exh. MDT Direct at 5.)

Opponents argue that there are many flaws with Dakota Access's plans regarding environmental protection, but the principal one "is that Dakota Access has not undertaken thorough and complete environmental studies for the entire pipeline route." (Sierra Club In. Br. 36.) The proposed construction project will cut through Iowa's rivers, streams, forests, and prairies; the permanent right-of-way will be permanently cleared of trees, leaving some woodland areas fragmented and potentially destroying habitat. (Exh. DH-1 at 4; Tr. 2578-79.) No one can know the full impact unless an adequate environmental survey is conducted, Sierra Club argues, and Dakota Access has not undertaken that effort. (In. Br. 38.)

Sierra Club argues that there are many endangered species living in Iowa and no one knows exactly where they all live. (*Id*. 39.) Only a complete environmental survey, as described in OCA Exh. Thommes Direct at 4-5, would suffice, and Dakota Access has not presented evidence to show it has undertaken any such survey. Sierra Club argues that without such a survey, the Board has no way to make an informed decision about whether to grant a permit; Dakota Access has failed to meet its burden of showing that it has addressed the environmental issues associated with the project. (In. Br. at 44-45.)

SEHN agrees that the lack of a comprehensive environmental impact survey represents a significant danger. (SEHN In. Br. 5.) SEHN argues that Iowa Code § 479B.1 charges the Board with the duty of protecting landowners and tenants from the environmental damages which may result from the

construction, operation, and maintenance of a hazardous liquid pipeline, and SEHN believes that duty cannot be fulfilled without a comprehensive study of the long-term environmental effects of the proposed pipeline on the soils, waters, fish, and wildlife of Iowa. (*Id*. at 6.)

Zakrasek presents a different environmental issue: He says that Dakota Access did not address climate change in its business case or its environmental mitigation plans. (Tr. 158, 1597.) Pursuant to Iowa Code § 479B.1, the Board must "protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline." Zakrasek says the only way to do that is to deny the permit. (In. Br. 10-11.)

In reply, Dakota Access argues that OCA witness Thommes made recommendations regarding the analysis of protected species and potential mitigation measures and Dakota Access witness Howard then testified that Dakota Access has or will comply with the majority of those recommendations. (Exh. MH Reply at 2-5.) Further, at hearing OCA witness Thommes acknowledged that there was no basis for imposing environmental conditions beyond those required by the agencies with primary responsibility for protecting the environment. (Tr. 1611.)

*Board analysis.* When considering whether to grant a permit for the construction and operation of a hazardous liquid pipeline, the Board operates under a statutory mandate to "protect landowners and tenants from environmental or economic damages which may

result from the construction, operation, or maintenance of" the proposed pipeline. Iowa Code § 479B.1. Thus, this agency has an independent obligation to satisfy itself that adequate steps have been and will be taken to provide Iowans with reasonable protection against environmental damage, and if the evidence in the record is insufficient to provide that satisfaction then the Board will deny the petition for permit.

The relevant environmental considerations are numerous. The proposed pipeline would affect habitats for a wide variety of species, some of them protected, both during construction and while in operation. It is impossible to build and operate a pipeline without having any environmental impact at all, but it is important to take reasonable steps to minimize the adverse risks and impacts where possible.

OCA's witness Thommes proposed a number of environmental conditions or changes to Dakota Access's proposed method of construction to minimize the environmental impacts of the pipeline. (OCA Exh. Thommes Dir.) Dakota Access witness Howard addressed those conditions and testified that the company is already complying with 20 of them and will comply with 18 more of them at the appropriate time. (Exh. MH Reply at 6-22.) (The specific conditions that Dakota Access has accepted are listed later in this order, in § VI.e, as part of the discussion of proposed terms and conditions.) The Board expects Dakota Access to follow through on those commitments, subject to enforcement under Iowa Code ch. 479B.

In addition to those commitments, Dakota Access has shown that it will meet or exceed all applicable

environmental protection requirements. The route was selected in a manner designed to avoid and minimize impacts to the environment. The GIS routing program was designed to select a route that avoids environmental features and co-locates near other, already-existing infrastructure where possible to avoid creating new impacts. (Exh. Howard Dir. 3-4.) The output of the GIS program was then subjected to desktop and field surveys for refining the route. Further information was gathered from landowners during discussions and negotiations to further refine the route. Thus, to the extent it is reasonably possible to do so, the proposed pipeline avoids creating unnecessary environmental damages in the first place by routing the pipeline around them.

Dakota Access is taking (or has taken) other steps reasonably calculated to minimize the potential adverse environmental impact of the proposed pipeline. The design and construction plans for the line are significant; Dakota Access proposes to exceed the applicable PHMSA requirements in many respects relating to the construction, testing, and long-term protection of the line. These steps, plus the proposed enhancements to the AIMP and the use of BMPs even where not required, tend to minimize the potential for an adverse environmental impact.

The opposition parties continue to argue that an environmental impact report of some sort should be required. That argument was previously presented, considered, and rejected, in the Board's "Order Denying Motion To Require Environmental Impact Report" issued in this docket on October 5, 2015. As stated in

that order, there is no explicit legal requirement, in statute or in rule, for an independent environmental impact report as a part of this proceeding.

Dakota Access has established that the proposed route was selected in a manner intended to minimize adverse environmental impacts. If the pipeline is approved, the pipeline will be constructed and tested in a manner designed to minimize the possibility of leaks. The environmental impacts of constructing the pipeline will be reduced by following an enhanced AIMP, as modified below, and by the use of BMPs even where they are not required.

Still, while Dakota Access has taken steps to minimize the potential environmental concerns associated with the proposed pipeline, the fact remains that environmental concerns represent a factor that merits significant weight in the Board's balancing test.

**c. Safety Issues**

Dakota Access argues that jurisdiction over the safety-related aspects of the proposed pipeline lies exclusively with the federal government and the Board is preempted from engaging in state-level safety regulation of the project, citing *ANR Pipeline Co. v. ISCC*, 828 F.2d 465, 472 (8th Cir. 1987), and *Kinley Pipeline Co. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993). The *Kinley* Court relied upon language from the Hazardous Liquid Pipeline Safety Act stating that "[n]o State agency may adopt or continue in force any such standards [referring to state safety standards for intrastate pipelines applicable to interstate

transmission facilities]," citing 49 U.S.C. App. § 2002(d). (In. Br. at 40-41.)

Dakota Access also says that the evidence in this record establishes that the proposed pipeline will meet and exceed all applicable federal safety regulations, including PHMSA regulations found at 49 C.F.R. parts 194 and 195. (Exh. SG Direct at 8.) Dakota Access witness Stamm described many of the safety features of the proposed pipeline, including the Operations Control Center, monitoring and control technology, use of modern system analysis technology, use of in-line inspection tools, and other features. (Exh. TS Direct 3-8; Tr. 633-35.)

MAIN notes that Dakota Access will have an Operations Control Center that will permit operators in Houston to have full-time oversight of the condition of the pipeline to detect any leaks, changes in pressure, or deterioration of the condition of the pipeline. (Exh. SG Dir. at 10-13.) They will be able to remotely isolate any potential leak by turning off pumps and closing valves on each side of the suspected leak. (*Id*. at 17.) Dakota Access will work with local fire and police officials so that in the event of a leak or other incident, local officials will seal off the area and Dakota Access will follow with trained personnel to begin any necessary remediation.

The opponents argue that in recent years crude oil pipelines have experienced disastrous discharges of oil, referring to the Enbridge pipeline spill in Michigan, the Bridger pipeline spill into the Yellowstone River, the Plains All American pipeline spill in California, the Pegasus pipeline rupture in Arkansas, and others. (No

Bakken Here Exh. JM-1, 3-5.) Each of these pipelines was subject to PHMSA's safety regulations yet these spills occurred. (Sierra Club In. Br. at 45-47.) Some opponents argue that the current federal safety regulations are inadequate to protect the public. (SEHN In. Br. at 6.)

Several opponents also expressed concern that if the pipeline is permitted, Dakota Access plans to have as few as 12 permanent employees in Iowa, 10 of whom would be stationed in Cambridge, Iowa. (Tr. 660.) According to Dakota Access witness Stamm, it could take them up to an hour to reach the site of a spill. (Tr. 713.) Actual cleanup crews could be as much as 12 hours away. In the Mayflower, Arkansas, pipeline spill, over 250,000 gallons of crude oil was discharged in less than two hours; the opponents conclude that the proposed pipeline represents an unacceptable risk of a major crude oil spill, in part due to the time required to respond to any incident. (Sierra Club In. Br. at 47-48.)

IFOA argues that the route of the proposed pipeline runs through rural areas that do not have full-time emergency responders who are properly trained to respond to pipeline spills; they are mostly volunteer firefighters. (Exh. Wehrman-Andersen at 2.) IFOA expresses concern about the possible lack of funding for adequate training of these first responders.

The Sierra Club argues that the Board has jurisdiction to consider safety issues as a part of these permit proceedings, distinguishing the cases cited by Dakota Access. (Reply Br. 21-22.) Iowa Code § 479B.1 states that the Board has this permitting authority over hazardous liquid pipelines, in part, to "protect

landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline…." (*Id*. at 22.) However, Sierra Club agrees with Dakota Access that the Board would have no jurisdiction over the safety of the proposed pipeline once a permit is granted. Sierra Club concludes that the best alternative available to the Board is to deny the permit in the first place. (In. Br. 48.)

*Board analysis.* The Board agrees with Sierra Club that the Board has jurisdiction to consider safety issues as a part of this permit proceeding. Iowa Code chapter 479B was rewritten after the *Kinley* Court found the Board's earlier, broader statutory jurisdiction over interstate hazardous liquid pipelines was preempted. The new statute was written, in part, with the intent that the authority and responsibilities assigned to this agency are not preempted by federal law. Basically, if a pipeline company wants approval to exercise the power of eminent domain under Iowa's authority, it must accept the state's review of its proposal and it must show that it meets the state's standards. The Board has the authority to consider the future safety of the proposed pipeline in connection with the decision of whether to issue a permit for the construction of the pipeline, including the possible use of the state's power of eminent domain.

The evidence in this record is sufficient to establish that Dakota Access has taken reasonable steps to reduce the safety risks associated with the proposed pipeline. Dakota Access will be required to meet the applicable PHMSA safety standards and will be subject

to PHMSA inspections. Further, as described in the preceding section of this order, the company proposes to exceed PHMSA standards for design, construction, and testing in many respects, including x-ray inspection of all main girth welds, use of thicker pipeline walls in many areas, and more severe hydrostatic testing, among other things. Each of these steps will tend to reduce the safety risks of the proposed pipeline when compared to a pipeline designed, constructed, and tested in accordance with PHMSA's requirements.

Moreover, if constructed, the proposed pipeline will be a valuable asset with a value of some $4 billion, so there are substantial financial incentives for Dakota Access to take all reasonable steps to ensure that the pipeline is designed and operated in a safe manner so that it can continue to provide transport services.

The safety risks of the proposed pipeline represent a factor that merits significant weight in the Board's balancing test.

**d. Oil Spill Remediation**

As described in the previous sections of this order, Dakota Access says it has gone above and beyond the safety requirements applicable to the design of the proposed pipeline because the best way to address a potential discharge is to prevent it from happening in the first place. (In. Br. 43.) Thus, the company concludes, a spill is unlikely. However, the financial ability of a petitioner to pay any damages that may occur is an important question the Board must address before granting a permit, *In re Quantum Pipeline*,

Docket No. HLP-97-2, "Proposed Decision and Order Granting Permit" (Ia. Utils. Bd. May 1, 1996) at pages 5 and 7-8. Dakota Access says that in prior cases, the Board has found that a petitioner that meets the requirements of Iowa Code § 479B.13 (by having property in the state, other than pipelines or underground storage facilities, subject to execution of a value in excess of $250,000) also meets the financial responsibility test. In fact, Dakota Access argues that where the legislature has established this specific requirement, the Board lacks the authority to establish a higher requirement in a specific permit proceeding. (In. Br. 44.)

Dakota Access clarifies, however, that meeting the financial responsibility requirements of Iowa Code § 479B.13 does not place any limit on Dakota Access's liability in the event of a spill. Rather, the company will be ultimately responsible for any damages caused by the operation of the pipeline. (*Id*.) For this reason, the company has provided evidence of financial responsibility far in excess of the $250,000 requirement. First, Dakota Access has committed to providing proof to the Board that it has obtained a $25,000,000 general liability policy before putting the pipeline into operation. (Tr. 2184, 2237, 2251, 2494.) Second, Dakota Access will own a revenue-generating physical asset, the pipeline itself, with a value of approximately $4 billion, and the company will have a strong incentive to provide sufficient resources to protect that asset. (Tr. 1306.) (In. Br. at 45.)

Beyond Dakota Access itself, its parent companies are among the largest companies in the United States.

For the 12 months ending June 30, 2015, the three parent companies had consolidated revenues of over $190 billion. (Exh. DRD Direct 21-23.) On this record, their market capitalization is over $60 billion. (Exh. DRD Dir. 21-22.) Dakota Access argues that these parents give it the financial capability to deal with clean-up expenses and damages from any potential spills and OCA witness Bodine agrees. (Exh. Bodine Dir. 7.) Dakota Access provided evidence of parent company guarantees pledging resources to Dakota Access to address emergency situations, including the testimony of a company executive that the parent companies would back Dakota Access. (Tr. 2495.)

Finally, if all of those assets were somehow insufficient or unavailable, Dakota Access says that the Oil Spill Liability Trust Fund provides protection. (Exh. DRD Dir. 21-23; Exh. JM Reply 7-8; Tr. 3230-35.) That fund, which is funded by the industry itself through a charge based on the volume of product being shipped through pipelines, provides the final backstop for any clean-up costs. (In. Br. 47.)

The Sierra Club argues that oil spills can cost millions, or even billions, of dollars to remediate, so the $250,000 financial responsibility requirement of Iowa Code § 479B.13 is inadequate. (In. Br. 48-9.) Sierra Club argues that the insurance policies and parent company guarantees mentioned by Dakota Access do not give much assurance of adequate financial responsibility because the insurance policies have not yet been obtained (so the coverage and exclusions are unknown) and the parent company guarantees are subject to terms and conditions that are not a part of

this record. (Sierra Club Reply Br. 22-23.) Sierra Club says that the Oil Spill Liability Trust Fund only applies to discharges into or upon the navigable waters of the United States, pursuant to the terms of 33 U.S.C. § 2702(a). Thus, the fund would not be available for spills that damage agricultural land or other land that is not a navigable water, according to Sierra Club. (In. Br. 49.)

SEHN argues that even if the parental corporate guarantees are relied upon, the Board still cannot assure Iowans as to the solvency of the owners and operators of the proposed pipeline because Dakota Access itself could be sold to different owners. Iowa Code § 479B.14 gives the Board authority to review and approve any sale or transfer of a permit, but it does not appear to provide authority to review and approve the sale of the permit holder itself. So, if Energy Transfer Partners chooses to sell its partnership interest in Dakota Access to another company with lesser assets, the Board would have no authority to review that transaction. (SEHN In. Br. 7.) SEHN notes that this has already happened to some extent while this matter was pending before the Board, as Energy Transfer Partners sold a 30 percent interest in Dakota Access to Sunoco Logistics Partners, L.P. (Exh. CAF Direct at 3.)

IFOA says that the insurance Dakota Access has promised to obtain will be inadequate; witness Lowman testified that "if there is no real risk, then Dakota Access should have no problem securing more insurance." (Exh. Lowman Dir. at 4.) IFOA also asks what would happen to an insurance claim if a spill occurred as a result of an accident or act of nature such

that the pipeline company could disclaim responsibility. (In. Br. at 30-31.)

Sorenson argues that the best way to solve a problem is not to have the problem in the first place. Thus, the best way to prevent oil spills associated with the pipeline is to deny the permit. (In. Br. at 33.)

In its reply brief, Dakota Access points to a Coast Guard ruling regarding the application of the Oil Spill Liability Trust Fund to oil discharges in agricultural fields that was determined to be covered by the Fund because the oil flowed from the field into a drainage ditch, then into a canal, and then could have flowed into a larger canal, a bayou, and finally into a lake that is a navigable waterway. (Reply Br. 14-15, citing Claim Number E1-642-0007, Determination dated 10/13/2011.) Because the Fund is triggered if there is a "substantial threat" of a discharge into a navigable waterway, the Fund's coverage is much broader than it might first appear, according to Dakota Access. (*Id.*)

*Board analysis.* Dakota Access has attempted to show that this project is backed by financial assets to address the clean-up and remediation of an oil spill. In addition to the minimum financial responsibility requirements of Iowa Code § 479B.13, the company has committed to purchase a $25,000,000 general liability insurance policy (which the company commits to file with the Board prior to commencing operations, see Dakota Access Reply Br. at 52) and has provided parental corporate guarantees. As the opposing parties point out, the insurance policy has not yet been purchased (so precise terms, conditions, and exclusions are not known), and the corporate guarantees are

subject to the terms and conditions of other corporate agreements that are not a part of this record, so there is still some uncertainty regarding the precise extent of the additional financial protection provided by these agreements. That concern will be addressed below, in connection with the terms and conditions applicable to the permit, if issued.

The oil spill remediation measures associated with the proposed pipeline represent a factor that merits significant weight in the Board's balancing test.

**e. Cultural Issues**

Sierra Club argues that Dakota Access has not properly investigated and documented the archaeological and historic resources that will likely be impacted by the proposed pipeline project. (In. Br. at 50-57.) Sierra Club based its argument on the testimony of John Doershuk, the Iowa State Archaeologist. (Exh. JD-1.) Dr. Doershuk testified to alleged deficiencies in the work performed by the consultants hired by Dakota Access. He said they failed to coordinate and consult with his office and did not provide requested information to the State Historic Preservation Office. He found the company's Unanticipated Discoveries Plan (Exh. MH-3) to be inadequate; the reports submitted by the company's consultants are limited to areas under the jurisdiction of the Corps of Engineers, which he finds inadequate; and the reports provided to the State Historic Preservation Office are deficient. (Sierra Club Exh. 33.)

Sierra Club acknowledges that there is no legal requirement that Dakota Access consult with the State

Archaeologist's Office but it argues that the failure to do so is "an absolute insult to [anyone] who cares about cultural resources." (In. Br. 55.) Sierra Club says this is a regulatory gap that the Board should fill by requiring consultation before any permit can be issued. (*Id.*) Sierra Club also argues that this is an example of why an Environmental Impact Statement (or equivalent) should be required in connection with this project. (*Id.* at 56.)

Dakota Access argues that it has properly surveyed and researched the potential impact of the project on cultural resources in Iowa. Dakota Access says that Dr. Doershuk admits his only complaint is that he did not get information he would have liked to get for the non-federal portions of the project (Tr. 2909), but the company is not required by any Iowa statute to provide that information. (Reply Br. 32.) Dakota Access argues that Dr. Doershuk's opinions are biased by the fact that Dakota Access chose to use other contractors to perform environmental consulting services, rather than the Office of State Archaeologist (OSA). (*Id.*)

*Board analysis.* As a part of this permitting process, Dakota Access is expected to plan for and take adequate steps to protect any cultural resources that may be impacted by the proposed project. The law allows an entity in Dakota Access's position to fulfill its obligations by hiring the OSA or by hiring other consultants. (Iowa Code ch. 263B; Tr. 2882-83.) So long as the final plans meet applicable legal requirements and are otherwise sufficient, the company has made an adequate showing on this point. Here, Sierra Club has taken issue with the manner in which Dakota Access

prepared the necessary plans and reports, but Sierra Club has not identified any respect in which the plans and reports are inadequate or insufficient, either legally or otherwise. The alleged deficiencies identified in Exhibit JD-1 really come down to dissatisfaction with the decision of Dakota Access to hire someone other than OSA to do this work, and as described above, Dakota Access had the legal right to hire a different contractor.

Cultural issues are important, but the issue here involves the identity of the consultants hired to perform this work. That issue is a factor that merits little weight in the Board's balancing test.

## V. Route Issues

### a. Compliance with Iowa Code § 479B.5

Iowa Code § 479B.5 lists several requirements that must be met when a petition for a hazardous liquid pipeline is filed with the Board. There appears to be no dispute concerning the requirements of Iowa Code §§ 479B.5(1-5, 7, and 9). The two requirements where issues have been raised are Iowa Code §§ 479B.5(6) and (8). Subsection 479B.5(6) requires that the petition address the possible use of alternative routes and Iowa Code § 479B.5(8) requires that the petition address the inconvenience or undue injury which may result to property owners from the pipeline project.

To address the issue of alternative routes, Dakota Access used a GIS software program to evaluate potential alternative routes based upon certain parameters provided by Dakota Access. The datasets utilized by Dakota Access included engineering,

environmental, and land use. Engineering includes the location of existing pipelines, railroads, karst landforms, and powerlines. Environmental includes critical habitat, fault lines, state parks, national forests, and national registry of historical sites. Land use includes dams, airports, cemeteries, schools, mining, and military installations.

Each of the factors contained in the datasets was weighted as low, moderate, or high based upon perceived risk and the engineering, environmental, and land use datasets. Dakota Access explains that the preferred route would use locations identified as low risk, or where necessary moderate risk, but would avoid high risk locations. Dakota Access also attempted to follow the shortest route in order to result in the fewest overall impacts to land use. According to Dakota Access, the computer model evaluated many more alternatives than could be evaluated manually. Dakota Access witness Howard testified that the proposed route has been modified in multiple locations to avoid Well Head Protection/HCAs (High Consequence Areas), wetlands and water bodies, certain cultural resource sites, home and farm sites, buildings, irrigation systems, power poles and towers, other structures, and property corners. According to Howard, route modifications were also made based upon aerial imagery, actual site visits, and helicopter reconnaissance. In addition, the specific weighting for the types of property to be crossed is shown in detail in IFOA Exhibit 5.

Issues have been raised by those parties opposed to the pipeline regarding the proposed route that runs

diagonally through landowner's property when there appears to have been no evaluation of an alternative route that would run north-south and then east-west on division lines of lands. Landowners point out that the proposed use of a diagonal route cuts across all tile systems in agricultural land while a route that ran along division lines or used road right-of-way would not have the same impact on landowners. It is argued that using division lines would alleviate or reduce the impact of the proposed line on tile systems since tile systems are typically separated along division lines where property owned by different landowners comes together.

*Board analysis.* Requiring a hazardous liquid pipeline to follow division lines or road right-of-way, as is required for electric transmission lines in Iowa Code § 478.18, is not a reasonable alternative for the proposed pipeline since sharp turns in the pipeline reduce the ability to inspect the pipeline with current technology. (Tr. 2223-25.) Moreover, division line construction would increase the total length of the pipeline in Iowa, affecting more land and potentially more landowners. Suggested routes running north to south and then west to east would increase the length of the pipeline and would affect different landowners with the same or similar interests to those landowners who are affected by the proposed route.

The GIS program relied on the weighting factors shown on IFOA Exhibit 5 and those weighting factors do not appear to be unreasonable. Neither the statute nor Board rules require specific weighting or a specific method of weighting for evaluation of a pipeline route

or alternative routes. The one type of structure or land use that is arguably missing from the list of land uses in IFOA Exhibit 5 is the location of tile systems utilized by landowners to remove excess water from agricultural land. There is also no weighting given to agricultural use of the land. This may be considered by some parties to be a fatal flaw in the evaluation performed by the GIS program; however, because of the pervasive nature of Iowa farmland, any pipeline of any significant length constructed in Iowa will cross agricultural land and cross tile systems. Even if agricultural land and tile systems were included as a dataset, the ranking for such a data set would be the lowest ranking since many other environmental and land uses would reasonably be considered a higher risk for location of a pipeline.

The evidence presented by Dakota Access shows that the routing process engaged in by Dakota Access was reasonable. The GIS program evaluated land uses and developed a route that would avoid those land areas where the pipeline could impact critical structures or habitat. The fact that the route goes diagonally across agricultural land is not a reason to require Dakota Access to start the evaluation process over. The safety of the hazardous liquid pipeline is of paramount importance and requiring a pipeline to zigzag using divisions of land creates safety issues that weigh against use of division lines. Although the GIS modeling done by Dakota Access did not consider alternative routes running north and south then east and west, the GIS modeling did consider alternative routes to avoid high risk and some moderate risk structures and land uses.

As discussed above, Dakota Access has shown that it has complied with the requirements of Iowa Code § 479B.5(6). Compliance with the requirements in Iowa Code § 479B.5(8) relating to undue injury to specific property will be addressed under the sections below which consider what, if any, conditions should be placed on construction of the pipeline and the issues regarding the request for the right of eminent domain over individual parcels.

## VI. Terms and Conditions Applicable to Overall Route

Iowa Code § 479B.9 provides, in relevant part, that "the board may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper." A number of parties to this docket have proposed a variety of terms and conditions that should be placed on construction of the pipeline for the Board's consideration. Those terms and conditions considered significant by the Board are addressed below.

### a. Dakota Access Commitments

Dakota Access in its reply brief at pages 52-53 made the following commitments with regard to the construction of the pipeline, which the Board considers conditions for approval of the pipeline permit. However, as discussed later in this order, the Board does not consider the commitments made by Dakota Access to be all of the conditions necessary to address issues raised concerning construction of the pipeline and in some instances the Board will consider modifying the commitments made by Dakota Access.

a. Dakota Access will obtain and maintain a general liability policy in an amount of no less than $25 million and will provide proof of such insurance to the Board prior to commencing operations. Dakota Access will commit to maintaining such a policy at all times the Dakota Access Pipeline is operational and will provide updated proof of such policy upon reasonable request from the Board (but no more than annually).

b. Dakota Access will provide quarterly status reports to the Board beginning July 1, 2016, and continuing until the pipeline is in operation.

c. If, at the time of filing the October 1, 2016, status report Dakota Access cannot represent that all construction and restoration in Iowa will be completed by December 1, 2016, Dakota Access will file with the status report a Winter Construction Plan including methods for construction and/or stabilization in winter conditions.

d. Dakota Access will keep record of all drainage tile crossings with GPS coordinates and within 180 days of the completion of the Project will file with the Board as-built specifications of the pipeline including the location and depth of all identified drainage tile.

e. Dakota Access will file with the Board final versions of the Stormwater Pollution Prevention Plan and Unanticipated Discovery plans prior to commencement of construction, and will notify

the Board when its final Facilities Response Plan is filed with PHMSA.

f. Dakota Access will file with the Board permits, approvals, or other similar documents from the U.S. Corps of Army Engineers and Iowa Department of Natural Resources prior to commencing construction.

g. For the area in the workspace easement but not over the trench, Dakota Access agrees to modify its AIMP to provide that the topsoil will be removed to a depth of 12 inches or, if the topsoil depth is greater than 12 inches, the actual topsoil depth if requested by the landowner, provided there is adequate room in the permitted workspace.

h. Dakota Access will place the pipeline underground with no less than 48 inches of cover to the top of the pipe in all agricultural lands except (a) where less cover is requested by the landowner and Dakota Access determines the request is prudent and otherwise lawful or (b) where there is a subsurface obstruction that would prevent Dakota Access utilizing the 48-inch depth, in which case the depth will be in accordance with applicable federal and state rules.

If the permit is granted, the Board expects Dakota Access to fulfill each of these commitments, including the ones that are strengthened or otherwise modified later in this order.

**b. Permits and Authorizations**

Dakota Access says it is seeking, and anticipates obtaining, all permits and authorizations required for the proposed pipeline. These include multiple federal and state permits and approvals. The company says the only permit the Board should be concerned with in this docket is the requested permit to construct, operate, and maintain the proposed pipeline under Iowa Code chapter 479B. (In. Br. 19.) Dakota Access says there is no requirement that the Board review the status of the various other permits and no requirement that the Board's approval be tied to those other permits or authorizations. (*Id*. at 20.) Instead, Dakota Access urges the Board to proceed to grant a permit and designate the approved route of the pipeline, as the approval of some other agencies is tied to the designated route. (*Id*.)

Sierra Club argues that Dakota Access has not shown adequate progress toward obtaining a Section 404 permit from the U.S. Army Corps of Engineers because there is no evidence in this record of sufficient archaeological and environmental review or sufficient consultation with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act. (16 U.S.C. § 1536.) Sierra Club says Dakota Access has also failed to demonstrate adequate consultation as required under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. Sierra Club "strongly believes that the Board should not grant a permit in this case since Dakota Access has not carried its burden to show that it has complied with federal permit requirements." (In. Br. 32.)

Sierra Club asserts that the primary state permit which Dakota Access must obtain is a permit to cross sovereign lands. (In. Br. 56.) Sierra Club says that the company has failed to provide any evidence regarding any studies or surveys that may have been done with respect to such a permit and argues that this is another reason that an Environmental Impact Statement or its equivalent should be required in connection with this project. (*Id*.)

Dakota Access does not appear to specifically address the permit to cross sovereign lands; instead, the company argues that there is no requirement that the Board must review the status of other pending permits or authorizations. The company says the Board should lead in Iowa by designating the route for the project so that other agencies know what to examine. (In. Br. 19-20.)

In its reply brief, Dakota Access commits to file with the Board the permits, approvals, or similar documents from the U.S. Army Corps of Engineers (and Iowa Department of Natural Resources) prior to commencing construction. (Reply Br. 53.)

*Board analysis.* The proposed pipeline will require a variety of permits before it can be built and operated. Many of those permit proceedings have at least some potential to interact; for example, many have the potential to require re-routing of the project, which could affect other permit proceedings in a substantial way. Still, if every agency reviewing the project for a particular permit were to refuse to act until all of the other agencies had acted, then no permit would ever be

issued and infrastructure that may be necessary to serve the public benefit would never be built.

The Board has avoided this Catch-22 in the past by issuing a permit that is based upon the record made before the agency, including the petitioner's representations that it will obtain all necessary and required permits and authorizations prior to construction and operation of the proposed project. If those permits or authorizations are not obtained, then the Board's permit is void because a necessary precondition of the permit has not been satisfied. The Board will use this same mechanism here; the permit, if one is issued, will be conditioned upon receipt of all other required permits and authorizations. Moreover, Dakota Access will be required to file a petition for an amended permit if, in the process of obtaining some other authorization, the route of the proposed pipeline (or any other major aspect of the proposed pipeline) is significantly changed.

Finally, the Board will monitor the company's compliance with these requirements by requiring that the company file a notice of completion each time the company acquires a permit, or completes an authorization process, for any of the permits identified in Hearing Exhibit MH-4. Dakota Access may either file the permit or other authorization directly or it may file a notice of having received the permit or authorization. If the company chooses to file a notice, it should include sufficient information to allow an interested person to easily obtain a copy or other confirmation that the permit or authorization has been issued.

**c. Agricultural Impact Mitigation Plan**

One of the issues with regard to the overall route is whether the Agricultural Impact Mitigation Plan (AIMP) proposed by Dakota Access complies with the Iowa Code § 479B.20 and Board rules and whether there should be additional terms and conditions required for construction of the pipeline. The AIMP is filed as Petition Exhibit I to the petition filed by Dakota Access.

NILA proposes a number of revisions to the AIMP and those proposed revisions considered significant will be considered by the Board in this order. The revisions proposed by NILA are shown on Appendix A to NILA's initial brief. NILA's brief includes an explanation for each proposed revision to the AIMP.

Before addressing the individual revisions proposed to the AIMP, the Board will address the legal issue raised by Dakota Access regarding the Board's authority to require terms and conditions beyond those required in 199 IAC chapter 9, the Board's "Restoration of Agricultural Lands During and After Pipeline Construction" rules. Chapter 9 establishes what the Board considers to be the minimum construction and restoration requirements for construction of a pipeline as required in Iowa Code § 479B.20.

NILA proposes more stringent standards for the AIMP and proposes to add language to the AIMP clarifying that Chapter 9 applies only where the AIMP is silent. Dakota Access argues that the AIMP complies with chapter 9 and the "Board is without authority to create new rules in a contested case proceeding," citing

*Office of Consumer Advocate v. Iowa Utilities Bd.*, 744 N.W.2d 640 (Iowa 2008). In that case, the Iowa Supreme Court held that "making policy by ad hoc decisions on a case-by-case basis is contrary to the legislative intent of the IAPA." (*Id.* at 646.) Dakota Access argues that imposing any additional conditions at this time would be an error of law. (Reply Br. 25.)

The Board does not agree with Dakota Access's interpretation of Iowa Code § 479B.9 or that the *Office of Consumer Advocate* case is applicable. Section 479B.9 specifically authorizes the Board to impose terms and conditions that the Board determines to be "just and proper" and if the evidence in this case indicates that for this particular project an additional land restoration standard is required then the Board may impose that standard as a condition of the permit. A decision that the evidence in a particular case supports additional mitigation conditions over and above those required in 199 IAC chapter 9 is not a policy decision as addressed in the *Office of Consumer Advocate* decision. The AIMP established in 199 IAC chapter 9 establishes the minimum requirements for mitigation of construction damage to agricultural land and does not limit the Board from adopting other specific conditions for a particular pipeline.

***(1) Author of the Plan.*** The current AIMP identifies Dakota Access as the author; NILA argues that the language should be revised to state that the AIMP has been adopted by the Board. The Board agrees with NILA. The AIMP should be understood as a Board directive that is applicable to the construction of the pipeline and is to be followed by Dakota Access

and the county inspectors, unless otherwise agreed to by the landowner. The Board will adopt this proposal from NILA and will require Dakota Access to file a modified AIMP incorporating this requirement.

***(2) Role of the County Inspector.*** NILA proposes to add language clarifying the roles of the county Board of Supervisors and the county inspector. NILA also proposes to add a new paragraph explaining the enforcement provisions of 199 IAC 9.7, that is, if Dakota Access or its contractors do not comply with the AIMP or Chapter 9, or with an independent agreement with a landowner, then the county Board of Supervisors may petition the Board for an order requiring corrective action and assessing civil penalties. According to NILA, the language clarifies that the county Board of Supervisors would be responsible for investigation and prosecution of the case before the Board.

In response, Dakota Access argues that NILA's proposal would give county inspectors unqualified "stop work" authority and, in particular, would allow them to stop the company from backfilling a trench if "winter conditions would be likely to occur," a condition proposed by NILA. Dakota Access argues this would be unworkable and would exceed the authority specified in Iowa Code § 479B.20(7), which only authorizes the temporary suspension of work "until the inspector consults with the supervisory personnel of the pipeline company."

Iowa Code § 479B.20 contains express language regarding the role of the county inspector and the obligations of the county inspector during pipeline

construction. It is the Board's understanding that all but a few counties have contracted for a qualified engineer to act as the county inspector to ensure the construction of this pipeline is consistent with the AIMP, as modified by this order, the standards in Iowa Code chapter 479B, and any agreement with the landowner. The inspector has the authority to order corrective action be taken by Dakota Access or a Dakota Access contractor for violation of the statutory standards, the AIMP, or an independent agreement with the landowner. The county inspector also has the authority to temporarily halt construction and consult with Dakota Access or the Dakota Access contractor if a violation is discovered.

Dakota Access is correct that pursuant to Iowa Code § 479B.20(7) a county inspector may only halt construction temporarily; however, there is no time period prescribed in that section for such a temporary halt in construction. Since the statute also provides that the county Board of Supervisors may petition the Board for civil penalties, it appears the temporary period may be long enough for the County Board of Supervisors to decide whether to file a complaint with the Board if the violation is not corrected. The Board adopts this proposal from NILA and will require Dakota Access to file a modified AIMP incorporating this requirement.

***(3) Conflict of Laws.*** NILA proposes to delete language from the AIMP stating that the mitigation measures will be implemented only if they do not conflict with federal, state, and local permits, approvals, and regulations. NILA says that county

inspectors should not be burdened with the task of interpreting federal, state, or local laws or other provisions while in the field.

The Board disagrees. The county inspector is to inspect the construction of the pipeline to ensure compliance with Iowa Code chapter 479B, the AIMP, as modified by this order, and any independent agreement with a landowner, but if other laws preempt those provisions it should be clear that those other laws are controlling.

***(4) Four Week Notice, Points of Contact, and Definition of "Proper Notice to the Landowner."*** These three proposed modifications to the AIMP are all addressed to the broader issue of when Dakota Access should provide notice to landowners, county boards of supervisors, and county inspectors and what should be contained in those notices. The Board will consider them together.

Iowa Code § 479B.20 requires that each county Board of Supervisors arrange for on-site inspection of the company's mitigation measures. NILA asserts that counties should be given four weeks after issuance of the permit to retain one or more county inspectors and that construction should not be permitted to commence until after that four week period has expired. NILA also proposes to delete language indicating the pipeline will take approximately nine months to complete. However, the Board understands that the various counties are already aware of this proposal and most, if not all, of those counties have already retained county inspectors. This additional notice period is unnecessary and will not be adopted.

With respect to points of contact, Dakota Access proposes to designate a state-wide point of contact for landowners that will be available until at least one year after completion of construction. It also proposes to provide contact information for its local representatives (or "geographic area representatives" in Dakota Access's terminology) at least two weeks prior to construction. NILA proposes a state-wide point of contact and at least three weeks written notice to landowners regarding the geographic area representatives. The three week written notice would inform landowners of the name and contact information for the relevant county inspector. Finally, NILA proposes that landowners also be permitted to designate a point of contact.

Next, NILA proposes language that would allow a landowner to request and receive at least 24 hours' written notice before trenching, permanent tile repair, dewatering, and backfilling takes place at any specific location. Dakota Access objects, saying it cannot logistically provide such notice to 1,274 landowners. (Tr. 2355-56; Reply Br. 36-7.)

The Board does not consider it necessary for Dakota Access to give three weeks written notice for the geographic area representatives. Two weeks' notice, as described below, should be sufficient. The Board will require Dakota Access to inform the landowner of the name and contact information for the relevant county inspector(s) as part of the two week notice.

As indicated above, the Board will require Dakota Access to give notice to the landowner two weeks before construction is to begin on the landowner's property

and a second notice 48 hours before construction is to begin. After the two week notice is given, Dakota Access, its contractor, the inspector, and the landowner will then each be responsible for being ready to observe and discuss any issues regarding trenching, tile repair, dewatering, and backfilling, if necessary. The 48 hours' notice is required since Iowa Code § 479B.20(6) provides that Dakota Access shall allow landowners and county inspectors to view the proposed center line of the pipeline prior to commencing trenching operations to ensure that construction takes place in the correct location. Finally, the Board agrees that landowners may also designate their own point of contact. The Board will require Dakota Access to file a modified AIMP incorporating these notice requirements.

**(5*) Definition of "Qualified Technician."*** NILA proposes to define the term "qualified technician" as including any person who regularly installs drainage tile or soil conservation practices or structures. NILA says this has been an issue for landowners who attempted to submit plans to Dakota Access in 2015. (NILA Br., Appx. B, p. 3.)

The term "qualified technician" is not included in the AIMP prepared by Dakota Access. The issue raised by NILA appears to involve acceptance by Dakota Access of diagrams presented by the landowner of tiling systems located on a parcel. Rather than adopt a definition for who is a qualified technician, the Board will require Dakota Access to request any drain tile diagrams for each parcel from the landowner when the two week notification (discussed above) is made and

the landowner can then provide any such diagram to Dakota Access prior to construction. The landowner should also provide any such diagrams to the county inspector. The Board will not adopt the proposal from NILA to define the term "qualified technician" and will instead require Dakota Access to file a modified AIMP incorporating the requirement that the company request any drain tile diagrams as a part of the two-week notice.

***(6) Separation of Topsoil and Subsoil.*** NILA proposes to modify in the AIMP the topsoil separation and replacement provisions of 199 IAC chapter 9, including rule 9.4. NILA proposes, among other things, to give landowners the right to require separation of more than 36 inches of topsoil where that condition exists.

Dakota Access argues that AIMP Section 6.2, relating to topsoil stripping and separation, is based on 199 IAC 9.4(1)(a), which provides that the actual depth of the topsoil, not to exceed 36 inches, will first be stripped from the area to be excavated. Dakota Access states that there is no basis for NILA's proposed change and, moreover, the 36 inch requirement is adequate because in most cases there will be far less than 36 inches of topsoil because the average topsoil depth in Iowa is approximately 15 to 16 inches. (Tr. 1036.)

The Board considers it important that Dakota Access separate all of the topsoil from the area where the topsoil is greater than 36 inches, even if Board rules do not require separation beyond that depth. The Board considers NILA's proposal to be a request for

waiver of 199 IAC 9.4(1)(a), to the extent it is inconsistent with this requirement; furthermore, the record evidence supports separating all topsoil in order to protect that precious resource. Removal of all topsoil from the land and then restoring it to the original depth will reduce the impact of the construction of the pipeline in those locations where topsoil of a depth greater than 36 inches is located. The Board will adopt this proposal from NILA and will require Dakota Access to file a modified AIMP incorporating this requirement.

***(7) Aboveground Facilities.*** Dakota Access's proposed AIMP language would allow the company and landowners to coordinate regarding the location of any aboveground structures. NILA proposes language limiting this option to "minor" aboveground structures, such as markers. NILA believes that the AIMP should not affect the location of major aboveground structures, such as valves.

The Board agrees with NILA and will adopt the language proposed by NILA to section 6.4 in the AIMP. Dakota Access will be required to incorporate this change into its modified AIMP.

**d. Proposed Modifications to Easement Forms**

Iowa Code § 479B.16 provides when a permit is granted the pipeline owner is granted the right of eminent domain to the extent necessary and as prescribed and approved by the Board, not exceeding 75 feet in width for right-of-way and not exceeding one acre in any one location in addition to right-of-way for the location of pumps, pressure apparatus, or other

stations or equipment necessary to the proper operation of its pipelines. Dakota Access is requesting that the right of eminent domain be granted for a total of 150 feet of which 50 feet would be for the permanent easement and 100 feet would be for a temporary construction easement.

Dakota Access argues that the full 150 feet of easement is necessary to allow for separation of the topsoil and other construction activity. There appears to be no dispute that this is a reasonable width of easement during construction to ensure sufficient space for construction and separation of topsoil and the Board finds that Dakota Access has presented sufficient evidence to demonstrate that an area greater than 75 feet is required for proper construction as allowed pursuant to Iowa Code § 479B.16.

Dakota Access witness Frey in Exhibit CAF-4 provided an overview of the easement rights sought from those landowners who had not agreed to voluntary easements. Frey describes four types of easements sought by Dakota Access: (1) a permanent 50 foot easement; (2) an access easement; (3) valve site easements; and (4) launcher and receiver site easements. There is no dispute concerning the width of the permanent easement, the dimensions of the valve site easements, or the dimensions of the launcher and receiver easements. On pages 19 to 43 of Exhibit CAF-4 the justification of the additional work space easements is described. This list includes locations where Dakota Access proposes to bore under roads and highways, railroads, work around county drainage tile mains, cross waterways, and the space needed for directional

drilling under the Mississippi River. There has been no general challenge to the request for additional work space easements, so the Board will approve the additional work space easements described in Exhibit CAF-4 for those parcels over which the power of eminent domain is granted.

NILA has proposed revisions to Dakota Access's proposed permanent and temporary easements for use on condemnation parcels. Each of the adopted revisions will be discussed below.

**(1)** ***Aboveground Appurtenances***. Dakota Access seeks the right to place aboveground appurtenances, such as valves, on each of the condemnation parcels at any time in the future without having to acquire any additional easement rights at that time. However, the testimony establishes that Dakota Access currently requires only 66 locations for aboveground appurtenances, each of which is subject to a separate easement. (Tr. 1389; Exh. CAF-4, p. 4.) Dakota Access witness Mahmoud admitted that the company does not currently need valves on the other condemnation parcels. (Tr. 2377-79.) NILA argues the burden of a potential future valve installation is substantial and Dakota Access has not shown any current need for that right, so language purporting to allow future valves without further compensation should be stricken. The only aboveground appurtenances that should be included in the condemnation easement are markers.

Dakota Access argues that the Exhibit H filings for currently-identified valve sites have specific valve site provisions. Dakota Access seeks condemnation

authority for other valve sites, not yet identified, "in the event that changed human or environmental conditions warrant additional or changed valve sites." (Reply Br. 30.) According to Dakota Access, this would enable the installation of additional valves without subjecting landowners to another condemnation proceeding. Dakota Access states that if this occurs it will provide additional compensation to the affected landowner.

OCA argues that future aboveground appurtenances should be the subject of new negotiations regarding location and compensation with the individual landowners involved. Future changes should be addressed when those changes are known.

The Board will require that the condemnation easement agreement be modified to remove the language that would allow Dakota Access the right under the easement to place valves on a landowner's property at some future time. The Exhibit H parcel descriptions filed by Dakota Access show the location of the valves that Dakota Access is required to install to comply with federal safety regulations. To install any additional valves in the future, Dakota Access will need to negotiate a voluntary easement with the landowner or, if no agreement is negotiated, file for additional eminent domain authority and an amendment to Exhibit H.

***(2) Access to the Easement Strips***. Dakota Access seeks the right to access its easement by crossing any part of each entire property in any manner and at any time that is convenient. Landowners have objected and assert that the company

should be allowed to access the Pipeline Easement and Temporary Construction Easement areas only by means of those easements or by specifically-defined access easements. Dakota Access witness Johnson testified that unless a specific access easement is defined and requested, or unless otherwise agreed by the landowner, Dakota Access will access the easement area via the easement itself. (Tr. 1792; Exh. KLJ Reply 16; Reply Br. 29.)

The Board will require that the condemnation easement agreement be revised to reflect that in the absence of an emergency, Dakota Access can only access a parcel where eminent domain is granted over the permanent easement or the temporary construction easement, unless there is a separate agreement with the landowner. This is consistent with the testimony of Dakota Access witness Johnson and will remove the language in the current condemnation easement that appears to allow access over the entire parcel at the discretion of Dakota Access.

***(3) Relocation of the Pipeline Within the Easement Area***. Dakota Access seeks the right to "reconstruct," "realign," or "relocate" the proposed pipeline to any location within the 50-foot Pipeline Easement area without having to acquire further easement rights. NILA describes this as an unnecessary overreach and says the words are not necessary.

Dakota Access has the right to locate the pipeline substantially anywhere within the 50-foot permanent easement. Minor changes to the exact route within the width of the permanent easement are reasonable.

Dakota Access does not have the right, or authority, to relocate the pipeline outside of the permanent easement as approved in this order without requesting additional eminent domain authority or by agreement with the landowner.

In connection with this issue, another issue was raised concerning the ability of Dakota Access to deviate from the approved pipeline route by 660 feet as provided for in 199 IAC 13.2(1)(a). The exact language in that rule states that "Construction deviation of 660 feet (one-eighth mile) from proposed routing will be permitted." This rule addresses the scope of deviations from the route that are allowed without first filing for an amended permit; it is not related to, and does not authorize location of the pipeline outside of the 50-foot permanent easement unless Dakota Access is able to obtain a voluntary easement for the deviation.

***(4) Term of Temporary Construction Easement***. Dakota Access seeks a Temporary Construction Easement with a term of 18 months. NILA believes that installation of the pipeline should be performed in a manner that may require more time than that so NILA proposes increasing the term to either 30 months or two years.

It is not entirely clear, on this record, whether 18 months is a reasonable length of time for the temporary easement to remain in effect, given the terms and conditions the Board is imposing on the permit; however, the Board considers it to be Dakota Access's decision regarding the length of the voluntary easement and will not adopt the 30-month term proposed by NILA.

***(5) Fences, Gates, and Keys***. Dakota Access seeks to include a term in the condemnation easement requiring that if a landowner erects a fence across the Access Easement (if any) or Pipeline Easement, the owner must install a gate and supply Dakota Access with a key. Dakota Access must also be permitted to install its own lock if it so chooses. NILA proposes that if a fence is in existence prior to the Pipeline Easement, Dakota Access must pay to install the gate; if the fence is installed after the Pipeline Easement is in place, the owner must pay for the gate. Whichever party is responsible for installing the gate must supply the other party with a key. Dakota Access may install its own lock if it chooses, but the method of locking must allow both parties to open the gate without the assistance of the other.

The landowner and Dakota Access should both have access to the pipeline easement area and the ability to open any gate installed across a permanent easement. The Board will adopt the revision proposed by NILA as a reasonable way to accomplish this goal.

***(6) Review and Approval of Future Plans***. Dakota Access seeks the right to review and approve the owner's plans to do any of the following within the easement area(s) or in any location that could adversely affect the easement area(s): (1) Construct or install any temporary or permanent site improvements other than streets and roads; (2) Drill or operate a well; (3) Remove soil or change the grade or slope; (4) Impound surface water; or (5) Plant trees or landscaping.

NILA proposes that any plan approval rights should be limited to the 50-foot pipeline easement area and it should be clarified that the approval of Dakota Access shall not be unreasonably withheld. Similar clarifications should be applied to Dakota Access's right to review any landowner plans to construct certain roads or to construct or alter water, sewer, or other utility lines.

This issue is addressed by the Board decision that revises the condemnation easement agreement by limiting the pipeline company's access to the 50-foot permanent easement. The restrictions included by Dakota Access in the condemnation easement as described above are therefore only applicable to the 50-foot permanent easement. Moreover, the Board concludes this right of approval should be bilateral. Dakota Access should give the landowner the right to review and approve any future plans of Dakota Access to make surface changes within the easement, which approval shall not be unreasonably withheld.

***(7) Removal of Trees and Shrubbery***. Dakota Access seeks the right to trim or remove trees and shrubbery that, in the sole judgment of Dakota Access, may be necessary to prevent possible interference with any of its easement rights, even if those trees or shrubbery are located outside the easement area. NILA objects that this right should be limited to the 50-foot permanent easement area. The Board agrees; one reason for a 50-foot-wide easement is to make it so that vegetation from outside the easement area will not affect the pipeline in its actual location. Further, the easement should contain language recognizing the

obligation of Dakota Access to leave the easement area in satisfactory condition after trimming or removing trees or shrubbery.

***(8) Assignment of Easement Rights***. Dakota Access seeks the right to assign the easement rights without limitation. NILA proposes that any assignment of easement rights should be allowed only after the assignment of the permit has been approved pursuant to Iowa Code chapter 479B and with advance written notice to the landowner. NILA argues that there should also be a notice requirement in order to make certain that landowners have up-to-date contact information.

Board approval is required before Dakota Access can assign to another company the permit granted in this order. Board rules at 199 IAC 13.19(1) state that no permit shall be sold without prior written approval of the Board. NILA's proposed provision is unnecessary and will not be adopted; any landowner who seeks to challenge the transfer of an easement may do so in the context of the permit transfer proceedings.

**e. Environmental Issues**

Several parties addressed environmental issues concerning the proposed hazardous liquid pipeline that could support the adoption of additional terms and conditions. Many of those issues were raised by OCA witness Thommes, who recommended the Board require certain conditions if the pipeline is approved. Thommes recommended 47 environmental conditions and the proper method of construction to avoid or minimize these issues. (OCA Exhibit Thommes Direct.) Thommes also testified that he was not recommending

any conditions that would go beyond what the U.S. Fish and Wildlife Service and Army Corps of Engineers will require. (Tr. 1611.)

In reply testimony, Dakota Access witness Howard addressed many of the conditions recommended by OCA witness Thommes. (Exhibit MH Reply at 2-5). Howard testified that Dakota Access agreed to comply with some of the conditions recommended by Thommes; however, there were some of the recommendations that Dakota Access did not consider appropriate. (*Id*. at 6-9.) Howard's reply testimony includes a table setting out each of those conditions, providing a reference to the testimony supporting the proposed condition, and responding to each proposed condition. (Exh. MH Reply at 6-22.)

Using the numbers shown on the table in Howard's reply testimony, Howard testified that Dakota Access is already complying with the following recommended conditions: 1-3, 8, 9, 18, 24-26, 29, 30-35, 37, 39, 43, 45, and 46. Howard testified that Dakota Access will comply with the following recommended conditions at the appropriate time: 5, 6, 10, 12-20, 23, 28, 40, 41, 44, and 47. Howard testified that Dakota Access sees no current or future need to comply with recommended conditions 4, 7, 21, and 27 and Dakota Access disagrees with the recommended conditions 13, 30, 36, 38, and 42.

The Board will not individually address those recommended conditions that Dakota Access is complying with or has agreed to comply with. However, as previously indicated, the Board expects Dakota Access to follow through on those commitments.

The recommended conditions that Dakota Access has indicated it does not agree are necessary are individually discussed below.

***(1) "Incidental Take" Permit.*** Proposed Condition No. 4 is a recommendation that the company "obtain any necessary permits for take of or impacts on listed species." Dakota Access says it is not seeking an incidental take permit because the project is not expected to take any federal or state protected species.

Dakota Access has committed to obtaining all necessary pre-construction permits and authorizations prior to commencement of construction. The Board considers this commitment sufficient to address this recommended condition.

***(2) Migratory Bird Assessment.*** Proposed Condition No. 7 is a recommendation that a Migratory Bird Assessment, Mitigation, and Compliance Plan should be developed. Dakota Access says the U.S. Fish and Wildlife Service is responsible for enforcement of these matters and the company has been and will continue to comply with all directives of that agency. Further, no mitigation plan is required to comply with those requirements. Dakota Access argues that OCA witness Thommes testified that there is no basis to impose conditions beyond what the federal agencies require, saying "I'm not going to recommend any [conditions] beyond what the U.S. Fish & Wildlife and Army Corps require, no." (Tr. 1611.)

The Board considers the commitment made by Dakota Access to obtain all necessary permits and authorizations to be sufficient to address this

recommended condition. Compliance with the requirements of the U.S. Fish & Wildlife Service and U.S. Army Corps of Engineers is a reasonable accommodation of this concern.

***(3) Weed Management Plan.*** Proposed Condition No. 21 is a recommendation that a Weed Management Plan should be developed with cleaning stations for construction equipment leaving areas with weed populations to decrease the potential for introducing noxious plants into the habitat of listed species. Dakota Access states its biological field surveys determined no large plots of weed infestation were documented. Therefore, in the absence of weed infestations, standard restoration and revegetation practices are expected to be protective of listed species habitat.

The Board considers Dakota Access's biological field surveys to be sufficient compliance and a separate Weed Management Plan is not necessary. However, if any county inspector identifies an area where extra weed control measures may be appropriate, Dakota Access shall take reasonable steps to implement those extra measures identified by the county inspector. Dakota Access shall modify the AIMP to reflect this requirement.

***(4) Winter Construction Plan.*** Proposed Condition No. 27 is a recommendation that the Storm Water Pollution Prevention Plan (SWPPP) and AIMP should include provisions for construction or restoration during frozen conditions. Dakota Access has committed to file a Winter Construction Plan if, as of

October 1, 2016, Dakota Access determines that construction will be required after December 1, 2016.

The Board does not consider the commitment made by Dakota Access to be sufficient to allow for the necessary review of a Winter Construction Plan. The Board will require that Dakota Access file by August 1, 2016, a plan for construction during winter conditions. This plan can then be reviewed by the Board and interested parties in a timely manner, prior to winter construction.

***(5) Hydrostatic Testing Water Sources.*** Proposed Condition No. 13 is a recommendation that waterbodies with the potential to contain listed species should not be used as sources of water for hydrostatic testing. Dakota Access disagrees, saying water withdrawals can take place in those waterbodies without affecting the protected species if BMPs are used, such as using filters and taking water from the surface instead of the bottom of the waterbody, where sensitive species may live. (Exh. MH Reply at 9; Tr. 575.)

OCA agreed that the precautions proposed by Dakota Access would reduce the risk, but argued that the better approach is to take water for testing from sources that do not contain protected species in the first place. (OCA Br. 23.)

The Board agrees with OCA that the best practice would be for Dakota Access to take water for hydrostatic testing from sources that do not contain protected species; however, this may not always be possible. Dakota Access will be required to commit to

only taking water from sources where protected species may be affected when no other reasonable source is available.

***(6) Spoil Storage From Streams.*** Proposed Condition No. 30 is a recommendation that excavated material from streams should be set back farther than the ordinary high water mark, so the edge of the workspace in those areas should be placed 50 feet back from the ordinary high water mark. (OCA Exh. Flo Direct at 9-10.) Further, the storage area should be in an area with little slope (less than 5 percent). (*Id*.) Dakota Access disagrees, saying a 30-foot setback of the spoil area from the top of the bank is typically sufficient and can be adjusted on a case-by-case basis. (Exh. MH Reply at 13-14.) Dakota Access says the 50-foot setback is a Federal Energy Regulatory Commission (FERC) requirement that only applies to natural gas pipelines and does not apply to this proposed pipeline, and even if it did apply, it would only apply to non-agricultural lands. (*Id.,* Dakota Access Cross Exh. 1, and Tr. 1486-87.) Finally, Dakota Access disagrees with the proposed slope setback requirement, saying successful spoil storage on slopes greater than 5 percent is often possible, depending on other factors such as soil types, land use, and other existing features (roads and wetlands, for example).

Dakota Access asserts that BMPs based upon the specific conditions at each location will be as protective of the environment as a flat 50-foot setback requirement. (Reply Br. 19-20.)

OCA replies that it makes no sense to treat crude oil pipelines differently than natural gas pipelines and

that the recommendations of OCA's experts are best practices that have been implemented on other crude oil pipeline projects. (Tr. 1507; Reply Br. 6.)

It appears from the evidence that the setback requirements for natural gas pipelines are different than those for hazardous liquid pipelines. Dakota Access has committed to using best management practices on a case-by-case basis to address any issues regarding slope or setback distance. In addition, according to Dakota Access the FERC setback requirements do not apply to agricultural land for any type of pipeline. The Board will approve the 30-foot setback and use of slopes greater than 5 percent as proposed by Dakota Access, with the understanding that Dakota Access will follow best management practices and use a greater setback distance and no greater than a 5 percent slope where those best management practices require those limitations.

***(7) Pre-identification of Waterbody Crossing Methods.*** Proposed Condition No. 36 is a recommendation that a proposed and an alternate crossing method should be identified for each jurisdictional waterbody that will be crossed so that the Environmental Inspector can make informed recommendations to minimize impacts. Dakota Access says that it has identified the waterbodies that will be drilled and every other crossing should be constructed by whatever method the contractor determines is best at the time of the crossing, based on the conditions existing at that time, which must be assessed and incorporated into the decision. The Chief Inspector and

the Environmental Inspectors will have input at that time.

Proposed Condition No. 38 is a related recommendation that all information regarding construction plans and waterbody crossing methods should be provided to the Board and the county inspectors designated by each county's Board of Supervisors prior to commencement of construction. Dakota Access disagrees, saying there are four potential waterbody crossing methods (horizontal directional drilling or HDD, wet open cut, and two dry open cuts, flume and dam and pump), and the specific method should be determined on site at the time of construction. (Exh. MH Reply at 16-17.)

The Board will require that information about the intended method to be used in crossing a waterbody or waterway be provided to the county inspector prior to construction. The county inspector is to be informed prior to any construction over the crossing if the initial method is changed. County inspectors need to be informed of the crossing methods so the inspector can consult with Dakota Access if the inspector sees a problem with the method intended to be used for crossing the waterbody.

***(8) Board Approval of Final Plans.*** Proposed Condition No. 42 is a recommendation that final versions of all construction plans, including but not limited to the SWPPP, AIMP, SPCC, and Winter Construction and Winterization Plan, should be submitted to the Board for evaluation prior to issuance of a final decision on the petition. Dakota Access disagrees, saying that finalizing all plans prior to

permit issuance is not standard practice in the industry; instead, applicants commit to the implementation of certain plans in a manner that is coordinated with the agency or agencies having authority to enforce each plan. Other than the AIMP, which is required in Iowa prior to issuance of the permit, the plans OCA has identified will be implemented as necessary to comply with federal regulations and Dakota Access will coordinate with those federal agencies. (Reply Br. 22-23.)

Dakota Access has committed to provide the Board with the final version of the SWPPP and Dakota Access will be required to file a revised AIMP for Board approval prior to commencement of construction. Review and approval of these two plans will ensure the construction meets the requirements approved by the Board.

***(9) Roosting Trees for Bats.*** Intervenor Tweedy suggested that some hickory trees on his property in Lee County are favored roosting sites for a variety of bats. (Tr. 1408.) OCA witness Thommes testified that a typical measure to avoid disrupting the bats is to clear the trees in the winter, when the bats have migrated south (Tr. 1618), or to survey the forested areas to determine whether bats are present and only clear areas with no bats. (Tr. 1619.) Dakota Access noted that it avoided bat habitat in its routing process, which may have caused some corner clips. (Tr. 3256.) Because it was used as an avoidance criterion, Dakota Access estimated the impacted forested area to be less than 5 percent along the proposed route. (Tr. 420.)

The Board understands that Dakota Access included as a data set in the GIS routing program the location of species such as the bats' roosting area. Other than on the Tweedy parcel, no other locations have been identified in the record as roosting areas for bats. The Board will address the roosting tree concerns on the Tweedy property in its discussion in the eminent domain sections of this order. The Board will not require Dakota Access to revise the AIMP for other parcels where trees are to be removed and the unanticipated discoveries plan will address any roosting trees that may be encountered.

**f. SEHN Proposals**

SEHN recommended the following conditions, if the pipeline permit is granted: (1) Require that Dakota Access obtain and maintain adequate insurance; (2) Require removal of the pipeline if it is abandoned; (3) Revoke the permit for any spill of over 100 barrels; (4) Require sufficient legally-enforceable financial guarantees to address a worst-case oil spill, leak, or other accident; the guarantees should be certified to the Board on an annual basis or the permit should be revoked; and (5) Withhold the permit until all remaining county, state, and federal permits and authorizations have been issued and reviewed by the Board.

The Board has addressed the issue of adequate insurance and remediation financing in other sections of this order. The proposed requirement to remove the pipeline if abandoned is addressed by Iowa Code § 479B.32 and no need has been shown for any additional requirements in this respect. The Board does

not consider the 100-barrel spill limit for revoking the permit to be reasonable; the proposed condition does not include any consideration of why a spill may have occurred. Dakota Access has committed to providing the Board with the required permits and authorizations prior to commencement of construction.

**g. Other OCA Proposals**

OCA recommended that certain additional conditions should be required if the pipeline permit is granted. Those conditions are:

(1) Require unconditional and irrevocable financial guarantees from the parent companies of Dakota Access. (OCA Br. 18.) OCA argues this condition is consistent with Dakota Access's own evidence and arguments. For example, Dakota Access witness Mahmoud testified that Dakota Access's parent companies (Energy Transfer Partners, Sunoco Logistics, and Phillips 66) have provided guarantees "essentially backstopping the project or the asset from a liability standpoint in the event of an emergency." (Tr. 2178.) In its initial brief, Dakota Access argued that it makes sense to rely on the assets and guarantees of the parent corporations because their interests in preserving a $4 billion asset and restoring it to service are aligned with those of Dakota Access. (Init. Br. 46.)

(2) Require Dakota Access to provide the Board with construction plans even if another agency has specific regulatory authority over those documents so that Board staff can review them to ensure that any

and all conditions imposed by the Board are included in the plans. (OCA Br. 27.)

(3) Require Dakota Access to implement certain measures it has already committed to, such as repairing all tiles damaged during construction (AIMP at 6-8), accommodating landowners' tiling plans, relocating drain tiles, and installing headers along the pipeline in fields where it will cross extensive tiling (Tr. 2327-34, 2385-86), and provide landowners with GPS coordinates for all drain tiles discovered during construction and for the locations of all repaired tiles (Tr. 2395-97). Dakota Access says the tile repair is required by law and it has already committed to providing GPS locations as part of the "as-built" plans, so this condition is unnecessary. (Reply Br. 23-24.)

The Board addressed some of these issues in other sections of this order. For example, Dakota Access is required to repair tile in accordance with the AIMP and Dakota Access has committed to mapping the tile found during construction and providing a GPS map of the tile found to the landowner.

With regard to the financial guarantees made by the parent companies of Dakota Access, the Board agrees with OCA that those guarantees should be unconditional and irrevocable and should be filed with the Board before construction commences. Dakota Access has committed to provide a $25 million insurance policy to cover costs of remediation if a leak or spill occurs. However, the company's commitment is to provide the policy prior to the commencement of operations. The Board will require that the policy be filed with the Board prior to the issuance of a permit so

the Board is assured that coverage is available when construction operations begin. This will allow the Board and the parties to review the insurance policy to ensure that the coverage is available to any person affected by a leak or spill and that no unnecessary requirements are in place that would hinder recovery under the policy.

**h. Sierra Club Proposals**

Sierra Club recommended the Board require an Environmental Impact Statement (EIS) prior to construction and that the Board, prior to issuing the permit, require Dakota Access to consult with the State Archaeologist's Office as part of the environmental impact statement or equivalent process.

Dakota Access responds that the Board has previously rejected Sierra Club's contention that an EIS is required or would be meritorious, in the October 5, 2015, "Order Denying Motion to Require Environmental Impact Report." (Reply Br. 30.) Dakota Access says the record established that it will meet all environmental requirements of those agencies with responsibility for environmental permitting. Dakota Access says it conducted on-the-ground field surveys of 98.4 percent of the route and used that information to avoid environmental resources. (Exh. MH-12.) OCA witness Flo agreed that Dakota Access's responses to his environmental recommendations "essentially satisfy my recommendations." (Tr. 1518.) Witness Timpson agreed the plan and procedures for mitigating soil compaction are generally adequate (Tr. 1527) and witness Thommes testified that the company's consultation with applicable agencies was "sufficient to

have identified areas of concern" so that an "appropriate field assessment" could be conducted (Tr. 1619-20). (Reply Br. 31.)

Dakota Access argues the Board cannot require an EIS for this project as there is no state or federal legal requirement that an EIS be prepared for a hazardous liquid pipeline in Iowa. Dakota Access says that there is no EIS requirement in any of the 40 states that, like Iowa, do not have a state NEPA law. (Reply Br. at 31, n. 122.) Dakota Access says that it is up to the state legislature to enact an EIS requirement if one is desired. (Reply Br. 30-1.)

As indicated by Dakota Access, the Board has addressed this issue in an earlier order and an environmental impact statement is not required by statute.

**i. Puntenney Proposals**

Puntenney recommended that the Board require that the pipeline be inspected annually and, if the pipeline is no longer used, require the removal of the pipeline. In addition, Puntenney recommended that the Board include a "claw-back" provision in the permit so that any subsequent purchaser is required to meet all of the requirements in Iowa Code chapter 479B, including a public comment requirement, before the purchase of the permit is approved.

PHMSA establishes requirements for the inspection of the pipeline and removal of the pipeline is governed by Iowa Code § 479B.32. The Board has already determined that Dakota Access will be required to file for Board approval if the permit is to be sold or

transferred. The Board will not adopt the remainder of Puntenney's recommendations.

**j. Farm Bureau Proposals**

The Farm Bureau recommended that the Board require Dakota Access to pay all damages resulting from the construction project in accordance with Iowa law and require Dakota Access to compensate for all losses described in Iowa Code § 479B.29 as a term or condition of a permit. Farm Bureau recommended the Board require Dakota Access to compensate landowners for entire crop loss, forage loss or yield reduction for more than three years, for fertilizer, lime, or organic material applied to restore the land, for the increased cost of future tile work caused by the existence of the pipeline, and pay for reduction in land value. Farm Bureau also proposes conditions related to:

1. Conservation compliance. Require Dakota Access to share with each landowner copies of all wetland determinations and permits for the landowner's property. (Br. 6-7.)

2. Storage of excavated soil. Require Dakota Access to avoid placing spoil piles where the topography indicates the land will not drain properly. (Br. 7.)

3. Add to the AIMP a requirement that the pipeline will be routed at a depth of no less than 48 inches (Dakota Access has said it will do this but it is not specifically stated in the AIMP.) (Br. 7-8.)

4. Require Dakota Access to consult with each landowner about the best locations to drain trench water to avoid damage to land and crops outside the construction easement. (Br. 8.)

5. Require that any subsequently discovered tile damage should be repaired by Dakota Access in a prompt manner or the costs of repair be reimbursed to the farmer. (Br. 9.)

6. Require that the toll-free telephone number and mailing address being used as a point of contact for Dakota Access be continued beyond the first year after construction. (Br. 9-10.)

7. Include the contact information for the relevant county inspector(s) with the identity of Dakota Access's "geographic area representative" when that information is provided to the landowners. (Br. 10.)

8. Easement terms. Require the following changes to the condemnation easement:

    a. Allow continued agricultural use (normal farming activities) within the easement area even if some soil is removed or the grade or slope is changed to a minor degree. (Br. 11.)

    b. Add language to the easement requiring Dakota Access to "comply with the land restoration rules and requirements." (*Id.*)

    c. Amend the easement to require Dakota Access to "comply with the requirements and procedure set forth in §§ 479B.29 and

479B.30" relating to paying damages during the first three years. (Br. 12-13.)

d. Valve locations. Do not allow placement of future valves, not yet planned, without requiring an additional easement. (Br. 13-14.)

e. Require, as a term of the easement, Dakota Access to provide the as-built survey and geospatial coordinate of the pipeline as installed and the accompanying easement. (Br. 14.)

The Board agrees that the AIMP should be modified to reflect the company's commitment to install the pipeline in agricultural land at a minimum depth of 48 inches (where reasonably possible). Some of the other conditions proposed by the Farm Bureau were first raised on brief and have no supporting testimony from Farm Bureau; if they are supported by evidence provided by other parties, they have been considered in the sections of this order addressed to those other parties. The remaining conditions proposed by Farm Bureau are restatements of already existing requirements in statute or rule and the Board will not require that they be repeated in the AIMP.

**k. Compensation for Eminent Domain Parcels**

Two parties expressed a concern that could be interpreted as a proposed condition on the permit. Specifically, Mr. Puntenney and Lamb, et al., argued that if Dakota Access is granted the power of eminent domain, the company might reduce its offers for

voluntary easements in the expectation that the condemnation process could result in lower prices for the easements. This concern can be addressed by imposing a condition that Dakota Access must continue to offer to purchase voluntary easements, with the same terms and conditions already offered to the landowners, for the best prices that have already been offered by Dakota Access, at least until the county compensation commission meets to assess the damages for the taking. This is consistent with the testimony of Dakota Access witness Mahmoud, who said that the company will negotiate voluntary easements "up until we are in the courthouse door." (Tr. 3378.) In that way, no landowner will suffer adverse consequences for waiting to see if the Board issues a permit before signing a voluntary easement.

## VII. Final Analysis of the Public Convenience and Necessity

The Board finds, based upon the evidence and arguments presented and consideration of the applicable legal standards, that a permit should be issued, subject to the terms and conditions approved in this order. If the terms and conditions adopted above were not in place, the evidence in this record would be insufficient to establish that the proposed pipeline will promote the public convenience and necessity.

As previously described in this order, Iowa Code § 479B.9 contemplates that the Board will apply a balancing test to determine whether the project will promote the public convenience and necessity, determining whether the benefits outweigh the costs. *South East Iowa Co-Op. Elec. Ass'n v. Iowa Utilities*

*Board*, 633 N.W.2d 814, 821-22 (Iowa 2001). When balancing these costs and benefits, the Board considers all of the evidence and arguments presented by the parties relating to each of the issues, but in this analysis the focus will be on those factors that have been shown to be most significant. When engaging in this balancing test, it is not necessary that all three Board members agree on the precise weight to be given to each specific factor.

Two factors weigh heavily in favor of granting a permit. First, the proposed pipeline represents a significantly safer way to move crude oil from the field to the refinery when compared to the primary alternative, rail transport. The most credible evidence in this record, based on data from the U.S. Department of Transportation, shows that the spill incident rate for transport of crude oil by rail transport is three to four times higher than the incident rate for pipeline transport on a ton-mile basis. The oil is going to be produced and shipped as long as the market demands it; given that reality, shipping by the safest available method makes sense. This public benefit carries significant weight in the statutory balancing test for determining whether the proposed pipeline will "promote the public convenience and necessity." (Iowa Code § 479B.9.)

Second, the economic benefits associated with the construction, operation, and maintenance of the proposed pipeline are substantial. The construction period benefits are projected to be at least $787,000,000, and may be much more. Thousands of construction jobs will be created, many of them to be

filled by Iowans. Long term, the project will generate substantial tax revenues and will directly generate at least 12 permanent jobs. These are real economic benefits to Iowa that have not been seriously challenged on this record. This public benefit also carries significant weight in the statutory balancing test for determining whether the proposed pipeline will "promote the public convenience and necessity." (Iowa Code § 479B.9.)

The fact that the proposed pipeline will serve a market where there is a clear demand for pipeline transportation service is another benefit. However, it merits less weight in the Board's balancing test than the economic and safety benefits. Crude oil producers have signed "take or pay" contracts for 90 percent of the capacity of the proposed pipeline, the maximum capacity that FERC will allow Dakota Access to commit. (Ten percent of the total capacity must be reserved for "walk up" or casual shippers.) Those producers have signed contracts that obligate them to pay for the shipping service whether they use it or not; clearly, they represent a portion of the public that demands the services to be provided by this pipeline.

Factors that weigh against a finding that the proposed pipeline will promote the public convenience and necessity include the environmental impacts associated with the project. However, the record is clear that in addition to the state and federal environmental regulations Dakota Access must comply with, the company has taken many steps to reasonably minimize those impacts. The route of the pipeline was developed in a manner intended to minimize adverse

environmental impacts by avoiding sensitive areas wherever possible and by co-locating with existing infrastructure, like other pipelines and roads, where possible. The design and testing of the pipeline will exceed the applicable federal safety standards in many respects, including use of thicker-than-required pipeline walls in many areas; weld testing of 100 percent of main girth welds where federal regulations require only 10 percent; hydrostatic testing that is more stringent than federal regulations require; and early activation of a cathodic protection system. These are only examples of the areas where Dakota Access has taken extra steps to minimize the potential for adverse environmental impacts while the pipeline is in operation.

The Board's rules require that a pipeline company adopt a minimum Agricultural Impact Mitigation Plan (AIMP) for protection and restoration of agricultural land during and after construction. The Board has imposed additional terms and conditions on the AIMP that will further protect the environment during the construction phase of this project, as described in previous sections of this order.

Dakota Access will also minimize adverse environmental impacts by following best management practices for pipeline construction even where those practices are not required by law. They include preparation of a Storm Water Pollution Prevention Plan, a plan for addressing unanticipated discoveries along the route, a facilities response plan, an integrity management plan, an environmental training and

inspection plan, and other mitigation measures designed to protect the environment.

The evidence establishes that there will be financial resources available for remediation of possible future incidents, particularly in light of some of the terms and conditions the Board is imposing. In addition to the minimum financial responsibility requirements of Iowa Code § 479B.13, the company will be required to purchase and file with the Board, prior to commencing construction, a $25 million general liability insurance policy and to re-file that policy on an annual basis. The Board has also required the company to file unconditional and irrevocable financial guarantees from its parent companies prior to commencing construction. These guarantees are consistent with the financial interests of Dakota Access and its parent companies; once in operation, the pipeline will represent a $4 billion investment in a revenue-producing asset.

Finally, as discussed previously, the Board will impose certain additional terms and conditions on the AIMP and the permit itself to further minimize the adverse environmental impacts of the project. For example, the Board will require Dakota Access to prepare and file a Winter Construction Plan by August 1, 2016, so that there will be ample time for the parties to review it and comment on it.

As noted above, the environmental risks associated with the proposed pipeline represent public and private detriments that weigh against issuance of a permit. But the extra measures Dakota Access has taken, or will be required to take, tend to reduce the significance

of this factor in the overall balancing test. This factor still carries significant weight in the statutory balancing test for determining whether the proposed pipeline will "promote the public convenience and necessity." (Iowa Code § 479B.9.)

A second factor weighing against issuance of a permit is the burden the pipeline will impose on private interests, particularly the landowners along the proposed route. Construction of the pipeline will require opening and closing a trench on most parcels and the permanent easements will restrict landowners' future use of the land immediately around the pipeline in some ways. However, the statute provides that when a pipeline permit is granted, the company "shall be vested with the right of eminent domain…" (see Iowa Code § 479B.16) and the statute goes on to require restoration of the land and to provide compensation to those landowners for the damages they may suffer. (Iowa Code §§ 479B.17, 479B.20, 479B.29, 479B.30, and 479B.31.) Moreover, the Board has required certain changes to the AIMP and the condemnation easement in order to minimize the adverse impacts on those landowners during construction and during operation of the pipeline. This factor also carries significant weight in the statutory balancing test for determining whether the proposed pipeline will "promote the public convenience and necessity," although there are offsetting considerations, as just described. (Iowa Code § 479B.9.)

In the final analysis, this is not a simple matter of adding up the various factors for and against a finding that the pipeline will promote the public convenience

and necessity; some factors merit great weight in the balancing test, and other factors, while still important, are less significant. The Board has weighed and balanced all of the factors and issues discussed in this order or presented by the parties when arriving at its decision. The record in this matter establishes that the proposed pipeline will substantially benefit Iowa, and the public in general, in terms of relative safety benefits and economic benefits. Those benefits, when combined with the additional conditions the Board has imposed, outweigh the public and private costs associated with the project. The Board finds that, subject to the terms and conditions the Board has adopted in this order, the proposed pipeline will promote the public convenience and necessity and, pursuant to Iowa Code § 479B.9, a permit is granted and will be issued to Dakota Access after the company has complied with the filing requirements set forth in this order.

## VIII. Board's Authority to Grant Eminent Domain

Iowa Code § 479B.1 describes the Board's authority with regard to the construction of hazardous liquid pipelines in Iowa as follows:

> 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.

Iowa Code § 479B.16 provides that a pipeline company, if granted a permit, shall be vested with the right of eminent domain "to the extent necessary and as prescribed and approved by the board, not exceeding seventy-five feet in width for right-of-way and not exceeding one acre in any one location in addition to right-of-way for the location of pumps, pressure apparatus, or other stations or equipment necessary to the proper operation of its pipeline." This section also provides the Board with the authority to grant additional eminent domain rights where there is sufficient evidence to adequately demonstrate that a greater area is required for the proper operation of the pipeline. The Board does not have authority over the valuation of any property condemned through the right of eminent domain pursuant to Iowa Code § 479B.16. That determination will be made, if necessary, by a county compensation commission pursuant to Iowa Code chapter 6B.

Those parties opposed to the pipeline have raised issues regarding the Board's authority to grant rights of eminent domain under this section of the statute. The issues involve the relationship between the Board's authority and Iowa Code § 6A.21, as well as certain constitutional issues. The Board will address the constitutional issues first.

**a. Constitutional Issues**

The Fifth Amendment of the Constitution of the United States contains certain express limitations on the power of government to take private property through eminent domain. One of these limitations is that private property may only be taken for "public use," although the public use need not be for use of the general public. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005). The *Kelo* decision includes a description of three areas of public use where the government could take private property. (545 U.S. at 497-98 (O'Connor, dissenting.)) The three areas are: (1) Public ownership, such as national parks, interstate highways, and military bases; (2) Private ownership for a public use, such as railroad lines, electric transmission lines, and natural gas lines; and (3) Private ownership for a public purpose, such as the removal of urban blights. Under *Kelo*, the concept of public use is broadly defined, reflecting a policy of deference to legislative judgments in this field. (*Id.* at 480.)

The Iowa Constitution, Article I, Section 18, provides that private property shall not be taken for public use without just compensation first being made or secured to the landowner. The Iowa Supreme Court in a recent decision involving the Board's jurisdiction under Iowa Code § 476.27 stated that statutes that delegate the power of eminent domain should be strictly construed. *Hawkeye Land Co. v. IUB,* 847 N.W.2d 199, 208 (Iowa 2014); see also *Clarke County*

*Reservoir Commission v. Abbott,* 862 N.W.2d 166, 168 (Iowa 2014).

Issues regarding due process and the equal protection clause have been raised. Specific reference has been made to the rights of landowners to challenge an application for condemnation in district court pursuant to Iowa Code § 6A.24 in contrast to the rights of the acquiring agency under that section. Specific reference has also been made to the substantive rights of landowners and the ability of landowners to seek judicial review before a condemnation proceeding is initiated. Finally, there is the issue of whether Iowa Code § 479B.16 provides fewer protections for landowners than Iowa Code § 6A.21 and, if so, whether this violates the equal protection clause.

The *Hawkeye Land* case is instructive on the Board's authority to address constitutional issues. The *Hawkeye Land* Court stated that it reviews constitutional issues in agency proceedings de novo. *Hawkeye Land*, 847 N.W.2d at 208 (citing *NextEra Energy Res. LLC v. Iowa Utilities Board*, 815 N.W.2d 30 (Iowa 2012).) The *Hawkeye Land* Court also stated if a case can be resolved on statutory grounds, the Court would not reach constitutional arguments. *Hawkeye Land*, 847 N.W.2d at 210 (citing *State v. Seering*, 701 N.W.2d 655, 663 (Iowa 2005); *State v. Button*, 622 N.W.2d 480, 485 (Iowa 2001).

The Board has determined that it can resolve the issues raised by the parties on statutory grounds and need not reach the constitutional issues raised by those opposing the pipeline.

**b. Statutory Issues**

As discussed above, the Board should interpret a statute in a fashion to avoid a constitutional infirmity, where possible. *Bd. of Prof. Ethics v. Visser*, 629 N.W.2d 376, 380 (Iowa 2001). Under this analysis, the Board considers the grant of eminent domain authority in Iowa Code § 479B.16 to be consistent with the takings protections in the Constitution of the State of Iowa and the takings protections in the Fifth Amendment of the Constitution of the United States. The Fifth Amendment limits government takings to those that are for a public use. It has long been recognized that the public use requirement does not strictly limit takings to those in which the property condemned is to be used by the public at large. *See, e.g.*, *Berman v. Parker*, 348 U.S. 26, 33-34 (1954). Further, it is also not a per se unconstitutional taking if the condemned property is immediately transferred to a private party. *Midkiff*, 467 U.S. at 244. However, it is clear that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation [is] paid." *Id.* at 241 (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937).)

In determining whether a taking by eminent domain satisfies the public use requirement, courts will defer to the wisdom of the legislature. *Kelo,* 545 U.S. at 487-88. "When the legislature's purpose is legitimate and its means are not irrational" a condemnation is constitutional. *Id.*, quoting *Midkiff*, 467 U.S. at 242-43. The Constitution of the State of Iowa contains similar limitations on the use of eminent domain as those

contained in the Constitution of the United States. Iowa Const. art. 1, § 18. Because the federal and state constitutional provisions regarding takings are nearly identical, federal cases interpreting the federal provision are persuasive" when interpreting the Iowa provision. *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005) (citations omitted). However, the Iowa Supreme Court has been clear that cases interpreting the federal takings limitation are not binding on the interpretation of the state takings provision. *Kingsway Cathedral v. Iowa Dept. of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006) (citing *Harms*, 702 N.W.2d at 97).

The Iowa Legislature has granted the Board the authority to grant or deny hazardous liquid pipeline permits. The Board is not to grant a permit unless the "[B]oard determines that the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9. Further, the statute states that "[a] pipeline company granted a permit shall be vested with the right of eminent domain, to the extent necessary and as prescribed and approved by the [B]oard." Iowa Code § 479B.16. 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.

The next issue to be considered is whether Iowa Code §§ 6A.21 and 6A.22 limit the Board's authority to grant eminent domain to a pipeline company granted a permit to construct a hazardous liquid pipeline pursuant to Iowa Code chapter 479B. Iowa Code

§ 6A.21(1)(c) prohibits the exercise of the right of eminent domain over agricultural land for private development purposes unless the owner consents. Private development purposes are defined in Iowa Code § 6A.21(1)(b) as the construction of, or improvement to, recreational trails, recreational development paid from primarily private funds, housing and residential development, or commercial or industrial enterprise development. There appears to be no real issue that the hazardous liquid pipeline proposed by Dakota Access is an industrial enterprise development for purposes of Iowa Code § 6A.21(1)(c).

Iowa Code § 6A.21(2) provides that the limitation on public use in Iowa Code § 6A.21(1)(c) does not apply to "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce or to any other utility conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain." Some of the opposition parties have argued that Iowa Code § 6A.21(2) was specifically enacted in response to the *Kelo* decision and the General Assembly amended this section of the eminent domain statute in order to remove the authority to condemn agricultural land for industry, as defined in Iowa Code § 260E.2. By deleting this provision, it is argued, the legislature expressed its intent that agricultural land could not be condemned for industrial purposes. The argument continues by stating that the timing of the amendment shows that the limitation on eminent domain authority applies to Dakota Access and, even if the Board grants Dakota Access a permit, Dakota

Access cannot condemn agricultural land to construct the pipeline.

These arguments are only valid if the Board finds that Dakota Access does not meet the exception to the limitation of taking agricultural land found in the same section of the statute. Iowa Code § 6A.21(2) states that the limitation on the definition of public use, public purpose, or public improvement in Iowa Code § 6A.21(1)(c) does not apply to "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce or to any other utility conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain." The opposing parties have argued that Dakota Access is not a "utility" and therefore does not qualify for the exemption.

The argument about whether Dakota Access is a utility, whether private or public, ignores the fact that the exception in Iowa Code § 6A.21(2) includes "companies[] or corporations" under the jurisdiction of the Board. Dakota Access is a company; the question that remains is whether it is subject to the Board's jurisdiction.

The Board considers that the use of the term "jurisdiction" in Iowa Code § 6A.21(2) includes the jurisdiction granted the Board under Iowa Code chapter 479B 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 the proposed pipeline. Since the language in this section includes Board jurisdiction

over entities other than utilities, it is reasonable to interpret this language as also including the jurisdiction granted the Board over the routing and construction of hazardous liquid pipeline companies. Since the Board determines that the exception in Iowa Code § 6A.21(2) includes jurisdiction over Dakota Access, the Board determines that it has the authority to grant the power of eminent domain to Dakota Access, to the extent found necessary, pursuant to Iowa Code § 479B.16.

In their reply brief, Lamb, et. al, assert that if the Board grants the permit to Dakota Access, not only will there be condemnation proceedings in almost every county where the pipeline is located but petitions for judicial review will also be filed in each of those counties. Lamb, et. al, argue that the Board should, if the permit is granted, delay the effective date of the permit until all of the petitions for judicial review have been consolidated and been considered by a district court. This would in effect stay the Board's granting of the permit until a final court decision.

This request is premature. Iowa Code § 17A.19(5) states that the filing of a petition for judicial review does not itself stay execution or enforcement of any agency action. The same section of Iowa Code chapter 17A provides that a person may request a stay from the agency and, if the agency does not grant the stay, the person may seek relief from the court. Section 17A.19(5)(c) sets out the factors a court will consider in deciding whether to grant a stay. Those procedures will be available at the appropriate times.

### c. Individual Eminent Domain Parcels

Dakota Access has requested the right of eminent domain over a number of parcels, as identified in the attachments and in the body of this order. The Board will address the parcels in four categories. The first category will be those parcels where the landowner or tenant did not file an objection, did not intervene or file prepared testimony, or did not testify at the hearing. The second category will be those parcels where an objection was filed by the landowner but the landowner did not intervene, file prepared testimony, or testify at the hearing. The third category will be those parcels where the landowner either intervened and filed prepared testimony or testified at the hearing. The fourth category is those parcels owned by a governmental entity.

The right of eminent domain granted to Dakota Access over the parcels addressed in this section of the order is subject to the conditions approved by the Board in this order, unless otherwise specifically addressed. The right of eminent domain is for a 50 foot wide permanent easement, an approximately 150 foot temporary easement for construction (which includes the 50 foot permanent easement), and an easement of approximately 50 feet by 75 feet for placement of valves in specified locations. Dakota Access Exhibit CAF-4, pages 19-43, sets out the justification for those parcels where Dakota Access is requesting temporary work easements greater than 150 feet in width. The grant of the right of eminent domain over the parcels addressed in this order includes the right for a temporary construction easement greater than 150 feet for those

parcels specifically mentioned in Dakota Access Exhibit CAF-4.

The first category consists of the parcels where the landowner has not filed an objection and did not intervene or file prepared testimony and did not otherwise testify at the hearing. The list of these parcels is attached as Attachment 1 to this order and incorporated into this order by reference. Since the Board has granted Dakota Access a permit to construct the hazardous liquid pipeline as described in this order, the Board will grant Dakota Access the right of eminent domain over the parcels listed on Attachment 1 as described in the Exhibit H filings for each parcel, subject to the conditions approved by the Board in this order.

The second category consists of parcels where the landowner filed an objection but did not intervene or did not testify at the hearing. The parcels in this category are listed on Attachment 2 to this order and incorporated in this order by reference. Most of the objections raised issues concerning whether Dakota Access had met the requirements of Iowa Code chapter 479B for a pipeline permit. Since the Board has found that Dakota Access has met the requirements in Iowa Code chapter 479B for a permit, the Board will grant Dakota Access the right of eminent domain over these parcels, subject to the conditions described in this order.

The third category consists of parcels over which Dakota Access has requested the right of eminent domain and the landowners of these parcels either intervened and filed prepared testimony or testified at

the hearing. Each of these parcels will be considered individually. The parcels will be addressed by county and identified by the landowner and both the parcel number shown on the Exhibit H description of each parcel and the parcel number given the Exhibit H when it was filed in the Board's electronic filing system. This section of the order will address only those issues directly related to the easement over the parcel and will not address those issues raised by landowners regarding the issue of whether the project will promote the public convenience and necessity, that is, whether the permit should be issued. The Board has addressed that issue in earlier sections of this order.

**Boone County**

**John A. Burkhart, H-BO-001 (IA-BO-018)**

Kevin Lambert filed an objection on November 4, 2015, and presented testimony concerning parcel H-BO-001, which is owned by his grandfather, John Burkhart. Lambert is a tenant on this parcel. Lambert testified that his grandfather's attorney was going to be at a meeting with Dakota Access, but the meeting was canceled by the pipeline company and never rescheduled. (NILA Exh. 7 at 2.) He testified that he does his own tiling, and does tiling for his neighbors. He testified that he calls for utility locates before he digs and checks with the proper agencies to make sure there are no restrictions on the property. (Tr. 3101). He testified that there is a creek, approximately 50 feet wide and up to 40 feet deep, on parcel H-BO-001 that the pipeline will cross. (Tr. 3103).

Lambert raised issues concerning eminent domain, the term of the easement, the reduced overall value of the parcels, and the propriety of granting eminent domain to a private company. (Tr. 3105.) He wants the pipeline to go around the parcel. (Tr. 3104.)

Many of the arguments Lambert has presented related to whether a permit should be granted or whether the power of eminent domain should be granted; those issues are addressed elsewhere in this order. The evidence presented by Lambert regarding parcel H-BO-001 does not propose any specific alternative route and does not indicate that there is any particular characteristic of the property that would support denying the right of eminent and requiring Dakota Access pursue an alternative route. Lambert identified a drainage creek on the parcel, but Exhibit CAF-4, page 31, shows that Dakota Access is requesting additional storage area for the crossing of the "deep County Drainage Ditch DD-222 Main B." In other words, Dakota Access is aware of the drainage ditch and has plans to cross it in an appropriate manner based upon the prevailing circumstances at the time of construction.

The Board will grant Dakota Access the right of eminent domain over parcel H-BO-001 as requested, subject to the conditions approved by the Board in this order.

**LaVerne Johnson: H-BO-047 (IA-BO-028) and H-BO-048 (IA-BO-033)**

LaVerne Johnson testified that the pipeline could be routed to avoid his property and thereby avoid his tile

lines. (IFOA Exh. LaVerne Johnson Direct.) Johnson also presented the testimony of his drainage contractor, Dan Rasmussen. Johnson owns two parcels along the pipeline route. The west parcel, H-BO-047, has been in his family since 1896 and the east parcel, H-BO-048, since 1962. The two parcels have been used for growing corn and soybeans. He testified that his home is on the west parcel and is identified on the parcel map as a metal barn. The metal barn is approximately 40 feet away from the construction easement and 143 feet from the centerline of the pipeline. (Exh. LaVerne Johnson Direct at 1.)

Johnson has installed layers of drain pipes on the west parcel because it holds water. Some of his tile lines are buried up to 16 feet deep. (Id. at 3.) He installed the drainage system with great care and separated and replaced the topsoil when the tiling was done. He believes the pipeline will affect the drainage on his property and unless the pipeline goes under all of the tile lines it will have to go through them which he believes will prevent water from flowing through the tiles. Johnson believes that Dakota Access could find a less destructive route, but they have not proposed to change the route.

At the hearing, Johnson testified that he would not sign an easement even if Dakota Access agreed to bore the pipeline under his 24-inch tile main which is located on the western parcel, H-BO-047. (Tr. 3027.) Johnson described the extensive tiling he had put in on the western parcel and that the proposed pipeline would cut across this tile system in proximity to the discharge point on the northeast corner of the property.

He believes the tile system will fail to discharge if the pipeline goes through this tile system at the location proposed by Dakota Access.

After consideration of the evidence regarding the tiling system on parcel H-BO-047, the Board will grant Dakota Access the right of eminent domain over that parcel upon the condition that the pipeline be bored under the 24-inch concrete main. Johnson suggests that this will not be successful because of the type of soil under the 24-inch main; however, there appears to be no reasonable alternative to granting eminent domain along the route proposed by Dakota Access and boring under the 24-inch main appears to be the least intrusive alternative.

The Board will grant eminent domain over parcel H-BO-047 as modified, and over parcel H-BO-048 as requested, subject to the conditions approved by the Board in this order.

**Judith Anne Lamb Revocable Trust, H-BO-032 (IA-BO-134), and Richard R. Lamb Revocable Trust, H-BO-033 (IA-BO-136)**

Richard Lamb testified regarding the two parcels owned in revocable trusts. (NILA Exh. 1.) The proposed pipeline route traverses almost the entire 150 acres of parcels H-BO-032 and H-BO-033. The two parcels are separated by Highway 30. Lamb testified that the two parcels might be developed for non-agricultural use in the future; however, he testified that he has received no offers for his property and there was no pending rezoning of his property. (Tr. 3086). Lamb testified that he told Dakota Access that he would not sign an

easement and that he had not negotiated with Dakota Access about moving the pipeline route to the edge of the two parcels. (Tr. 3087). Lamb testified that he had not provided his tile map to Dakota Access, but would provide the tile map to the county inspector if the pipeline permit is granted.

The Board understands that the route crosses almost all of the two parcels; however, there has been no evidence presented in the record upon which to require that the route should be relocated. The Board will grant Dakota Access the right of eminent domain over parcels H-BO-032 and H-BO-033 as requested, subject to the conditions approved by the Board in this order.

**Buena Vista County**

**Martha A. Murray, H-BU-031 (IA-BU-020)**

Murray testified that the proposed pipeline would enter her property on the west and cut diagonally across her tile lines and two waterways. (NILA Exh. 3.) Murray testifies that the pipeline route on the parcel to the east has the pipeline route along and parallel to a road. She does not understand why the route did not go along the road across her property. (*Id.*)

Murray testified that her parcel is not easy to access since it is an "inside 80" acres. (NILA Exhibit 3, page 2). She does not understand why Dakota Access has not described exactly how it intends to access her parcel during the construction of the pipeline and after construction. Murray testifies that access to the pipeline on her property should be from the road to the Pedersen property to the east and then go to the

northeast. (NILA Exhibit 3, page 3). She does not want Dakota Access to access the south part of her property. At the hearing, Murray testified that Dakota Access could come up from the Garberson property rather than coming on her property as proposed. (Tr. 1299.)

Murray has proposed an alternative route on her property, running along the road, but that would require substantially increasing the pipeline's intrusion on the parcel to the west, as the pipeline would have to be re-routed down entire the west edge of that parcel and then along the entire south edge. The Board does not consider shifting the burden from one landowner to another to be a reasonable alternative in this particular situation.

As discussed previously in this order, Dakota Access can only access a parcel where eminent domain is granted over the permanent easement or the temporary easement, unless there is a separate agreement with the landowner. This addresses Murray's concerns about the manner of access. The Board will grant Dakota Access the right of eminent domain over parcel H-BU-031 as requested, subject to the conditions approved by the Board in this order.

**Michael G. Lenhart, Retha A. Lenhart, Patrick G. Lenhart, and Carol J. Lenhart, H-BU-008 (IA-BU-073)**

In prepared testimony, Patrick G. Lenhart testified that the Lenharts have a turkey operation on a parcel directly south of the parcel that the pipeline will cross. (NILA Exh. 2.) NILA Exhibit 12 shows the location of three existing buildings in relation to the proposed

route of the pipeline. The northernmost building is 339 feet from the proposed pipeline route. (Tr. 3168). The buildings are used for raising turkeys; the Lenharts currently have the capacity to raise approximately 150,000 turkeys on the southern parcel and anticipate expanding the turkey operation which will include additional buildings that will be located on the south end of parcel H-BU-008. Lenhart testified that if the company that owns the turkeys wants to expand operations, the Lenharts will need to be ready to expand their operations. (Tr. 3184).

Lenhart testified that to accommodate the construction of three new buildings the Lenharts will need 500 feet on the parcel the pipeline is to cross. In addition, the Lenharts will need to borrow dirt from the northern parcel and the dirt needed is located on the north side of the proposed pipeline route. Lenhart testified that Dakota Access land agents indicated the proposed route could be moved 960 feet to the north; however, the Lenharts never received a map showing the exact location. (NILA Exh. 2 at 3.) Lenhart testified that the pipeline needed to be relocated approximately 1,000 feet to the north of the south border of the parcel to accommodate the three proposed buildings and to allow access to the additional dirt needed for the proposed buildings. (Tr. 3172). That represents 500 feet for the buildings and 500 feet to obtain the additional dirt needed. In addition, the Lenharts request that Dakota Access be required to cross Highway 71, located on the east border of the parcel, at least 1,000 feet north of the south border of the parcel.

Dakota Access states, in its reply brief, that some relocation may be possible; however, if a voluntary easement cannot be negotiated, Dakota Access should be granted the right of eminent domain as requested.

Based upon the testimony and evidence presented by Lenhart, the Board will not grant eminent domain over parcel H-BU-008 as requested by Dakota Access unless the pipeline is relocated to the north to allow the Lenharts to expand their turkey operation on to parcel H-BU-008. That may require relocating the line 960 feet to the north to accommodate the buildings and provide dirt, or it may require relocating the line 500 feet to the north with compensation to Lenhart for the excess cost of obtaining dirt elsewhere. The Board understands that Dakota Access may need to negotiate modifications to the voluntary easement for the landowners to the east of parcel H-BU-008 to accommodate the relocation of the proposed route. The Board understands that Dakota Access may need to modify the proposed route over parcel H-BU-013 (IA-BU-071) owned by the Citizens Bank of Storm Lake, Iowa, to accommodate the relocation of the route. Both of these modifications are reasonable to reduce the inconvenience and undue injury to the Lenharts from the proposed route.

The Board has previously addressed the concerns about access to the parcel by limiting access to the 50 foot permanent easement and the 150 foot temporary easement. The Board will not grant eminent domain as requested by Dakota Access, but the Board will grant eminent domain over parcel H-BU-008 as modified

above, subject to the conditions approved by the Board as described in this order.

**Brent N. Jesse, Shawn B. Jesse, Darren D. Jesse and Wendi J. Taylor, H-BU-021 (IA-BU-096) and H-BU-022 (IA-BU-105); ERN Enterprises, Inc., H-BU-061 (IA-BU-097)**

Brent Jesse testified regarding three parcels in which he has an ownership interest. (NILA Exh. 4.) He did not testify regarding the parcels owned by his cousins. (Tr. 3138). In his direct testimony, Jesse testified that Dakota Access should only be granted an access easement from the shortest point on the parcel and he should be contacted when Dakota Access intends to use the access easement. (*Id.* at 2-3.) With regard to Parcel IA-BU-022, Jesse testified that this parcel has a waterway that was put in to control erosion and the waterway will be affected by the proposed pipeline route. (Tr. 3143). No specific alternative routes were proposed to avoid this waterway. Jesse testified that the proposed pipeline should be moved north to avoid this waterway. (Tr. 3145).

The evidence does not establish that the proposed route of the pipeline will significantly affect the grass waterway constructed to control erosion on this parcel such that it cannot be restored to full operation after construction is completed. The Board will grant Dakota Access the right of eminent domain over parcels H-BU-021, H-BU-022, and H-BU-061 as requested, subject to the conditions approved by the Board in this order.

**Calhoun County**

**Prendergast Enterprise, Inc., H-CA-041 (IA-CA-157.501)**

Kenneth Anderson testified on behalf of Prendergast Enterprise, Inc., his family farm corporation. (IFOA Exh. Ken Anderson Direct.) Anderson testified that there is a neighbor's well in the easement area and the well is used by the neighbor. (Tr. 2940). Anderson has concerns that a leak from the pipeline might affect the well. He is also concerned about the possible use of eminent domain and who will be responsible for remediation.

The testimony regarding the potential effect of a hypothetical future leak in the area of the neighbor's well does not provide sufficient evidence to require relocation of the route. The Board will grant Dakota Access the right of eminent domain as requested over parcel H-CA-041, subject to the conditions approved by the Board in this order.

**Cherokee County**

**William R. Smith and Anne C. Smith, H-CH-015 (IA-CH-080), H-CH-016 (IA-CH-082), and H-CH-024 (IA-CH-083); Marie J. Smith Revocable Trust, H-CH-012 (IA-CH-081)**

William R. Smith filed prepared direct testimony regarding three parcels, H-CH-015, H-CH-016, and H-CH-024. (NILA Exh. 5.) NILA Exhibit 14 shows the three properties and that the proposed pipeline route cuts across a very small corner of parcel H-CH-024. Smith testified that the route should be relocated to the

north of that parcel so that corner of parcel H-CH-024 is not affected by the route. With regard to parcel H-CH-015, Smith testified that the route should be relocated further to the south so the entire parcel would be missed.

At the hearing, in addition to the three parcels described in his direct testimony, Smith testified regarding parcel H-CH-012, a parcel owned by his mother. With regard to parcel H-CH-015, Smith is requesting that the pipeline route be relocated further south on this parcel and as close to the southwest corner of the parcel as possible. He requested that the pipeline be relocated as close as possible to the southwest corner of the Parcel No. IA-CH-015 so that it crosses as close to the intersection of those two roads as possible. (Tr. 3124).

Smith pointed out that Dakota Access has a voluntary easement over the parcel to the west and he testified he can give Dakota Access better access to parcel H-CH-015 if the route is relocated as described. (Tr. 3115-16.) Smith agreed that the temporary construction easement could be on parcel H-CH-015 to the north of the pipeline route so the route could be relocated further toward the southwest corner of this parcel. (Tr. 3127.)

Smith testified that he is requesting the pipeline route be moved at least 150 feet to the north of parcel H-CH-024 so the pipeline does not cross this parcel at all. (Tr. 3119). In its initial brief, NILA points out that Dakota Access witness Mahmoud appeared to admit the line could be moved to avoid Parcel H-CH-024. (Tr. 3359-60).

The Board will not grant Dakota Access the right of eminent domain over parcel H-CH-024, owned by Smith. Dakota Access should negotiate with Smith to relocate the route and permanent easement as close as possible to the southwest corner of parcel H-CH-015 and then modify the route accordingly over parcels H-CH-016 and H-CH-012 so that the route does not cross parcel H-CH-024. The Board will grant the right of eminent domain over parcels H-CH-015, H-CH-016, and H-CH-012 for a route that is consistent with the described revisions to the route, subject to the conditions approved by the Board in this order.

**Marian D. Johnson, H-CH-019 (IA-CH-025) and H-CH-020 (IA-CH-026)**

At the hearing, counsel for Marian D. Johnson offered the affidavit of Verdell Johnson to establish that parcels H-CH-019 and H-CH-020 owned by Marian D. Johnson are agricultural land for purposes of an appeal of a Board order granting Dakota Access the right of eminent domain over the two parcels. Dakota Access objected to the admission of the affidavit and the Board sustained the objection. Counsel for Johnson made an offer of proof of the affidavit. (Tr. 3059).

Upon review of the transcript regarding the offer of proof, the Board has reconsidered the decision to sustain the objection. A review of the arguments about the admissibility of the affidavit in the transcript does not show that show that Dakota Access would have been prejudiced by the admission of the affidavit for the purpose offered. Upon reconsideration, the Board

will admit the affidavit of Verdell Johnson as Marian D. Johnson Exhibit 1.

No other issues or arguments are raised by the affidavit. The Board will grant Dakota Access the right of eminent domain over parcels H-CH-019 and H-CH-020 as requested, subject to the conditions approved by the Board in this order.

**Jasper County**

**Cornlan Farms, Inc., H-JA-017 (IA-JA-020)**

Dan Gannon filed prepared direct testimony but did not testify at the hearing. (Affidavit of Dan Gannon.) Gannon's prepared direct testimony was admitted without objection at the hearing. (Tr. 1946-47). In his prepared testimony, Gannon stated that he is an owner of Cornlan Farm, Inc., and was authorized to testify on behalf of the corporation. Gannon testified regarding the issues addressed by the Board in an earlier section of this order that considered whether the proposed pipeline meets the requirements of Iowa Code chapter 479B for a permit.

The Board has addressed the chapter 479B requirements elsewhere in this order. The Board will grant Dakota Access the right of eminent domain over parcel H-JA-017 as requested, subject to the conditions approved by the Board in this order.

**Sondra K. Feldstein, H-JA-002 (IA-JA-040)**

Sondra Feldstein filed prepared direct testimony in this proceeding. (IFOA Exh. Feldstein Direct.) She is opposed to the pipeline because "it represents a

throwback to the use of fossil fuels" and because the does not believe that eminent domain should be used by a private company to take an interest in a privately-owned farm. (*Id*. at 2.) At hearing, Feldstein also testified that Dakota Access contacted her after the date for filing testimony and informed her that a change had been made in the proposed route over her property. (Tr. 2967). Feldstein testified the revised route would have a greater impact on her property than the initial route by taking protective timber for her market gardening activities. Feldstein testified that corn or soybeans can be grown over a pipeline but that market fruits and vegetables cannot. Some market crops are perennials and she cannot plant them if Dakota Access can come across the easement and tear the plants down. (Tr. 2968). Feldstein testified that the revised Exhibit H filing was filed too late for her to address the change in her prepared direct testimony. The revised route cuts right through the middle of her property. (Tr. 2980).

Dakota Access witness Mahmoud testified that perennial plants and shrubs up to 15 feet tall and with trunks up to 3 inches in diameter at chest height will be permitted on the permanent easement area. (Tr. 3288.) This appears to address Feldstein's concerns about blueberry bushes, rhubarb plants, asparagus beds, and many fruit trees. (Tr. 2968.) In order to ensure Dakota Access's vegetation management standards, as testified to at hearing, are applicable to this parcel, the Board will require that the permanent easement for this parcel be modified to incorporate the 15-foot and 3-inch standards. It appears that returning the pipeline to its original proposed location would

require substantial relocation on other nearby parcels where voluntary easements have been negotiated based upon the revised location shifting that burden to the adjoining parcels would not be reasonable. Under these circumstances, the Board will grant Dakota Access the right of eminent domain over this parcel at the location shown on the revised Exhibit H for parcel H-JA-002 as filed in the Board's electronic filing system on December 10, 2015, subject to the modification above and to the conditions approved by the Board in this order.

**William J. Gannon and Kathleen Kennedy Gannon, H-JA-014 (IA-JA-012); Max E. Maggard, Trustee of the Max E. Maggard and Gloria Joyce Maggard Joint Revocable Trust, H-JA-018 (IA-JA-048) and H-JA-019 (IAJA-051)**

Bruce Babcock testified on behalf of William J. Gannon and Kathleen Kennedy Gannon, and Max E. Maggard, Trustee of the Max E. Maggard and Gloria Joyce Maggard Joint Revocable Trust (Gannon et al.), as well as Herman Rook, Laverne Johnson, the IFOA, and NILA. (Exh. Gannon-Babcock Direct Testimony.) Babcock's testimony addressed the issues considered by the Board earlier in this order regarding whether the proposed pipeline meets the requirements for a permit established in Iowa Code chapter 479B. There was no testimony presented specifically regarding parcels H-JA-014, H-JA-018, or H-JA-019.

The issues regarding the requirements of Iowa Code chapter 479B have been addressed elsewhere in this order. The Board will grant Dakota Access the right of eminent domain over parcels H-JA-014, H-JA-018, or

H-JA-019 as requested, subject to the conditions approved by the Board in this order.

**Herman C. Rook, H-JA-025 (IA-JA-201)**

Herman C. Rook filed prepared direct testimony regarding parcel H-JA-025. (IFOA Exh. Herman Rook Direct.) He testified that the parcel is 100 percent flat bottom land in the Elk Creek basin with extremely limited draining options. Water is drained from the north and south into the parcel. To address the drainage issues on the parcel, Rook testifies that the pipeline will need to be placed at least eight feet deep. (*Id*. at 3.) At this depth, the drainage tiles will continue to be able to drain the parcel. Rook testified that there is no evidence Dakota Access considered a pipeline route along division lines rather than cutting diagonally across the parcel.

Keith Rook, Herman Rook's son, filed prepared direct testimony regarding parcel H-JA-025. (IFOA Exh. Keith Rook Direct.) Larry E. Rook, another son of Herman Rook, also filed prepared direct testimony regarding this parcel. (IFOA Exh. Larry Rook Direct.) Keith Rook and Larry Rook's prepared testimony is essentially the same as that of Herman Rook.

Keith Rook testified at the hearing. (Tr. 2991-94.) According to Keith Rook, the tile system on the parcel runs north to south and the proposed pipeline route cuts across the tile system diagonally.

Most of the issues raised by the Rooks relate to whether to grant a permit or whether to grant the power of eminent domain and have been addressed elsewhere in this order. The Board will grant Dakota

Access the right of eminent domain over parcel H-JA-025 subject to the condition that the pipeline be placed at least eight feet deep on this parcel, and also subject to the conditions approved by the Board in this order.

**Lee County**

**Hugh E. Tweedy, H-LE-028 (IA-LE-171)**

Hugh E. Tweedy testified that the landowners to the east, west, and south of parcel H-LE-028 have signed voluntary easements and Dakota Access could have gone around his parcel by using those other parcels. His parcel is mainly timber with a 2.6 acre organic field close to the center. Tweedy testified that the trees located on the east side of his property are favorite roosting places for several species of bats. Tweedy testified that several fruit trees are located along the proposed pipeline route. Tweedy requested that the pipeline go around his farm. (Tr. 1407-19).

On cross-examination, Tweedy was asked if he was aware that his property would be horizontally directionally drilled under the parcel for the entire distance. (Tr. 1420). Tweedy testified that he still was not comfortable with having the pipeline on his property. Dakota Access witness Mahmoud testified that parcel H-LE-028 would be drilled; however, Dakota Access is still requesting the right to cut a 30-foot path through the property over the pipeline route. (Tr. 3379). According to Mahmoud, the path to be cleared is for safety, in the event of a spill, and for visual observations. (Tr. 3385). There is also concern about tree roots wrapping around the pipeline.

The Board will require Dakota Access to horizontally directionally drill parcel H-LE-028 at a depth of at least 25 feet. The Board is not persuaded that granting the right of eminent domain to clear a 30-foot wide path across parcel H-LE-028 is necessary. The need for visual inspection does not outweigh the environmental concerns over the removal of roosting areas for the several species of bats that roost in the trees, particularly when visual inspection may still take place on foot.

The Board will grant Dakota Access the right of eminent domain over parcel H-LE-028 as modified, subject to the conditions approved by the Board in this order.

**Mahaska County**

**Grandma's Place, H-MA-013 (IA-MA-196) and AIM Acres, L.C., H-MA-007 (IA-MA-198)**

Pamela Alexander testified with regard to parcels H-MA-013 and H-MA-007. Alexander's testimony deals with issues regarding whether Dakota Access has met the requirements of Iowa Code chapter 479B for the proposed hazardous liquid pipeline. Those issues have been addressed in an earlier section of this order.

The Board will grant Dakota Access the right of eminent domain over parcels H-MA-013 and H-MA-007 as requested, subject to the conditions approved by the Board in this order.

**O'Brien County**

**Ruth Portz Konz, H-OB-001 (IA-OB-003)**

Tom Konz testified about the manner of negotiations by Dakota Access. (NILA Exh. 8.) This included a statement by the land agent that Dakota Access could not be stopped. (*Id*. at 4.) Even though Konz was represented by counsel, Dakota Access never contacted his counsel. (Tr. 3197). Konz requests that the Board direct Dakota Access to enter into additional negotiations for an easement over the parcel. Konz testified that he told the Dakota Access land agents that they should talk to his attorney about the easement, but talk to him about compensation. (Tr. 3208).

Konz is concerned about the construction being permitted when the ground is wet and addresses issues with the eminent domain easement. Konz testified that his tile lines lies above a natural gas pipeline that crosses the property. The tile lines are three and one half feet deep to the bottom tile and run north to south spaced 50 feet apart. (Tr. 3200). Konz is concerned about replacement of his topsoil if there is a leak. He testified that the topsoil is deep black dirt. (Tr. 3201-02.)

The concerns raised by Konz are addressed by the Board in the section of this order regarding the terms and conditions the Board is attaching to the permit. The Board will grant Dakota Access the right of eminent domain over parcel H-OB-001 as requested, subject to the conditions approved in this order.

**Sioux County**

**Double-D Land & Investments, LLC, H-SI-018 (IA-SI-073)**

Double-D Land & Investments, LLC (Double-D), stated that it is willing to sign an easement for the pipeline, but did not want a proposed valve location on its property. (Exh. DDH Direct at 2-3.) Double-D argues that part of the value of the property is an immaculately-maintained residential acreage and the valve would be in view of the acreage. The valve site would also interfere with farming operations and leave a small area of cropland between the valve and railroad tracks. Double-D also contends that Dakota Access did not negotiate in good faith since Dakota Access only offered a "take-it-or-leave-it" option.

Dakota Access responds in its reply brief that valve locations are the result of sophisticated modeling and engineering that determines where valves are needed to protect, among other things, HCAs (High Consequence Areas). (Reply Br. at 49.) According to those studies, the valve needs to be placed in the near vicinity of the Double-D parcel. (*Id.*) Dakota Access is seeking eminent domain since it could not negotiate a voluntary easement with Double-D.

The Board finds that the evidence shows that the intrusion on the land by the proposed valve location would be significant and the Board finds that such an intrusion is not warranted in this instance, where the landowner has identified an alternative valve site and the evidence does not show that the alternative site would be inadequate.

The Board will not grant Dakota Access the right of eminent domain to place a valve on parcel H-SI-018. However, the Board will grant Dakota Access the right of eminent domain to cross parcel H-SI-018 as modified, subject to the conditions approved by the Board in this order.

**Story County**

**Richard G. Begg and Carole Lee Sorenson Begg Revocable Living Trust, H-ST-001 (IA-ST-020)**

Eric A. LeSher testified concerning parcel H-ST-001. The parcel is the residence of LeSher's mother-in-law and is rented for farming purposes. LeSher points out that the proposed pipeline route cuts diagonally across the parcel. This affects the potential value of the property. The parcel is located next to land owned by Iowa State University and there is development within two miles of the parcel. LeSher questions why the pipeline could not be located along a gravel road rather than diagonally across the property. (Tr. 2285).

LeSher raises concerns about the terms of the easement and the valuation of the property. He was also concerned about a perceived lack of communication from the company. However, on cross-examination LeSher admitted that he was unaware that his brother-in-law had told the land agents that, collectively, the interested parties in the parcel did not want to negotiate. (Tr. 2289).

The identified concerns and arguments go to issues the Board has already decided elsewhere in this order

(whether the project will promote the public convenience and necessity, for example) or to compensation issues that are outside the jurisdiction of the Board. The evidence offered appears to indicate that the interested persons in the parcel were not able to negotiate collectively and so negotiations were not constructive. The Board will grant Dakota Access the right of eminent domain over parcel H-ST-001 as requested, subject to the conditions approved by the Board in this order.

**Walnut Creek Limited Partnership, H-ST-002 (IA-ST-025) and H-ST-007 (IA-ST-027); Lowman Brothers, Inc., H-ST-006 (IA-ST-026)**

David Lowman testified that parcel H-ST-002 has been in his family for generations and that the propose pipeline would be constructed through a walnut grove that has been on the property for 47 years. (IFOA Exh. Lowman Direct at 7, Tr. 2949-65.) The trees would be cut down and no trees would be allowed on the easement after construction. Lowman is also concerned that pipeline will limit his options to develop the land for uses other than agriculture. The other issues raised by Lowman are addressed by the Board in the earlier sections concerning whether the pipeline meets the requirements of Iowa Code chapter 479B.

At the hearing, Lowman testified that parcel H-ST-002 has timber land that will be crossed by the pipeline and a little cropland. Parcel H-ST-006 is entirely cropland and parcel H-ST-077, where the pipeline is proposed to cross, is entirely cropland. (Tr. 2960). Lowman testified that parcel H-ST-002 is considered to have potential for development and he is

concerned the pipeline will diminish the value of the land. Lowman testified that the drainage tiles on three parcels are county-owned drainage tiles. (Tr. 2962).

The Board has determined that Dakota Access has met the requirements for a permit, which addresses most of Lowman's concerns, and the Board finds that there does not appear to be a reasonable alternative to the proposed pipeline route over the three parcels. The Board will grant Dakota Access the right of eminent domain over parcels H-ST-002, H-St-006, and H-ST-007 as requested, subject to the conditions approved by the Board in this order.

**Arlene Bates and Leona O. Larson, H-ST-003 (IA-ST-070.500)**

Leonard Larson testified for the property owners, his mother and sister. He opposed the pipeline and the use of eminent domain. (IFOA Exh. Larson Direct.) At the hearing, Larson testified that the property around parcel H-ST-003 has several houses and so the parcel has potential for development. (Tr. 2947). He also testified that he does not believe the pipeline will promote the public convenience and necessity and that it is unconstitutional to grant the power of eminent domain to a private company. (*Id*.) He does not want the pipeline on his property. (Tr. 2948.)

The Board has addressed the concerns raised by Larson concerning whether the pipeline meets the requirements of Iowa Code chapter 479B in earlier sections of this order. The Board has determined that Dakota Access has met those requirements. The development potential of the parcel is not sufficiently

well-developed to justify denial of the power of eminent domain; one other parcel in the area has a housing development of four or five houses, but there are no firm plans for this parcel. (Tr. 2946.) The Board will grant Dakota Access the right of eminent domain over parcel H-ST-003 as requested, subject to the conditions approved by the Board in this order.

**Wapello County**

**Hickenbottom Experimental Farms, Inc., H-WA-016 (IA-WA-061.300)**

Steven Hickenbottom testified regarding parcel H-WA-016, which he owns with his brother Mark. (NILA Exh. 6 at 1.) He testified that there is one place on the parcel that "we had left to put a pond and have a place where we could put a house." (Tr. 3132). The location of the pond and house, if built, would be just to the east of the pipeline route. Hickenbottom testified that the location of the pipeline would prevent him from constructing the pond in that location but it would not interfere with construction of the house. (Tr. 3133.)

The evidence presented by Hickenbottom was not specific as to the timing or exact location of the pond and house. On this record, any plans to put in a pond are not sufficiently well-developed to justify denying eminent domain on this parcel. The Board will grant Dakota Access the right of eminent domain over parcel H-WA-016 as requested, subject to the conditions approved in this order.

**Webster County**

**Keith D. Puntenney, H-WE-004 (IA-WE-078)**

Keith D. Puntenney appeared pro se at the hearing and participated in cross examination of Dakota Access witnesses. In addition, Puntenney offered a number of exhibits in support of his opposition to the pipeline. The majority of the testimony and exhibits presented by Puntenney address the issues of whether Dakota Access has met the requirements of Iowa Code chapter 479B for a hazardous liquid pipeline permit. The Board has addressed similar concerns in an earlier section of this order.

At the hearing, Puntenney testified that he had attached a map to his objection which shows how the proposed pipeline route could be straightened to go completely around his property. By moving the route to the south, the pipeline would cross a parcel where there is a voluntary easement and then cross parcel H-WE-008 (IA-WE-079), owned by Beer Implement Company which is also a parcel where Dakota Access is requesting the right of eminent domain. Puntenney testified that the land that would be crossed by his recommended alternate route is agricultural land. (Tr. 3487).

Puntenney testified that by moving the pipeline off of his property he could put three wind turbines in the area of the proposed pipeline route. He testified that he and a neighbor had been trying to put together a proposal for MidAmerican Energy Company for the wind turbines. (Tr. 3488-89). In his objection dated January 13, 2015, Puntenney describes the

specifications for tiling he had planned for 2015 and argued that if the pipeline is constructed, major reconstruction and reconfiguration of the tile system will be required.

The evidence shows that Puntenney's plan to install wind turbines on this parcel is not a firm plan at this stage; Puntenney and a neighbor "are trying to put together a proposal to approach MidAmerican to use our land." (Tr. 3489.) That is not a sufficiently developed plan to justify denial of eminent domain on this parcel, particularly when it has not been shown that the pipeline would necessarily interfere with the possible future installation of wind-driven turbine generators.

The Board will grant Dakota Access the right of eminent domain over parcel H-WE-004 as requested, subject to the conditions approved by the Board in this order.

**Carolyn A. Lambert, Life Estate, H-WE-026 (IA-WE-101)**

Kevin Lambert testified regarding parcel H-WE-026 which is owned by his mother, Carolyn Lambert. Lambert raised concerns about placing the pipeline above any tile since he would be reluctant to use a backhoe for tile located below the pipeline. He is worried about the ground settling over the trench after the pipeline is installed. He is worried about hitting the pipeline because of erosion and heavy tilling.

Lambert presented the same testimony regarding parcel H-WE-026 that he presented concerning parcel H-BO-001 in Boone County. As found by the Board

with regard to parcel H-BO-001, the Board will grant Dakota Access the right of eminent domain over parcel H-WE-026 as requested, subject to the conditions approved by the Board in this order.

**Parcels Owned by or Affiliated with Governmental Entities**

**Iowa Department of Transportation, H-JA-026 (IA-JA-004.001)**
**Jasper County Conservation Board, H-JA-016 (IA-JA-015.910)**
**State of Iowa, Department of Natural Resources, H-LY-011 (IA-LY-004)**
**State of Iowa, H-ST-017, (IA-ST-001)**
**Story County, Iowa, H-ST-030 (IA-ST-064.500.900)**
**Iowa State College of Agriculture and Mechanic Arts, H-BU-004 (IA-BU-131)**

Dakota Access requests that it be granted the power of eminent domain over these parcels owned by governmental entities, that is, property that is already devoted to a public use. It has long been the law in Iowa that when a party asserts a right to condemn an interest in land that is already devoted to the public benefit, the party must identify a statute conferring that authority. *Town of Alvord v. Great Northern Ry. Co.*, 179 Iowa 465, 161 N.W. 467, 469 (1917), citing *2 Elliott on Roads and Streets* (2d Ed.), § 219. The general rule is that if the two uses are consistent, such that neither public use will obstruct or interfere with the other, authority for the second use to condemn the first may be implied from a general grant of the power of eminent domain, but if the two uses cannot coexist

without material impairment of the first use, then authority to condemn an interest for the second use must be specifically granted by the Legislature. *Id*; *see also Chicago Great Western Ry. Co. v. Mason City*, 155 Iowa 99, 135 N.W. 9, 10 (1912).

Here, Dakota Access has not cited any statute that specifically allows the Board to grant the power of eminent domain to a hazardous liquid pipeline company in order to condemn property that is already devoted to the public use. Statutes delegating the power of eminent domain are to be strictly construed and restricted to their expression and intention. *State v. Johann*, 207 N.W.2d 21, 24 (Iowa 1973). Unless and until specific authority for a pipeline company to condemn government-owned property is identified, the Board will not grant Dakota Access the right of eminent domain with respect to these parcels.

**Board of Regents, State of Iowa, H-ST-005 (IA-ST-013)**
**Committee for Agricultural Development, H-ST-018 (IA-ST-002) and H-ST-026 (IA-ST-010)**
**Iowa State University Achievement Foundation, H-ST-024 (IA-ST-003) and H-ST-025 (IA-ST-006)**

In their briefs, each of these public landowners states that the Board has the statutory authority to determine whether Dakota Access meets the requirements of Iowa Code chapter 479B for a pipeline permit and the landowner defers to the Board's judgment on this issue. Each landowner also stipulates if the Board grants a permit to Dakota Access then the

landowner will negotiate a voluntary easement with Dakota Access.

Based upon the stipulation in the initial briefs, and the lack of any identified statutory authority to allow a hazardous liquid pipeline company to condemn property already devoted to the public benefit, the Board will not grant Dakota Access the right of eminent domain over these parcels.

## IX. Conclusion

Having considered all of the evidence and arguments presented in this record, the Board concludes as follows:

1. When all of the costs and benefits are considered, and expressly conditioned upon and subject to the terms and conditions the Board has adopted in Section VI of this order, the Board determines that the proposed pipeline will promote the public convenience and necessity as required by Iowa Code § 479B.9 and a permit will be issued when Dakota Access has complied with certain filing requirements. Specifically, no permit will be issued, and construction may not commence, until the insurance policy, the unconditional and irrevocable parent corporation guarantees, a statement of acceptance of the Board's terms and conditions, a modified AIMP, revised condemnation easement forms, and a landowner notification timeline have all been filed with and accepted by the Board.

2. Dakota Access has considered the possible use of alternate routes, as required by Iowa Code § 479B.5(6), and, on this record, the proposed route is a reasonable one.

3. Dakota Access has demonstrated compliance with the financial responsibility requirements of Iowa Code § 479B.13.

4. When the permit is issued, Dakota Access shall be vested with the right of eminent domain as described and limited in this order, as required by Iowa Code § 479B.16.

5. This is the Board's final order on the merits for purposes of Iowa Code §§ 17A.16, 476.12, and 479B.22. Parties to this proceeding may file applications for rehearing or reconsideration within 20 days of the date of issuance of this order.

## ORDERING CLAUSES

**IT IS THEREFORE ORDERED:**

1. Marian D. Johnson Exhibit 1 is admitted into the record in this docket.

2. Motions and objections not previously granted or sustained are overruled. Arguments presented in written filings or made orally at the hearing that are not addressed specifically in this final decision and order are rejected, either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comment.

3. Pursuant to Iowa Code chapter 479B, the petition for hazardous liquid pipeline permit filed by Dakota Access in this docket is hereby granted. The permit will be issued when Dakota Access has filed, and the Board has accepted, the following:

a. A revised Agricultural Impact Mitigation Plan with the additional conditions as described in this order.

b. A general liability insurance policy in the amount of at least $25,000,000, to be filed and reviewed each time it is renewed, but at a minimum annually, for the life of the pipeline.

c. The unconditional and irrevocable guarantees of the parent companies of Dakota Access for remediation of damages from a leak or spill.

d. A timeline showing when, and to whom, the various construction notices will be given in relation to a typical parcel and describing the time frames available for consultation with the landowner and inspector, as described in this order. The timeline should also identify all of the information that will be included with each notification.

e. Modified condemnation easement forms as described in this order.

f. A statement accepting the terms and conditions the Board has determined to be just and proper for this permit, as described in this order.

Construction cannot begin until all of these filings have been made and accepted by Board order and a permit has been issued. The permit will be issued based upon Dakota Access's representations that all necessary or required permits and authorizations will be obtained prior to the construction and operation of the pipeline. If any necessary or required permit or authorization is not obtained in a timely manner, the permit will be

void. If, in the process of obtaining a permit or other authorization, the route or any other significant aspect of the pipeline or the information contained in this record (and upon which the permit is issued) is changed, Dakota Access shall file an amended petition or a request for an amended permit, as appropriate. Finally, Dakota Access shall file a notice of completion each time it acquires a permit or authorization identified in Hearing Exhibit MH-4, as described in this order. If the company chooses to file a notice, it should include sufficient information to allow an interested person to easily obtain a copy, either from the granting authority or from Dakota Access (so long as the permit or authorization is not confidential by law).

4. Prior to commencing construction, Dakota Access shall file the final versions of its Storm Water Pollution Prevention Plan and its Unanticipated Discoveries Plan.

5. Dakota Access is to notify the Board, by means of an appropriate filing in this docket, when the Facilities Response Plan is filed with PHMSA.

6. Dakota Access is to file quarterly status reports concerning this project starting on July 1, 2016, and continuing until the pipeline is in operation.

7. Dakota Access is to file a Winter Construction Plan on or before August 1, 2016.

8. Dakota Access must continue to offer to purchase voluntary easements, with the same terms and conditions already offered to the landowners, for the best prices that have already been offered by

Dakota Access, at least until the county compensation commission meets to assess the damages for each taking.

9. Dakota Access is granted the right of eminent domain over the parcels listed on Attachment 1 and Attachment 2 to this order and are incorporated into this order by reference.

10. Dakota Access is granted the right of eminent domain over the following parcels as described in this order:

Boone County

John A. Burkhart, H-BO-001 (IA-BO-018)
LaVerne Johnson, H-BO-048 (IA-BO-033)
Judith Anne Lamb Revocable Trust, H-BO-032 (IA-BO-134)
Richard A. Lamb Revocable Trust, H-BO-033 (IA-BO-136)

Buena Vista County

Martha A. Murray, H-BU-031 (IA-BU-020)
Brent N. Jesse, Shawn B. Jesse, and Wendi J.Taylor, H-BU-021 (IA-BU-096) and H-BU-022 (IA-BU-105)
ERN Enterprises, Inc., H-BU-061 (IA-BU-097)

Calhoun County

Prendergast Enterprise, Inc. H-CA-041 (IA-CA-157)

Cherokee County

Marian D. Johnson, H-CH-019 (IA-CH-025) and H-CH-020 (IA-CH-026)

Jasper County

Cornlan Farms, Inc., H-JA-017 (IA-JA-020)
Willam J. Gannon and Kathleen Kennedy Gannon, H-JA-014 (IA-JA0012)
Max E. Maggard, Trustee of the Max E. Maggard and Gloria Joyce Maggard Joint Revocable Trust, H-JA-018 (IA-JA-048) and J-JA-019 (IA-JA-051)

Mahaska County

Grandma's Place, H-MA-013 (IA-MA-196)
AIM Acres, L.C., H-MA-007 (IA-MA-198)

O'Brien County

Ruth Portz Konz, H-OB-001 (IA-OB-003)

Story County

Richard G. Begg and Carole Lee Sorenson Begg Revocable Living Trust, H-ST-001 (IA-SAT-020)
Walnut Creek Limited Partnership, H-ST-002 (IA-ST-025) and H-ST-007 (IA-ST-027)
Lowman Brothers, Inc., H-ST-006 (IA-ST-026)
Arlene Bates and Leona O. Larson, H-ST-003 (IA-ST-070)

Wapello County

Hickenbottom Experimental Farms, Inc., H-WA-016 (IA-WA-061)

Webster County

Keith D. Puntenney, H-WE-004 (IA-WE-078)
Carolyn A. Lambert, Life Estate, H-WE-026 (IA-WE-101)

11. Dakota Access is granted the right of eminent domain over the following parcels as modified by this order:

Boone County

LaVerne Johnson, H-BO-047 (IA-BO-028)

Buena Vista County

Michael G. Lenhart, Retha A. Lenhart, Patrick G. Lenhart, and Carol J. Lenhart, H-BU-008 (IA-BU-073)

Cherokee County

Marie J. Smith Revocable Trust, H-CH-012 (IA-CH-081)
William R. Smith and Anne C. Smith, H-CH-015 (IA-CH-080) and H-CH-016 (IA-CH-082)

Jasper County

Sondra K. Feldstein, H-JA-002 (IA-JA-040)
Herman C. Rook, H-JA-025 (IA-JA-201)

Lee County

Hugh E. Tweedy, H-LE-028 (IA-LE-171)

Sioux County

Double-D Land & Investments, LLC, H-SI-018 (IA-SI-073)

12. Dakota Access is denied the right of eminent domain over the following parcels as described in this order.

William R. Smith and Anne C. Smith, H-CH-024 (IA-CH-083)
Iowa Department of Transportation, H-JA-026 (IA-JA-004)
Jasper County Conservation Board, H-JA-016 (IA-JA-015)
State of Iowa, Department of Natural Resources, H-LY-011 (IA-LY-004)
Story County, Iowa, H-ST-030 (IA-ST-064)
State of Iowa, H-ST-017 (IA-ST-001)
Board of Regents, State of Iowa, H-ST-005 (IA-ST-013)
Committee for Agricultural Development, H-ST-018 (IA-ST-002) and H-ST-026 (IA-ST-010)
Iowa State University Achievement Foundation, H-ST-024 (IA-ST-003) and H-ST-025 (IA-ST-006)
Iowa State College of Agriculture and Mechanic Arts, H-BU-004 (IA-BU-131)
Iowa Interstate Railroad, LTD., H-JA-028 (IA-JA-100.900)
Union Pacific Railroad Company, H-ST-031 (IA-ST-077.500.900)

13. Within 180 days after completion of the new pipeline, Dakota Access must file a map that accurately shows the location of the pipeline route as constructed. The map will be a part of the record in this case and will represent the final route authorized by the permit.

14. The Board retains jurisdiction of the subject matter of this docket for purposes of receiving and considering the additional filings required by this order and for such other purposes as may be appropriate.

**UTILITIES BOARD**

/s/ *Geri D. Huser*

/s/ *Elizabeth S. Jacobs*

ATTEST:

/s/ *Trisha M. Quijano*
Executive Secretary,
Designee

/s/ *Nick Wagner*

Dated at Des Moines, Iowa, this 10th day of March 2016.

**ATTACHMENT 1**

**HLP-2014-0001**

**EMINENT DOMAIN PARCELS**

Boone County

- H-BO-035 (IA-BO-004.000)
    - William Robert Petty and Majorie D. Petty
- H-BO-036 (IA-BO-005.000)
    - William Robert Petty
- H-BO-037 (IA-BO-011.000)
    - William Robert Petty and Marjorie D. Petty
- H-BO-038 (IA-BO-012.000)
    - William Robert Petty and Marjorie D. Petty
- H-BO-017 (IA-BO-014.000)
    - Litchfield Realty Company
- H-BO-018 (IA-BO-016.000)
    - Litchfield Realty Company
- H-BO-002 (IA-BO-020.000)
    - Leanne L. Samuelson
- H-BO-019 (IA-BO-023.000)
    - D. C. Gustafson and Margaret Ann Gustafson
- H-BO-029 (IA-BO-055.509)
    - Boone County
- H-BO-007 (IA-BO-063.509)
    - Beverly Sturtz
- H-BO-014 (IA-BO-071.512)
    - LJP Farms Limited Partnership, LLLP
- H-BO-009 (IA-BO-074.512)

    - Schonesland Corporation
- H-BO-003 (IA-BO-076.512)
    - Erbe Farms, Inc.
- H-BO-004 (IA-BO-077.512)
    - Liselro, LTD
- H-BO-005 (IA-BO-081.512)
    - Triange B Farms, Inc.
- H-BO-042 (IA-BO-083.512)
    - Barbara A. Weigel
- H-BO-025 (IA-BO-085.512)
    - T and K Farms, Inc. Phil Eastlund Farms, Inc.
- H-BO-026 (IA-BO-086.512)
    - Phil Eastlund Farms, Inc.
- H-BO-027 (IA-BO-093.512)
    - Edward Ochylski Revocable Trist Edward Ochylski Trustee
- H-BO-030 (IA-BO-097.000)
    - Kyle S. Chesnut and Ellen M. Chesnut
- H-BO-006 (IA-BO-098.000)
    - Richard E. Nelson
- H-BO-043 (IA-BO-098.300)
    - Barbara A. Weigel
- H-BO-044 (IA-BO-101.000)
    - Double U, Inc.
- H-BO-015 (IA-BO-118.300)
    - Paul A. Parish and Michael R. Parrish Revocable Trust
- H-BO-045 (IA-BO-123.000)
    - Maxine Harms
- H-BO-039 (IA-BO-124.000)
    - Maxine Harms

- H-BO-022 (IA-BO-129.000)
    - Todd Land Corporation
- H-BO-016 (IA-BO-139.000)
    - David M. Ballantyne & Jana L. Ballantyne
- H-BO-040 (IA-BO-144.500)
    - Swanson Farm, LTD
- H-BO-041 (IA-BO-145.500.300)
    - Swanson Farm, LTD
- H-BO-010 (IA-BO-146.500)
    - Dennis R. Cooper
- H-BO-023 (IA-BO-148.500)
    - Irene D. Ross
- H-BO-046 (IA-BO-149.500)
    - Gaylord L. Swanson and Mary Ann Swanson
- H-BO-011 (IA-BO-151.000)
    - Beth B. Gaul
- H-BO-034 (IA-BO-154.000)
    - Goeppinger Enterprises, Inc.

Buena Vista

- H-BU-072 (IA-BU-028.000)
    - The Schaller Company, a corporation
- H-BU-055 (IA-BU-029.000)
    - David L. Pedersen, Deann L. Ramsey and Donna L. Bird
- H-BU-056 (IA-BU-042.300)
    - Thomas R. Morrison and Margaret W. Baron
- H-BU-074 (IA-BU-044.000)
    - Ballou Holdings LLC and Cynthia L. Brown Trust

- H-BU-003 (IA-BU-048.000)
    - Linda L. Gutel Trust
- H-BU-010 (IA-BU-049.000)
    - Laverne Dierenfield Trust for the Benefit of Marilyn M. Lindsay
- H-BU-017 (IA-BU-052.000)
    - Helen Ruebel Revocable Trust
- H-BU-018 (IA-BU-055.000)
    - Gary T. Worthan Revocable Trust
- H-BU-036 (IA-BU-056.000)
    - John Foster
- H-BU-049 (IA-BU-060.000)
    - J.F. Mckenna Farms, Inc.
- H-BU-037 (IA-BU-061.000)
    - Susan K. Geisinger and Harold V. Geisinger II
- H-BU-038 (IA-BU-063.000)
    - Susan K. Geisinger and Harold V. Geisinger II
- H-BU-007 (IA-BU-064.000)
    - Susan F. Graves Trust
- H-BU-039 (IA-BU-065.000)
    - Geisinger Land Trust and Martha Christine Geisnger Revocable Trust
- H-BU-012 (IA-BU-067.000)
    - Mary E. Nakayama 2003 Trust
- H-BU-013 (IA-BU-071.000)
    - The Citizens First National Bank of Storm Lake, Iowa
- H-BU-040 (IA-BU-075.000)
    - Geisinger Land Trust
- H-BU-041 (IA-BU-077.000)
    - Geisinger Land Trust

- H-BU-058 (IA-BU-079.000)
    - John J. Miller and Mary L. Miller
- H-BU-059 (IA-BU-080.000)
    - Betty Jean Richardson Revocable Trust
- H-BU-019 (IA-BU-083.000)
    - Karen K. Nehring
- H-BU-020 (IA-BU-085.000)
    - Estate of William D. Walters
- H-BU-076 (IA-BU-003)
    - Jesse Farms, Inc.
- H-BU-014 (IA-BU-092.000)
    - Duane Magnussen and Cindy Magnussen
- H-BU-079 (IA-BU-093.205)
    - Ina N. Hansen Trust
- H-BU-042 (IA-BU-099.000)
    - James Selleck
- H-BU-080 (IA-BU-108.000)
    - Mary E. Mernin, Life estate
- H-BU-023 (IA-BU-110.000)
    - Barbara Doyen and the Barbara Doyen life estate
- H-BU-082 (IA-BU-121.000)
    - Virgil M. Petty and Wendell M. Petty
- H-BU-044 (IA-BU-139.000)
    - Marian Kinney, Life Estate
- H-BU-045 (IA-BU-140.000)
    - Henningsen Family Farm Trust
- H-BU-053 (IA-BU-149.000)
    - Doyle H. Nissen and Lavonne M. Nissen
- H-BU-054 (IA-BU-157.000)
    - Cletus and Ruth Ann Stark Trust U/T/A Dated October 10, 1997

Calhoun

- H-CA-043 (IA-CA-005.000)
    - Murphy Farms, Inc.
- H-CA-009 (IA-CA-022.000)
    - Ann Frances Sullivann Trust
- H-CA-051 (IA-CA-059.000)
    - Gary Olsen, Trustee of the Gary Olsen Trust
- H-CA-012 (IA-CA-062.001)
    - Gary D. Hammen and Linda L. Hammen
- H-CA-018 (IA-CA-064.000)
    - John F. Wilson, Robert F. Wilson, Robert F. Wilson, Jr., and Katherine Anne Wilson
- H-CA-036 (IA-CA-077.001)
    - The Estate of Muriel M. Moeller
- H-CA-037 (IA-CA-079.000)
    - Diane C. Hoymann, Gene L. Moeller, and Christopher J. Kelley
- H-CA-060 (IA-CA-096.000)
    - Mary Fouts Metzger
- H-CA-053 (IA-CA-108.200)
    - Michael D. Folsom and Gail L. Folsom
- H-CA-061 (IA-CA-111.000)
    - Michael D. Folsom, Life Estate, Gail L. Folsom, life estate, Michael D. Folsom, Patricia Frerich, Susan Kinnnear, and Ann Taylor
- H-CA-032 (IA-CA-114.000)
    - Darvin Tasler and Margrette Tasler
- H-CA-015 (IA-CA-114.305)
    - Michael E. Tasler

- H-CA-020 (IA-CA-118.000)
    - Kelly and Eakins Iowa Revocable Trust Kathryn Haynes Zerkus Iowa Revocable Trust
- H-CA-038 (IA-CA-119.000)
    - Ronald Weiss
- H-CA-039 (IA-CA-121.000)
    - Joyce M. Weiss
- H-CA-063 (IA-CA-122.000)
    - Leroy C. Bailey and Elenora M. Bailey
- H-CA-054 (IA-CA-131.501)
    - Sidney C. Dillon revocable trust
- H-CA-040 (IA-CA-135.501)
    - Donald Rasmuson
- H-CA-004 (IA-CA-137.501)
    - Travis C. Rasmuson
- H-CA-035 (IA-CA-142.501)
    - Sidney C. Dillon Revocable Trust
- H-CA-022 (IA-CA-144.501)
    - Glenrose Ewing Moeller, life estate
- H-CA-005 (IA-CA-145.501)
    - Marvel lee McNeil
- H-CA-023 (IA-CA-146.501)
    - Kim A. Martin
- H-CA-024 (IA-CA-148.501)
    - Kim A. Martin
- H-CA-006 (IA-CA-153.501)
    - Douglas M. Berg and Jane R. Berg
- H-CA-025 (IA-CA-155.501)
    - Mabel C. Hammen
- H-CA-042 (IA-CA-159.501)
    - Kenneth and Margaret Hiler Trust

Cherokee

- H-CH-001 (IA-CH-008.000)
    - Melanie S. Rose and Lisa L. Johnson
- H-CH-002 (IA-CH-021.000)
    - Randall A. Anderson
- H-CH-005 (IA-CH-028.000)
    - Marvin F. Zoch and Bonnie Zoch
- H-CH-010 (IA-CH-032.000)
    - Janet J. Jerome Trust
- H-CH-003 (IA-CH-040.501
    - Sharon K. Nelson Revocable Trust Sharon K. Nelson, Life Estate
- H-CH-006 (IA-CH-048.000)
    - The Sharon K. Nelson Revocable Trust
- H-CH-004 (IA-CH-091.000)
    - William John Luetkman and Kimberly Sue Luetkman
- H-CH-013 (IA-CH-092.000)
    - Gary Anderson and Virginia Anderson
- H-CH-025 (IA-CH-102.000)
    - Sherrilyn A. Stewart

Jasper

- H-JA-021 (IA-JA-092.200)
    - Ernest F. Bell and Betty L. Bell
- H-JA-010 (IA-JA-161.000)
    - Arvin G. Voss and Laura B. Voss
- H-JA-011 (IA-JA-172.000)
    - Keth Van Hemert
- H-JA-013 (IA-JA-195.000)
    - Carl Eugene Van Zee and Lloyd J. Van Zee

Jefferson

- H-JE-001 (IA-JE-006.000)
    - Eugene R. Person and Jane P. Person
- H-JE-002 (IA-JE-009.000)
    - Darlene R. Morrison
- H-JE-003 (IA-JE-033.000)
    - Dorothy Marie Page
- H-JE-009 (IA-JE-070.000)
    - Carroll Eugene Parker and Joneane L. Parker
- H-JE-008 (IA-JE-090.000)
    - Nathan James Porter, Mark Andrew Porter, Ryan Stephen Porter

Keokuk

- H-KE-005 (IA-KE-004.000)
    - Bank Iowa, Trustee of the M. Louise Reinwand Testamentary Trust
- H-KE-006 (IA-KE-013.000)
    - South Ottumwa Savings Bank, Trustee of the Helen D. Kielkopf Family Trust
- H-KE-004 (IA-KE-024.000)
    - Ronna Lea Peterson
- H-KE-022 (IA-KE-030.000)
    - Steven Lee Roquet

Lee

- H-LE-029 (IA-LE-091.000)
    - Ball Acres, Ltd.
- H-LE-015 (IA-LE-156.000)
    - Idol Rashid, Inc.

- H-LE-016 (IA-LE-162.000)
    - Michael J. Dresser

Lyon

- H-LY-008 (IA-LY-003.000)
    - Shirely Styke as Trustee of Shirley Styke Revocable Trust
- H-LY-005 (IA-LY-021.000)
    - Corrine Bonnema and Ruth R. Van Tol
- H-LY-001 (IA-LY-022.000)
    - Mark L. Van Tol
- H-LY-006 (IA-LY-029.000)
    - Harold Niemeyer and Lorraine Niemeyer
- H-LY-007 (IA-LY-035.200)
    - Vincent E. Leners and Mary Ellen Leners Revocable Truster
- H-LY-003 (IA-LY-036.000)
    - Lynn Colvin

Mahaska

- H-MA-017 (IA-MA-047.000)
    - Dennis R. Blanke and Sharon K. Blanke
- H-MA-009 (IA-MA-048.000)
    - Dennis R. Blanke and Sharon K. Blanke
- H-MA-010 (IA-MA-049.000)
    - Wilma Blanke Trust
- H-MA-011 (IA-MA-087.000)
    - Leslie Everett
- H-MA-012 (IA-MA-108.000)
    - Glenview Family Farms, L.L.C.
- H-MA-020 (IA-MA-146.000)

    - Jaqueline M. Walters and Steven J. Walters
- H-MA-028 (IA-MA-169.000)
    - David J. Meinders and Rebecca L. Meinders
- H-MA-005 (IA-MA-190.000)
    - Lois Maxine McCracken
- H-MA-006 (IA-MA-191.000)
    - Lois Maxine McCracken
- H-MA-031 (IA-MA-195.000)
    - Paul Robert Weiland
- H-MA-014 (IA-MA-200.500)
    - Gary Ver Ploegh and Karen Ver Ploegh

O'Brien

- H-OB-004 (IA-OB-011.000)
    - Todd Joanning and Scott Joanning

Polk

- H-PO-006 (IA-PO-014.500
    - Bertha Ann Swanson and John B. Jones
- H-PO-007 (IA-PO-015.500)
    - Bertha Ann Swanson
- H-PO-009 (IA-PO-021.500)
    - Nancy L. Nehring, Steven P. Winegarden
- H-PO-004 (IA-PO-033.000)
    - Mary E. Goodwin

Sac

Sioux

- H-SI-012 (IA-SI-056.000)
    - Lois Van Maanen Life Estate
- H-SI-005 (IA-SI-057.000)
    - Lois Van Maanen Life Estate
- H-SI-001 (IA-SI-059.000)
    - Daryl E. Van Maanen & Greta Van Maanen
- H-SI-013 (IA-SI-060.000)
    - Lois Van Maanen Life Estate
- H-SI-014 (IA-SI-081.000)
    - Robert D. Hulstein

Story

- H-ST-027 (IA-ST-010.300)
    - Lettah L. Thompson, Trustee of the Kenneth L. Thompson Disclaimer Trust
- H-ST-008 (IA-ST-035.000)
    - Sunrise Farm, A General Partnership H-ST-003
- H-ST-029 (IA-ST-046.500)
    - Cindale Farms, L.C.
- H-ST-009 (IA-ST-051.500.305
    - David J. Lee, Doreen K. Lee
- H-ST-010 (IA-ST-055.500.300)
    - David J. Lee, Doreen K. Lee
- H-ST-014 (IA-ST-063.500)
    - David A. Kalsem
- H-ST-020 (IA-ST-068.500)
    - Steven E. Claussen and The Claussen Family Trust
- H-ST-021 (IA-ST-071.500)

    - Steven E. Claussen and The Claussen Family Trust
- H-ST-011 (IA-ST-074.500)
    - Faith Baptist Church
- H-ST-022 (IA-ST-075.500)
    - Marla K. Barnes Revocable Trust

Van Buren

- H-VA-011 (IA-VA-006.000)
    - William Howard Clark, Sr. and Donna Lee Clark
- H-VA-012 (IA-VA-007.300)
    - William Howard Clark, Sr. and Donna Lee Clark
- H-VA-004 (IA-VA-017.000)
    - The Vern Vorhies Jr. Revocable Trust
- H-VA-008 (IA-VA-039.300)
    - Fesler Living Trust
- H-VA-007 (IA-VA-081.000)
    - The Ross Family Trust

Wapello

- H-WA-009 (IA-WA-029.000)
    - Alissa A. Meacham, Trustee of the Alissa A. Meacham Trust
- H-WA-011 (IA-WA-036.000)
    - Jane Dillon Life Estate and Nancy Squire
- H-WA-003 (IA-WA-039.000)
    - Jill Ann Miller Revocable Trust Jill Ann Miller, Trustee and Todd A. Moore
- H-WA-019 (IA-WA-061.000)

    - Terri Ann Huffman, as executor of the Estate of Lawrence LaVerne Payne

Webster

- H-WE-020 (IA-WE-014.000)
    - The Keith E. Peterson and Doroty J. Peterson Revocable Inter-Vivos Trust
- H-WE-016 (IA-WE-020.000)
    - Estate of Judith Linquist
- H-WE-017 (IA-WE-021.000)
    - Estate of Judith Linquist
- H-WE-021 (IA-WE-036.000)
    - Judith Anderson, Jean Volpe and Steven R. Anderson
- H-WE-001 (IA-WE-042.000)
    - T.R. Watts and Sons, Incorporate
- H-WE-023 (IA-WE-048.000)
    - Judith Anderson, Jean Volpe Steven R. Anderson, Charles E. Christianson and Karen M. Inman
- H-WE-002 (IA-WE-053.000)
    - 3511 Corporation, an Iowa Corporation
- H-WE-003 (IA-WE-053.300)
    - Lightner Farms, Inc.
- H-WE-019 (IA-WE-073.000)
    - Linda M. Bradshaw
- H-WE-024 (IA-WE-077.200)
    - Linda M. Bradshaw
- H-WE-008 (IA-WE-079.000)
    - Beer Implement Co., An Iowa Corporation
- H-WE-005 (IA-WE-114.000)
    - Betty Lou Carlson
- H-WE-015 (IA-WE-122.000)

- Thomas R. Good, William J. Good Family Trust and Randall L. Good

**ATTACHMENT 2**

**HLP-2014-0001**

**EMINENT DOMAIN PARCELS**

Boone County

- H-BO-013 (IA-BO-007.000)
    - Craig Peterson and Barbara A. Peterson

Buena Vista

- H-BU-028 (IA-BU-014.000)
    - Richard C. Garberson
- H-BU-029 (IA-BU-018.000)
    - Richard C. Garberson
- H-BU-030 (IA-BU-019.000)
    - Richard C. Garberson
- H-BU-033 (IA-BU-024.000)
    - Arlene Anderson, Life Estate Anne Rydstrom Mohr, David Rydstrom, Judith Rae Englert, Kathryn S. Nelson, Linda Rydstrom Moenck, Peggy L. Fliss
- H-BU-002 (IA-BU-025.001)
    - Kent R. Pickrell and the Greg L. Pickrell separate property trust
- H-BU-034 (IA-BU-027.001)
    - Joyce M. Frish
- H-BU-050 (IA-BU-037.000)
    - Joyce Pedersen Frish
- H-BU-073 (IA-BU-041.000)
    - David L. Magnussen and Janet M. Magnussen

- H-BU-075 (IA-BU-070.000)
    - Terry A. Stull and Margaret Stull
- H-BU-060 (IA-BU-090.000)
    - Sheila L. Jesse Revocable Trust, Marvin E. Jesse Revocable Trust
- H-BU-078 (IA-BU-093.000)
    - Sheila L. Jesse Revocable Trust and Marvin E. Jesse Revocable Trust

Calhoun

- H-CA-044 (IA-CA-006.300)
    - Murphy Land, Inc.
- H-CA-049 (IA-CA-035.000)
    - Murphy Land, Inc.
- H-CA-014 (IA-CA-058.000)
    - Francis J. Patterson and Mary J. Patterson, Timothy J. Martin and Angela A. Martin
- H-CA-001 (IA-Ca-060.000)
    - Gary D. Hammen, Trustee of the Hammen Family trust, U/W Drois E. Hammen
- H-CA-002 (IA-CA-088.000)
    - Rex S. Hartwig and Craig M. Hartwig
- H-CA-052 (IA-CA-092.000)
    - Craig M. Hartwig
- H-CA-062 (IA-CA-117.000)
    - The Shirley Gerjets Family Trust
- H-CA-034 (IA-CA-124.000)
    - Cherich Farm, LLC
- H-CA-016 (IA-CA-127.000)
    - Randy Dischler and Michelle Dischler

Cherokee

- H-CH-007 (IA-CH-050.000)
    - Lois Mae Nelson
- H-CH-011 (IA-CH-060.000)
    - Montgomery, Inc.
- H-CH-021 (IA-CH-060.200)
    - Skadeland Farms, LLLP

Jasper

- H-JA-004 (IA-JA-004.000)
    - Gayle E. Conover

Jefferson

- H-JE-004 (IA-JE-072.000)
    - Allan Baker

Keokuk

- H-KE-014 (IA-KE-001.000)
    - Beverly J. Abel, Stacey Abel, Susan Abel McCarron and Sarah Abel Bailey
- H-KE-016 (IA-KE-003.000)
    - Beverly J. Abel, Stacey Abel, Susan Abel McCarron and Sarah Abel Bailey

Lee

- H-LE-025 (IA-LE-102.200)
    - May W. Crowe
- H-LE-026 (IA-LE-103.000)
    - May W. Crowe

Lyon

- H-LY-004 (IA-LY-015.000)
    - Bonnema Harvest Farms Limited Partnership, A South Dakota Limited Partnership

Mahaska

- H-MA-008 (IA-MA-208.000)
    - M. Louise Reinwand Testamentary Trust

O'Brien

Polk

- H-PO-002 (IA-PO-027.500)
    - Daniel Higginbottom and Jayne Higginbottom, Trustees of the Darlene Higginbottom Irrevocable Trust

Sac

Sioux

Story

- H-ST-030 (IA-ST-064.500.900)
    - Story County, Iowa

Van Buren

Wapello

Webster

- H-WE-014 (IA-WE-119.000)
    - John P Helde, Trustee and Successors in Interest of Helde Family Revocable Trust