

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>SHELBY COUNTY, WRIGHT COUNTY, FLOYD COUNTY, WOODBURY COUNTY, DICKINSON COUNTY, KOSSUTH COUNTY, EMMET COUNTY, HARDIN COUNTY, and FRANKLIN COUNTY,</p> <p>Petitioners,</p> <p>v.</p> <p>IOWA UTILITIES COMMISSION f/k/a IOWA UTILITIES BOARD,</p> <p>Respondent.</p>	<p>CASE NO. _____</p> <p>PETITION FOR JUDICIAL REVIEW</p>
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Petitioners Shelby County, Wright County, Floyd County, Woodbury County, Dickinson County, Kossuth County, Emmet County, Hardin County, and Franklin County (“the Counties”), pursuant to Iowa Code § 17A.19, submit the following Petition for Judicial Review:

INTRODUCTION

The Counties seek judicial review of the final decision and order of the Iowa Utilities Commission f/k/a Iowa Utilities Board¹ (“IUC”) that granted a hazardous liquid pipeline permit to Summit Carbon Solutions, LLC (“Summit”) for purposes of constructing a carbon capture pipeline across 29 counties in Iowa, approved the location and route of the pipeline, and granted Summit the right of eminent domain. Because the IUC committed numerous substantive and procedural errors in reaching its final decision, and because those errors prejudiced the substantial rights of the Counties, the Court must “reverse, modify, or grant other appropriate relief” from the IUC’s decision. Iowa Code § 17A.19(10).

¹ Effective July 1, 2024, the Iowa Utilities Board was renamed the Iowa Utilities Commission. See 2024 Iowa Acts, Senate File 2385. <https://iuc.iowa.gov/press-release/2024-07-02/iowa-utilities-board-now-iowa-utilities-commission>.

PARTIES

1. The Counties are political subdivisions of the state of Iowa. The Counties have a jurisdictional interest in the location and route of Summit's pipeline because it travels through the Counties and because the Counties have statutory duties under Iowa Code chapter 479B regarding inspection of the pipeline's construction. The Counties were parties to the underlying proceedings before the IUC.

2. The IUC is the state agency responsible for permitting hazardous liquid pipelines in the state of Iowa. The IUC has primary but not exclusive authority over the location and routing of such pipelines and may grant eminent domain rights for eligible projects.

JURISDICTION

3. This Court has jurisdiction pursuant to Iowa Code § 17A.19(1), which provides for judicial review of final agency action.

4. This action was timely because it was filed within thirty days after the motions for reconsideration were deemed denied by operation of law. *See* Iowa Code § 17A.19(3).

VENUE

5. Venue is proper in Polk County District Court pursuant to Iowa Code § 17A.19(2).

FACTUAL BACKGROUND

6. On January 28, 2022, Summit filed a petition pursuant to Iowa Code chapter 479B with the IUC in Docket No. HLP-2021-001 for a permit to construct, operate, and maintain a hazardous liquid pipeline across 29 counties in Iowa.

7. The pipeline will collect and transport carbon dioxide from 30 facilities in Iowa, Nebraska, and Minnesota (primarily ethanol plants) through South Dakota to a sequestration site in North Dakota and will consist of approximately 688 miles of pipeline in Iowa.

8. The contested case hearing on Summit's petition was held between August 22, 2023, and November 8, 2023.

9. The Counties were all parties to the IUC proceeding.

10. On June 25, 2024, the IUC issued its final decision and order. The IUC granted Summit its state permit, approved the location and route of the pipeline, and vested Summit with the right of eminent domain.

11. On July 12, 2024, the Counties (except for Franklin County) filed a motion to reconsider the IUC's final decision and order pursuant to Iowa Code § 476.12 and Iowa Admin. Code r. 199-7.27(1). The motion was timely because it was filed within twenty days of the date of the final decision and order. *Id.*

12. Numerous other parties filed timely motions to reconsider on or about July 15, 2024.

13. On August 15, 2024, the IUC filed a notice indicating that because the IUC had not taken action on the motions to reconsider on or before August 14, 2024 (30 days after the last motion to reconsider was filed), the motions were deemed denied by operation of law. *See* Iowa Code § 476.12; Iowa Admin. Code r. 199-7.27(1).

COUNT I – JUDICIAL REVIEW OF FINAL AGENCY ACTION

14. The Counties incorporate by reference all preceding paragraphs.

15. The IUC's August 14, 2024, denial of the motions to reconsider by operation of law constituted final agency action. *See Christiansen v. Iowa Bd. of Educational Examiners*, 831

N.W.2d 179, 190 (Iowa 2013) (where multiple applications for rehearing are filed, the agency's decision on the last pending application constitutes the final decision of the agency).

16. Pursuant to Iowa Code § 17A.19(1), any person who has exhausted all adequate administrative remedies and is aggrieved or adversely affected by final agency action may seek judicial review thereof.

17. The Counties exhausted all adequate administrative remedies by participating as parties in the contested case before the IUC and obtaining a final decision and order from the IUC.

18. The Counties were adversely affected by the IUC's final decision and order because (1) the IUC granted Summit a permit to construct a hazardous liquid pipeline through the Counties despite the Counties' objections, and (2) the IUC denied the Counties' requests to modify the route and/or impose conditions on the permit that are necessary to protect landowners, local economic development, future property tax base, and the public safety.

19. This petition is timely because it was filed within thirty days of the date the motions to reconsider were deemed denied by operation of law. *See* Iowa Code § 17A.19(3); *Christiansen*, 831 N.W.2d at 190.

20. Pursuant to Iowa Code § 17A.19(10), the Court is required to reverse, modify, or grant other appropriate relief from agency action when the petitioner's rights are prejudiced by procedural or substantive errors in the agency's decision. *See* Iowa Code § 17A.19(10)(a)-(f).

21. The IUC committed numerous prejudicial errors in its final decision and order as set forth below.

Unconstitutional Actions – Iowa Code § 17A.19(10)(a)

22. Under Article I, Section 18 of the Iowa Constitution, the power of eminent domain can only be exercised for a public, as opposed to a private, use.

23. Summit's carbon capture pipeline is an economic development project, and the trickle-down benefits of economic development projects are not sufficient to constitute a public use. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019).

24. Summit is not a common carrier under Iowa law because (1) Summit is only obligated to perform services for those with whom it elects to contract, *see State ex rel. Bd. of R.R. Com'rs v. Carlson*, 251 N.W. 160, 161 (Iowa 1933), and (2) pursuant to its offtake agreements with the ethanol plants, Summit takes title to the carbon before transporting it and thus the pipeline only handles Summit's own product. *Mid-Am. Pipeline Co. v. Iowa State Com. Comm'n*, 114 N.W.2d 622, 624 (Iowa 1962).

25. Summit's carbon capture pipeline does not otherwise provide a public benefit or use because it is not safer than the status quo and because it actually *raises* food and fuel prices for consumers.

26. Accordingly, the IUB's grant of eminent domain rights to Summit was unconstitutional because Summit's pipeline is a purely private use.

27. In addition, the IUC failed to ensure that its grant of eminent domain was no greater than necessary to effectuate the purported public use.

Actions in Excess of Statutory Authority – Iowa Code § 17A.19(10)(b)

28. Iowa law also prescribes statutory restrictions on the use of eminent domain.

29. Pursuant to Iowa Code § 6A.22, eminent domain may only be exercised for "a public purpose, public use, or public improvement," which are defined to mean, as pertinent

here, “[t]he acquisition of any interest in property ... necessary to the function of a common carrier...” *Id.* §§ 6A.22(1), (2)(a)(2); *see also Punttenney*, 928 N.W.2d at 842-43 (applying the limitations in Iowa Code § 6A.22 to eminent domain rights granted by the IUC under Iowa Code chapter 479B).

30. As discussed above, Summit is not a common carrier under Iowa law.

31. Accordingly, the IUC’s grant of eminent domain rights to Summit violated Iowa Code § 6A.22.

32. In addition, the IUC’s statutory authority to grant eminent domain rights to pipeline companies is limited “to the extent necessary.” Iowa Code § 479B.16; *see also* § 479B.1 (“It is the purpose of the general assembly in enacting this law ... to grant rights of eminent domain *where necessary*.” (emphasis added)).

33. This necessity requirement is distinct from the “public convenience and necessity” requirement to obtain a permit, *see* Iowa Code § 479B.9, and instead refers to the scope of the taking.

34. By requiring that the taking be only “to the extent necessary,” the legislature seeks to ensure that the grant of eminent domain is constitutional by going no farther than necessary for the public use.

35. A taking that exceeds that which is necessary for the public use is unconstitutional and beyond the statutory authority of the IUC. *See, e.g., Race v. Iowa Elec. Light & Power Co.*, 257 Iowa 701, 704, 134 N.W.2d 335, 337 (1965) (“Only property necessary for the public use may be taken.”); *Vittetoe v. Iowa S. Utilities Co.*, 255 Iowa 805, 812, 123 N.W.2d 878, 882 (1963) (“If the amount sought to be condemned is in excess of that necessary for the improvement, the appropriation of such excess is not for the public use.”).

36. The IUC has statutory authority to impose conditions to ensure that the grant of eminent domain goes no farther than necessary for the purported public use. *See* Iowa Code §§ 479B.9 (“The board may 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.”); 479B.16(1) (“A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, to the extent necessary *and as prescribed and approved by the board...*”) (emphasis added).

37. The IUC found that Summit’s project promoted the public convenience and necessity based on three “significant national issues”: federal tax credits, low carbon fuel markets, and climate change.

38. However, the IUC refused to impose conditions on its grant of eminent domain that would ensure that the taking is no greater than necessary to achieve these purported benefits, including the following conditions specifically requested by the Counties:

- a. Requiring Summit to obtain all necessary permits before exercising rights of eminent domain;
- b. Requiring expiration and reversion of the taking if the regulatory markets for low carbon fuels are no longer accessible to ethanol;
- c. Requiring expiration and reversion if the sequestration of carbon dioxide is no longer eligible for federal tax credits;
- d. Requiring expiration and revision if the pipeline is ever converted to another use or commodity;
- e. Requiring the sequestration of all carbon dioxide transported by the pipeline and prohibiting any offtake prior to the sequestration site; and

f. Prohibiting the use of any transported carbon dioxide for purposes of enhanced oil recovery.

39. By refusing to impose these conditions, the IUC failed to limit its grant of eminent domain to that which is “necessary” to obtain the purported public use in violation Iowa Code § 479B.16(1).

Erroneous Interpretation of Law Not Vested in the Agency – Iowa Code § 479B.10(c)

40. Whether Summit qualifies as a common carrier is a question of law that has not been vested in the IUC.

41. The IUC erred in determining that Summit qualifies as a common carrier because, among other reasons, Summit is only obligated to perform services for those with whom it elects to contract and the pipeline will only carry Summit’s own products.

42. The interpretation of Iowa Code chapter 17A has likewise not been vested in the IUC.

43. Iowa Code § 17A.16(1) provides that “[i]f, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.”

44. The IUC has not adopted a rule prohibiting parties from submitting proposed findings of fact.

45. Accordingly, the Counties submitted proposed findings of fact to the IUC.

46. The IUC, however, refused to rule on the Counties’ proposed findings of fact, interpreting section 17A.16(1) as only requiring rulings on proposed findings where the agency’s rules specifically *require* submission of proposed findings of fact.

47. This was an erroneous interpretation of section 17A.16(1). If the IUC's rules do not prohibit proposed findings of fact, then the Counties' submission of proposed findings is "in accordance with agency rules" since there was no rule prohibiting them from doing so.

Findings Not Supported by Substantial Evidence – Iowa Code § 17A.19(10)(f)

48. The IUC found that Summit's pipeline would provide climate change benefits.

49. However, when Summit's Chief Operating Officer, James Powell, was asked at hearing whether one of the purposes of the project was to help with global warming and climate change, he responded that "Summit doesn't take a position on climate change." Rather, Mr. Powell explained the purpose of the pipeline was "to help ethanol plants reduce their carbon intensity and help them be competitive in low-carbon fuel markets."

50. Consistent with Mr. Powell's testimony, while Summit presented evidence that the pipeline would capture 3.28 million metric tons of carbon dioxide per year, it failed to present any evidence quantifying any alleged climate change benefit as a result of this capture. Instead, Mr. Powell testified there is "probably a benefit."

51. In contrast to Mr. Powell's speculation about a possible climate change benefit, the Sierra Club presented substantial evidence that Summit's pipeline would cause an *increase* in emissions, and the amount of carbon dioxide sequestered would be "miniscule" compared to the amount generated.

52. Accordingly, the IUC's finding of a climate change benefit is not supported by substantial evidence.

53. The IUC also found that tax credits were a benefit of Summit's pipeline project.

54. However, the evidence presented at hearing established that such tax credits are considered a *cost* to the public, not a benefit.

55. The evidence further established that Summit would be receiving tax credits in the estimated amount of \$414 million per year for 12 years, and that these tax credits were far more than any tax payment or economic benefit being provided to the Counties or other levels of government.

56. Accordingly, the IUC's finding that tax credits are a benefit of the project was not supported by substantial evidence.

57. The IUC also found that Summit complied with the requirement of Iowa Code § 479B.5(7) to state "the relationship of the proposed project to the present and future land uses and zoning ordinances."

58. However, Summit's petition did not discuss or even mention the comprehensive plan or zoning ordinances of any county through which the pipeline will travel.

59. Rather, the petition stated in conclusory fashion that "No significant impacts are anticipated as a result of the construction and operation of the Project and associated facilities, and the Project can be constructed and operated consistent with present and future land uses."

60. IUC staff issued a report finding that the petition was deficient with respect to the zoning requirement.

61. The evidence at hearing established that Summit's statement in its petition was incorrect because industrial uses such as pipelines cannot be built in agricultural zones absent a variance or special exception, which Summit had not even sought.

62. The evidence further established that Summit has not complied with the zoning ordinances of counties that have adopted requirements specific to hazardous liquid pipelines.

63. Accordingly, the IUC's finding of compliance with Iowa Code § 479B.5(7) is not supported by substantial evidence.

Actions Inconsistent with Prior Agency Practice – Iowa Code § 17A.19(10)(h)

64. The IUC's prior practice and precedent has been to issue pipeline permits "conditioned upon receipt of all other required permits and authorizations." *In Re: Dakota Access, LLC*, No. HLP-2014-0001, 2016 WL 943929, at *36 (Mar. 10, 2016).

65. The Counties requested the same condition for Summit's pipeline. Such a condition was particularly appropriate in this case because there is ongoing litigation between Summit and several of the Counties over the validity of county zoning ordinances regulating hazardous liquid pipelines.

66. To date, Summit has refused to apply for county zoning permits, arguing that the zoning ordinances are preempted by state and federal law. That litigation is currently on appeal to the United States Court of Appeals for the Eighth Circuit. *See Couser v. Shelby County, et al.*, Eighth Circuit No. 23-3758; *Couser v. Story County, et al.*, Eighth Circuit No. 23-3760.

67. The IUC refused to impose the condition requested by the Counties, reasoning that Summit's obligation to comply with county zoning ordinances stems from the validity of those laws and regulation, which is in dispute.

68. However, the fact that the validity of county zoning ordinances is currently being litigated in federal court only underscores the need for this condition. If the Eighth Circuit holds that county zoning ordinances are preempted, then county zoning permits are not required and this condition would impose no obligation on Summit as it relates to county zoning permits. However, if the Eighth Circuit upholds the validity of the county zoning ordinances, this condition would ensure Summit's compliance with the county zoning ordinances just like any other required federal, state, or local permit.

69. The IUC's failure to impose this condition is contrary to its prior practice and precedents and is unreasonable and arbitrary.

Illogical and Irrational Reasoning – Iowa Code § 17A.19(10)(i)

70. The IUC's treatment of safety-related evidence in this proceeding was the product of reasoning so illogical as to render it wholly irrational.

71. Throughout the early stages of the proceeding, Summit argued that safety was not relevant to any criteria before the IUC and that any consideration of safety was preempted by the federal Pipeline Safety Act.

72. Summit was successful in resisting the Counties and other parties' attempt to obtain safety-related information.

73. Nevertheless, on the eve of hearing, Summit filed direct and rebuttal testimony which included substantial discussion of safety.

74. Summit thus used safety-related information for its own benefit while denying its use to the other parties, arguing on the one hand that it could not be compelled to produce safety-related information and that safety-related information could not be used in any way adverse to its project, while on the other hand using such safety-related information to its advantage during the IUC's balancing process.

75. The Counties moved to strike Summit's evidence on the grounds that it should be estopped from presenting safety-related evidence considering its unequivocal position throughout the proceeding that safety was irrelevant and preempted.

76. The IUC denied the Counties' motion without any legal analysis of the Counties' estoppel arguments.

77. In its final decision and order, the IUC made several contradictory and inconsistent findings related to safety.

78. For example, the IUC stated that “[w]hile the Board may consider safety as part of its analysis, the Board cannot impose safety criteria on Summit Carbon.”

79. However, the IUC proceeded to impose a number of safety standards as conditions on Summit’s permit, including x-ray inspections of pipe welds, pipeline coating testing, hydrostatic testing, use of thicker walled pipe, and use of fracture arrestors.

80. The IUC also concluded that it could not use dispersion modeling to assist with routing determinations because any modifications done based upon dispersion modeling “would be done under the guise of safety.”

81. However, the IUC proceeded to approve Summit’s route based on Summit’s consideration of dispersion modeling.

82. The IUC’s consideration of Summit’s safety-related evidence, while disclaiming any ability to consider safety in response to other parties’ arguments or evidence, was illogical and irrational.

83. The IUC allowed Summit to use safety as both a sword and shield, a tactic which is fundamentally unfair and offensive to justice.

84. Furthermore, the federal Pipeline Safety Act (“PSA”) only preempts states from adopting “safety standards,” but does not preclude them from regulating “the location or routing” of pipeline facilities. 49 U.S.C. § 60104(c), (e).

85. In light of this preemptive scope, the IUC’s decision to impose substantive safety standards as conditions on Summit’s pipeline, while refusing to even consider safety in the location and routing of process, is irrational and illogical.

Failure to Consider Relevant and Important Matters – Iowa Code § 17A.19(10)(i)

86. In employing its balancing test to determine whether Summit's project would promote the public convenience and necessity, the IUC weighed the taxes that would be paid by Summit to the Counties and other levels of government as a substantial benefit of the project.

87. However, the IUC failed to weigh the tax credits that Summit would receive as a cost of the project.

88. The evidence established that Summit would be receiving tax credits in the estimated amount of \$414 million per year for 12 years, and that these tax credits were far more than any economic benefit or tax revenue being provided to the Counties or to other levels of government.

89. The amount of tax credits Summit will receive is a relevant and important matter that a rational decisionmaker should have considered in weighing the costs and benefits of the project.

Irrational and Illogical Application of Law to Fact – Iowa Code § 17A.19(10)(m)

90. In employing its balancing test to determine whether Summit's project would promote the public convenience and necessity, the IUC treated the federal tax credits Summit will receive as a benefit.

91. In fact, the IUC found the tax credits weighed *heavily* in favor of Summit's petition.

92. The IUC's reasoning leads to the irrational and illogical result that tax *payments* by Summit are a public benefit, and tax *credits* back to Summit are also a public benefit. Logically, they cannot be both.

93. The IUC's reasoning is contrary to Iowa law, which treats tax credits as expenditures. *See* Iowa Code § 2.48(1) (defining "tax expenditure" as the "exclusion from the operation or collection of a tax imposed in this state," including "tax credits.>").

94. The IUC also determined that the ethanol industry's ability to access low carbon markets was a benefit that weighed in favor of the project.

95. However, the evidence at hearing established that access to low carbon markets will *increase* prices for consumers.

96. While acknowledging this fact, the IUC nonetheless found that such increased prices would be "enjoyed by farmers who are able to reap the benefits of the higher prices and receive a higher return on their product."

97. However, a financial benefit to the ethanol industry and farmers is not a benefit to the public, who will pay higher prices as a result of the pipeline.

98. Higher prices for consumers should have weighed against, not for, the project.

99. The IUC's weighing of the costs and benefits of the project was therefore illogical and irrational.

100. The IUC's application of law to fact was also illogical and irrational as it related to its denial of route modifications requested by the Counties.

101. For example, the Counties requested that the IUC not approve the North-South lateral line.

102. That line runs approximately 123 miles through seven counties and impacts 118 eminent domain parcels, yet serves only a single, small ethanol plant.

103. As found by the board member who dissented from the approval of the North-South lateral line, the anticipated benefits to be received by the one facility served by the North-South lateral do not justify the lateral's length, costs, and impacts to Iowa landowners.

104. The Counties also requested, for economic development reasons, that the IUC make route changes to avoid the boundaries of incorporated cities to allow for future growth and development, including the proposed route segments near the cities of Sioux City, Earling, Westphalia, Rockford, and Charles City.

105. The IUC refused to do so but gave no substantive explanation for its decision.

106. The IUC's denial of these route modifications without explanation was illogical and irrational.

Decision Making that is Unreasonable, Arbitrary, Capricious, or an Abuse of Discretion – Iowa Code § 17A.19(10)(n)

107. The above errors also render the IUC's final decision and order otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

108. In addition, the errors identified herein may fit under multiple subparagraphs of Iowa Code § 17A.19(10). The Counties reserve the right to argue these errors under any of the subparagraphs that might apply.

PRAYER FOR RELIEF

WHEREFORE, the Counties request that the Court reverse the IUC's final decision and order and remand it back to the agency for further proceedings as to the following:

- a. Find that Summit does not qualify as a common carrier;
- b. Impose conditions sufficient to ensure that any grant of eminent domain is no greater than necessary for the purported public use;
- c. Rule on each proposed finding of fact submitted by the parties;

d. Reconsider whether the pipeline promotes the public convenience and necessity when climate change, tax credits, and benefits to the ethanol industry are properly weighed in the analysis;

e. Find that Summit failed to satisfy the requirement of Iowa Code § 479B.5(7);

f. Condition Summit's permit on receipt of all other required permits and authorizations;

g. Exclude Summit's safety-related evidence on the basis of judicial estoppel and reconsider Summit's petition without such evidence;

h. Reconsider the pipeline route by giving appropriate consideration to safety and dispersion modeling;

i. Re-weigh the costs and benefits of the project by classifying tax credits as a cost rather than a benefit; and

j. Impose the route modifications requested by the Counties.

The Counties further request that the Court grant such other and further relief as the Court deems just and proper.

/s/ Jason M. Craig

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