

STATE OF SOUTH DAKOTA)
)
) :SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

DAKOTA ACCESS, LLC,

Plaintiff,

vs.

MARGARET C. HILT AND ELMER R. HILT, AS THE TRUSTEES OF THE MARGARET C. HILT REVOCABLE TRUST DATED JUNE 26, 2003; DEVONA B. SMITH, AS TRUSTEE OF DEVONA B. SMITH REVOCABLE TRUST DATED MAY 8, 2001; DELORES L. ASSID AND JAMES Z. ASSID, AS TRUSTEES OF THE ASSID FAMILY TRUST; RODNEY RENBACK; MARILYN RENBACK; PEDERSON AG, LLC; PENTE FARMS, LLC; DANIEL HOILAND; MARCIA HOILAND; JEAN OSTHUS; AND KKKP PROPERTY, LLLP;

Defendants.

Civ. 15-145

**PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came before the Court on August 13, 2015, in the Lincoln County Courthouse in Canton, South Dakota; and the Plaintiff having appeared by and through its attorneys of record, Brett Koenecke and Justin L. Bell of May, Adam, Gerdes and Thompson, LLP and Defendants Devona B. Smith, as Trustee Of Devona B. Smith Revocable Trust Dated May 8, 2001 and Delores L. Assid and James Z. Assid, as Trustees of the Assid Family Trust having appeared by and through their attorney of record David L. Edwards of Breit Law Office, P.C.; and the parties having fully briefed the matter and the Court having heard the arguments of counsel, examined the pleadings

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Lincoln County, S.D.
Clerk Circuit Court

EXHIBIT

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and other evidence which have been made a part of the record, and the Court being fully advised in the premises makes the following:

FINDINGS OF FACT

1. Plaintiff Dakota Access, LLC ("Dakota Access") proposes to construct a crude oil pipeline through several South Dakota counties, including Lincoln County (the "Dakota Access Pipeline"). Dakota Access filed an application with the South Dakota Public Utilities Commission (the "PUC") for the project on December 15, 2014.

2. Defendants own or are otherwise in possession of land in Lincoln County that is proposed to be crossed by the Dakota Access Pipeline.

3. Dakota Access alleges in its Complaint that "it is common carrier as defined by South Dakota and federal law and has the privilege of eminent domain pursuant to SDCL §§ 49-2-12 and 49-7-13." *Complaint* at ¶3.

4. Dakota Access further alleges that "Inherent in Dakota Access's privilege of eminent domain in the right to access property for survey purposes before condemnation." *Id.* at ¶4.

5. The PUC will conduct a hearing regarding Dakota Access' permit application beginning September 29, 2015.

6. Dakota Access has evaluated the proposed pipeline route according to local, state and federal rules and regulations that govern pipelines. *Affidavit of Micah T. Rorie in Support of Motion for Preliminary Injunction* dated June 17, 2015, at ¶¶5-8. During this evaluation, Dakota Access utilized a geographic information system ("GIS"), publicly available environmental and demographic data, soil and topographic conditions, location of public utilities, public properties or lands, and also evaluated environmental considerations such as wetlands, streams and rivers,

threatened and endangered species, cultural resources, agricultural lands, drainage features and unique land uses or land features. *Id.* Dakota Access has also driven, walked, surveyed and flown the proposed route to avoid as many physical land features and constraints as possible. *Id.* Dakota Access has completed the vast majority of the civil and environmental surveys along the proposed route. *Id.*

7. Defendants have refused to allow Dakota Access entrance upon their land to begin surveys on their property.

8. Plaintiff moved the Court for preliminary injunction to prohibit Defendants from refusing Dakota Access entry upon their land.

9. Defendants Devona B. Smith Revocable Trust and Assid Family Trust opposed the Plaintiff's motion by filing their Reply Brief in Opposition to Plaintiff's Motion for Preliminary Injunction.

CONCLUSIONS OF LAW

1. Proceedings to take private property by condemnation are special in character and must be conducted in strict accordance with governing statutes. *Lewis & Clark Rural Water Sys. v. Seeba*, 709 NW2d 824, 838 (SD 2006)(citing *Ehlers v. Jones*, 135 NW2d 22 (SD 1965)).

2. Article 6, §13 of the South Dakota Constitution provides "Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to the legal procedure established by the Legislature and according to §6 of this article[.]"

3. Pursuant to SDCL §49-41B-1, the South Dakota Legislature has found that it is a necessity to require a permit for energy conversion or transmission facilities. That statute provides in full:

The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that *a facility may not be constructed or operated in this state without first obtaining a permit from the commission.* (emphasis added).

4. To the extent SDCL §49-7-11 might apply to Dakota Access as a common carrier, it would furthermore subject Dakota Access to the requirements of SDCL Chapter 49-41B.

5. Dakota Access entry upon Defendants' land would constitute "a taking" under South Dakota law. Such a taking is impermissible without first obtaining the PUC permit in accordance with SDCL §49-41B-1.

6. Dakota Access' argument that its PUC permit application will be incomplete or prejudiced from not being able to survey the Defendants' land is without merit. Dakota Access has already completed the vast majority of the civil and environmental surveys along the proposed route and submitted that information to the PUC. *See Aff. Rorie* at ¶¶5-8, *supra*. Moreover, the applicable administrative rules only require Dakota Access to provide in its application "existing information" regarding the effect of the proposed facility on the ecosystem and environment. ARSD §20:10:22:16.

7. In several contexts, the Legislature has recognized a condemning authority's right to enter land for survey purposes. *See* SDCL §50-6A-19 ("For the purpose of making surveys and examinations relative to eminent domain proceedings, it shall be lawful for the [regional airport] authority to enter upon the land, doing no unnecessary damage."); SDCL §46A-7A-156 (repealed)

(Cendak Irrigation District “may enter on land to make surveys, may exercise the right of eminent domain); SDCL §46A-6-5 (any irrigation district “shall have all the authority herein granted for levying special assessments or otherwise providing funds necessary to properly drain such lands, entering upon lands for the purpose of making surveys, exercising the right of eminent domain”); SDCL §46-8-2.1 (“The circuit court for the county in which a proposed water project is located has jurisdiction to issue an order permitting entry upon land for the purpose of surveying or locating the most advantageous route for works necessary to put water to beneficial use.”).

8. However, the Legislature has not granted a pipeline applicant condemnation rights for survey purposes, nor has this Court been granted such jurisdiction.

9. “The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. We are guided by the principle that a court should construe multiple statutes covering the same subject matter in such a way as to give effect to all of the statutes if possible.” *Schafer v. Deuel County*, 745 NW2d 241, 245 (SD 2006).

10. In construing the relevant statutes, there is no statutory grant of authority to allow the subject surveys and no jurisdiction granted by the Legislature to this Court for such purpose.

11. Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dacy v. Gors*, 471 NW2d 576, 579 (SD 1991)(citing *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

12. The inability of Dakota Access to survey the Defendants land may result in a slowdown of its pipeline construction project. A slowdown of construction does not constitute irreparable harm. In addition, irreparable harm is not found because the PUC has not yet decided whether to grant the permit to Dakota Access or not.

13. Dakota Access may have been able to prove the remaining factors for a preliminary injunction, but the absence of a showing of irreparable harm renders the remaining factors moot.

14. Dakota Access's Motion for Preliminary Injunction is denied.

15. If any Findings of Fact are improperly designated as such, they are hereby incorporated by reference in the Conclusions of Law. If any Conclusions of Law are improperly designated as such, they are hereby incorporated by reference in the Findings of Fact.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Dated this 1st day of September, 2015.

BY THE COURT:

[Handwritten Signature]
HONORABLE BRADLEY G. ZELL
CIRCUIT COURT, JUDICIAL SYSTEM



ATTEST: **KRISTIE TORGERSON**
LINCOLN COUNTY CLERK OF COURTS

By: Karen Nelson
Deputy

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