

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ESTATE OF LaVERNE I. JOHNSON,
Petitioner,

v.

IOWA UTILITIES BOARD,
Respondent,

and concerning

DAKOTA ACCESS, LLC,
Indispensable Party.

Case No. CVCV057960

RULING ON JUDICIAL REVIEW

The Estate of LaVerne I. Johnson, successor in interest to Laverne I. Johnson, (collectively “Johnson”) appeals a decision of the Iowa Utilities Board (the “IUB”). The Court held a hearing on the matter on August 23, 2019. Johnson appeared through attorney John Murray. The Board appeared through attorney Kim Snitker. The indispensable party, Dakota Access, LLC (“Dakota Access”), appeared through attorney Brant Leonard.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On March 10, 2016, the IUB issued a Final Decision and Order (“2016 Final Order”) granting Dakota Access a permit for the construction, operation, and maintenance of the Dakota Access Pipeline in Iowa. (Denial Order at 1). Pursuant to Iowa Code section 479B.16, when the IUB grants a pipeline permit, the pipeline company is “vested with the right of eminent domain, to the extent necessary and as prescribed and approved by the board...” The IUB prescribed and approved temporary construction and permanent easement rights applicable to Dakota Access’s right of eminent domain. (See Permit Order at 30-49). The permanent easement area was 50 feet wide, while the temporary construction easement area was 150 feet wide. (Petition Exhibits B and D). The temporary construction easement granted Dakota Access the right to:

...construct one pipeline and any appurtenant facilities in, over, through, across, under, and along the Pipeline Easement area. The term ... shall be for a period to extend eighteen (18) months from the date of the construction commencement.

Petition Exhibits C and E, section ii. Dakota Access's permanent easement rights allowed them to enter the easement:

... for the purposes of accessing, establishing, laying, constructing, reconstructing, installing, realigning, modifying, replacing, improving, operating, maintaining, inspecting, patrolling, protecting, repairing, relocating ..., and removing at will, in whole or in part, one pipeline not to exceed 30" in diameter...

Petition Exhibits C and E, section i. The IUB also approved easement rights which gave Dakota Access:

The right of unimpeded entry and access in, to, through, on, over, under, and across the Pipeline Easement (and the Temporary Easement while in effect) for all purposes necessary and at all times convenient and necessary to exercise the rights granted to [Dakota Access].

Petition Exhibits C and E, section vii.

On August 23, 2016, Dakota Access condemned easements across two of Johnson's properties. On July 13, 2018, Johnson filed an informal complaint with the IUB. (Denial Order at 1). In the complaint Johnson alleged, in relevant part, that Dakota Access was violating its temporary construction easement and that Dakota Access was not complying with the land restoration requirements in the IUB-approved Agricultural Impact Mitigation Plan ("AIMP"). (Denial Order at 1). Of particular concern to Johnson was a section of his agricultural drainage tile system that still needed to be repaired after initial incorrect installations of replacement tile. (Denial Order at 10). Johnson characterized this activity as a construction-related repair and argued that the temporary construction easement ended after eighteen months and Dakota Access's permanent easement rights do not allow it to continue "construction activities" after

eighteen months. (Denial Order at 11-12). Johnson also argued that Dakota Access's construction activities caused him financial damages. (Denial Order at 1). Per IUB rule, Dakota Access filed a response to Johnson's allegations and IUB staff investigated the complaint and issued a proposed resolution. (Denial Order at 6).

In its proposed resolution, IUB staff found that Dakota Access satisfactorily addressed Johnson's allegations and determined that the complaint required no further action by the IUB. (Proposed Resolution at 1). The proposed resolution found that Dakota Access was not violating the temporary construction easement by attempting to repair a section of drainage tile as ordered by the county inspector because it had a right to access its permanent easement to make repairs. (Proposed Resolution at 1-2). The IUB staff also found that Dakota Access had taken appropriate and reasonable steps in mitigating construction-related damages under the AIMP. IUB staff noted that after the pipeline construction was complete, the county inspector had inspected all the work and repairs on Johnson's property and confirmed that there were no outstanding violations of the AIMP, except a single repair of a section of drainage tile. The IUB commented that Dakota Access contractors are ready to complete the replacement work, but that Johnson would not allow them to access the easement area to perform the work. The proposed resolution also explained that the IUB lacked jurisdiction to provide relief for Johnson's claims for construction-related damage to his property. (Proposed Resolution at 2-5).

Pursuant to Iowa Code section 476.3(1), where a party disagrees with the IUB's proposed resolution, they may "petition the board to initiate a formal complaint proceeding which shall be granted if the [IUB] determines that there is any reasonable ground for investigating the complaint." Johnson requested a formal complaint proceeding. (Denial Order at 2). In his request, Johnson largely reiterated his prior complaints. (Denial Order at 4-7). Johnson argued

that Dakota Access was seeking to extend its temporary construction easement by accessing Johnson's property for the repair work required by the county inspector and that Dakota Access's construction activities on his properties caused financial damage. (Denial Order at 5). Johnson supported his request with a letter from an agronomist and an index of supplemental materials that Johnson provided during the investigation of the complaint. (Denial Order at 2-3).

The IUB issued an order denying Johnson's request for a formal complaint proceeding and hearing. (Denial Order at 20). The IUB found no reasonable ground for further investigation, explaining that:

Dakota Access has a right to enter upon the permanent easement for maintenance and repair activities. The temporary easement allowed Dakota Access to enter upon the property to install the pipeline, which was to be installed within 18 months, once the pipeline was installed and the 18-month period ended, Dakota Access' rights were based upon the rights in the permanent easement as directed by the county inspector so the county inspector can inform the Board of Supervisors when the project is complete in a county.

(Denial Order at 20). With respect to Johnson's alleged AIMP violations, the IUB noted that all violations on Johnson's property have been cleared by county inspectors except for one for which Johnson will not allow access to the easement on his property to be repaired. (Denial Order at 20-21).

As to the issue of damages, the IUB reiterated that it does not have jurisdiction to assess damages to Johnson's property. (Denial Order at 21). The IUB noted that the letter from the agronomist provided by Johnson addresses damages to Johnson's property, which it cannot determine. (Denial Order at 21). The IUB found that the pipeline was constructed and is in operation, but that Johnson must allow Dakota Access onto the easement to make the required repair so that county inspector can inform the Board of Supervisors the construction is complete for the purposes of Iowa Code section 479B.30. (Denial Order at 21-22). If not, the IUB

explained that landowners would not be able to petition the Board of Supervisors to appoint a compensation commission to determine damages. (Denial Order at 23). The IUB concluded that based on Johnson's request for a formal complaint proceeding there were no outstanding issues to be investigated further. (Denial Order at 21).

On April 15, 2019, Johnson petitioned this court for judicial review.

STANDARD OF REVIEW

Iowa Code section 17A.19 governs judicial review of an agency action. *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 207 (Iowa 2014). The statute states that "a person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19(1). The Court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in Iowa Code § 17A.19(10)(a)-(n) (2009). The district court reviews the agency's decision in an appellate capacity. *Hawkeye*, 847 N.W.2d at 207.

In this case, Johnson contends that the Board's ruling violated provisions of Iowa Code §§ 17A.19(10)(b), (c), (f), (j), (m), and (n). Under the applicable statutes the Court shall also reverse, modify, or grant other appropriate relief from agency action: (1) if such action is beyond the authority delegated to the agency by any provision of law or in violation of any provision of law (2) such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency; (3) such action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the Court when the record is viewed as a whole; (4) such action was the product of a decision-

making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question; (5) if the agency's decision is based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; or (6) if the agency's decision is otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. Iowa Code §§ 17A.19(10)(b), (c), (f), (j), (m), and (n) (2019).

The "standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of judicial review," i.e. if it involves an issue of 1) findings of fact, 2) interpretation of law, or 3) an application of law to fact. *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Systems, Inc. v. Iowa Utils. Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)). The Court reviews 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 Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 42 (Iowa 2012) (quoting *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 603 (Iowa 2004)). "The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made." *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991).

Where the legislature "clearly vested the agency with the authority to interpret specific terms of a statute, then [the Court] defer[s] 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).

If the IUB's ultimate conclusion reached is the claimed error, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(i), (j). The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. Iowa Code § 17A.19(8)(a) (2019). The Court shall make a separate and distinct ruling on each material issue on which the Court's decision is based. Iowa Code § 17A.19(9) (2019).

ANALYSIS

Because the agency decision that Johnson must ultimately seek judicial review of under Iowa Code section 17A.19 was the denial of a formal complaint proceeding, this Court's authority is limited to reviewing whether the IUB erred in denying Johnson's request for a formal complaint proceeding. *See Mt. Pleasant Mun. Utilities v. Iowa Utilities Bd.*, 889 N.W.2d 700 (Table), 2016 WL 6902326 (Iowa Ct. App. 2016); *see also Campbell v. Iowa Beer & Liquor Control Dep't*, 366 N.W.2d 574, 576 (Iowa 1985) (explaining that the authority of the district court on judicial review is "limited to review of the challenged agency action"). Johnson's petition does not explicitly ask the Court to reverse the Board's decision to deny a formal complaint proceeding. Instead, it asks the Court to:

...[F]irst determine whether the IUB had the authority to define the meaning and extent of the temporary construction easement and permanent easements. If the IUB did not have that authority, the IUB should make such findings and remand accordingly.

2. If the Court finds the IUB had such authority, the Court should specifically reverse and modify the IUB's ruling in relation to the meaning and extent of the temporary construction and permanent easement.
3. In any event, the Court should define the extent and meaning and application of the temporary construction easement and the permanent easement. . .
4. The Court should remand the matter to the IUB and direct the IUB to apply other remedies accordingly, including civil penalties and other actions as are appropriate.

(Petition for Judicial Review at 5). To the extent that Johnson claims the IUB erred in other respects and to extent Johnson asks the Court to adjudicate the rights of Dakota Access and Johnson under the easement, the Court lacks the authority to consider these issues in a judicial review proceeding under Chapter 17A.19. In proceedings such as this one, "the district court exercises only appellate jurisdiction and has no original authority to declare the rights of the parties or the applicability of any statute or rule." *Black v. Univ. of Iowa*, 362 N.W.2d 459, 462 (Iowa 1985) (internal quotation marks and citation omitted). In other words, the only issue on judicial review is whether the IUB erred in not finding "any reasonable grounds" for further investigation pursuant to Iowa Code section 476.3(1).

Iowa Code section 476.3 requires the IUB to initiate a formal complaint proceeding if "the board determines that there is any reasonable ground for investigating the complaint." The Iowa Court of Appeals determined that "any reasonable ground" has an "independent legal definition not limited to the specialized work of the Utilities Board" and as such the Court does not give deference to the Board's statutory interpretation of the standard. *Office of Consumer Advocate v. Iowa Utils. Bd.*, No. 10-0347, 2010 Iowa App., at *11 (Ct. App. Oct. 20, 2010) (citing *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8, 13 (Iowa 2010)). The *Office of Consumer Advocate* court determined the statutory "reasonable ground" standard requires "facts

to rise above a mere suspicion that the totality of circumstances would lead a reasonable person to believe further investigation is appropriate.” *Id.* at *19.

The Court finds that IUB correctly applied the “any reasonable ground” standard in denying Johnson’s request for a formal complaint proceeding, and that the IUB’s denial of formal proceedings was supported by substantial evidence. The IUB determined that there were no reasonable grounds to initiate a formal complaint proceeding because it found that: (1) Dakota Access satisfactorily addressed the AIMP violations raised by Johnson, (2) the IUB did not have jurisdiction to provide relief for Johnson’s damages claims, and (3) Dakota Access was using its permanent easement for the purposes in which it was granted. Based on these findings, the IUB concluded that there were no outstanding issues for it to address in a formal complaint proceeding.

With respect to the first item, the IUB noted that all AIMP violations on Johnson’s property have been cleared by county inspectors except for one for which Johnson will not allow access to the easement on his property to be repaired. With respect to (2), the IUB explained in its denial order that damages are determined by a county compensation commission pursuant to Iowa Code section 479B.30. The Court finds both of these conclusions were correct, and Johnson does not challenge them in this action for judicial review.

With respect to (3), the IUB determined that the easement language in its 2016 Final Order granted Dakota Access the right to access its permanent easement for repair activities as directed by the county inspector, and that Dakota Access’s efforts to repair a section of agricultural drainage tile on Johnson’s property was within its permanent easement rights. Iowa Code section 479B.16(1) vested Dakota Access with the right of eminent domain “to the extent necessary and as prescribed and approved by the [IUB]...” The IUB prescribed and approved

language concerning the temporary and permanent easement rights associated with the Dakota Access's eminent domain rights in its 2016 Final Order. Such rights included a broadly defined permanent easement on Johnson's property for a number of purposes, including repair activities. The fact that Johnson contends that Dakota Access was attempting to exercise rights under its temporary easement by repairing a section of agricultural drainage tile and that Dakota Access's permanent easement rights do not allow it to conduct a repair does not constitute a reasonable ground for further investigation. Johnson's key premise was that the drainage tile repair was a "construction-related" activity as opposed to a "post construction activity". But, as the IUB noted, the 2016 Final Order did not contain a definition of or distinguish between the two activities. Instead, the temporary construction easement language clearly stated it was for the purpose of constructing the pipeline. As noted by the Iowa Supreme Court in *Puntenney*, which affirmed the IUB's 2016 Final Order, the pipeline was completed in May 2017. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 838 (Iowa 2019). As such, the IUB reasonably could have concluded that such repairs cannot be considered construction-related as Johnson suggests. In addition, the work Dakota Access sought to perform falls within the 50 foot area of its permanent easement and also falls within its broadly defined permanent easement rights based on the IUB's application of the record to its 2016 Final Order, as noted above.

In light of the above, the Court finds that substantial evidence supports the IUB's determination that Johnson's request for formal complaint proceedings did not provide the IUB with any reasonable ground for further investigation.

ORDER

IT IS THEREFORE ORDERED that the ruling of the IUB is **AFFIRMED**. Costs of this action are assessed to the Petitioner.



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV057960
Case Title EST OF LAVERNE I JOHNSON ET AL VS IOWA UTILITIES BOARD ET AL

So Ordered

A handwritten signature in black ink, appearing to be 'S. Beattie', written over a horizontal line.

Scott J. Beattie, District Court Judge,
Fifth Judicial District of Iowa