

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001
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ORDER GRANTING MOTION

(Issued June 7, 2016)

INTRODUCTION

On May 3, 2016, the Utilities Board (Board) issued an “Order Regarding Notice to County Inspectors and April 14, 2016, Compliance Filing” in this docket. That order noted that during the course of these proceedings, Dakota Access, LLC (Dakota Access), offered a voluntary commitment that it would file with the Board all “permits, approvals or similar documents from the U.S. Army Corps of Engineers and Iowa Department of Natural Resources prior to commencing construction” of the proposed pipeline. (Dakota Access Reply Brief filed February 2, 2016, at page 53.) The Board accepted that commitment, and others, in the March 10, 2016, “Final Decision and Order” (the March 10 Order).

THE DNR PERMIT

On March 29, 2016, Dakota Access filed with the Board a document from the Iowa Department of Natural Resources (DNR) entitled “Sovereign Lands Construction Permit 16-021.” The DNR permit allows the company to construct a 30-

inch diameter pipeline on the Big Sioux River Wildlife Management Area (Big Sioux WMA) and under the Big Sioux River, Des Moines River, and Mississippi River. The DNR permit is “issued on the condition that the U.S. Fish and Wildlife Service authorizes the activity...” and notes that as “part of this process, DNR may be required to rescind, modify and/or supplement the terms and conditions herein.”

On May 27, 2016, Sierra Club Iowa Chapter (Sierra Club) filed with the Board letters from the U.S. Fish and Wildlife Service (USFWS) and the DNR prohibiting construction pursuant to the DNR permit. The USFWS letter was sent to the DNR on May 25, 2016, and says that based on recent information provided by the State Archaeologist, a significant archaeological site was identified within the Big Sioux WMA and may fall along the proposed path of the pipeline. USFWS asks DNR to stop all tree clearing or other ground disturbing activities within the pipeline corridor pending further investigation.

The DNR letter was sent on May 26, 2016, and says that because USFWS has revoked its approval of the DNR permit, Dakota Access is no longer authorized to engage in any activities pursuant to that permit.

THE CORPS OF ENGINEERS APPROVALS

Dakota Access’s commitment with respect to approvals from the Corps of Engineers (Corps) includes Pre-Construction Notifications (PCNs) and the associated verifications. The record in this proceeding establishes that as of the time of the

hearing in this docket, Dakota Access anticipated it would receive the PCN approvals by January of 2016. However, those approvals have not yet been issued.

On May 5, 2016, Dakota Access filed a “Request for Permission to Begin Construction Outside PCN Areas,” saying that continued delay of the project increases the risk that a number of landowners will be subject to potential impacts in more than one growing season. On May 10, 2016, Dakota Access filed additional information in support of its request, including a list of the PCN sites in Iowa and a more detailed description of how some landowners’ interests could be affected if pipeline activities take place in two growing seasons rather than one.

On May 18, 2016, Dakota Access filed a “Report Regarding Request for Work in Certain PCNs” in which the company described certain communications between Dakota Access and the Corps regarding this project. The report says that the Corps expects to complete the PCN process for all but three PCN sites in Iowa on or before June 16, 2016, and will conduct additional cultural surveys on the last three sites.

The other parties have made numerous filings in response to the motion and other filings made by the company. Many urged the Board to deny the motion because of potential concerns about the scope of the review by the Corps or other matters outside the Board’s jurisdiction. Many disagreed with the company’s statements regarding potential consequences for landowners, suggesting that the construction schedule could be adjusted and that Dakota Access could pay damages

for any additional inconveniences the landowners may experience. The Board has considered all of the filings and arguments presented.

ANALYSIS

I. Jurisdiction

The Board has been served with two petitions for judicial review of the Board's March 10 Order, see *Gannon v. Iowa Utilities Board*, Polk County District Court No. CVCV051882, filed May 9, 2016, and *Richard R. Lamb, et al., v. Iowa Utilities Board, et al.*, Polk County District Court No. CVCV051997, filed May 27, 2016. The general rule is that the filing of a petition for judicial review divests the agency of jurisdiction of the matter unless and until the District Court remands the case to the agency. *McCormick v. N. Star Foods, Inc.*, 532 N.W.2d 196, 199 (Iowa 1995). The same general rule applies to the courts; a trial court loses jurisdiction over the merits of a controversy once an appeal is perfected. *Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992). There are exceptions to this general rule, as described below. Under these circumstances, the Board must determine whether it has jurisdiction to decide the pending motion.

One exception permits the lower tribunal to retain jurisdiction over "issues collateral to and not affecting the subject matter of the appeal." *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 110 (Iowa 2004) (citation omitted); *Universal Cooperatives, Inc. v. Tasco, Inc.*, 300 N.W.2d 139, 142 (Iowa 1981). In *Universal Cooperatives*, an appeal was pending regarding the District Court's ruling on a

motion to quash the original service of process when the District Court ordered that process be served by a different method; the second District Court order was upheld as being collateral to the issues on appeal. The issues regarding the first service of process were not the same as the question of whether the second method of service was proper. *Id.*

Another exception recognizes that the lower tribunal must retain jurisdiction to enforce its orders (in the absence of a stay from the appellate court) in order to perform its duties. *Kirk v. Iowa Dist. Court for Jefferson County*, 508 N.W.2d 105, 108 (Iowa App. 1993) (determining that the District Court had subject matter jurisdiction to hear a contempt action even when an appeal of other aspects of the District Court's final order was pending).

A third exception is, in essence, the reverse of the second. The lower tribunal retains jurisdiction to determine whether a party has complied with its orders. Stated differently, under the reasoning of the *Kirk* Court, the agency or trial court must have the jurisdiction to determine whether an enforcement action is necessary.

Here, Dakota Access asks for permission to begin construction in areas for which it has all necessary permits and authorizations, that is, areas outside those areas for which a PCN verification is required from the Corps. The original request did not address areas covered by the Sovereign Lands permit issued by the DNR, but subsequent events have made those areas relevant, too.

Meanwhile, the issues on appeal involve the Board's decision to grant a permit to Dakota Access pursuant to Iowa Code § 479B.9, and the associated act of granting the company the right of eminent domain pursuant to Iowa Code § 479B.16. No challenge has been filed to the Board's decision to accept the commitment of Dakota Access that it would file the Corp and DNR permits prior to commencing construction, so the pending motion is addressed to matters that are not the subject of judicial review and are therefore collateral to the issues on appeal.

Alternatively, the question presented by the company's motion is whether Dakota Access has complied with the intent of the Board's March 10 Order or whether it would violate that order if the company were to begin construction of the pipeline in areas where it has all required approvals and authorizations. Either way, as a collateral matter or as enforcement of the Board's order, the Board has jurisdiction of this matter.

II. The Merits

When a petition for a permit is filed with the Board pursuant to Iowa Code ch. 479B, the Board considers (among other things) the "environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline," see Iowa Code § 479B.1. Iowa Code § 479B.9 allows the Board to grant a permit upon such terms, conditions, and restrictions as the Board determines to be just and proper. As one of those conditions in the March 10 Order, the Board required Dakota Access to file the authorizations from the Corps and the

DNR permit so that the public and the Board could be certain that environmental matters within the jurisdiction of those agencies are being addressed and to provide a single location where interested members of the public can locate the permits and other authorizations associated with this project in Iowa.

Based upon the report filed on May 18, 2016, the Corps will process and complete nearly all of the outstanding PCNs in Iowa by June 16, 2016. In other words, the Corps is addressing the environmental matters within its jurisdiction, satisfying that purpose of the requirement in the March 10 Order. The Board recognizes that even after June 16, the Corps will continue its review and consultation on three PCN sites in Iowa for some unspecified period of time. However, it is apparent that the Corps will complete that process and address any environmental matters within its jurisdiction, satisfying the intent of the Board's requirement.

The analysis of the DNR permit is similar. It is apparent from the information provided by the parties that the DNR is addressing the matters within its jurisdiction, satisfying that purpose of the requirement in the March 10 Order. The Board finds that this complies with the intent of the order with respect to the DNR permit.

Given that finding, the Board finds it is reasonable to allow Dakota Access to commence construction in those areas where it has received all necessary permits, authorizations, approvals, and easements. However, Dakota Access proceeds at its own risk that it will receive the necessary authorizations from the Corps and that it will

be allowed to engage in activities pursuant to the DNR permit. If the company is required to relocate the pipeline as a result of those processes (or for any other reason), the Board's rules at 199 IAC 13.2(1)(a) (relating to allowed construction deviation) or 199 IAC 13.9 (relating to amendment of a permit) may apply.

Dakota Access will still be required to file the PCN verifications when received, and to re-file the DNR permit if it is modified or otherwise reissued, as required by Ordering Clause No. 3 of the March 10 Order. These filings will provide the public with a complete identification of the permits and other authorizations required for this project.

The Board also notes that the inspection and enforcement process of Iowa Code chapter 479B will apply to this project. Pursuant to § 479B.20, county inspectors will conduct on-site inspections for compliance with the applicable land restoration standards. If the inspector determines there is a violation of those standards, the inspector can give notice to Dakota Access or order corrective action to be taken. If Dakota Access does not comply, the inspector may temporarily halt construction at that site and the county board of supervisors may petition the Board for an order requiring corrective action and, in appropriate cases, assessing civil penalties pursuant to § 479B.21. In addition, the unanticipated discoveries plan filed by Dakota Access on April 14, 2016, is designed to address situations like the existing DNR permit matters.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Request for Permission to Begin Construction Outside PCN Areas" filed by Dakota Access, LLC, on May 5, 2016, is granted. Dakota Access may begin construction in areas where it has all required permits, authorizations, approvals, and easements, where it has provided all required notices, and where it has complied with all other legal requirements. Any such activities will be conducted at the company's own risk.

UTILITIES BOARD

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

/s/ Nick Wagner

Dated at Des Moines, Iowa, this 7th day of June 2016.

DISSENT

The Board's March 10 Order granted a permit to Dakota Access subject to Dakota Access submitting all permits, approvals, or other similar documents upon its own guarantee and commitment made both at the hearing and in its reply brief. On May 9, May 26 and May 27 the following five cases were filed in District Court, each challenging the issuance of the Iowa Utilities Board March 10 Order: *Gannon v. Iowa Utilities Board*, Polk County District Court No. CVCV051882, filed May 9, 2016; *Johnson v. Iowa Utilities Board*, et. al, Polk County District Court No. CVCV051990, filed May 26, 2016; *Puntenney v. Iowa Utilities Board, et al.*, Polk County District Court No. CVCV051987, filed May 26, 2016; *Sierra Club Iowa Chapter v. Iowa Utilities Board, et al.*, Polk County District Court No. CVCV051999, filed May 27, 2016; and *Lamb, et al. v. Iowa Utilities Board, et al.*, Polk County District Court No. CVCV051997, filed May 27, 2016.

Dakota Access now asks the Board to excuse it from the commitment it made to provide all "permits, approvals, or other similar documents from the U.S. Corps of Army Engineers and Iowa Department of Natural Resources prior to commencing construction," which the Board found necessary in order to grant the permit. (March 10 Order at 69-70) (citing Dakota Access Reply Brief filed February 2, 2016, at 52-53). In my opinion, the majority is modifying the March 10 Order over which the Board no longer has jurisdiction. This modification is not merely an issue of compliance but an issue that also affects the terms and conditions of the permit itself.

Since the permit is now the subject of judicial review proceedings, I believe jurisdiction now lies with the District Court. Yet, even if we had jurisdiction, I would find that Dakota Access should comply with its voluntary obligations made to the Board and expressed in the March 10 Order, as conditions of the permit. Therefore, I respectfully dissent.

I. Jurisdiction

The majority correctly notes that a petition for judicial review generally deprives an executive agency of jurisdiction. *McCormick v. N. Star Foods, Inc.*, 533 N.W.2d 196, 199 (Iowa 1995). The majority determines we have jurisdiction to respond to the present request by Dakota Access because the request falls into one of the exceptions to the general rule. These exceptions include a collateral issue, an enforcement issue, or a compliance issue that does not directly affect the matters on appeal. *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 110 (Iowa 2004) (citing *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990)); *Universal Cooperatives, Inc. v. Tasco, Inc.*, 300 N.W.2d 139, 142 (Iowa 1981) and *Kirk v. Iowa Dist. Court for Jefferson County*, 508 N.W.2d 105, 108 (Iowa App. 1993). I do not agree the motion meets any of the exceptions.

The majority relies on three cases for support of their position that the Board has jurisdiction to address Dakota Access' motion. The cases do not support the majority's conclusion. In *Iowa State Bank & Trust Co.*, the District Court entered a post-judgment motion to award attorney's fees following an appeal. The appeal did

not specifically raise as an issue the second order that awarded attorney's fees. *Id.* at 109-110. The Iowa Supreme Court determined that the District Court was within its power to retain jurisdiction on a collateral issue, such as attorney's fees. *Id.*

The Dakota Access motion does not raise a collateral issue to the Board's March 10 Order. In *Iowa State Bank & Trust Co.*, the issue of attorney's fees was not part of the District Court's initial decision. Here, Dakota Access is seeking relief from conditions that are encompassed by the judicial review proceedings by asking the Board to excuse it from fulfilling its obligations as required in the March 10 Order.

The majority also relies on *Universal Cooperatives, Inc. v. Tasco, Inc.*, 300 N.W.2d 139 (Iowa 1991) and *Kirk v. Iowa Dist. Court for Jefferson County*, 508 N.W.2d 105, 107-108 (Iowa App. 1993) for support of its decision. These cases are cited as supporting the Board's jurisdiction over enforcement of its orders.

In *Universal Cooperatives Inc.*, the issue on interlocutory appeal was the initial method of service. *Id.* at 142. While the appeal was pending, the District Court ordered service by an alternative method. *Id.* The Iowa Supreme Court determined that the District Court was not precluded from jurisdiction by the appeal and was able to order service by another method. *Id.* The Court determined the statutes used to order the new form of service were not appealed. *Id.*

In *Kirk v. Iowa Dist. Court for Jefferson County*, the Iowa Supreme Court held that the District Court still had subject matter jurisdiction to hear a contempt action even though the dissolution decree between the parties was still pending before the

Iowa Court of Appeals. *Kirk* at 508 N.W.2d 105, 107-108. “A trial court may enforce a decree while its correctness is being appealed . . . If there is jurisdiction of the parties and legal authority to make an order, it must be obeyed.” *Id.* (internal citations omitted). Here, Dakota Access is not in compliance with the March 10 Order. The primary issue raised on judicial review is whether the Board’s issuance of the permit was proper. See *Johnson v. Iowa Utilities Board, et. al*, Polk County District Court No. CVCV051990, filed May 26, 2016; *Puntenney v. Iowa Utilities Board, et al.*, Polk County District Court No. CVCV051987, filed May 26, 2016; and *Sierra Club Iowa Chapter v. Iowa Utilities Board, et al.*, Polk County District Court No. CVCV051999, filed May 27, 2016.

In the March 10 order, the Board “expressly conditioned” its finding of public convenience and necessity “subject to the terms and conditions” the Board adopted in Section VI of the order. (March 10 Order at 152). One of Dakota Access’s obligations is that it will file “permits, approvals, or other similar documents from the U.S. Corps of Army Engineers and Iowa Department of Natural Resources prior to commencing construction.” (March 10 Order at 69-70) (citing Dakota Access Reply Brief filed February 2, 2016, at 52-53). The Board also stated that the permit was being issued “based upon Dakota Access’s representations that all necessary or required permits and authorizations will be obtained prior to the construction and operation of the pipeline.” (March 10 Order at Ordering Clause 3).

The language in the March 10 Order is clear. The Board expressly conditioned the permit that is now on appeal on the terms that Dakota Access is now asking the Board to excuse. This is not a collateral issue relating to compliance or an enforcement issue; it is an issue central to the granting of the permit.

I would deny Dakota Access's request because the request directly affects the terms and conditions of the permit that the District Court is reviewing on appeal. The jurisdiction is vested in the District Court; therefore, the Board lacks jurisdiction to address the issue.

II. Compliance with the Board's Orders

In the March 10 Order, the Board issued the permit "based upon Dakota Access's representations that all necessary or required permits and authorizations will be obtained prior to the construction and operation of the pipeline." (March 10 Order at Ordering Clause 3). One of the commitments Dakota Access made was that it would file "permits, approvals, or other similar documents from the U.S. Corps of Army Engineers and Iowa Department of Natural Resources prior to commencing construction." (March 10 Order at 69-70) (citing Dakota Access Reply Brief filed February 2, 2016, at 52-53).

Since making that commitment, Dakota Access filed the "Sovereign Lands Construction Permit 16-021" (Sovereign Lands Permit) from the Iowa Department of Natural Resources (DNR) on March 29, 2016. It also filed a "Nationwide Permit 12" on April 14, 2016, that was issued by the Corps on March 19, 2012.

Additionally, as this Board previously noted in its May 3, 2016, order, Dakota Access's own witness, Monica Howard, testified that certain activities are authorized by Nationwide Permit 12 but "others, you still need additional permissions for." (Tr. 409). Howard explained that for a certain subset of water crossings, Dakota Access must file a Pre-Construction Notice (PCN) that requires an additional level of review by the Corps. (Tr. 444). Howard described that level of review as a "verification." (Tr. 495).

Recent filings in the Iowa Utilities Board Electronic Filing System show that the Sovereign Lands Permit has since been revoked, or at least temporarily suspended, pending further investigation by the U.S. Fish and Wildlife Service and the Department of Natural Resources. Dakota Access has not provided any evidence or even an estimate showing when it expects this permit to be reissued.

Dakota Access also has not filed any PCNs or associated verifications. Dakota Access, at the Board's request, has identified 65 PCN locations. (Dakota Access Response to May 3 & May 6 Orders filed May 10, Exhibit A). Of these 65 PCNs, Dakota Access states it has communicated with the Corps and expects all but three such verifications to be completed by the Corps on or before June 16, 2016. (Report Regarding Request for Work in Certain PCNs, filed May 18, 2016). However, Dakota Access also previously expected such verifications to be received back in December of 2015 or January of 2016. (Dakota Access Exhibit MH-4). Dakota Access fails to give an expected timeline for the issuance of the last three

PCN verifications. Dakota Access also fails to give any explanation as to why it has not received the required PCNs from the Corps when the estimated date to receive them was approximately six months ago.

Even if Dakota Access was able to provide such estimates, the Board's intent as expressed in its previous Orders is clear. Dakota Access is expected to fulfill its commitment to file such permits, authorizations, approvals, or similar documents with the Board before commencing construction. Dakota Access has not complied.

III. Conclusion

Dakota Access's request affects the terms and conditions of the permit that is currently subject to judicial review proceedings. The Board is therefore deprived of jurisdiction. Further, Dakota Access has not fulfilled its obligations that the Board adopted in its March 10 Order. I respectfully dissent.

/s/ Geri D. Huser

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 7th day of June 2016.