

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**RICHARD R. LAMB, trustee of the
RICHARD R LAMB REVOCABLE
TRUST, et al.,**

Petitioners,

v.

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

Respondent,

and

DAKOTA ACCESS, LLC,

Indispensable Party.

Case No. CVCV 051997

**RULING ON PETITIONERS' MOTION
FOR STAY**

Petitioners are a number of Iowa agricultural landowners who appeal a decision by the Iowa Utilities Board (the board) to approve a petition for hazardous liquid pipeline permit filed by Dakota Access, LLC (Dakota). The board's final decision was issued on March 10, 2016. Following post-hearing motions, petitioners filed a petition for judicial review in this case on May 27, 2016. A briefing and hearing schedule will be issued contemporaneous with this ruling.

On August 9, 2016, petitioners filed an emergency motion to stay enforcement of the board's March 10, 2016 decision, as to the 15 parcels held by petitioners. The motion was set for hearing on August 19, 2016. Dakota and intervener MAIN Coalition (Main) filed resistances. The board did not take a position on the motion. The court heard arguments for approximately three hours.

STATEMENT OF THE CASE

Proceedings before the board: On January 20, 2015, Dakota filed a petition for a hazardous liquid pipeline permit pursuant to Iowa Code § 479B.4. Dakota sought to build a pipeline of 1,168 miles to transport crude oil from the Bakken oil production area in North Dakota to a hub in Patoka, Illinois. Approximately 346 miles of the pipeline was to be built in the State of Iowa. (Board’s final order, p. 4).

The board has authority under Iowa law to implement controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages that may result from the construction, operation, or maintenance of a pipeline. Iowa Code § 479B.1. The board also has authority to approve the location and route of a pipeline and to grant eminent domain when necessary. *Id.* The board shall not grant a permit unless the proposed services will “promote the public convenience and necessity.” Iowa Code § 479B.9. The board may impose terms, conditions, and restrictions as to location and route. *Id.*

On November 16, 2015, the board began its evidentiary hearing. The hearing lasted a total of eleven days, ending on December 7, 2015. On March 10, 2016, the board issued a 159 page final decision and order. The board granted the requested permit. The board found that, subject to several terms and conditions set forth in its order, that the proposed pipeline will promote the public convenience and necessity. The board noted that Dakota had taken a number of steps to minimize the environmental impact associated with the project. The board imposed additional requirements beyond those required by rules and the Agricultural Impact Mitigation Plan.

The board also considered whether to grant Dakota a right to eminent domain to place the pipeline across several parcels to which landowners did not enter into voluntarily agreements

with Dakota. The board granted eminent domain over most of the parcels as requested, denied eminent domain to some, and ordered some modifications and further negotiations in others.

Action following the board decision: Dakota began construction on the pipeline in June of 2016. Construction crews have cleared 60 percent of the route. Nearly 40 percent of the route has been graded (including the separation of topsoil). Dakota has dug the pipeline trench in several counties and other counties are 50 percent trenched. Absent any delays, Dakota expects to finish the project late in 2016. (Dakota exhibit H).

Dakota has proceeded in a linear fashion along its proposed route. If petitioners' request for stay was granted, it would have to move construction crews and equipment around the 15 impacted parcels. Dakota estimated the cost of each move at \$535,000. Petitioners contest Dakota's cost estimate, but the court agrees that some cost would be incurred at moving crews and equipment around parcels to continue work. (Dakota exhibit H).

Petitioners filed claims for injunctive relief with other courts since the board's ruling. In rulings issued June 13, 2016, and June 21, 2016, respectively, district court judges in Cherokee and Calhoun Counts denied petitioners' request to enjoin the board's decision. Each found that petitioners had to seek relief pursuant to this judicial review action. Interestingly, petitioners claimed in the Cherokee County case that judicial review would be inadequate to address their claims for injunctive relief. The court reminded them at that time (June 13, 2016) that they could request a stay pursuant to Iowa Code § 17A.19. (Dakota exhibits B, C).

Petitioners do not disagree with much of the information provided by Dakota regarding progress on the pipeline. The affidavit on behalf of Richard Lamb stated that they believed Dakota would be grading its land within a week and that trenching would follow shortly. Arlene Bates stated that, on her property, Dakota has mowed her crops, taken down a fence, and built a

culvert. Other affidavits are comparable. It is unquestioned that Dakota will be performing physical work on petitioners' properties and putting in the pipeline as soon as a few days from the date of this decision. (Petitions' exhibits A-D).

CONCLUSIONS OF LAW

The filing of a petition for judicial review does not itself stay execution or enforcement of any action of an administrative agency. Iowa Code § 17A.19(5)(a). Instead, the statute sets forth a process to apply for a stay. First, the administrative agency may grant a stay during the pendency of judicial review unless precluded by law. *Id.* If the agency denies a stay, a party may ask the district court to review the agency's decision on the application for stay. Iowa Code § 17A.19(5)(b). In that event, the court may grant relief. Iowa Code § 17A.19(5)(c). The court must consider the following four factors:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

If the court determines that relief should be granted from the agency's action on an application stay, it may remand the matter to the agency with directions, or the court may issue an order granting the stay. Iowa Code § 17A.19(5)(d).

Respondents claim that petitioners failed to comply with the clear terms of the statute by first applying for a stay with the agency. They also claim that petitioners failed to meet a basic tenet of administrative law to exhaust all administrative remedies before proceeding to court. It

is well-established that a party must exhaust any available administrative remedies before seeking relief in the courts. *Keokuk Cty. v. H.B.*, 593 N.W.2d 118, 122 (Iowa 1999). The exhaustion requirement serves several purposes including honoring agency expertise, handling matters within an agency and not in the courts, and preserving judicial resources. *Id.* at 123. Two conditions must exist before the exhaustion requirement is imposed: 1) an administrative remedy must exist, and 2) a statute must expressly or implicitly require that the remedy to be exhausted before resort to the courts. *Id.*

Respondents' claim is supported by the clear language of the statute. Section 17A.19(5) plainly directs a party to first file a motion for stay with the agency unless precluded by law. The court's only review under the statute is to review a decision by the agency on an application for stay. At that point, it can either remand back to the agency or issue a stay on its own.

This interpretation is supported by the statutory history. Prior to 1998, section 17A.19(5) read:

The filing of the petition for review does not itself stay execution or enforcement of any agency action. Upon application *the agency or the reviewing court* may, in appropriate cases, *order such a stay pending the outcome of the judicial review proceedings.*

See Teleconnect Co. v. Iowa State Commerce Comm'n, 366 N.W.2d 511, 513 (Iowa 1985) (emphasis added). Under the old language, a party could go to the agency or a court to request a stay. There was no requirement that a party go to the agency first. The current language was added in 1998. Iowa Acts ch. 1202, § 23. The new language clearly showed the legislative intent to first require a stay to be considered by the agency before a party could file with the district court. *See Martin v. Waterloo Cmty. Sch. Dist.*, 518 N.W.2d 381, 383 (Iowa 1994) (when the legislature amends a statute, the presumption is that it intended to change its meaning).

This reading appears consistent with other statutes. For example, Iowa Code section 86.26 implements exceptions from the administrative procedures act for workers' compensation appeals. One of those exceptions provides that "an application for stay of agency action during the pendency of judicial review shall not be filed in the division of workers' compensation [] but shall be filed with the district court." This exception would not be necessary but for the general rule that a party shall first file a motion for stay with the agency. *See Grinnell*, 751 N.W.2d at 400 (noting that the parties are not permitted to seek a stay from the workers' compensation commissioner after a judicial review petition has been filed).

This finding is supported by principles of exhaustion of remedies. The exhaustion doctrine is particularly applicable to the facts of this case. The board was receptive to hearing a motion for stay, as it referred to that remedy in its March 30, 2016, final decision. *See Final Decision* at p. 122. The agency had already heard the legal arguments and would have been well-prepared to make a decision on the element regarding likelihood of success in the merits. The agency likewise heard arguments regarding the harm to the objecting parties and the public interest, so it could easily evaluate those factors as they apply to the stay analysis.

The only factor that has changed since the board's March 10, 2016, decision is the factor regarding the impact a stay may have on Dakota. Dakota has started working on the pipeline and claims it would incur significant costs by stopping work as it approaches each of petitioners' 15 parcels and moving its equipment and restarting work on the other side. However, the board can evaluate these claims as well as the court and may be better suited to do so due to its expertise. Further, the only reason this factor has changed is due to petitioners' failure to file a motion for stay before Dakota started any work. If it had filed a motion in March or April or May before

any work was done, Dakota's interest would be the same as it was during the course of the hearing process before the board.

Petitioners argue that it would be futile to seek a stay from the agency because there is no guarantee that a timely hearing or order could be granted by the board. However, there is no proof that it cannot make a timely decision. The board did not take a position on petitioners' motion knowing that it may still need to decide the issue. To any extent that petitioners have a timing problem, it is due to the timing of their motion. They could have filed a motion for stay with the board before Dakota did any physical work on the pipeline. If they had, there would have been more than enough time to consider the issue. Petitioners cannot create their own futility argument by delaying their motion until it becomes an emergency.

To any extent petitioners argue futility based on predisposition, the claim would be rejected for reasons noted in respondents' briefs. *See North River Insurance Co. v. Iowa Division of Insurance*, 501 N.W.2d 542, 546 (Iowa 1993) (claim of bias against the insurance commissioner is insufficient to avoid the exhaustion requirement). Petitioners had an adequate remedy before the agency, but they did not present the stay to the board. Moreover, there is was no evidence that the board would not have seriously considered a motion for stay in this case. Agency decision makers, like decision makers at the district court level, understand that there is an appellate process and that decisions made at the agency or trial level may be reversed or modified on appellate review. Just because an agency (or district court) ruled against one party on the merits of a claim, does not mean that the agency (or court) would not consider a stay as the case proceeded on review.

For these reasons, petitioners are not entitled to a stay because they did not comply with the requirements of Iowa Code section 17A.19(5) by first requesting the stay from the agency.

The same decision would result from applying the exhaustion doctrine, as petitioners came to court before first seeking an available remedy at the agency level.

The court understands that petitioners are worried about Dakota clearing and trenching their land prior to having a hearing. Their claim boils down to due process. However, they must follow process too. Process is important and is in place for a reason. The legislature established a specific protocol that parties can use to request a stay. Petitioners did not comply with that protocol. They cannot skip a step in the process and now claim justification by an emergency. Any emergency is of their own making. They must comply with the process established by law.

At this point, there is no reason for the court to go through the four factors. If petitioners file a motion with the board, the board will need to independently consider the four factors in light of the record before the board. The issue may return to the court and the court will consider any issues at that time.

RULING

The motion for stay is denied. The motion is denied without prejudice for the petitioners to file a motion with the board per Iowa Code § 17A.19(5).



State of Iowa Courts

Type: OTHER ORDER

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Case Title RICHARD LAMB ET AL VS IOWA UTILITIES BOARD

So Ordered

A handwritten signature in black ink, which appears to read "Jeffrey Farrell". The signature is written in a cursive style and is positioned above a horizontal line.

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa