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

IN RE:	**DOCKET NO. HLP-2014-0001**
DAKOTA ACCESS, LLC	**REPLY 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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STATEMENT OF ISSUES ADDRESSED AND NOT ADDRESSED

In this Reply Brief, the Intervenors reply to the January 19, 2016 initial briefs of Dakota Access and the other proponents of its permit petition. This brief addresses only "Eminent Domain-legal analysis of Board's authority". To the extent necessary, the Intervenors reassert, without repeating, all corresponding arguments set forth in their initial brief filed January 19, 2016. All other issues set forth in the Board's December 18, 2015 Order are not addressed.

ARGUMENT

I. DAKOTA ACCESS' CLAIM THAT THE BOARD HAS "SUFFICIENT" JURISDICTION OVER IT FOR PURPOSES OF THE JURISDICTIONAL EXCEPTION OF § 6A.21(2) FAILS BECAUSE IOWA LAW REQUIRES THAT AN ACQUIRING AGENCY MUST BE ACCOUNTABLE AT THE BALLOT BOX TO THE PERSONS SUBJECT TO ITS EXERCISE OF EMINENT DOMAIN.

In its initial brief beginning at page 54, Dakota Access claims that the Board has "sufficient" jurisdiction over it to protect Iowa agricultural landowners throughout the life of the pipeline. It asserts that the Board has present influence over eminent domain and easements and future influence over any possible extension or transfer of its permit and that these are enough.[1] The recent holding of the Iowa Supreme Court in Clarke County Reservoir Comm'n v. Robins, 862 N.W.2d 166 (Iowa 2015) demonstrates that Iowa law requires more accountability in the use of eminent domain. In Clark County Reservoir, a County and private developers attempted to cooperate in a Chapter 28E organization to exercise eminent domain over Iowa landowners for purposes of building a lake. In denying the application of eminent domain, the Iowa Supreme Court looked to U.S. Supreme Court precedent and

[1] Dakota Access also claims that the Board shares jurisdiction with FERC and PHMSA which is untrue given the testimony of the Board's Safety & Engineering Section Manager Mr. Stursma and the holding in Kinley v. Iowa Utilities Board, 999 F 2nd 354 (8th Cir. 1993). Stursma Testimony, Vol 7, p.2130:525, p.2131:1-18

found that "Liberty requires accountability." *Id*. at 176 *quoting*, Dep't of Transp. v. Ass'n of Am. R.R.s, —– U.S. ——, ——, 135 S.Ct. 1225, 1234, 191 L.Ed.2d 153, —— (2015) ("This case on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional provision must not be forgotten: Liberty requires accountability."). Because the private developers in Clarke County Reservoir "are not accountable to voters" the Iowa Supreme Court denied their use of eminent domain.[2] *Id*.

Here, no one controlling Dakota Access will ever stand for election to any office by voters of any of the eighteen affected Iowa counties. Additionally, Dakota Access will not even have indirect accountability to voters via the Board in any significant way after the Board grants it a permit. In Clarke County Reservoir the Court added:

> If the legislature wanted to grant eminent domain powers to 28E entities that include private members, it could have said so explicitly. Policy arguments in favor of granting eminent domain powers to joint private-public entities should be directed to the legislature.
>
> *Id*.

Similarly, if the Legislature had wanted to grant crude oil pipelines, interstate hazardous liquid pipelines of any sort, or other common carriers an exception to the agricultural land protections of § 6A.21(2), it could have said so explicitly. Like the lake developers in Clark County, Dakota Access must direct its policy arguments to the Legislature.

II. DAKOTA ACCESS' CLAIM THAT THE BOARD HAS "SUFFICIENT" JURISDICTION OVER IT ALSO FAILS BECAUSE THE BOARD'S LACK OF OPERATIONS AND MAINTENANCE JURISDICTION OVER DAKOTA

[2] The Court makes no mention of and was apparently unimpressed with the fact that the lake developers would be otherwise accountable to federal agencies such as the EPA and the Army Corps of Engineers.

ACCESS PREVENTS THE BOARD FROM FULFILLING ITS OBLIGATION TO PROTECT LANDOWNERS AND TENANTS FROM ENVIRONMENTAL AND ECONOMIC DAMAGES WHICH MAY RESULT FROM OPERATION OR MAINTENANCE OF A HAZARDOUS LIQUID PIPELINE AS REQUIRED BY § 479B.1.

The Board's purpose and authority regarding hazardous liquid pipelines is prescribed by Iowa Code § 479B.1. It provides:

> It is the purpose of the general assembly in enacting this law to grant the utilities board the authority to implement certain controls over hazardous liquid pipelines *to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline* or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary (emphasis added).

However, the Board has no operational or maintenance control over interstate hazardous liquid pipelines given the holding in Kinley, *supra*. It cannot protect landowners and tenants from any resulting environmental or economic damages. Because the Board does not have all of its required authorities and cannot perform all of its required duties under § 479B.1, it is without the relevant jurisdiction required by § 6A.21(2). Alternatively, Dakota Access might claim that § 479B.1 also discusses the Board's authority to "approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary". This portion of its authority leaves it no power to protect Iowa landowners and tenants from environmental and economic damages after a permit is granted. Protecting Iowa landowners from environmental and economic damages are the Board's greater responsibilities, as compared to its other § 479B.1 authority.

III. DAKOTA ACCESS' CLAIM THAT THE LEGISLATURE INTENDED BY OMITTING THE TERM "COMMON CARRIER" FROM THE UTILITY EXCEPTION OF § 6A.21(2) TO BE INCLUSIVE OF COMMON CARRIERS INSTEAD OF EXCLUSIVE FAILS BECAUSE THE LEGISLATURE INTENDED § 6A.21(2) TO BE MORE RESTRICTIVE THAN § 6A.22(2).

In its initial brief at page 54, Dakota Access claims that the Legislature uses the words "public utility", "private utility", and "common carrier" in § 6A.21(1). This first claim is erroneous. Although § 6A.22(2) uses the words "public and private utility" and "common carrier", the operative section protecting agricultural land is § 6A.21(2), and it does not use these words. Then Dakota Access claims that the only logical reading of the Legislature's use of the word "utility" in § 6A.21(2) is that it is a shorthand way to refer to all three words used in § 6A.22(2). However, it is more logical to conclude that the Legislature, knowing the distinctions between the three words and that all three must be used in order to mean each as in § 6A.22(2), intended its use of the word "utility" in § 6A.21(2) to include only public and private utilities to the exclusion of common carriers. This is particularly true given the Legislature's intention that § 6A.21(2) be more restrictive and protective of agricultural land than § 6A.22(2) is of all other lands. To its credit, Dakota Access acknowledges this intent at page 54 of its initial brief.[3] Finally, the Legislature amended § 6A.21(2) in the same bill that created § 6A.22(2). This was in HR 2351 (2006). That of course was the optimal opportunity for the Legislature to have given common carriers eminent domain powers over agricultural land, but it did not.

Dakota Access would like to find any Iowa statute that suggests that a crude oil pipeline traversing the state without access points is a utility for our citizens. The inconvenient truth for Dakota Access is that the Legislature has never said that a common carrier or an interstate hazardous liquid

[3] "Notwithstanding Dakota Access qualifying as a public use under § 6A.22, there is an additional limit in § 6A.21 that applies solely to agricultural land: "'Public use' or 'public purpose' or 'public improvement' does not include the authority to condemn agricultural land for private development purposes." Dakota Access Initial Brief at p.54.

pipeline is a utility, and the mere fact that the Board has authority to approve the routes of hazardous liquid pipelines does not make every hazardous liquid pipeline into a utility. If Dakota Access was proposing to build a private highway for the private use of its shippers, without on-ramps or off-ramps within our State, then no one would suggest that it could condemn Iowa agricultural lands under § 6A.21(2). Its crude oil pipeline provides a distinction without a difference.

IV. DAKOTA ACCESS' CLAIM THAT IT IS A UTILITY UNDER § 6A.21(2) BECAUSE OF ITS BELIEF THAT VARIOUS UNRELATED PROVISIONS OF IOWA CODE EQUATE COMMON CARRIERS WITH UTILITIES IS IRRELEVANT AND INACCURATE.

A. Dakota Access' belief that various other Iowa statutes equate common carriers and utilities is irrelevant to the instant case because Iowa law requires that statutes governing the use of eminent domain be strictly construed and restricted to "their" expression and intention.

In eminent domain decisions in each of the last two years, the Iowa Supreme Court has recited that, "Statutes that delegate the power of eminent domain 'should be strictly construed and restricted to their expression and intention.'" Clarke County Reservoir Comm'n v. Robins, 862 N.W.2d 166, 171 (Iowa 2015) *quoting* Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199, 208 (Iowa 2014) (*quoting* Hardy, 357 N.W.2d at 626. Importantly, the analysis of eminent domain statutes must be restricted to "their" expression and intention. *Id*. The expression or intention of the various eight other statutes cited by Dakota Access in its initial brief on page 56 are irrelevant. Dakota Access might cite an infinite number of other statutes to support its claim that it is a utility, but because we are analyzing § 6A.21(2) which is an eminent domain statute, none of those other statutes would matter.

B. Dakota Access' belief that various other Iowa statutes equate common carriers and utilities is inaccurate because each statute it relies upon is distinguishable from the § 6A.21(2) requirement that it be a utility.

1. At page 56 of its initial brief, Dakota Access relies upon Chapter 28J (regarding port authorities) and claims that it "appears" to equate utility companies with common carriers. Actually, each of the ten references to common carriers in Chapter 28J is to a "utility company or common carrier" with is to say that one excludes the other, requiring reference to both in order to intend both. This supports the Intervenors' argument. Because § 6A.21(2) says "utility" and not also "common carrier", the Legislature intended to exclude common carriers.
2. At page 56 of its initial brief, Dakota Access relies upon § 306.47 (regarding establishment of highways) which provides relocation policies for public and private utilities. There is no mention by the Legislature of common carriers, hazardous liquid pipelines, or crude oil pipelines, or that any of the foregoing are or can be utilities.
3. At page 56 of its initial brief, Dakota Access relies upon § 306A.4 (regarding access to highways) which refers to facilities for which the Board determines the route. Dakota Access concludes that each is therefore a utility. Section 306A.4 makes no reference whatsoever to utilities or common carriers and regards the authority of the Iowa Department of Transportation, not the Board.
4. At page 56 of its initial brief, Dakota Access relies upon § 306A.13 (regarding access to highways) which defines a utility to, "include all privately, publicly, municipally or co-operatively owned systems for supplying water, sewer, electric lights, street lights and traffic lights, gas, power, telegraph, telephone, transit, pipeline, heating plants, railroads

and bridges, or the like service to the public or any part thereof if such system be authorized by law to use the streets or highways for the location of its facilities". Although, the definition includes the word "pipeline", Dakota Access does not qualify as a utility under § 306A.13 because it does not supply any "service to the public or any part thereof". Iowa Code Chapter 306A makes no reference to either hazardous liquid pipelines or common carriers and provides authority to the Iowa Department of Transportation, not the Board.

5. At page 56 of its initial brief, Dakota Access relies upon § 314.11 (regarding the use of bridges) by utility companies including "pipe lines". Again, there is no reference to common carriers or hazardous liquid pipelines. Fortunately, the statue provides at its end, "No grant to any public utility to use such bridge shall in any way interfere with the use of such bridge by the public for highway purposes." Dakota Access does not claim to be a public utility under Chapter 471. Surely, it must not claim that although regulated public utilities may not interfere with public traffic and safety, an unregulated interstate hazardous liquid pipeline may interfere with the public traffic and safety. This reference does Dakota Access no good.

6. At page 56 of its initial brief, in its only reference to a Chapter providing authority to the Board, Dakota Access relies upon § 479B.20, § 479B.31, and § 479B.33 concluding that the Legislature must have contemplated that hazardous liquid pipelines would have an unlimited right to traverse agricultural lands. Section 479B.20 regards restoration of agricultural lands. Although § 479B.31 makes no reference to agricultural lands, it provides for restoring or adding tiling to lands. Both agricultural and other lands may have tiling. Section 479B.33 regards a variety of farmland improvements including terracing and tiling. Dakota Access seems to ask that if hazardous liquid pipelines were

not meant to condemn agricultural lands, how did the Legislature expect them to get across? The answer to Dakota Access' question is not difficult. The Legislature intended that § 479B.20, § 479B.31, and § 479B.33 apply to protect landowners granting voluntary easements over agricultural lands such as those already under the possession of Dakota Access. The Legislature also intended that these provisions apply to intra-state hazardous liquid pipes over which the Board has jurisdiction notwithstanding the decision in Kinley, *supra*.

No provision of Chapter 479B, or any other unrelated or tangentially related Iowa law, makes Dakota Access a utility, puts it under the operational or maintenance jurisdiction of the Board, or otherwise expressly provides it a right to condemn agricultural land.

V. DAKOTA ACCESS' CLAIM THAT EMINENT DOMAIN IS NECESSARY FOR THE DEVELOPMENT OF INFRASTRUCTURE IS EXAGGERATED AND IGNORES THE OBLIGATIONS OF THE LEGISLATURE, THE COURTS, AND THE BOARD TO PROTECT THOSE IOWANS WITH LESSER POWER AND INFLUENCE FROM THE WILL OF WEALTHY PERSONS HAVING GREATER POWER AND INFLUENCE.

In its initial brief at page 56, Dakota Access justifies its claim to take agricultural lands from its rightful owners by the statement, "Eminent domain is necessary to prevent a relatively small percentage of holdouts from having veto power over beneficial infrastructure." There are many oversights here. First, § 6A.21 does not limit construction of public infrastructure by the state, its counties, cities, and all of their agencies for the public benefit. Second, § 6A.21 does not limit eminent domain's application for infrastructure constructed by public utilities, private utilities, and intrastate common carriers under the Board's jurisdiction. Third, § 6A.21 does not limit the application of eminent domain for interstate

common carriers upon any land other than agricultural land. Fourth, if there was a threat to the development of important interstate crude oil pipelines, then Congress could provide their developers with federal eminent domain powers just as it has for interstate natural gas pipelines under the federal Natural Gas Act, but it has not. *See* 15 U.S.C. § 717f(h). Accordingly, it does not appear that the federal government is as worried as is Dakota Access about the nation's energy infrastructure soon being exhausted, or that interstate commerce is materially threatened if Dakota Access is required to either obtain its interests in agricultural land at arm's-length or to go around certain parcels. Finally, although the majority decision in Kelo, *supra*, gives a limited deference to the states to determine the adequacy of a public purpose, the dissent of Justice Thomas predicted the coming of cases such as this permit petition. In 2005, he anticipated that unless remedied by the individual States, the majority decision in Kelo would result in an inverse-Robin-Hood phenomena where wealthy developers, such as Dakota Access, would use their greater political access, and economic power, to utilize generous eminent domain statutes to subjugate individual landowners and take their private property for private industrial use in the name of the State. Kelo v. City of New London, Conn., 545 U.S. 469, 521-522 (2005). Fortunately, in response to the majority decision in Kelo, our Legislature enacted the amendments to § 6A.21 over the veto of then Governor Vilsack to defend Iowa agricultural landowners.

VI. DAKOTA ACCESS' SUGGESTION THAT THE BOARD'S FINDING OF A PUBLIC CONVENIENCE AND NECESSITY UNDER § 479B.9 IS AUTOMATICALLY A FINDING THAT THE DAKOTA ACCESS CRUDE OIL PIPELINE IS NOT A PRIVATE DEVELOPMENT FOR § 6A.21 FAILS TO RECOGNIZE THAT § 6A.21(1) PROVIDES ITS OWN DEFINITION OF "PRIVATE DEVELOPMENT PURPOSES" AND "PUBLIC USE" OR "PUBLIC PURPOSE" OR "PUBLIC IMPROVEMENT".

In footnote number 116 at page 54 of its initial brief, Dakota Access suggests that if the Board finds that there is a public convenience and necessity for the Dakota Access crude oil pipeline, and desires to issue a permit, then the whole project automatically is not a "private development" protected by § 6A.21(2). Of course, § 6A.21(1)(c) has its own definition of "Public use", "public purpose", and "public improvement" which is more restrictive than the definitions at § 6A.22(2). If the Legislature had not intended § 6A.21(2) to be more restrictive, then there would be no purpose for the statute.

VII. DAKOTA ACCESS' CLAIM THAT IOWA SHOULD GRANT IT AN UNRESTRICTED PERMIT BECAUSE OTHER STATES HAVE ALREADY DONE SO, AND ITS ASSOCIATED DEMAND THAT ITS PERMIT MUST INCLUDE EMINENT DOMAIN OVER IOWA AGRICULTURAL LANDS, FAILS TO RECOGNIZE THAT NONE OF THE LEGISLATURES OF THESE OTHER STATES HAVE ADOPTED A COROLLARY TO IOWA CODE §6A.21 FOR THE EXPRESS PURPOSE OF PROTECTING AGRICULTURAL LANDS.

At pages 1 and 39 of its brief, Dakota Access attempts with some subtlety to intimidate the Board into granting its permit so as to not be the sole state agency blocking the construction of its crude oil pipeline. It notes that the relevant state agencies in South Dakota and Illinois have already authorized permits.[4] First, Dakota Access makes no reference to the various judicial appeals that those persons adversely affected in those states are bound to make. It does not mention whether the courts of last resort in those states have yet determined the validity of their respective agencies' actions. Second, and more importantly here, Dakota Access fails to understand that in Iowa, § 6A.21 is the game changer. It is a creature of our Legislature and our laws. North Dakota, South Dakota, and Illinois don't have it. The Legislature passed it and then overrode Governor Vilsack's veto for a reason.

[4] North Dakota's state agency subsequently issued a permit to Dakota Access on January 20, 2016.

VIII. THE BOARD SHOULD NOT PROVIDE DAKOTA ACCESS WITH UNRESTRICTED EMINENT DOMAIN AUTHORITY OVER AGRICULTURAL LANDS BECAUSE DENYING OR RESTRICTING SUCH AUTHORITY WILL PROMOTE JUDICIAL ECONOMY IN THE FACE OF THE LIKELY MULTIPLE AND DUPLICATIVE CONDEMNATION PROCEEDINGS IN EIGHTEEN SEPARATE IOWA COUNTIES.

At page 59 of its brief, Dakota Access claims that it has done everything necessary to be awarded an unrestricted permit. The Intervenors disagree. However, if the Board desires to award a permit, then Dakota Access is likely to serve each agricultural landowner not having voluntarily acquiesced with a notice of assessment pursuant to Iowa Code § 6B.8. These agricultural landowners are then entitled to commence separate actions in their eighteen separate counties pursuant to Iowa Code § 6A.24(1) in order to assert their rights under Iowa Code § 6A.21(2). There likely will be dozens separate of actions asserting the same facts and asking the very same legal question. At that point, after much delay and expense, the District Court is likely to consolidate many or all of the separate cases under Iowa Rule of Civil Procedure 1.913. In Johnson v. Des Moines Metro. Wastewater Reclamation Auth., 814 N.W. 2d 240, 245 (2012), the Iowa Supreme Court noted the discretion of the District Court to consolidate cases and found:

> The critical question for the district court in the final analysis was whether the specific risks of prejudice and possible confusion were overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Citing cases involving proceedings by a single condemning agency for a single project, such as Dakota Access, the Court additionally found:

> …, consolidation of condemnation appeals may well be appropriate for the routine cases involving serial takings from neighboring properties by a single condemner for the same project.

Id. at 246.

Here, a massive eighteen county set of simultaneous condemnation proceedings is unprecedented in Iowa. Once all of the landowners' actions are commenced in all of the counties, the District Court is very likely to consolidate all or most of those § 6A.24 cases based on the Iowa Supreme Court's analysis in Johnson. However, the Board already sits as the trial court in these proceedings, and it has the same authority under Johnson to effectively consolidate all of these cases for the § 6A.21(2) question. This authority arises under § 479B.9 which allows it to 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.

If the board desires to issue a permit to Dakota Access, then § 479B.9 allows it to apply conditions and restrictions as to the route (i.e. preconditions or restrictions of the route over agricultural land) to either prohibit its application to agricultural land or delay the effectiveness of the permit to agricultural land until after the District Court has had an opportunity to consider the application of § 6A.21(2) and the exhaustion of appeals. In either event, condemnation proceedings against agricultural land will be effectively consolidated and focused in one District Court instead of many. Unnecessary cost and delay will be avoided in an already overburdened District Court system. Dakota Access will not be prejudiced because of the identity of the facts and law in each case. It too will benefit from one appeal instead of many. Restricting a permit's application over agricultural land will accomplish all of the consolidation virtues set forth in Johnson and the parties and the District Court system will be relieved from multiple lawsuits.

CONCLUSION

The Intervenors created a record at the hearing to support their statutory claims. Specifically, Dakota Access is neither under the Board's relevant jurisdiction, nor is Dakota Access a utility under Iowa Code § 6A.21(2). Therefore, it may not exercise the power of eminent domain over Iowa agricultural lands, and the Board may not issue it a permit including such power. Additionally, because Iowa Code § 6A.24 denies landowners the right to challenge the application of eminent domain to their agricultural lands in District Court until after the Board has granted a permit, but allows Dakota Access to have sought the same determination beginning at the time the petition for permit was filed, Iowa Code § 6A.24 denies landowners their Constitutionally protected rights of Procedural Due Process, Substantive Due Process, and Equal Protection. Therefore, the Board should not otherwise issue Dakota Access a permit until after the District Court has had a full hearing upon the application of Iowa Code §§ 6A.21(2) and 6A.24, and until after the exhaustion of all appeals.

Dated: February 4, 2016.

Respectfully submitted,

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