STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION
BEFORE THE IOWA UTILITIES BOARD

IN RE:	**DOCKET NO. HLP-2014-0001**
DAKOTA ACCESS, LLC	**POST-HEARING BRIEF OF LAMB, JESSE, HICKENBOTTOM, AND HICKENBOTTOM EXPERIMENTAL FARMS, INC. IN RESISTANCE TO PETITION FOR HAZARDOUS LIQUID PIPELINE PERMIT OF DAKOTA ACCESS, LLC**

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I. STATEMENT OF THE CASE

On January 20, 2015, pursuant to Iowa Code chapter 479B, Dakota Access, LLC petitioned the Board to grant it a permit to construct, operate and maintain a pipeline for the transportation of crude oil and related purposes and to be granted the use of the power of eminent domain to acquire interests in land in the State of Iowa. The Board granted the Motion to Intervene of Richard R. Lamb, trustee of the Richard R. Lamb Revocable Trust, and Brent Jesse, in these proceedings on November 13, 2015, and Steven Hickenbottom and Hickenbottom Experimental Farms, Inc. had previously intervened (collectively, the "Intervenors). The Intervenors respectively own parcels of agricultural land in Boone, Buena Vista, and Wapello Counties over which Dakota Access would seek to exercise eminent domain if available. The Board concluded an evidentiary hearing regarding the petition of Dakota Access on December 7, 2015. The Intervenors resist Dakota Access' petition for hazardous liquid pipeline permit, and any corollary grant of authority to Dakota Access to utilize the power of eminent domain over agricultural land, because: (a) Dakota Access is not under the Board's operational or safety jurisdiction,

(b) Dakota Access is not a utility, (c) the Legislature intended to protect agricultural land from private development, and (d) operation of Iowa Code § 6A.24 violates the State of Iowa and United States Constitutions.

II. SCOPE AND LIMITATION OF THE BOARD'S PERMIT AUTHORITY

The Iowa Utilities Board (the "Board") has statutory authority to deny Dakota Access' permit application or grant it subject to such terms, conditions, and restrictions as to location and route as it determines to be just and proper. Iowa Code § 479B.9. In this regard, Iowa Code § 479B.1 authorizes it to:

> protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline … 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.9 prohibits the board from granting a permit to a pipeline company, "unless the board determines that the proposed services will promote the public convenience and necessity." If a permit is granted, then Iowa Code § 479B.16 vests the pipeline company "with the right of eminent domain, to the extent necessary and as prescribed and approved by the board …".

If the Board finds the presence of public convenience and necessity, then Iowa Code Chapter 6A sets forth the state's eminent domain laws, and Iowa Code Chapter 6B sets forth its procedures. Precedent of the U.S. Supreme Court defers to local legislative judgment to determine constitutional exercise of eminent domain power. Kelo v. City of New London, Conn, 545 U.S. 469, 480 (2005). Iowa Code § 6A.1 allows condemnation of private property "as may be necessary for any public improvement". Subject to limitations found in its subsection 2, Iowa Code § 6A.21(1)(c) protects agricultural land from this power of eminent domain. It provides:

> "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.

Iowa Code § 6A.21(1)(a) defines agricultural land to mean:

> real property owned by a person in tracts of ten acres or more and not laid off into lots of less than ten acres or divided by streets and alleys into parcels of less than ten acres, and that has been used for the production of agricultural commodities during three out of the past five years. Such use of property includes, but is not limited to, the raising, harvesting, handling, drying, or storage of crops used for feed, food, seed, or fiber; the care or feeding of livestock; the handling or transportation of crops or livestock; the storage, treatment, or disposal of livestock manure; and the application of fertilizers, soil conditioners, pesticides, and herbicides on crops. Agricultural land includes land on which is located farm residences or outbuildings used for agricultural purposes and land on which is located facilities, structures, or equipment for agricultural purposes. Agricultural land includes land taken out of agricultural production for purposes of environmental protection or preservation.

The second sentence of Iowa Code § 6A.21(2), however, allows certain entities to nonetheless condemn agricultural land. It provides:

> 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.

The Board is therefore required to harmonize competing provisions. Although the Board may find that the petition of Dakota Access satisfies the public convenience and necessity requirement of Iowa Code § 479B.9, thereby vesting Dakota Access with a qualified power of eminent domain under Iowa Code § 479B.16, Iowa law requires the Board to restrict the use of such power over agricultural land under Iowa Code § 6A.21(c), unless Dakota Access is "under the jurisdiction of" the Board or is otherwise a "utility" under Iowa Code § 6A.21(2). Therefore, prior to granting a hazardous liquid pipeline permit, the Board must determine whether Dakota Access is under its relevant jurisdiction or whether Iowa law considers Dakota Access to be a utility for these purposes.

III. ARGUMENT

A. IOWA LAW PROHIBITS DAKOTA ACCESS FROM UTILIZING EMINENT DOMAIN OVER AGRICULTURAL LAND BECAUSE DAKOTA ACCESS IS NOT UNDER THE OPERATIONAL OR SAFETY JURISDICTION OF THE BOARD NOR IS IT OTHERWISE A UTILITY.

1. Dakota Access seeks to utilize the power of eminent domain over the protected agricultural land of the Intervenors.

Intervenor Richard Lamb, on behalf of the Richard R. Lamb Revocable Trust, provided his testimony to the Board on December 7, 2015. He testified that the trust owns real estate in Boone County, Iowa which Dakota Access would potentially seek to condemn. Lamb, Transcript Vol. 11, p. 3081: 3; NILA Exhibit 1. He testified that his trust's real estate is identified as parcel number IA-BO-136.000. It consists of approximately 150 acres of farmland that is not subdivided, has no streets or alleys, has been used for the production of corn and soybeans over the last five years, and has received fertilizer to promote the production of crops. Lamb, Transcript Vol. 11, p. 3081: 19-25; 3082 1-10. Therefore, Intervenor Richard Lamb's trust owns agricultural land as defined in Iowa Code § 6A.21(1)(a) which is thereby subject to protection from Dakota Access' use of eminent domain by Iowa Code §§ 6A.21(1)(c) and 6A.21(2).

Intervenor Brent Jesse also provided his testimony to the Board on December 7, 2015. He testified that he owns an interest in parcel number IA-BU-105.000 over which Dakota Access potentially would seek to exercise eminent domain. Jesse, Transcript Vol. 11, p. 3139: 6-9; NILA Exhibit 2. This parcels consist of 160 acres. Jesse, Transcript Vol. 11, p. 3140: 11-13. He added that the parcel has not been subdivided, contains no public streets or alleys, and has been producing corn and soybeans on rotation in each of the last five years with the application of fertilizer. Jesse, Transcript Vol. 11, p. 3140: 14-25; p. 3141:1-4. Therefore, Intervenor Brent Jesse also owns an interest in agricultural land as

defined in Iowa Code § 6A.21(1)(a) which is thereby subject to protection from Dakota Access' use of eminent domain by Iowa Code §§ 6A.21(1)(c) and 6A.21(2).

Intervenor Steven Hickenbottom also provided his testimony on behalf of Hickenbottom Experimental Farms, Inc. to the Board on December 7, 2015. He testified that the subject interest is in parcel number IA-WA-061.300 over which Dakota Access potentially would seek to exercise eminent domain. Hickenbottom, Transcript Vol. 11, p. 3128: 11-23. This parcel consists of 140 to 150 acres. Hickenbottom, Transcript Vol. 11, p. 3130: 5-8. He added that the parcel has not been subdivided. Hickenbottom, Transcript Vol. 11, p. 3130: 9-12. It contains no public streets or alleys. Hickenbottom, Transcript Vol. 11, p. 3130: 13-15. It has been used to produce corn and soybeans on rotation in each of the past five years with the application of fertilizer. Hickenbottom, Transcript Vol. 11, p. 3130: 16-23. Therefore, Intervenor Steven Hickenbottom also owns an interest in agricultural land as defined in Iowa Code § 6A.21(1)(a) which is thereby subject to protection from Dakota Access' use of eminent domain by Iowa Code §§ 6A.21(1)(c) and 6A.21(2).

Because Dakota Access, a private company, seeks to use the State's power of eminent domain over agricultural land, the second sentence of Iowa Code § 6A.21(2) requires that it either be "under the jurisdiction of" the Board or be in the class of "any other utility conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain."

2. Because Dakota Access is an interstate crude oil pipeline company, it is not under the operational or safety jurisdiction of the Board.

It is well established that although states have authority to permit hazardous liquid pipeline routes, and the federal government has jurisdiction over their safety and operations. *See* Hazardous Liquid Pipeline Permits, Iowa Utilities Board, https://iub.iowa.gov/hlp-pipeline-permits ("The Iowa Utilities Board has primary jurisdiction over the routing/siting, but not safety, of hazardous liquid

pipelines in Iowa."). *See also* 49 U.S.C. § 60104(e) ("This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.")

Any jurisdiction of the Board over the operational safety of interstate pipelines has been defeated in the past on the grounds of federal preemption. ANR Pipeline Co. v. Iowa State Commerce Comm'n., 828 F.2d 465, 468 (8th Cir. 1987) ("[section 601, et seq.] leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards."). Kinley Corp. v. Iowa Utilities Board, 999 F.2d 354 (8th Cir. 1993)(Iowa Utilities Board has no jurisdiction over jet fuel pipeline because Hazardous Liquid Pipeline Safety Act preempted Iowa Code Chapter 479 under the Supremacy Clause of the United States Constitution.) *See also* 49 U.S.C. § 60104(c) ("a state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."); *Id.*; § 60101 (defining "pipeline facility" to include "hazardous liquid pipeline facilit[ies]," which includes oil pipelines). The Manager of the Board's Safety and Engineering Section clarified the controlling federal jurisdiction over interstate pipelines in his testimony on November 30, 2015 during a colloquy with Board Member Jacobs. He testified that the Pipeline and Hazardous Materials Safety Administration under the U.S. Department of Transportation has "exclusive pipeline jurisdiction" except for certain states specifically authorized by the PHMSA to inspect hazardous pipelines and that Iowa is not among the authorized states. Stursma Testimony, Vol. 7 p. 2130: 5-25, p. 2131: 1-18. Their discussion continued:

> [MR. STURSMA:]
> And, thirdly, when you act as an interstate agent, you are not operating under state authority, you're operating under federal authority, you're acting as their agents. You do the inspections and you turn your reports and findings over to them for any further action, and the state cannot adopt additional or more stringent regulations for interstate pipelines.

BOARD MEMBER JACOBS: So that last statement, a state must only comply with the federal restrictions and couldn't add—not anything else?
THE WITNESS: Correct. For interstate pipelines, we can only inspect for compliance at the Federal Pipeline Safety Standards. A state cannot adopt additional or more stringent standards applicable to interstate hazardous liquid pipelines.

Stursma Testimony, Vol. 7 p. 2132: 3-18. Accordingly, the Board completely lacks any jurisdiction or even influence over the safe operations of interstate hazardous liquid pipelines such as that of Dakota Access. However, such jurisdiction is exactly the "jurisdiction" which the Legislature requires the Board to have under the second sentence of Iowa Code § 6A.21(2) in order to authorize Dakota Access to exercise the State's power of eminent domain over agricultural land. The fact that the U.S. Department of Transportation allows states to govern location and routing of proposed interstate hazardous liquid pipelines under 49 U.S.C. § 60104(e) is not the relevant jurisdiction required by Iowa Code § 6A.21(2). The Legislature did not intend to allow an interstate hazardous liquid pipeline company to use the power of the State to force its way under agricultural land and then not be subject to the Board's safety and maintenance oversight intended to protect the landowners living in their homes and operating their farms on the surface. *See* Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc., No. 2014-CA-000517-MR, p.9; 2015 WL 2437864 (Ky. Ct. App. May 22, 2015)("We believe 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 [Public Service Commission]"). In the face of the controlling federal jurisdiction over interstate hazardous liquid pipelines, the Board must determine whether Dakota Access is otherwise a "utility" for purposes of the second sentence of Iowa Code § 6A.21(2). If it is not, and if the Board intends to grant a permit to Dakota Access, then such permit may not allow the involuntary condemnation of agricultural land.

3. Dakota Access is not a public utility.

As a hazardous liquid pipeline company under Chapter 479B, Dakota Access' permit petition does not assert that Dakota Access is a public utility. *See* Petition for Hazardous Liquid Pipeline Permit, Docket No. HLP 2014-0001. Iowa Code § 476.1 defines public utilities to be those providing electricity, natural gas, water, and telecommunications services to the public. Dakota Access does not propose to provide any of these services. It "proposes to construct approximately 346 miles of 30 inch diameter pipeline for the transportation of crude oil". *Id.* The Iowa Supreme Court has recently adopted an eight factor test to determine whether a party is a public utility. In SZ Enterprises, LLC v. Iowa Utilities Bd., 850 N.W.2d 441, 447-449 (2014) the court found *inter alia*, the following five factors which are immediately applicable to determining whether Dakota Access is a public utility: "a dedication to public use", "[d]ealing with the service of a commodity in which the public has been generally held to have an interest", "[m]onopolizing or intending to monopolize the territory with a public service commodity", "[a]ctual or potential competition with other corporations whose business is clothed with public interest" and "[w]hat the corporation actually does."[1]

The testimony of Dakota Access clarifies that it is not a public utility. Dakota Access presented the Vice President of Commercial Development for Energy Transfer Partners, Mr. Damon Rahbar-Daniels for cross examination on November 16, 2015. He testified that crude oil has no intrinsic value unless refined, and that 100% the crude oil to be transported through the pipeline is destined to a refinery. Damon Rahbar-Daniels, Transcript Vol. 1, p. 141: 25; p. 142: 1-10. He also testified that Iowa has no oil wells or oil refineries. Damon Rahbar-Daniels, Transcript Vol. 1, p. 133: 15-17. Having no oil wells or refineries, the Iowa public will not use the Dakota Access pipeline. Having no intrinsic value, the crude oil transported by Dakota Access will provide no direct value to Iowans as it passes through our state.

[1] The remaining three factors of SZ Enterprises, LLC v. Iowa Utilities Bd, although less appliable here, are, ""[a]rticles of incorporation, authorization, and purposes," "[a]cceptance of substantially all requests for service," and "[s]ervice under contracts and reserving the right to discriminate is not always controlling."

Because Iowans cannot use the crude oil, Dakota Access does not have any Iowa customers or territory. Mr. Rahbar-Daniels further testified that he is not aware of any technology in the marketplace that would even allow the tracing of crude oil transported through the Dakota Access pipeline through a refinery and then back to Iowa in the form of refined gasoline. Damon Rahbar-Daniels, Transcript Vol. 1, p. 137: 9-15. Accordingly, the Iowa public does not have any measureable indirect use of the Dakota Access pipeline. Furthermore, he indicated that Dakota Access has only nine shipper-customers. Damon Rahbar-Daniels, Transcript Vol. 1, p. 137: 16-19. Nine nonresident customers do not evidence a dedication to public use. No one can say that the Iowa public has an interest in crude oil, particularly given that no one can measure whether the refined gasoline will ever find its way back to the Iowa market place. Indeed, the recent enactment of H.R. 2029, Pub. L. 114-113, Division O, Title I, Sec. 101 (December 18, 2015) allows U.S. crude oil to be exported to foreign countries for the first time since 1975. Therefore, there is no assurance that the crude oil traveling through the Dakota Access pipeline will even be refined in the U.S. for the greater U.S. marketplace. Quoting Mr. Rahbar-Daniels, "It's the shippers who control what they do with their oil, sir." Damon Rahbar-Daniels, Transcript Vol. 1, p. 46: 19-20. Finally, Mr. Rahbar-Daniels clarified that Dakota Access will not have any Iowa competitors and will not compete with any Iowa public utilities governed by Iowa Code §476.1 (electricity, natural gas, water and telecommunication services.) Damon Rahbar-Daniels, Transcript Vol. 1, p. 141: 3-20. What Dakota Access actually does is transport crude oil from western North Dakota to Patoka, Illinois. Damon Rahbar-Daniels, Transcript Vol. 1, p. 106: 3-6 and Damon Rahbar-Daniels, Transcript Vol. 1, p. 132: 23-24. From Patoka, Illinois the crude oil can go anywhere in the world to be refined and serve anyone in the world with petroleum products. In SZ Enterprises, the Court found that a company that installed solar energy systems on customer property and sold electricity was not like a utility because behind-the-meter electric generation is no more a utility activity than is a consumer's adoption of electricity cost saving measures. The same can be said for crude oil transportation. There are no Iowa utilities in the

business of transporting crude oil. Crude oil is not even in the stream of commerce with any activity of an Iowa utility. Crude oil is not processed into or utilized to manufacture electricity, water, natural gas, or telecommunication services. *See* Iowa Code § 476.1.

Dakota Access is not dedicated to public use, has no monopolized territory, will not compete with any Iowa utilities, and does not do what Iowa utilities do or otherwise interfere with Iowa utilities. Additionally, the general public has no direct interest, or measurable indirect interest, in producing, transporting, receiving, or refining crude oil. Iowans may never receive the refined crude oil products derived from the crude oil of Dakota Access customers. Because the crude oil is now available for export, there is no guarantee that the refining and consumption will even occur in the United States. These factors confirm the fact that Dakota Access is not a public utility under the SZ Enterprises test.[2]

4. Dakota Access is also not a private utility.

The universe of utilities includes only those that are either public or private. Public utilities include only those that provide one of the four categories of services set forth in Iowa Code § 476.1 (electricity, natural gas, water and telecommunication services). While interpreting our statutes, the Iowa Supreme Court has often said, "The legislative intent is expressed by omission as well as by inclusion." North Iowa Steel Co. v. Staley, 112 NW 2d 355 (Iowa 1961). In Iowa, we therefore have only four types of utilities. Private utilities therefore must provide one or more of these same four services, which Dakota Access obviously does not do. To allow Dakota Access to utilize eminent domain over the Intervenors' agricultural land, the Board would have to administratively create a new class of Iowa utility which it cannot do. "This is because '[w]e may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction.' " In re Estate of Whalen, 827 N.W.2d 184, 194 (Iowa 2013)

[2] The U.S. Constitution similarly prohibits the exercise of eminent domain "under the mere pretext of a public purpose, when its actual purpose is to bestow a private benefit." Kelo, 545 U.S. at 478. For the same reasons that Dakota Access is not a public utility pursuant to the SZ Enterprises standards, the claim that it serves a public purpose is only a pretext to its actual private purpose of serving private shippers, thereby prohibiting Dakota Access' use of eminent domain.

citing In re Estate of Bockwoldt, 814 N.W.2d at 223 (quoting Doe, 786 N.W.2d at 858). Furthermore, "policy arguments to amend the statute should be directed to the legislature." *See* In re Estate of Myers, 825 N.W.2d at 8. Similarly, "Neither the trial court nor this court can by judicial decision extend and enlarge the enactments of the legislature." Wall v. Cty. Bd. of Ed. of Johnson Cty., 249 Iowa 209, 218, 86 N.W.2d 231, 37 (1957). Because the Iowa Legislature has not specifically prescribed that a crude oil transportation pipeline, or common carrier, is a utility in Iowa, Dakota Access is not a utility and cannot use the power of eminent domain over agricultural land.

Notwithstanding the conclusiveness of this categorical exclusion, the Board may consider a recent analogous case. In Hawkeye Land Co. v. Iowa Utilities Bd., 847 N.W.2d 199, 214 (Iowa 2014) the court reviewed de novo the Board's determination that the entity involved was a "public utility" under the statute, and reversed that Board's decision. Rather than transporting crude oil, in Hawkeye Land Co., an independent transmission company of electricity (ITC) sought to use eminent domain power to run electrical lines across a railroad at a legislatively set price schedule, known as the crossing statute, as set out by Iowa Code § 476.27. Hawkeye Land Co., 847 N.W.2d at 201. An ITC "furnishes electricity to public utilities which in turn furnish that electricity to the public." *Id* at 216. The owner of the railroad easement objected to the use of the crossing statute because the ITC was not a public utility authorized to avail itself of the crossing statute's pay-and-go procedure. *Id.* The court determined, after reviewing the determination of the Board de novo, that the ITC was not a public utility because it did not furnish any product directly to the public, and therefore could not avail itself of the eminent domain rights available to other public utilities under the crossing statute. *Id.* at 214 (holding ITC is not a "public utility" under the definition prescribed by Iowa Code § 476.1, or under the more broad definition under the crossing statute). Here, Dakota Access would accept crude oil from producers in North Dakota and transport it to a pipeline hub in Illinois. Damon Rahbar-Daniels, Transcript Vol. 1, p. 106: 3-6 and Damon Rahbar-Daniels, Transcript Vol. 1, p. 132: 23-24. It does not deal in a commodity in which the

public has an interest, furnish a consumable product, or furnishing any product or service to the public. It is not a utility, public or private.

Although it is not a utility, Dakota Access is a pipeline company under Iowa Code § 479B.2(4), and a "common carrier" under the federal Interstate Commerce Act. *See* Valvoline Oil Co. v. United States, 308 U.S. 141 (1939)(company transporting its own crude oil interstate to its own refineries is a pipeline company and common carrier under the Interstate Commerce Act) and Champlin Refining Co. v. United States, 329 U.S. 29 (1946)(the Act defines the term "common carrier" as including all oil pipeline companies, and not merely those engaged in the business of common law carriers for hire.) Mr. Rahbar-Daniels confirmed in his testimony that Dakota Access is a common carrier under the Interstate Commerce Act. Damon Rahbar-Daniels, Transcript Vol. 1, p. 42: 11-17. As such, it must file tariffs with the Federal Energy Regulatory Commission which regulates its rates and charges, rather than the Board. *See* 49 USC § 60502. The federal Department of Transportation regulates its safe operation. *See* 49 USC § 108. Unlike Dakota Access, a utility serves a customer with a finished good, ready for consumption. *See* Iowa Code § 476.1. A common carrier merely moves a product, finished or not, between two points. *See* Valvoline Oil Co. v. United States, 308 U.S. 141 (1939). Iowa Code § 6A.21(2) does not by its terms extend the power of eminent domain to common carriers.

The purpose of allowing public utilities the right to avoid the statutory limitation on eminent domain found in Iowa Code § 6A.21(2) is the state policy favoring affordable energy, water, and communications services to Iowans. Hawkeye Land Co. v. Iowa Utilities Board, 847 N.W.2d 199, 214 (Iowa 2014); *cf*. Mid-America Pipeline Co v. Iowa State Commerce Commission, 114 N.W.2d 622 (Iowa 1962) (holding, prior to enactment of 479B and 6A.21, that the granting of a permit to a private corporation to operate a proposed pipeline for private purposes was "beyond the pale of constitutional authority" where it was "solely for private purposes, and without the showing of public necessity or convenience."). Dakota Access will not furnish electricity, water, or communications services to Iowa.

Dakota Access is a sophisticated, private entity transacting business with other sophisticated, private entities. Its rates are not regulated by the Board, it is not selling its product directly to Iowans, and its business is not clothed in the public interest. Therefore, it would defeat the intention of the Legislature in enacting the agricultural land limitation of § 6A.21(2) to allow any and every private entity who seeks eminent domain authority through the Board to avail itself of the ability to condemn the agricultural property of private individuals. The exception contained in § 6A.21(2) should not be allowed to swallow the rules contained in §§ 6A.1 and 6A.21(1)(c). *See e.g.* Branstad v. State ex rel., Nat. Res. Comm'n., No. 14-0205 2015 WL 1546439 at *6 (Iowa App. April 8, 2015) ("We are mindful that the exception should not be interpreted to swallow the rule."). In codifying the exception for agricultural land, the Legislature expressed a policy against use of the eminent domain power to seize agricultural real property except for very limited purposes, such as to provide for use by public utilities and other entities providing necessary, public services to the general Iowa populace.

B. THE LEGISLATURE EXPRESSED ITS INTENT TO PROHIBIT PRIVATE INDUSTRY FROM EXERCISING EMINENT DOMAIN OVER AGRICULTURAL LAND IN ITS 2006 AMENDMENT TO IOWA CODE 6A.21(2) WHICH STRUCK THE EXCLUSION FOR "AGRICULTURAL LAND ACQUIRED FOR INDUSTRY AS THAT TERM IS DEFINED IN SECTION 260E.2" FROM ITS PROTECTIONS, THEREBY INTENTIONALLY PROTECTING AGRICULTURAL LAND FROM PRIVATE INDUSTRIAL DEVELOPMENT BY DAKOTA ACCESS.

The Legislature passed HF 2351 (2006) on May 3, 2006, and it was subsequently vetoed by then Governor Vilsack on June 2, 2006. The Legislature thereafter overrode the Governor's veto, and HF 2351 became law on July 14, 2006. Among other things, HF 2351 (2006) amended the first sentence of § 6A.21(2)[3] to prohibit the condemnation of "agricultural land acquired for industry as that term is defined in Iowa Code § 260E.2" as follows:

> The limitation on the definition of public use, public purpose, or public improvement does not apply to ~~a slum area or blighted area as defined in section 403.17, or to agricultural land~~

[3] This brief has previously focused on the second sentence of the same section of the same statute.

~~acquired for industry as that term is defined in section 260E.2, or to~~ the establishment, relocation, or improvement of a road pursuant to chapter 306, or to the establishment of a railway under the supervision of the department of transportation as provided in section 327C.2, or to an airport as defined in section 328.1, or to land acquired in order to replace or mitigate land used in a road project when federal law requires replacement or mitigation.

Accordingly, the Legislature specifically intended that the "limitation on the definition of pubic use, public purpose, and public improvement" should apply to "agricultural land acquired for industry as that term is defined in §260E.2." In other words, "industry" may not exercise eminent domain over agricultural land in Iowa. Under Iowa Code Chapter 260E, the Iowa Industrial New Jobs Training Act provides funds to eligible businesses for employee training at Iowa's community colleges. For purposes of determining eligible businesses, Iowa Code § 260E.2 defines "Industry" to mean:

> a business engaged in interstate or intrastate commerce for the purpose of manufacturing, processing, or assembling products, conducting research and development, *or providing services in interstate commerce*, but excludes retail, health, or professional services…

(emphasis added).

Here, Dakota Access is an industry proposing to provide crude oil transportation services in interstate commerce. By allowing Iowa Code § 6A.21(2) to protect agricultural land from condemnation by industries "providing services in interstate commerce", the Legislature intended to protect agricultural land from private industrial developers such as Dakota Access.[4] It is important to consider the timing of the 2006 amendment to § 6A.21(2) in response to the US Supreme Court's 2005 decision in Kelo v. City of New London, *supra*. In Kelo, the US Supreme Court allowed the City of New London, Connecticut to take homes from individual homeowners in order to allow a private developer to utilize the space. In

[4] The Legislature also added new Iowa Code § 6A.22 to our laws as a corollary to the changes at § 6A.21(2) with the enactment of HF 2351 (2006). Among other things § 6A.22(2)(b) specifically excludes "privately owned or privately funded commercial or industrial development" from the definition of "public use" or "public purpose" or "public improvement". Accordingly, and in addition to the special protection for agricultural land afforded by § 6A.21(2), the Legislature intended that private industry not exercise the power of eminent domain in Iowa.

response, not only did our Legislature pass HF 2351 in its very next legislative session. It over-road the governors' veto in order to make it law. There cannot be a more assertive expression of the Legislature's commitment to protect agricultural land from private industrial development. Because Dakota Access is a private industry providing services to customers in interstate commerce, not including Iowans, the Legislature has protected the Intervenors' agricultural lands from Dakota Access' use of the State's power of eminent domain.

If the Board finds a public convenience and necessity, it may issue a permit to Dakota Access to construct a crude oil pipeline, however the permit may not include the power of eminent domain over agricultural land. The intersection of Iowa Code §§ 479B.16 and 6A.21 would nonetheless cooperate to allow Dakota Access the power of eminent domain over all types of Iowa lands that are not agricultural lands.

C. IOWA CODE § 6A.24 VIOLATES THE DUE PROCESS AND THE EQUAL PROTECTION CLAUSES BECAUSE IT DEPRIVES AGRICULTURAL LANDOWNERS OF A RIGHT TO SEEK IMMEDIATE REVIEW OF THE CONDEMNATION AUTHORITY BEFORE SERVICE OF THE NOTICE OF ASSESSMENT.

Iowa law limits the exercise of eminent domain. "[A] party seeking to take land by eminent domain must first satisfy the court that it has been authorized by the Legislature to exercise the power, that the statute purporting to grant such authority is constitutional, that the conditions exist under which it was provided that the authority might be exercised, and that the condemning party has complied with the requirements of the statute." State v. Johann, 207 N.W.2d 21, 23-24 (Iowa 1973). The Iowa Supreme Court made it clear that when exercising the power of eminent domain, the authority to do so must be strictly construed. *Id.* at 24 ("We have consistently maintained … that statutes providing for the exercise of eminent domain must be strictly complied with and restricted to their expression and intent.").

Iowa Code § 6A.24 is entitled "Judicial Review of Eminent Domain Authority". Subsection 1 provides:

> An owner of property described in an application for condemnation may bring an action challenging the exercise of eminent domain authority or the condemnation proceedings. Such action shall be commenced within thirty days after service of notice of assessment pursuant to section 6B.8 by the filing of a petition in district court. Service of the original notice upon the acquiring agency shall be as required in the rules of civil procedure. In addition to the owner of the property, a contract purchaser of record of the property or a tenant occupying the property under a recorded lease shall also have standing to bring such action.

Iowa Code § 6A.24 sets out the procedure for how parties to a condemnation proceeding may challenge the action in court. Subsection (1) permits the owners of the property to file an action in district court only after their property is "described in an application for condemnation" filed with the acquiring agency. *Id.* § 6A.24(1). Subsection 2 of § 6A.24, however, grants an acquiring agency - here, Dakota Access - the right to commence, "at any time prior to the filing of an application for condemnation pursuant to section 6B.3." an action "seeking a determination and declaration that its finding of public use, public purpose, or public improvement necessary to support the taking meets the definition of those terms". These provisions effectively create two classes of persons who are entitled to seek judicial review or a declaratory action of the public use of a proposed condemnation: one class that must wait until the condemnation procedure commences and then file within thirty days (and, thus, after the opportunity has passed to negotiate for the sale of the land); and another that may ascertain its rights at any time.

The Intervenors have been prejudiced by the inability to seek immediate judicial determination as to the legality of Dakota Access' proposed pipeline condemnation. Each Intervenor has the ability to bargain with Dakota Access to sell their land at an agreeable price, presumably higher than what would otherwise be received in a condemnation proceedings. Without the ability to adjudicate their full rights under Iowa and federal law due to the disparity created under the statute, however, they are unable to

fully avail themselves of their negotiating power with regards to their real property.

This provision violates the United States and Iowa Due Process and/or the Equal Protection clause because it deprives Intervenors (and other similarly situated, aggrieved landowners) of the right to seek immediate review of the condemnation authority before service of the notice of assessment. Landowners must wait while Dakota Access need not.

1. Constitutional Takings Clauses.

Both the Iowa Constitution and the U.S. Constitution prevent the taking of private property for "public" use without just compensation. *See* Iowa Constitution Art. 1 § 18; U.S. Constitution Amend. V. The Intervenors raise constitutional issues regarding the Board's authority to grant the right to eminent domain, particularly in light of the conflict between code §§479B.16 and 6A.21. *Cf.* Mid-America Pipeline Co., 114 N.W.2d at 624 (noting constitutional limitations on right of Legislature to grant the power of eminent domain for strictly private purpose).[5]

2. Procedural Due Process.

"A person is entitled to procedural due process when state action threatens to deprive the person of a protected liberty or property interest." Bowers v. Polk Cnty. Bd. of Supervisors, 638 N.W.2d 682, 690 (Iowa 2002). Due Process of law requires "notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'" *Id.* at 691 (quoting City of Cedar Rapids v. Mun. Fire & Police Ret. Sys. of Iowa, 526 N.W.2d 284, 291 (Iowa 1995).

Courts will first look to whether a protected liberty or property interest is involved. *Id.* Property interests "are created and their dimensions are defined" by an independent source, such as state law. Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716, 718 (8th Cir. 1995). In the proposed Dakota

[5] Although Iowa Code section 479B.9 now requires a Board determination that the proposed pipeline will "promote the public convenience and necessity," to the extent chapter 479B is interpreted to allow the Board to grant the power of eminent domain to a private company seeking to build a pipeline through Iowa for private purposes (and without any on or off-ramps in Iowa), such a determination would exceed the Legislature's constitutional authority.

Access pipeline condemnation, a property interest is certainly involved, since the right to keep and own agricultural land is defined by state law.

The court must next determine what process is constitutionally due by balancing the competing interests of (1) the private interests affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the probable value of additional safeguards. Bowers, 638 N.W.2d at 691 (quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

Intervenors' right to obtain timely review in court is a powerful, private interest because of the mandate to protect real property ownership, an inalienable right protected by Article I, Section 1, of the Constitution of the State of Iowa. As a consequence, the Iowa Constitution excludes arbitrary restrictions on property rights just as it does for due process rights. May's Drug Stores v. State Tax Com'n, 242 Iowa 319, 328-329 (1950).

3. Substantive Due Process.

Substantive due process "forbids the government [from infringing] certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores*,* 507 U.S. 292, 302 (1993). Substantive due process analysis begins with the identification of the asserted right. *Id.* Narrow tailoring is required when fundamental rights are involved. *Id.* at 305. The impairment of a lesser interest "demands no more than a 'reasonable fit' between governmental purpose ... and the means chosen to advance that purpose." *Id.*

Whether substantive due process rights are implicated by government action requires an initial determination of whether fundamental rights are involved. Bowers, 638 N.W.2d at 694. Substantive due process is intended to address egregious governmental abuses against liberty or property rights; abuses that offend judicial notions of fairness. Blumenthal Inv. Trusts v. City of West Des Moines, 636 N.W.2d 255, 268 (Iowa 2001). Notably, Iowa's Constitution specifically protects property rights in our Bill of Rights. Iowa Constitution Art. 1 § 1 ("All men and women are, by nature, free and equal, and have

certain inalienable rights - among which are those of enjoying and defending life and liberty, *acquiring, possessing and protecting property*, and pursuing and obtaining safety and happiness." (emphasis added))

At issue is Intervenors' ability to seek a judicial determination of rights to their privately owned agricultural land before a condemnation proceeding is initiated. As discussed *supra*, Iowa Code §§ 479B.16 and 6A.21(2), when considered together, as well as the ability of Dakota Access—but not the affected landowners—to seek judicial declaration of the public use question under § 6A.24, create a situation that is manifestly unjust to Intervenors, as potential condemnees. Given this extensive bargaining advantage created for Dakota Access, as potential condemnors, the interaction violates Intervenors' fundamental property rights under the Iowa Constitution.

4. Equal Protection.

In order to prove a violation of equal protection principles, the court will apply a specific level of scrutiny to the government action. Bowers, 638 N.W.2d at 689. Under a rational basis standard, the presumed constitutionality of a statute can be overcome by proof that the law is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *Id.*

A court will only apply strict scrutiny under equal protection principles if the issue involves a fundamental right. Concerning Intervenors' interests in their agricultural land, the same analysis as applies in the substantive due process context applies regarding whether a fundamental right is implicated. There are two equal protection issues implicated here. First, the Board could act under Iowa Code § 479B.16 without fulfilling the requirements and limitations of Iowa Code §6A.21. Notably, owners of agricultural land sought to be condemned for a pipeline under § 479B.16 would be granted fewer protections than all other owners of agricultural land protected by Iowa Code section 6A.21. Second, the Board or Dakota Access can petition a District Court for a determination of the issue of public use—the critical issues in eminent domain circumstances, but the affected landowners are

treated differently and do not have that same rights, despite the significant effect on their bargaining power and the value of their land.

WHEREFORE, Intervenors ask that the Board either deny Dakota Access' Petition for Hazardous Liquid Pipeline, issue a permit excluding any application of the power of eminent domain over agricultural land pursuant to Iowa Code § 6A.21, or file a petition in District Court pursuant to Iowa Code § 6A.24(2) seeking a determination about whether the Board may issue a permit including the authority to condemn agricultural land and provide such other relief and further relief as the Board deems appropriate under the circumstances.

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Respectfully submitted,

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