STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: **SUMMIT CARBON SOLUTIONS, LLC** **PETITION FOR HAZARDOUS LIQUID PIPELINE PERMIT**	**DOCKET NO. HLP-2021-0001** **JORDE LANDOWNERS' POST-HEARING OPENING BRIEF**

This Post-Hearing Opening Brief is submitted on behalf of all Jorde Landowners, as defined prior to the outset of the Iowa Utilities Board ("IUB" or "Board") hearing in this matter, and on behalf of Exhibit H Landowners Julie Kaufman, Marvin Leaders, Kohles Family Farms, LLC, Allen and Christine Hayek, and Douglas and Jill Williamson, and Kathryn Josephine Byars each of whom have joined with the original Jorde Landowners since conclusion of the hearing for briefing assistance.

TABLE OF CONTENTS

SECTION V. INDIVIDUAL LANDOWNER BRIEF INDEX

Volume No. 1 – Jorde Landowners' Parcel Specific Briefs

- Chen Beverly Chow
- Benita A. Schiltz Revocable Trust dated the 6th day of May 2009
- Estate of Dorla D. Hill
- Jane Anna Howard Trust dated July 28, 2011
- Kathleen Hunt

Volume No. 2 – Jorde Landowners' Parcel Specific Briefs

- Weber Acres, Ltd.
- NWJ Farms, L.L.P.; Nels Johnson & Joyce Johnson
- Andrew and Caila Corcoran
- Janet Miller
- Debra K. Lavalle

Volume No. 3 – Jorde Landowners' Parcel Specific Briefs

- Kent Kasischke
- Mary J. Woodward Trust dated July 21, 2009
- "James D. Fetrow Revocable Living Trust u/a/d February 27, 1996 as amended and restated June 4, 2002"
- Betty H. Nolan Revocable Trust under Agreement dated October 7, 2005
- Gail R. Todd Revocable Trust, dated February 9, 2009

Volume No. 4 – Jorde Landowners' Parcel Specific Briefs

- Donald O. Johannsen Trust dated September 26, 2011
- Graham Farms
- Craig Beyer; JCD Beyer Family Farm, LLC
- Mau Farm, Inc.
- Dennis L. King

Volume No. 5 – Jorde Landowners' Parcel Specific Briefs

- Barbara Schomaker
- John L. Hargens
- Margaret Ann Thomson
- Gadsby Family Farm Company, LLC
- Michael White

Volume No. 6 – Jorde Landowners' Parcel Specific Briefs

- Marie Larson
- DeWayne Schultz
- Virgil W. Ewoldt and Bonnie L. Ewoldt Family Trust dated May 8, 2013
- Estate of Hans Hoffmeier & Linda Hoffmeier
- Vicki Koeppe

Volume No. 7 – Jorde Landowners' Parcel Specific Briefs

- Kruthoff Farms, L.L.C.
- Sharen F. Kleckner
- Delmar E. Baines Revocable Living Trust
- Daniel L. Wahl Family Trust dated April 4, 2018
- Robert J. Soat

Volume No. 8 – Jorde Landowners' Parcel Specific Briefs

- Lloyd W. Curtis and Della M. Curtis Living Trust, dated April 15, 2007
- Matthew Valen
- George G. Cummins
- Kathy A. Johnson Revocable Trust Dated June 12, 1999
- Sandy S. Sonne; Larry D. Sonne

Volume No. 9 – Jorde Landowners' Parcel Specific Briefs

- Tronchetti Family Trust
- The Gunion Family Trust
- Brenda A. Barr
- Teresa A. Thoms Revocable Trust dated September 10, 2020
- Raymond T. Stockdale Revocable Trust, dated July 20, 2018; Katherine A. Stockdale Revocable Trust

Volume No. 10 – Jorde Landowners' Parcel Specific Briefs

- Nancy C. Erickson
- Arndorfer Brothers Partnership; Marilyn V. Arndorfer Revocable Trust
- Moore Family Trust dated September 13, 1990; Drews Land Company, Inc.

Volume No. 11 – Jorde Landowners' Parcel Specific Briefs

- Alan A. Laubenthal
- Geraldine R. Pedersen Revocable Trust
- Joan T. Centlivre Revocable Trust
- Dr. Jeffrey Colvin
- TSL Farms LLC

Volume No. 12 – Jorde Landowners' Parcel Specific Briefs

- Nancy Jean Conrad
- Maher Farms, Incorporated
- Debra L. Wheeler
- Mersch Farms, Inc.
- Cletus R. Elbert Revocable Trust dated November 7, 2022

Volume No. 13 – Jorde Landowners' Parcel Specific Briefs

- Grandma Frieda Boettger Hansen's 40, Inc.
- Bonnie J. Peters
- Cornelius J. Schelling and Esther Ruth Schelling Revocable Trust
- Wilmer J. Hulstein Revocable Trust dated December 9, 1999
- Joanne M. Franken; Gerald Franken

Volume No. 14 – Jorde Landowners' Parcel Specific Briefs

- Howard H. and Bernice Sandbulte Revocable Trust - Eugene Sandbulte
- Linda Hoffmeier
- D. Richard Hocraffer
- Marjorie Swan
- Robert A. Watts

Volume No. 15 – Jorde Landowners' Parcel Specific Briefs

- Dennis L. Valen
- Productive Farms, LLC
- Joan E. Gaul 2012 Trust
- Delores A. Sidener Family Trust dated October 29, 1993
- Maureen H Allan

Volume No. 16 – Jorde Landowners' Parcel Specific Briefs

- Huntoon Farms, Ltd.
- Denise A. Tindall Revocable Trust, created November 2, 2021
- Timothy Baughman
- Sandra K. Marth; Gary L. Marth
- Jackson Farms of Terril, Inc.

Volume No. 17 – Jorde Landowners' Parcel Specific Briefs

- Lori L. Goth Revocable Trust dated November 26, 2019
- Kohles Family Farms
- David L. Gerber
- Neil R. Dahlquist Living Trust dated January 15, 2019
- Jill & Doug Williamson

Volume No. 18 – Jorde Landowners' Parcel Specific Briefs

- Carl S. Palmquist Testamentary Trust
- Margaret A. Thomas Revocable Trust
- Julie Kaufmann
- RMT Family Real Estate, LLC
- Jenifer Jane Berge a/k/a Jenifer J. Berge

Volume No. 19 – Jorde Landowners' Parcel Specific Briefs

- Allen & Christine Hayek
- Gaylord Boeck
- Marvin Leaders
- Louis Rosman Estate
- Greg L. Pickrell Separate Property Trust

THE TAX CREDIT CAPTURE PIPELINE

Not all pipelines are created equal. Permit Petitioner, Summit Carbon Solutions, Inc. ("Summit"), proposes the first ever supercritical hazardous carbon dioxide pipeline across nearly 722 miles[1] of valuable Iowa land, mostly prime farm ground.

Iowa is not currently "crisscrossed" by a single foot of supercritical carbon dioxide pipeline. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019). Summit would not transport energy and its proposal is not energy infrastructure. *Puntenney*, 928 N.W. 2d at 841. Rather, Summit proposes to transport waste in the form of CO2 that currently vents from ethanol plants safely into the atmosphere. Under Summit's proposal, this waste CO2 is destined for "permanent" storage deep underground in North Dakota.

But there is no evidence in the record of **(1)** a single "market" for permanently stored CO2 deep underground in North Dakota, or **(2)** a single person or entity that is contracted to "use" this waste CO2. And even if this evidence existed, which it does not, Summit's claimed purpose for the pipeline—to permanently reduce carbon dioxide in the atmosphere—would fail. There is no evidence in the record that the Summit pipeline will lead to long-term reduced prices on refined products and goods and service dependent on supercritical CO2 and refined products. *Puntenney*, 928 N.W. 2d at 850. There is substantial evidence—thousands of pages—of the real and direct negative economic and social impacts Summit has already caused, continues to inflict, and will only magnify and multiple should the Board approved this doomed project.

[1] Jorde Landowner ("JLO") Ex. 644 Summit Map

RELEVANT LAW AND LEGAL STANDARDS SUMMARIZED

Before such a proposed pipeline could be approved and before a historic and unprecedented amount of Iowa landowners' property rights could be trampled upon, Summit must clear many hurdles, including but not limited to, each of the following:

Subject Matter Jurisdiction: Chapter 479B of the Iowa Code specifically limits this Board's permitting authority over hazardous liquid pipelines. To invoke the IUB's jurisdiction, the applicant—here, Summit—must affirmatively demonstrate that it is a "pipeline company" transporting or storing "hazardous liquid." Iowa Code § 479B.2(4). This requires an additional showing that the molecules of hazardous "supercritical" CO2 are transported in a "liquid" state. *See* § 479B.2(2) (defining "hazardous liquid" in part as "*liquified* carbon dioxide"). Unless Summit affirmatively proves each of these requirements, the IUB lacks jurisdiction over its permit application.

Public Convenience and Necessity: Even if the Board has jurisdiction, Summit would still need to prove that its proposed services "will promote the public convenience and necessity." § 479B.9. This generally requires the applicant to show that the "substantial benefits" of its proposed pipeline "outweigh[] the costs." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019). For the Dakota Access Pipeline, this Board considered factors such as reduced transportation costs, market demand, and stabilized prices for crude oil derivatives—all factors that shown through record evidence. Ultimately, the Board must weigh these "benefits" against the Iowa Legislature's objective in "protect[ing] landowners and tenants" from "environmental and economic damages." Iowa Code § 479B.1.

Public Use: In addition to jurisdiction and public necessity, Summit must affirmatively prove that its proposed pipeline—which will require eminent domain—satisfies the

constitutional requirement of "public use." Under Iowa law, this requires something more than mere indirect economic benefits. *Puntenney,* 928 N.W.2d at 845. With the Dakota Access Pipeline, for example, the Iowa Supreme Court rejected the argument that "trickle-down benefits of economic development" are enough to satisfy "public use." *Id*. at 849. Rather, the constitutional requirement was satisfied there because—and only because—the applicant affirmatively proved through record evidence that its proposed services would result in the "cheaper and safer transportation of oil," and would fill a critical market need for the production and refining of crude oil. *Id*.

Protect Landowners: Relevant to each of the above considerations, but distinct from them, Summit must also prove that its proposed project aligns with the Legislature's purpose in enacting Chapter 479B—to implement "controls" over hazardous liquid pipelines "to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline[.]" § 479B.1. To this end, Summit must provide a compelling reason for its unprecedent project, which, if approved, will affect the property rights of thousands of landowners throughout the State. Summit must do all of this on a per Exhibit H parcel basis to be awarded eminent domain rights on any given parcel.

In the absence of clear evidence showing "protection" from "environmental or economic damages which may result from [the project]," that eminent domain rights should be granted for each particular parcel, and a showing of the specific "extent [eminent domain is] necessary," the application must be denied. § 479B.1 and § 479B.16.

QUESTIONS TO BE ANSWERED

Summit's significant hurdles and burdens of proof can be structed as the following questions for the Board to consider and answer based on the evidence in the record:

- Does the Board have jurisdiction over this permit petition?
    - Are the molecules of hazardous "supercritical" CO2 identical to those of hazardous liquid CO2 pursuant to IA Code Section 479B.2(2)?
    - Does Summit's proposed "Pipeline" fit under § 479B.2(3)?
    - Is Summit a "Pipeline Company" under § 479B.2(4)?

- Has Summit proven that its "… proposed services will promote the public convenience and necessity" pursuant to § 479B.9? (emphasis added). If there is no public convenience and necessity finding the Board doesn't go further.
    - What does it mean to "promote" the public convenience and necessity?
    - What are all the factors to weigh in the public convenience and necessity balancing process? (*Puntenney* at 841)

- Would the Board's grant of eminent domain powers to Summit pursuant to 479B.16 violate article I, section 18 of the Iowa Constitution or the Fifth and Fourteenth Amendments to the United States Constitution?
    - Has Summit proven that its "proposed services" for which it claims it must have the right to exercise eminent domain upon hundreds of Iowa parcels, are for a public purpose, public use, or public improvement consistent with IA Code Sections 6A.22(2) "necessary to the function of a common carrier"?
        - Has Summit proven it is a common carrier under its unique business model?
    - Has Summit proven that the public, in the aggregate, would be the primary beneficiary of the pipeline? (*Puntenney* at 850)

- Does Summit's Permit petition comply with the purposes of Chapter 479B as expressed in 479B.1?

  - Has Summit proven that the pre-construction, construction, operation, and maintenance, of its proposed hazardous pipeline on a route at the locations as contemplated "protect landowners and tenants from environmental or economic damages which may result…"? § 479B.1
  - Has Summit proven its proposed hazardous pipeline's location and route are the least invasive to Exhibit H landowners? § 479B.1

- Has Summit proven that it is "necessary" for the Board to grant each and every request for the right of eminent domain across every inch of every Exhibit H parcel per § 479B.1?
- Has Summit proven what is "the extent necessary" for Summit to be vested with the right of eminent domain across each Exhibit H parcel per § 479B.16?

ARGUMENT

"It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other, and there can be neither prosperity nor progress where there is uncertainty."[2]

If approved, Summit's pipeline will jeopardize and infringe upon a historic and unprecedented number of landowners' property right in Iowa infusing uncertain, risk, and negative economic impacts. Given this reality, Iowa law requires companies like Summit to clear several hurdles before permitting approval is granted. In this case, Summit's application fails each and every requirement imposed under Iowa law, and its application for a permit should therefore be denied.

[2] Tr. 4031-4032

I. The Board lacks jurisdiction over Summit's Petition.

Summit's application hits a roadblock right out of the gate. To obtain a permit under Chapter 479, an applicant must demonstrate—as a threshold matter—that it is a "pipeline company" as defined by the Act. This, in turn, requires evidence of the applicant's intent to transport, transmit, or store "hazardous liquid." Iowa Code § 479B.2(4).

As discussed below, the Board lacks jurisdiction over Summit's application because "supercritical" carbon dioxide—which is what Summit intends to transport—is not a "hazardous *liquid*." As such, Summit does not fall within the definition of a "pipeline company" under Chapter 479B. Because Summit has not—and cannot—establish this threshold jurisdictional requirement, its "*liquid* pipeline permit" should be denied.

A. Summit is not a "pipeline company" under 479B.2(4) because it is not storing or transporting "hazardous liquid."

Iowa law is clear: only a "pipeline company" can obtain a permit for a hazardous liquid pipeline. The term "pipeline company" is specifically defined as "a person engaged in or organized for the purpose of owning, operating, or controlling pipelines for the transportation or transmission of any **hazardous liquid** or underground storage facilities for the underground storage of any hazardous liquid." § 479B.2(4) (emphasis added).

So, in order to qualify as a "pipeline company" under Chapter 479B, the applicant must prove through evidence that it owns, operates, or controls <u>either</u> (1) "pipelines for the transportation or transmission of any hazardous liquid," <u>or</u> (2) "underground storage facilities for the underground storage of any hazardous liquid." § 479B.2(4). Because Summit does not claim to own or control underground storage facilities, jurisdiction turns on whether the proposed pipeline transports or transmits "hazardous liquid." *Id.*

For purposes of chapter 479B, "hazardous liquid" means "crude oil, refined petroleum products, liquefied petroleum gases, anhydrous ammonia, liquid fertilizers, **liquefied carbon dioxide**, alcohols, and coal slurries interstate pipelines for the transportation or transmission of natural gas or hazardous liquids." Iowa Code § 479B.2(2) (emphasis added). Thus, Summit cannot meet its burden merely by showing the transmission of some phase of carbon dioxide—rather, Summit's petition must establish the transportation or transmission of *liquified* carbon dioxide. § 479B.2(2).

Summit cannot meet this requirement, so the Board lacks jurisdiction over its application. Indeed, in its January 28, 2022, Petition, Summit states it is proposing to construct 681 miles of 4-to-24-inch diameter pipeline in Iowa for the transportation of "carbon dioxide." *See* Petition for Hazardous Liquid Pipeline Permit at page 1, section II. Then, in subsequent sworn testimony, Summit specifically and repeatedly averred that the pipeline will transport carbon dioxide in the "supercritical" state. *See* Powell direct testimony at pages 4 and 8; Louque direct testimony at pages 3, 5, and 7; and McCown direct testimony at pages 5 and 9.

Accepting Summit's admissions as true, the permit application cannot be granted because **(1)** carbon dioxide in the "supercritical" phase is not a "liquid," and **(2)** "supercritical" carbon dioxide is not the same as or synonymous with "liquified carbon dioxide." If the Iowa Legislature intended "supercritical" carbon dioxide be included for purposes of Iowa Code Ch. 479B, then it would have added the word "supercritical" to the definition of "hazardous liquid." Because the legislature did not do so, the Board lacks jurisdiction over the application. *See* § 479B.2(4) (pipeline companies must transport hazardous liquid, which is defined in part as *liquified* carbon dioxide).

B. Supercritical carbon dioxide is not a liquid under 479B.2(2)

The regulations of the Pipeline Hazardous Materials Safety Administration (PHMSA) incorporate this important distinction. For example, 49 CFR § 195.1 provides that "…this Part applies to pipeline facilities and the transportation of **hazardous liquids** or **carbon dioxide**…" Then, 49 CFR § 195.2 defines both terms separately.

The definition of "hazardous liquid" does not include carbon dioxide. "Hazardous liquid means petroleum, petroleum products, anhydrous ammonia, and ethanol or other non-petroleum fuel, including biofuel, which is flammable, toxic, or would be harmful to the environment if released in significant quantities." *Id.* And the definition of "carbon dioxide" makes specific reference to the physical state of carbon dioxide and that state is the "supercritical" state. "Carbon dioxide means a **fluid** consisting of more than 90 percent carbon dioxide molecules compressed to a **supercritical** state." See *Id.* (emphasis added). The definition of "carbon dioxide" does not utilize the word "liquid" as that is a different physical state than "supercritical."

The point is that the physical state of the carbon dioxide matters for purposes of both federal regulations and Iowa Code chapter 479B. See George Cummins' Motion to Dismiss filed on or about June 20, 2023, and all Attachments, including the Affidavits of experts Jasper Hardesty and Richard B. Kuprewicz incorporated herein. These gentlemen are chemical engineers and experts on these matters, and each one explains why the "supercritical phase" is separate and distinct from "liquid" or "liquified" carbon dioxide.

C. **Because Summit is not a "pipeline company," the Board does not have subject matter jurisdiction over its permit application**.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings belong." *Heartland Express v. Gardner,* 675 N.W.2d 259, 262 (Iowa 2003) (citations omitted). "Challenges to the subject matter jurisdiction of an adjudicatory body—be it a court or an agency—may be raised at any time, and we have consistently held that parties cannot confer subject matter jurisdiction by waiver or consent." *Heartland Express, Inc. v. Terry,* 631 N.W.2d 260, 265 (Iowa 2001); *see also Bair v. Blue Ribbon, Inc.*, 256 Iowa 660, 665–66, 129 N.W.2d 85, 88 (1964) (noting that "[a]n objection based upon the want of jurisdiction of the court over the subject matter of the action may be raised at any time, and is not even waived by consent.")

Moreover, the Board does not have the authority to interpret chapter 479B's statutory terms to extend its jurisdiction. "The power of the agency is limited to the power granted by statute." *Service Employees International Union, Local 199 v. Iowa Board of Regents*, 928 N.W.2d 69, 75 (Iowa 2019). Ultimately, the interpretation and construction of a statute is a question of law for the courts to decide. *City of Des Moines*, 911 N.W.2d at 438. A Court will "not defer to the agency's interpretation of its own statutory authority to issue a rule unless 'the legislature has clearly vested that interpretation in the agency.'" *Id.* (quoting *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 533 (Iowa 2017)). And, as the Iowa Supreme Court stated in the *Mathis* case, "in recent years, we have generally not deferred to IUB interpretations of statutory terms." See *Mathis v. Iowa Utilities Board*, 934 N.W.2d 423, 427 (Iowa, 2019).

Summit's permit petition must be denied because the Board lacks subject matter jurisdiction under the code, § 479B, that Summit invoked – they can't change horses at the end of the race. Only a "pipeline company" can apply for and obtain a permit and Summit does not fit this definition. Because Summit's proposed pipeline neither transmits nor transports "liquified" carbon dioxide, the Board lacks subject matter jurisdiction, and its Petition should be denied.

II. Summit's proposed pipeline will not promote the "public convenience and necessity" as required under § 479B.9.

Even if the Board had subject matter jurisdiction, which it does not, the application would still fail under the requirements of § 479B.9.

Under Iowa law, "A permit shall not be granted to a pipeline company unless the board determines that the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9. By its terms, § 479B.9 requires a showing by the applicant of *both* "public convenience" *and* "necessity"—after all, "[t]he words are not synonymous, and effect must be given to both." *Puntenney*, 928 N.W.2d at 840 (quoting *Thomson v. Iowa State Com. Comm'n*, 235 Iowa 469, 474 (1944)).

In *Puntenney*, the Iowa Supreme Court approved the IUB's application of a "balancing test" for determining whether a particular project is both publicly convenient and necessary. The test balances and considers whether "the substantial benefits [of the project] outweigh[] the costs." *Id*. (quoting *S. E. Iowa Co-op. Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814, 821 (Iowa 2001)). The burden rests with the applicant to satisfy this test based on the evidence adduced in the record. *See id*. The IUB's application of the balancing test must account for the

legislature's objective in "protect[ing] landowners and tenants" from "environmental and economic damages." Iowa Code § 479B.1.

In applying the balancing test approved in *Puntenney*, the IUB gave weight to the reduced transportation costs associated with the Dakota Access Pipeline, finding "lower costs for crude oil transportation tend to keep prices of crude oil derivatives lower than they otherwise would be." *Id.* at 841. The IUB also credited evidence indicating that the Dakota Access Pipeline will lead to "longer-term, reduced prices on refined products and goods and services dependent on crude oil and refined products." *Id*. And IUB looked to data showing that "pipeline transportation of oil is safter than rail transportation of oil." *Id.*

As is obvious on the face of Summit's Permit Petition and as set forth below, none of these considerations are present here. Additionally, significant facts tilt the balancing analysis in Jorde Landowners' favor. Accordingly, to the extent the IUB exercises jurisdiction at all, Summit's permit application should be denied for failure to satisfy the public convenience and necessity standard.

A. Summit's 2,000 Miles of Hazardous CO2 Pipeline Is Not the Answer

"… [C]arbon capture is not a climate solution. On the contrary, investing in carbon capture delays the needed transition away from fossil fuels and other combustible energy sources. It poses significant new environmental, health, and safety risks, particularly to Black, Brown, and Indigenous communities already overburdened by industrial pollution, dispossession, and the impacts of climate change."[3] The farce Summit peddles is that proposed project is somehow good for the environment was not supported by the evidence. Carbon

[3] JLOs' Pre-filed Testimony Attachment No. 6

Capture and Storage ("CCS") projects have systematically overpromised and underdelivered and the alleged CCS "technology" has not even made a dent in CO2 emissions.[4]

"CCS technology and associated pipeline infrastructure are economically costly and come with a significant set of public health hazards. We can achieve more CO2 reduction and eliminate pollution and mining and pipeline infrastructure by utilizing existing and accessible renewable energy like wind, solar, efficiency, and other readily scalable and available strategies. It is reckless to spend money on unproven technologies that contribute negligible benefit or, worse, disproportionately impact already disenfranchised communities."[5]

"Science indicates that they [CO2 pipelines] are poor investments and unlikely to have a meaningful effect on reducing greenhouse gas emissions."[6] Elizabeth Garst testified for Jorde Landowners. See JLO Ex. 485-486. Ms. Garst did her undergraduate studies at Stanford University, received a M.S. in Agricultural Economics from Michigan State University, and an M.B.A. from Harvard Business School with a concentration in Agribusiness.[7] She provided expert opinion that "[c]apturing carbon dioxide generated during the process of fermentation at ethanol plants and then transporting it by pipelines through Iowa and other states and storing it underground would have trivial effects on our nation's carbon dioxide emissions. Carbon dioxide emissions in the U.S. in 2020 were 110 times greater than the amount that might be captured at all our nation's ethanol plants under the most favorable projections."[8]

The irony, or perhaps hypocrisy, of Summit's claimed remote environmental benefits ring true when you conclude the obvious – if Summit is correct and more ethanol is produced,

[4] JLOs' Pre-filed Testimony Attachment No. 5
[5] JLO Pre-filed Testimony Attachment No. 11, pg. 6
[6] JLO Ex. 485-486 pg. 6
[7] JLO Ex. 485 pg. 4
[8] JLO Ex. 485-486 pg. 7

that is a net negative environmentally speaking. Garst testified that "[t]he use of ethanol in our cars contributes to greenhouse gas emissions, which exacerbate our ever-increasing climate crisis. Tailpipe emissions from U.S. vehicles in 2020 using gasoline blended with 10% ethanol (E10) were almost 25 times greater than the 43 million metric tons of carbon dioxide that could potentially be captured at all the nation's ethanol plants. Because vehicles using ethanol rather than regular gasoline typically get 4% to 5% fewer miles per gallon of fuel consumed, due to the lower energy content of ethanol, carbon dioxide emissions per mile traveled are as high or higher for ethanol blends as for pure gasoline."[9]

"Because the carbon dioxide transported by pipelines from ethanol plants for underground storage would hardly dent U.S. greenhouse gas emissions while incurring substantial damage to private land, we believe insufficient public benefit would accrue from allowing private pipeline projects to proceed using eminent domain."[10] We are fooling ourselves if we think producing larger quantities of ethanol and then shipping that across the county or to Canada is going to create a net reduction in greenhouse gas emissions. In fact, "supplementing gasoline with ethanol would increase climate-damaging greenhouse gas emissions, further pollute the water from Iowa to Louisiana, and divert needed funds away from real climate solutions in California and the Midwest."[11] Studies have demonstrated that "ethanol is 24% more carbon-intensive than traditional fuel."[12] See peer-reviewed article in the journal Proceedings of the National Academy of Sciences of the United States of America (PNAS) as cited in testimony of Jorde Landowner witness Sherri Deal-Tyne. The enormous

[9] JLO Ex. 485-486 pg. 7
[10] JLO Ex. 485-486 pg. 7
[11] JLO Ex. 479-480 pg. 6
[12] *Id.*

rise in nitrogen fertilizer to raise corn for ethanol has increased emissions of nitrous oxide, a potent greenhouse gas that is 289 times as powerful as CO2. Adding carbon capture to ethanol production will only compound these problems. Fertilizers used in corn production, including for ethanol, also cause vast water pollution extending from drinking water in Iowa to the Dead Zone in the Gulf of Mexico.[13]

It is neither publicly convenience nor necessary to approve a project that is not likely to achieve its stated purpose.

B. Large Scale CCS Projects are Failures

Large scale carbon capture projects to date have been failures and cost the public billions of dollars. "The Texas Clean Energy and Hydrogen Energy California C.C.S. projects were allocated over a half- billion dollars collectively, then dissolved. The list goes on, with at least 15 projects burning billions of dollars of public money without sequestering any meaningful amount of carbon dioxide. Petro Nova, apparently the only recent commercial-scale power project to inject carbon dioxide underground in the United States (for enhanced oil recovery), shut down in 2020 despite hundreds of millions of dollars in tax credits."[14] "These subsidies create a perverse incentive, because for companies to qualify for the subsidies, carbon dioxide must be produced, then captured and buried. This incentive handicaps technologies that reduce carbon dioxide production in the first place, tilting the playing field against promising innovations that avoid fossil fuels in the steel, fertilizer and cement industries while locking in long-term oil and gas use."[15] See also, "Shell's massive carbon

[13] *Id.*
[14] JLOs' Pre-filed Testimony Attachment No. 8, pg. 4
[15] JLOs' Pre-filed Testimony Attachment No. 8, pg. 5

capture facility in Canada emits far more than it captures, study says" at JLO Ex. 422 page 322, also JLO Ex. 428. See also, report on the Gorgon Carbon Capture and Storage project in Western Australia – "Despite this pedigree [ownership by oil and gas global majors Shell, ExxonMobil, and Chevron] the Gorgon CCS project as failed to deliver, underperforming its targets for the first five years by about 50%." *Id.*

Summit, a recent start-up LLC with no history and no experience, is more likely than not to fail at its stated goals given the largest and most experienced companies in the world have not been able to make large scale projects a success.

C. Federal Safety Regulations Woefully Behind

Bill Caram, the Executive Director of the Pipeline Safety Trust testified in support of Jorde Landowners.[16] Mr. Caram serves on the US Department of Transportation's Hazardous Liquids Pipeline Advisory Committee (LPAC) and is a member of the White House Carbon Capture Utilization and Storage Task Force.[17] "As a pipeline safety expert, I can confidently say that we are not ready for a buildout of carbon dioxide pipelines. Federal minimum safety regulations are in desperate need of modernization."[18]

"In 1986, a large, natural release of carbon dioxide from Lake Nyos in Cameroon led to the death of every person within a 16-mile radius of the release — more than 1,700 people. In response, Congress mandated that the U.S. Department of Transportation begin to regulate carbon dioxide pipelines. Rather than develop new rules to mitigate the unique risks carbon dioxide pipelines pose, U.S. DOT simply added carbon dioxide to existing pipeline regulations

[16] Bill Caram Pre-filed Testimony at JLO Ex. 469-470
[17] JLO Ex. 469 pg. 3
[18] *Id* pg. 5

designed for hydrocarbon liquids, a step that was wholly inadequate and inappropriate. For example, an impurity such as water, which is notoriously difficult to eliminate from carbon dioxide pipelines, can wreak havoc on a pipeline by producing carbonic acid which aggressively eats at steel and is not addressed in current regulations."[19]

It is important to determine which "businesses, schools, hospitals and other buildings are within the area where a pipeline failure could injure or kill people. This can be a relatively simple calculation for hydrocarbon pipelines. However, for carbon dioxide pipelines, a release can travel over large distances in lethal concentrations in unknown directions for large distances."[20]

Mr. Caram testified about significant regulatory gaps and CO2 pipelines including contaminants within CO2 being transported, the matter of odorization, and undefined hazard distances. "Contaminants within CO2 products being transported can jeopardize the integrity of the pipeline" because when water mixes with CO2 carbonic acid can form which rapidly erodes carbon steel pipelines.[21] "Odorization of CO2 is likely one of the simplest ways to ensure effective leak detection as well as public safety and emergency response."[22] Until odorization strategies are determined it is premature to site a CO2 pipeline as proposed by Summit. Additionally, "there is currently no defined safe distance or plume dispersion model for developing a potential impact area (PIR) along CO2 pipelines. Without a PIR, it is impossible to establish accurate emergency response safe distances. Due to the asphyxiation potential for CO2 pipelines, this could have deadly consequences. Only once an appropriate

[19] *Id* pg. 7
[20] *Id*
[21] *Id* pg. 9
[22] *Id* pg. 10

PIR for CO2 pipelines has been established can PHMSA assess the effectiveness of integrity management procedures."[23] Pipeline Expert engineer Richard Kuprewicz added, "[t]o address this risk, PHMSA should revise federal regulations, especially for supercritical CO2 pipelines, to specifically mitigate the effects of these fracture propagation forces. The current regulations do not adequately address these CO2 fracture risks."

It is neither publicly convenient nor necessary to rush approval of a Permit Petition that proposes a never done before project in scope and size before federal regulations are in place – but if the Board does push forward absent appropriate federal regulations, it then has no choice but to respect all local regulations such as setbacks in County Ordinances.

D. You are Who You Hang Out With

SK E&S, an energy company affiliated with South Korea's SK Group invested $110 million to acquire a ten (10) percent stake in Summit Carbon Solutions. [24] "Prosecutors raid SK Group in connection with alleged slush fund cases at SK Networks"[25] "SK Group's No. 2 executive indicted on breach of trust charge."[26] On June 10, 2020 "SK Engineering & Construction Co. Ltd pleaded guilty to one count of wire fraud and paid $68.4 million in criminal fines, restitution, and a False Claims Act settlement in connection with a fraudulent scheme to obtain U.S. Army construction contracts through payments to a Department of Defense contracting official and the submission of false claims to the U.S. government."[27] Summit has failed to denounce the actions of SK Group and maintain their 10% ownership stake in this venture.

[23] *Id*
[24] JLO Attachment No. 20, pg. 13
[25] Id. pg 16
[26] Id pg. 18
[27] Id pg. 23

This type of entity should not be given a Permit in Iowa. It is neither publicly convenient nor necessary to approve an entity with questionable owners and unknown owners.

E. No Net Economic Benefits to Summit's Pipeline

One of Summit's few justifications for Petition approval is that if approved there would be some temporary jobs filled by out-of-state pipeline workers. The reliability of Summit's "economic contributions" claims, however, can be summed up by simply reading the limitations and restrictions and disclaimers within Summit's Phillips Direct Exhibit 1 page 2, the Ernst & Young ("EY") report:

> "Limitations and restrictions
>
> The services performed by Ernst & Young LLP (EY US) in preparing this report for the Summit Carbon Solutions were advisory in nature. Neither the report nor any of our work constitutes a legal opinion or advice. No representation is made relating to matters of a legal nature. **Our scope of work was determined by Summit** and agreed to by EY US pursuant to the terms of our engagement agreement. Certain analyses **and findings in this report are based on estimates and/or assumptions about the cost of construction and operation of the Summit Carbon Solution's pipeline project.** The findings and analyses contained in the report are based on data and information made available to EY US through the date hereof. Should additional relevant data or information become available after the date of the report, such data or information may have a material impact on the findings in the report. EY US has no future obligation to update the report.
>
> The report is intended solely for use by Summit Carbon Solutions. While we believe the work performed is responsive to Summit's request pursuant to the scope of work in the SOW, **we make no representation as to the sufficiency of the report and our work for any other purposes. Any third parties reading the report should be aware that the report is subject to limitations, and the scope of the report was not designed for use or reliance by third parties for investment purposes or any other purpose.** We assume no duty, obligation, or responsibility whatsoever to any third parties that may obtain access to the report. (emphasis added).

Summit's economic contribution "evidence" on its face warns the Board, as a third party, to not rely on the report for any purpose! Jorde Landowners agree this is sound warning.

To make matters worse for Summit, EY describes further limitations on the reliability and veracity of its report on page 17 of Summit's Phillips Direct Ex. 1:

> "In interpreting the results, the reader should note the following:
> All of the results presented in this report are based to some degree on **data provided by Summit, which has not been independently audited or validated** by EY. As such, EY offers no opinion on the validity of the data provided by Summit…" (emphasis added).
>
> "**The economic impact does not consider the counterfactual. Total employment figures presented in this report are not necessarily net new jobs**, but rather gross new jobs supported in the five pipeline states and the rest of the United States. Some of the jobs may be supported as workers shift between industries in the labor market, meaning the **net change in employment will likely be smaller than the gross employment impacts shown in this report**." (emphasis added).

EY highlighting that Summit's "guest-ements" of economic impacts failed to consider the counterfactual is devastating to Summit. Again, Summit induces the Board that if any labor is utilized for its project or it expends any money on a good or service in advancement of its project that it has checked the box of economic benefit. But what EY knows is you can't rely on data that doesn't consider the other side of the ledger – the counterfactual. The cost and negative impacts of the project were not analyzed or calculated. The EY report is Summit propaganda and not a reliable tool to assist in the public convenience and necessity balancing exercise. Landowners stress the Board must not fall into Summit's trap and instead engage in logical analysis of NET overall benefits, if any, and more factually the NET costs of the proposed project. In fact, Mr. Phillips admitted that all the alleged "induced" and "indirect" so-called benefit calculations include double counting[28] such that those estimated are knowingly inflated.

[28] Tr. 2382 and 2378; Phillips Direct Ex. 1 pg. 18

Summit was asked to "[P]rovide the details of any tax equity financing Summit has used to secure funds for the construction of the proposed pipeline."[29] This inquiry is relevant to test any claimed net benefit of the project. But, Summit provided this answer instead, "[S]ummit objects to this Request because is not reasonably calculated to lead to admissible evidence relevant to any issue or decision criteria before the IUB for decision."[30] This is one example of many that Summit has failed to provide information necessary for the board to balance and fully consider its burden of proving both public convenience and necessity, the Permit Petition must be denied.

Summit cannot simply say the project will employ one or more persons on a short-term basis and then trip over one of their burdens of proof. The Board analysis must weigh any alleged positive benefits less all alleged costs. A project without significantly more tangible public benefits to public costs cannot be approved. Later sections highlight the overwhelming cost of approving this Petition.

None of the EY assertions were made to a reasonable degree of professional certainty and any EY claim was disclaimed as noted above. The "report" and its "findings" are unreliable and should not be considered.

In sum, as is typical, industry pays for a "independent" report that simply dresses up and regurgitates the client's, Summit, rosy unverified and unvetted one-sided self-serving projections and then warns that no third party should rely on the report or its conclusions which are based on unaudited and unvalidated data and whose alleged economic impact conclusions

[29] JLO Ex. 576/576R, pg. 30
[30] *Id.*

do "not consider the counterfactual." Board, please do not pass go, do not enable Summit's collect $18.5 billion in tax credits, and instead proceed directly to denial of Summit's Petition.

i. No Evidence Summit is the Savior of Ethanol

Jorde Landowners pushed Mr. James Pirolli's speculative conclusions of an alleged 10-35 cents per gallon revenue increase for ethanol plants made in his direct testimony at page 9 lines 5-6. Request: "Provide all workpapers and underlying assumptions showing how Summit arrived at a figure of 10-35 cents per gallon of revenue for ethanol plants."[31] Summit's response is telling: "**The calculations are not in evidence**."[32] (emphasis added). Jorde Landowners agree. Without this evidence the Board cannot conclude that there would be any revenue increase, let alone how short such an alleged bounce may be, and therefore, Summit's claim isn't reliable and can't be used in the public convenience or necessity balancing analysis.

ii. Reduction in Property Taxes

Nearly every Jorde Landowner testified in their written testimony about protesting their property valuation should Summit's hazardous pipeline be forced upon them. See JLO Pre-filed testimony generally pages 22-23. Landowners testified they will protest their property assessment and request the County Assessor reduce the valuation considering the hazardous pipeline on their property. If Landowners are successful, that will reduce the property tax and tax revenue of that County and have a net negative affect on the County at large and all residents and businesses within that County.

[31] JLO Ex. 576/576R, pg. 35
[32] *Id.*

F. 45Q Tax Credits – Corporate Welfare Boondoggle Costs

Governor Reynolds professed upholding the Iowa state motto stating Americans are not in support of giving billions in tax giveaways to millionaires and billionaires[33]. If this is truly what Iowa stands for then the IUB must reject Summit's Petition.

The primary beneficiary of this hazardous pipeline is Summit and its wealthy investors. This project exists because of the 45Q Tax Credit boondoggle. Summit seeks authority to construct a pipeline with capacity, as proposed, to move 18 million metric tons of CO2 per year. The 45Q Tax Credits would be revenue to Summit of $85/metric ton of CO2 captured.[34] $85/metric ton x 18,000,000 metric tons = $1,530,000,000 per year. Presently the tax credits are available at this rate the 12-year period beginning on the date the equipment was originally placed in service[35]. 12 years x $1,530,000,000 per year = $18,360,000,000 paid to Summit. Not too bad when you could use eminent domain to take land of others to make you richer.

Not only does this $18+ billion go to Summit, instead of to the State of Iowa or the public, because it is in the form of tax credits, the public gets to pay for this by making up the tax revenue deficit. You see it takes tax revenue to operate the United States and when tax credits are offered you are reducing the tax receipts of the Country and given Summit will not pay tax on the tax credit sums received like a typical business would pay tax on its net income, you and the rest of the public will make up the tax revenue shortfall.

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[33] JLO Pre-filed Testimony, page 23-24; Governor Reynolds televised speech https://www.c-span.org/video/?517465-1/republican-response-state-union-address minutes 4:05 to 4:15, 4:52 to 5:02 and 12:02 to 13.20

[34] JLO Pre-filed testimony generally at pg. 29-32; 26 U.S. Code § 45Q

[35] 26 U.S. Code § 45Q(a)(4)(A)

The appropriate public convenience and necessity balancing analysis requires that Summit to start in a $18,360,000,000 hole and they failed to prove how the public even gets back to $0. Summit can't get to dollar number one of a net positive benefit of this project unless it can first account for the $18,360,000,000 cost. Summit hasn't done so because it can't do so. Based on the record, it is impossible for this project as proposed to ever be a net benefit to the public.

If the Board approves this Petition, Summit's temporary out-of-state third-party contractors and their subcontractors will infiltrate Iowa for a year or two. The wages paid will largely be spent out of state in the resident state of those pipeline workers. Iowa won't see even a temporary bump in state income tax receipts. The personal property tax and very minimal real property tax Summit is required by law to pay on its pipeline and related appurtenances is a rounding error when compared to the billions Summit and Mr. Rastetter will use to line their pockets.

Regardless of if the Board wants to enable Mr. Rastetter's riches or not, and regardless of his mountain of political contributions (see JLO Ex. 422 pg. 317, also JLO Ex. 427 for list of known donations) there is no urgency to approve the permit petition because as long as the construction of the qualified facility begins before January 1, 2033 it can be eligible for the 45Q tax credits. [36] There is time to get this right, if the Board is leaning towards approval, and there are simply too many problems with the current petition and it must be denied.

These tax credits – are a cost to the public and not a benefit of the project –<u>the public would not be the primary beneficiary of the pipeline</u>. The primary beneficiary is clearly

[36] *26 U.S. Code* § 45Q(d)(1)

Summit's secret group of investors. In no universe could the public ever benefit more than Summit's shareholders. Summit's business plan doesn't allow it. Recall this is not a utility providing any sort of energy delivery or energy transportation to further the public need or use. This project is doomed under the *Puntenney* test that Permit applicant's economic gain can't be the primary driver for approval. Trickle-down benefits of economic development are not enough to constitute public use.

G. The 12-Year Pipeline

It would be irresponsible for the Board to approve a 12-year pipeline, particularly when balancing all the negative implications to Iowa and its landowners and citizens. Jorde Landowners offered Summit the opportunity to prove its proposed hazardous pipeline has an operations life cycle greater than the 12-year 45Q tax payment scheme. Summit willfully failed to produce any such evidence and in fact failed to provide any substantive response, because they cannot. This was the request: "[P]rovide any workpapers showing the economic impact on Summit's revenue sources and business model after the conclusion of twelve years of 45Q eligibility."[37] Summit responded, "The Section 45Q credit is just one source of revenue for Summit's capture, transportation, and sequestration system. Low carbon solutions will generate revenue through other sources including direct payments from shippers, low carbon fuel markets, voluntary compliance initiatives, and other tax credits."[38] Summit provides four responses to the question. First, "direct payments from shippers." However, Summit has failed to produce a single contract or single piece of evidence that they have an agreement with any third-party shipper to ship CO2 on its proposed pipeline. See here also James Pirolli's hearing

[37] JLO Ex. 576/576R, pg. 31
[38] *Id.*

testimony. As to Summit's second alleged source, "low carbon fuel markets" Summit failed to explain exactly how Iowa ethanol was going to physically get to those markets, how long the markets would be available, and the direct alleged benefit of those markets on the public at large. The third and fourth alleged sources stated above, "voluntary compliance initiatives, and other tax credits" are also vague, undefined, speculative, and unreliable as sufficient answers to justify the invasion and destruction and negative impacts the construction and location of 700 miles of pipeline would have on Iowa and its landowners. Summit failed to meet its burdens of proof.

H. No Evidence of Net Carbon Emissions Reduction

Summit vaguely claims climate benefits via reduced carbon emissions as a purpose of their proposal; however, it provided no evidence of any of the following such that the Board cannot determine any net permanent reduction on carbon emissions. Summit has the burden of proof – the opposition does not - and Summit failed to present evidence on any of the following:

- How much carbon will be released during construction of the pipe itself?
- Hom much carbon will be released during transportation of the pipe to all locations across Iowa?
- How much carbon will be released during mobilization and transportation of every person and piece of equipment used for pre-construction, construction, post-construction, and remediation related to the pipeline?
- How much carbon will be released during construction of the pipeline?

- How much carbon will be released during the disturbance of land that otherwise was no-till or low-till farm ground?
- How much carbon will be released during construction of the capture facilities?
- How much carbon will be released during the lifetime maintenance of the capture facilities?
- How much carbon will be released during the lifetime maintenance of the pipeline?
- How much carbon will be released during the lifetime operation of the capture facilities?
- How much carbon will be released during the lifetime operation of the pipeline?
- How much carbon will be released during decommissioning of the pipeline?

These questions should have been answered by Summit and because they were not that Board is without sufficient evidence to perform its balancing analysis. Given only Summit has the burden of proof and there is none as to these questions, it is impossible for the Board to find that Summit has offered sufficient proof that there would be any net reduction of carbon emissions in the world's atmosphere simply if this project were to be approved. Summit has the burden of proof and it failed.

I. Summit for EOR – The Worst Kept Secret

The business "genius" behind Summit's decision to dump waste CO2 in North Dakota is because their dumping ground is in close proximity to significant oil and gas resources that could use and "need" CO2 for enhanced oil recovery ("EOR"). Summit's real plan is to grab the 45Q government handout Tax Credits and when the time is right, sell the CO2 for

fracking and EOR purposes. But don't take our word for it just read between the lines of what the North Dakota State Department of Mineral Resources Director Lynn Helms said shortly after the ND Public Service Commission denied Summit's North Dakota Pipeline route application 3-0.[39] "…[M]ore carbon dioxide will be needed to sustain oil production for the long term." This comes following the PSC's decision to deny Summit's pipeline permit.[40] "Helms said North Dakota needs to get the gas from somewhere to help with enhanced oil recovery." Current North Dakota CO2 production only meets about 10 percent of what is needed for EOR.[41]

The connection is clear. As soon as the North Dakota PSC denied the pipeline North Dakota's Mineral Resources department made obvious the nexus – the CO2 Summit claims will be "permanently" sequestered and not used for any purpose is really intended for fracking to enable increased production of carbon intense fuel sources and financially benefit the North Dakota holdings of one its largest investors – billionaire Harlod Hamm of Continental Resources. What also is not being explained is that if the CO2 is used for fracking then that qualifies as sequestering CO2 because the CO2 is injected into the subsurface formations to allow more production of oil and/or natural gas, so industry then argues the CO2 injected is technically sequestered all the while producing more carbon intense fuels and destroying all alleged environmental benefits of Summit's proposal.

Furthering this thought is the fact that only CO2 used for EOR purposes must be transported in a supercritical state – as Summit claims it will. Richard B Kuprewicz, one of

[39] JLO Ex. 570
[40] JLO Ex. 571
[41] *Id.*

the foremost pipeline engineering experts in the country, testified for Jorde Landowners. See JLO Ex. 477 and 478. Kuprewicz testified "the primary reason that the existing 5,000 or so miles of CO2 pipelines transport CO2 in a supercritical state is because CO2 in this state is an excellent solvent having no liquid surface tension. It readily dissolves oil trapped in porous rock."[42]

On the other hand, "CO2 destined for sequestration could be transported as a gas or liquid, because sequestration does not, as a practical matter, need the CO2 to be in a supercritical state, and federal law does not require transportation in a supercritical state." Clearly the sources and needs of CO2 for EOR are not the same as those for the CCS objective, which is to remove CO2 from the atmosphere.

Expert witness Bill Caram testified that only CO2 that is moved in a supercritical state is regulated under PHMSA. There are currently no federal regulations for CO2 transported in liquid or gas form.[43] Kuprewicz continued "[i]n fact, a clever pipeline operator could employ loopholes to avoid federal pipeline safety oversight by PHMSA." Hmmmm.

So, unless Summit is transporting CO2 for the ultimate purpose for use in EOR, there would be no reason to transport in a supercritical phase, unless they really will be transporting in a liquid or gas phase but know if they were honest about that their project would be dead in its tracks given no federal regulation exist for transporting CO2 in those forms. This discussion harkens back to Jorde Landowners' jurisdictional argument made at the outset. It is undisputed that there are three (3) distinct and different phases in which CO2 can be transported, supercritical, liquid, or gas – they are all different. The IUB doesn't have

[42] JLO Ex. 477 pg 16
[43] JLO Ex. 467 pg 9

jurisdiction over Summit's supercritical CO2 pipeline Permit Petition. Summit is counting on its Iowa largess and political connections to help their sham purposes be approved.

J. Proposed Easement Terms Not Publicly Convenient or Necessary

Condemning and taking Iowa land by eminent domain does not fit in with what Governor Reynolds professes and does not support the Governor's plans for rural Iowa development[44].

The Board's balancing analysis must include review and careful consideration of the legal rights the Board's eminent domain approval would vest in Summit and the corresponding restrictions such Board action would place on the Landowners – forever. Significant time was spent examining Summit witness Micah Rorie on the exemplar Easement Agreement attached to his pre-filed testimony[45]. Although Summit also included a shorter version of the powers it seeks over landowners with their various Ex. H filing requests, should the Board grant eminent domain against any landowner, then the Board is *de facto* approving and endorsing each term of the longer Easement Agreement. If you grant eminent domain powers, then Summit can force that onerous Easement Agreement, as drafted, and discussed below, upon any such landowner and the landowner has no recourse in Court to modify those provisions. No judge, no jury has the power to amend or modify Summit's proposed easement in any judicial proceeding, including condemnation actions. Board grant of eminent domain against any one parcel is the Board's explicit approval of each and every word of the Micah Rorie Easement Agreement.

[44] Tr. page 6917, lines 7-22
[45] Summit Rorie Direct Ex. 1, pgs. 2-8

If the Board approves the Petition and if it then approves eminent domain powers against Ex. H Landowners it will have granted significant unilateral power to Summit over Iowa land, the current and future uses and structures on that land, and the farmers, tenants, residents, and owners of that land. Therefore, evaluation of the Easement and all of its terms are necessary to determine public convenience and necessity as well the separate analysis for eminent domain decisions under 479B.1 and 479B.16. But for the Board greenlighting this project and granting Summit eminent domain powers, Summit would not be able to force its other Easement terms upon unwilling Landowners.

Summit's Easement is problematic in many ways as follows that were outlined by nearly every Jorde Landowner in their pre-filed testimony pages 6 through 17 and confirmed in testimony with Summit's witnesses Rorie and Powell:

- Neither the Board nor any Landowner knows who Summit Carbon Solutions, LLC[46] is. We don't know the owners other than a select few, including SK Group affiliated foreign entity whose sister companies plead guilty to crimes against the United States of America including tens of millions of dollars of fraud against the U.S. Military. Other owners and potential beneficiaries of corporate welfare remain unknown as Summit resisted all attempts to pull the curtain back on this newly formed Limited Liability Company. If you are so proud of who you are and what you do – why hide? This is particularly distressing when these owners seek powers co-equal is government – the power

[46] Summit Rorie Direct Exhibit 1, pg. 2

to seize property rights over private landowners. Until we know who all the owners are it is impossible to apply the pro-con balancing analysis.

- Summit's request of a "permanent"[47] easement is unreasonable and weighs heavily against them in the balancing analysis. No Summit witness or evidence justified a forever until the end of earth taking of Iowa land. Other than theoretical possible future revenue streams for Summit, the project's viability is anchored to the 12-year 45Q tax credit. If we are to presume the Federal Government has prioritized carbon capture via this tax credit, we must then conclude the 12-year limit on that incentive is a sufficient length for permanent easement rights on Iowa land. The Board is uniquely positioned, and the Iowa Legislature has entrusted the Board to make a reasonable determination if eminent domain rights are to be granted at all but if they are with what restrictions. A 12-year easement is worth over $18,000,000,000 to Summit. There is zero evidence of economic viability after 12 years.
- Granting of these rights forever will substantially impair each Landowners' health, safety, and general welfare as well as are negative economic impacts:
    - for "the purposes of owning, accessing, surveying, establishing, laying, constructing, reconstructing, installing, realigning, modifying, replacing, improving, substituting, operating, inspecting, maintaining, repairing, patrolling, protecting, changing slopes of cuts and fills to ensure proper lateral and subjacent support for and drainage for, changing the size of,

[47] *Id.* pg, 2, 1.a.

relocating and changing the route or routes of, abandoning in place and removing at will, in whole or in part, one pipeline not to exceed twenty-four inches (24") in nominal diameter…"[48]

- There is no justification of a hazardous CO2 pipeline diameter up to 24 inches, other than Summit wants it that big. 20 inches is already potentially deadly at 2,920 feet.[49] 8-inch diameter can be deadly at 417 feet[50].
- Abandonment in place[51] of such pipeline Landowners already do not want is not reasonable. This request alone is enough to deny the Petition as there is no evidence from Summit as to why abandonment is convenient or necessary for the public. It is certainly convenient for Summit's owners to hold the golden ticket to avoid future business expenses but how wide and long of a red carpet is the IUB willing to roll out? Such unilateral powers and the threat and ability to abandon the pipeline in place poses a threat of serious injury to my social and economic condition but it also substantially impairs my health, safety and welfare all the while unduly interfering with the orderly development of my land and therefore the region.[52]
- Allowing Summit an Easement to not only transport CO2 waste but also "for the transportation of … its naturally occurring constituents and associated substances and any appurtenant facilities above or below ground, including

[48] *Id.*
[49] JLO Ex. 645 pg. 10
[50] *Id*.
[51] Summit Rorie Direct Exhibit 1, pg. 2, 1.a.
[52] Jorde Landowners' Pre-filed Testimony pg. 11-12

aerial markers, power drops, telecommunications, cathodic protection, and such other equipment as is used or useful for the foregoing purposes …"[53] is unreasonable. At any time whenever it suits Summit can construct and located on or under Landowners' land "any appurtenant facilities" and "such other equipment" Summit in its sole discretion deems necessary or convenient to Summit and their profit generation. Granting Summit's Petition requests eliminates all power of the Landowner to protest or negotiate further use of their land should Summit switch business plans and start shipping any "naturally occurring constituents" of CO2 – whatever those are – or any "associated substances" – whatever those are. We don't know and the Board doesn't know.

- 24/7/365 Access is unreasonable. Summit seeks an "Access Easement"[54] with zero restrictions and would allow them and their agents to enter anywhere on Landowners' entire parcel at any time and does not restrict movement upon the permanent right-of-way easement only. This means that every second forever Summit holds the power to tell the Landowner, their tenants, their invited guests, and agents where they can and can't be located and what they can and can't do on their own land insofar as it may interfere with Summit's desires.
- Summit seeks the right to move its permanent and temporary easements and reconfigure them at any time yet there is no compensation or reimbursement for the inconvenience and costs this would have on the landowner or their tenants.[55]

[53] Summit Rorie Direct Exhibit 1, pg. 2, 1.a.
[54] Summit Rorie Direct Exhibit 1, pg. 2, 1.c.
[55] Summit Rorie Direct Exhibit 1, pg. 3, para. 2. "Location"

- Summit's request that the Board allow it to only restore Landowners' property "insofar as reasonably practicable…"[56] as solely determined by Summit is unreasonable. Summit wants this power because it knows the land will never be returned to the condition it was before their intrusion. The land is forever scarred and damaged to varying degrees.
- IUB were to approve this Petition, which it should not, Summit would have the unilateral power to tell Landowner what they can and can't do on all of the easements. If anything, that Landowner wants to do on their property above the surface of where the pipeline or any easement is located that in Summit's "sole discretion" "causes a safety hazard or unreasonably interfere[s]" with Summit's rights, then Landowner is prohibited from taking such action. See Easement paragraph 5.a. – "Landowner's Use." Such restrictions chill the natural use of the property and negatively affects the value of the property and poses a threat of serious injury to my social and economic condition, but it also substantially impairs my health, safety and welfare all the while unduly interfering with the orderly development of their land and therefore the region.[57]
- Unless previously being given permission by Summit – which it can withhold, Landowner cannot construct anything on the easements, cannot drill or operate any well or equipment for production or development of minerals, cannot remove soil or change the grade or slope of my land, cannot impound surface

[56] Summit Rorie Direct Exhibit 1, pg. 3, para. 4. "Restoration"
[57] JLO Pre-filed Testimony pg. 15

water, and cannot plant trees or place landscaping.[58] Landowner also cannot place any above ground or below ground "obstruction" of any kind that Summit may deem to interfere with or be inconvenient to operation of the pipeline or other Pipeline Facilities or use of the Easements without written permission from Summit – which they can withhold. See Easement paragraph 5.b. – "Landowner's Use." Worse yet, if I do utilize my property as I see fit, and Summit in its sole discretion determines any such actions in any way "…interferes or may interfere with its right…" then Summit "shall have the immediate right to correct or remove such violation or obstruction at the sole expense of Landowner."[59] "Such restrictions chill the natural use of the property and negatively affects the value of the property and poses a threat of serious injury to my social and economic condition, but it also substantially impairs my health, safety and welfare all the while unduly interfering with the orderly development of my land and therefor the region."[60]

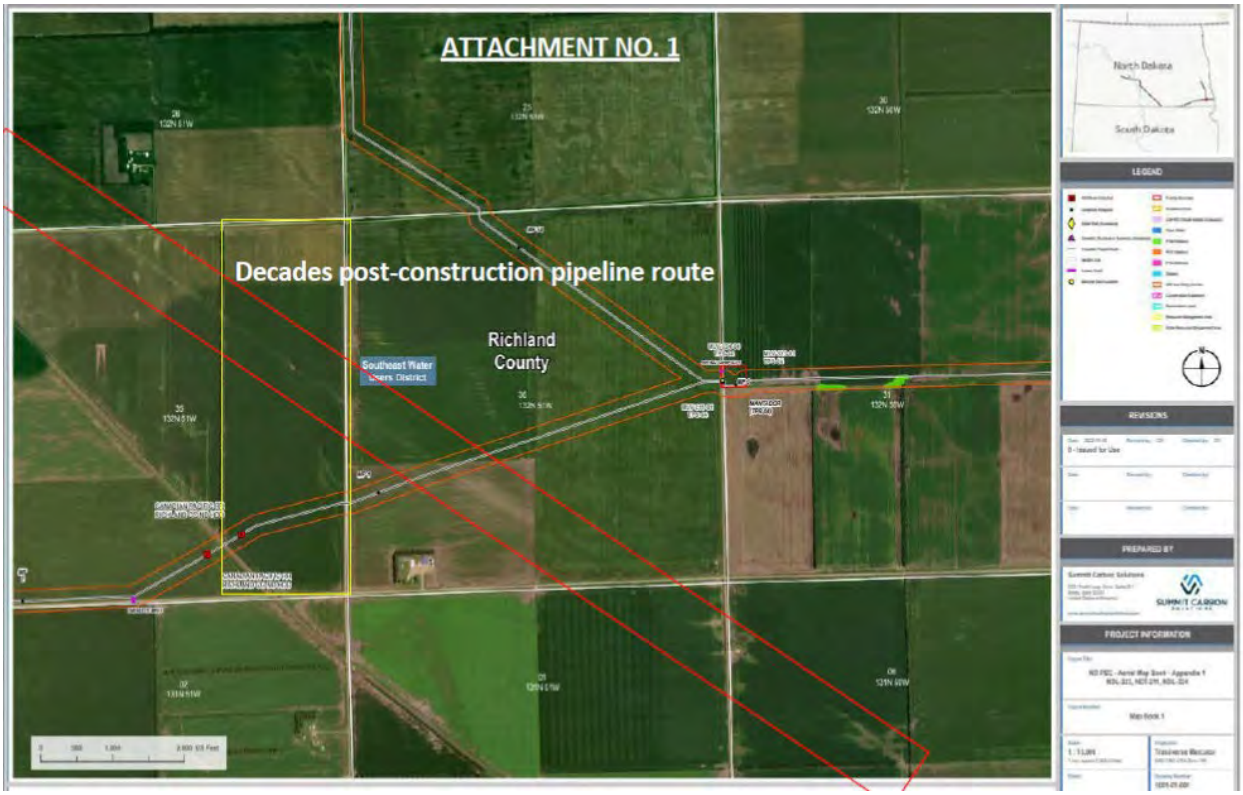
- If the IUB were to approve this Petition, which it should not, Landowner is prohibited "during the initial construction of the Pipeline Facilities or any construction, maintenance, repair, replacement or removal work on the Pipeline Facilities…" from using any portion of the Easements for any purpose. See Easement paragraph 5.c. – "Landowner's Use."

i. Yield Losses Persist for Decades

[58] Summit Rorie Direct Exhibit 1, pg. 4, para. 5.b.
[59] *Id.*
[60] Jorde Landowner pre-filed testimony generally pg. 16

It should be no surprise that tearing up the soil, soil mixing, compaction, and generally disturbing ordinary farming practices reduces crop yields. Reduced yields mean reduced profits, less income, and less taxes being paid. Even the industry funded Iowa State study by Dakota Access Pipeline concluded: "Our findings show extensive soil disturbance from construction activities had adverse effects on soil physical properties, which come from mixing of topsoil and subsoil, as well as soil compaction from heavy machinery."[61]

Loren Staroba, a North Dakota landowner with two existing pipelines and Summit planned as the third, testified and provided evidence proving crop and yield loss 25 to 45 years AFTER initial pipeline construction. See JLO 491 to 494. Even the fourth-generation image below clearly shows the scar deep in the land 45 years post-pipeline construction[62]:



[61] Jorde Landowners' Attachment No. 9, pg. 2 – Iowa State Pipeline study 2021
[62] JLO Ex. 491 pg. 4, Attach No. 1

ii. Liability Insurance Impacts Not Cured by Summit's Promises

Summit and its executives, when under fire during hearing testimony made various assurances and promises related to liability and landowner risks in case of a rupture or leak – the veracity and believability of those promises are questionable – but Summit didn't make promises on behalf of third parties like its liability insurer because if can't.

Attachment No. 4 to most Jorde Landowners' pre-filed testimony is a copy of a Federal Lawsuit out of the District of Nebraska where Zurich American Insurance Company sued Nebraska farmer-landowners who accidently struck two hazardous pipelines on their property owned by Magellan Midstream Partners, LP. So, while the pipeline company did not directly sue landowners for their honest mistake – not an intentional bad act – the Insurance company instead sued landowners after paying out to their insured, Magellan, for its losses, and sought to recoup that payment for losses from landowner-farmers. Zurich sued the farmers to recover "$3,044,255.19 on behalf of Magellan related to clean up, remediation, and other damage caused by the Release."[63] In addition, Zurich sued the farmers for $1,106,893.50 in future damages.[64]

In Zurich's negligence theory it alleged farmers did not use the One Call Notification System, however, it did not mention that there were no longer any visible pipeline location signs or any indication the farmers even knew the pipelines existed. As would be the case years from now, when Summit has cashed out and sold out and its successor is too busy counting its money than to bother with maintaining old signs put in years or decades earlier.

[63] JLOs' Attachment No 4. pg. 4 para 24-25 and pg. 5, para 32-34
[64] *Id.*

[65]

Interestingly, Zurich, on behalf of the Magellan pipeline company, sued the farmers under negligence and trespass theories. This is significant because while Summit has verbally said it would remove language from its proposed easements related to retaining the right to sue landowners for negligence in some instances, trespass is not a negligence theory. Trespass is an intentional tort based on an intentional act. This is a sneaky way for Summit's or its insurance company's lawyers to make the IUB think Summit is broadening landowner protections in its easement while in reality Summit, and its successors, are maintaining the right to sue under legal liability theories that they retain against landowners in its proposed Easement language.

But all of these problems are in addition to the fact that Summit does not indemnify landowners from the claims of third parties, not only Summit's own insurance carriers, but neighbors or other who may be injured or suffer damage from CO2 migration from a rupture.

[65] JLO Pre-filed Testimony Attach No. 21, pg. 10

Summit speaks extensively about indemnifying Landowners for damage to the pipeline and to the physical infrastructure but nothing concrete about indemnification for ANY CLAIMS arising from or out of CO2 damages or injuries or any other substances transported within the proposed pipeline now or in the future. Summit also maintains the One-Call defense such that if in 30 years from now, when Summit is long forgotten, and the little CO2 Waring signs are missing or unintelligible all Summit's successor will say is you didn't use One-Call and therefore the indemnification provision does not apply.

The point is, regardless of if this pipeline becomes obsolete when the 45Q tax credits run out or if it is operating in some form long in the future, the landowner is always at risk that a clever insurance defense attorney or pipeline attorney will develop a theory that could bankrupt any landowner unfortunate enough to own property upon which this pipeline is placed. And, even if they were lucky enough to escape liability, the cost and stress to defend themselves from a lawsuit can never be recouped. These are real risks and real costs to Iowans that Summit does not want to see the light of day – because they know this Permit Petition must be denied on this basis alone. These undue impacts to the farming and business operations of the landowners are too significant to ignore.

Attachment No. 12 to most Jorde Landowners' pre-filed testimony provides exemplar correspondence from various Insurance Companies whose opinions on whether a landowner would have liability coverage for damages caused by a release of CO2 range from no coverage due to pollution exclusion exceptions to unable to provide a coverage commitment one way or another. Neither of these assessments are palpable for Iowa landowners. Indeed, numerous landowners testified about either the inability to obtain liability insurance coverage or

unsatisfactory responses from insurance companies that have not and will not commit to covering landowners if they need it. A few highlighted here:

- Kent Pickrell testified for the Greg L. Pickrell Property Trust that he could not get liability insurance to protect against the concerns a pipeline poses. He tried after DAPL became located on this property and his inability to obtain insurance for his farm rings true should Summit be approved. So, they are selling the farm as the only way to protect themselves from potential Summit failures and the uninsurable and unlimited liability that could ensue.[66]
- Maureen Allan received an unsatisfactory response when she inquired to Farm Bureau: "The short answer is there's no easy answer. All claims are investigated at the time of loss to determine coverage. Based on the specific situation, coverage could be with the pipeline, individual policy, or denied."[67]
- After much back and forth with their current insurance provider, Sherri Webb learned CO2 would be considered a "pollutant" and all pollution related exclusions would apply to any claims made alleging CO2 was the cause of "bodily injury" or "property damage." This is the scenario Summit does not want to talk about. Regardless of who caused a leak or rupture or who is at fault for same, if CO2 escapes and the CO2 molecules are the proximate cause of either bodily injury or property damage, which includes loss of livestock, the landowners has NO COVERAGE. It's fine for Summit to say it will indemnify

[66] Tr. 7004
[67] JLO Ex. 233, pg. 4-5

the landowner for physical damage to the pipe (in some instances) but that has nothing to do with the real concerns expressed repeatedly by landowners.[68]

- Jill Williamson was told by State Farm that no such coverage to protect her from CO2 caused damages exists – she can't buy any such insurance to protect her or the farm assets from such claims.[69]
- Tom McDonald testified for TSL Farms that his insurer refuses to provide any assurances at all of whether he would be covered or not. "WILL NOT PROVIDE ANYTHING IN WRITING ABOUT COVERAGE OR NO COVERAGE." TSL can cross their fingers and hope for the best. But he was informed that CO2 is a pollutant, his umbrella policy language has the pollutant exclusion – meaning no coverage for CO2 related damage claims.[70]
- Winston Gadsby summed this all up well: "With a pipeline, there's nothing in it for me. This is like a bank coming to me and saying, "Here. We're giving you $100,000. This is a loan. Enjoy it. Oh, by the way, you owe ($)10,000 in liability on this forever." Not just ten years, not just 20, this is forever."[71]

This is significant for Board consideration, as is the fact Summit cannot indemnify Landowners for the actions of Summit's own liability insurers as the unfortunate Nebraska farmers quickly learned. Summit's $35 million policy is of no significance – it could be $35 Billion – what is covered, who is indemnified, and for what is the more important piece.

[68] JLO Ex. 348 pg. 424-431, aka Attachment No. 31
[69] Tr. 1230
[70] JLO Ex. 307 pg. 252, aka Attachment No. 23
[71] Tr. 6400

K. Practical Concerns Outweigh Private Profits

i. CO2 is Hazardous and Toxic to Living Things

Summit did not and cannot defend itself against the significant evidence detailing the omnipresent risks this project poses to Iowans. Unlike crude oil or its derivatives currently moving across Iowa, compressed supercritical CO2 is heavier than air but rather than sinking and staying on the ground like crude oil would, released CO2 displaces oxygen and can travel at concentrated levels.[72] The direction of travel is variable given the effects of weather, topography and other factors.

We know these facts about the kind of CO2 Summit proposed to transport:

- Concentrated CO2 is an asphyxiant and a toxicant.[73]
- Gaseous CO2 is 1.5 times heavier than air and when released in large quantities as gas or a liquid and displaces ambient air.[74]
- Human exposure to 10,000 Parts per million (ppm) of CO2 to 30,000 PPM is "unhealthy."[75]
- Human exposure to 30,000 to 50,000 ppm of CO2 is a "serious health risk."[76]
- **The National Institute for Occupational Safety and Health (NIOSH) defines IDLH as "the atmospheric concentration of any toxic, corrosive, or asphyxiant substance that poses an immediate threat to life, could cause**

[72] JLO Ex. 11 pg. 4
[73] JLO Ex. 11 – Iowa Chapter Physicians for Social Responsibility
[74] JLO Ex. 11 – Iowa Chapter Physicians for Social Responsibility
[75] JLO Ex. 568 and 11
[76] *Id.*

irreversible or delayed adverse health effects, or could interfere with an individual's ability to escape from a dangerous atmosphere." [77]

- **Human exposure to 40,000 ppm of CO2 is "immediately dangerous to life or health (IDLH)."**[78]
- Symptoms of human CO2 toxicity at 3% volume of CO2 in the air (30,000 ppm) include reduced hearing, mild narcosis, increased heart rate and blood pressure, and respiratory stimulation.[79]
- CO2 concentration of 4-5% (40,000 to 50,000 ppm) cause headaches, dizziness, increased blood pressure, and uncomfortable dyspnea (shortness of breath).[80]
- Symptoms of human CO2 toxicity at 5% volume of CO2 in the air (50,000 ppm) include confusion.[81]
- Symptoms of human CO2 toxicity at 8% volume of CO2 in the air (80,000 ppm) include dimmed sight, muscle tremors, unconsciousness, and possible death.[82]

ii. Summit's Plume Dispersion and Claimed Hazard Distances are Wrong

"There is one well known threat associated with supercritical state operation. A CO2 pipeline operating in a supercritical state can be more prone to pipe running ductile fractures than hazardous liquids or natural gas pipelines. Running ductile fractures are unusual and particularly dangerous fractures that can "unzip" a CO2 transmission pipeline for extended

[77] JLO Ex 645 pg. 9
[78] *Id.*
[79] *Id.*
[80] JLO Ex 645 pg. 7
[81] *Id.*
[82] *Id.*

distances exposing great lengths of the buried pipeline. These extreme rupture forces throw tons of pipe, pipe shrapnel, and ground covering, generating large craters along the failed pipeline." [83] Hazardous pipelines are dangerous generally but pipelines transporting supercritical CO2 are more dangerous. Because of this reality the Board must err well on the side of caution when considering approval of pipeline siting relative to not only existing structures but also likely future development.

Summit consistently refused to produce reliable risk analysis and plume modeling data. It wasn't until mid-hearing on or about September 7, 2023, they were forced by the IUB for the first time (after over a year of requests by concerned parties) to produce at least a version of study claiming to model a release. This delayed disclosure prevented discovery on this issue and prevented Jorde Landowners and others from developing expert witnesses to rebut Summit's presumptions and alleged findings. These litigation tactics can be attributed to Summit's terror and panic if the truth about how dangerous its proposed hazardous pipeline is actually saw the light of day. Summit's dream of bathing in corporate welfare riches could be thrown off track by the truth - and their investors (and politicians benefiting from their campaign contributions) would not like that.

Recollect Summit first said they can't disclose such vital public information because "terrorists" may use it to do bad things. This begs an important question – so you believe your proposed pipeline is so dangerous and so vulnerable to terrorist attach that would threaten the lives of Iowans – yet you still want to build it? Never mind that the exact route has been public

[83] JLO Ex. 477-478 pg. 17

knowledge for over a year, and I am sure your above-average terrorist could figure out how to access the KMZ files available to anyone on planet earth via the IUB public docket.

In any event, that ridiculous claim fell flat so then Summit pivoted claiming PHMSA did not allow the release of plume modeling.[84] Well, that is also a lie. But don't take our word for it – just ask Sean Quinlan of PHMSA - "[I]n answer to your CO2 plume modeling question, PHMSA does not instruct companies on what they can and cannot share with the public. That is a company decision."[85] Then Summit said it doesn't need to provide any information to citizens or first responders because there is free software available to run risk modeling, and they can just do it themselves – essentially, 'Google it!'

So, they did. The results were shocking. Similar to the quick computer plume analysis ran after the Sataria explosion that modeled hazardous CO2 traveling nearly 40 kilometers (24.855 miles) from the rupture and release point[86]:

[84] See Summit Brief on Federal Preemption, p. 2 - https://efs.iowa.gov/filing/4435688 ; See also Notice of Appeal from Decision of Presiding Officer and Request for Stay Pending Appeal - Expedited Relief Requested, pp. 7-8 at https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&noSaveAs=1&dDocName=2127461

[85] JLO Ex. 585

[86] JLO 565, pg 12 – NOAA Modeling

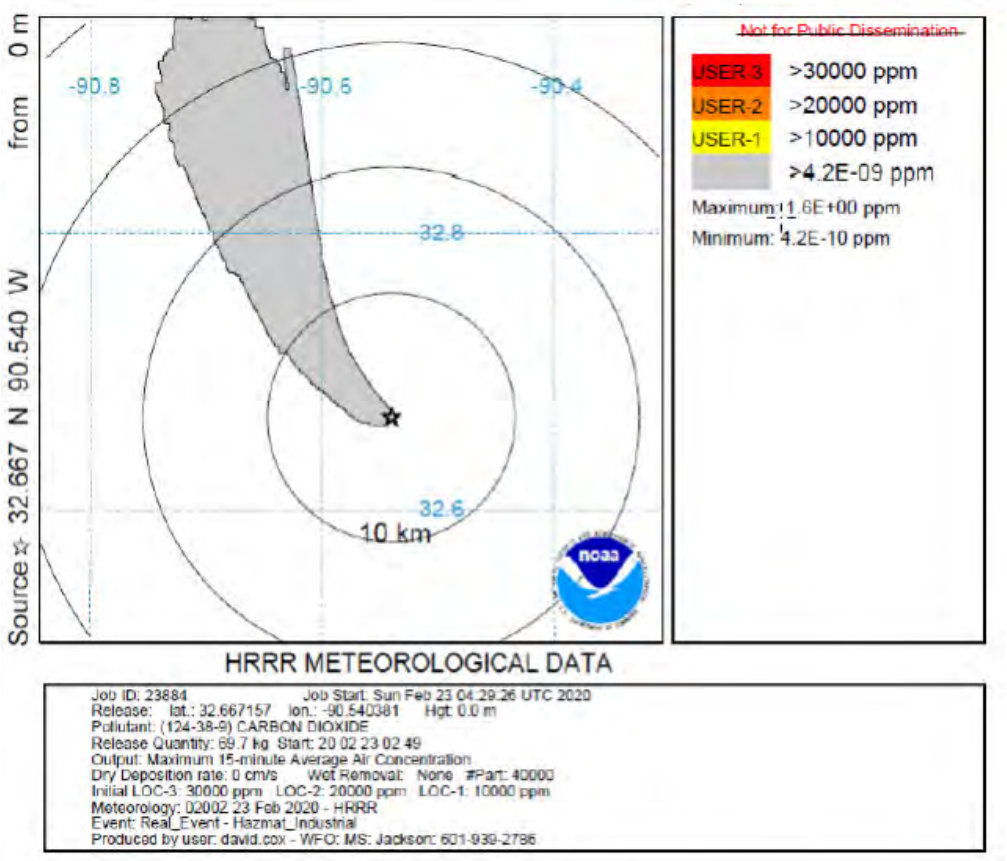
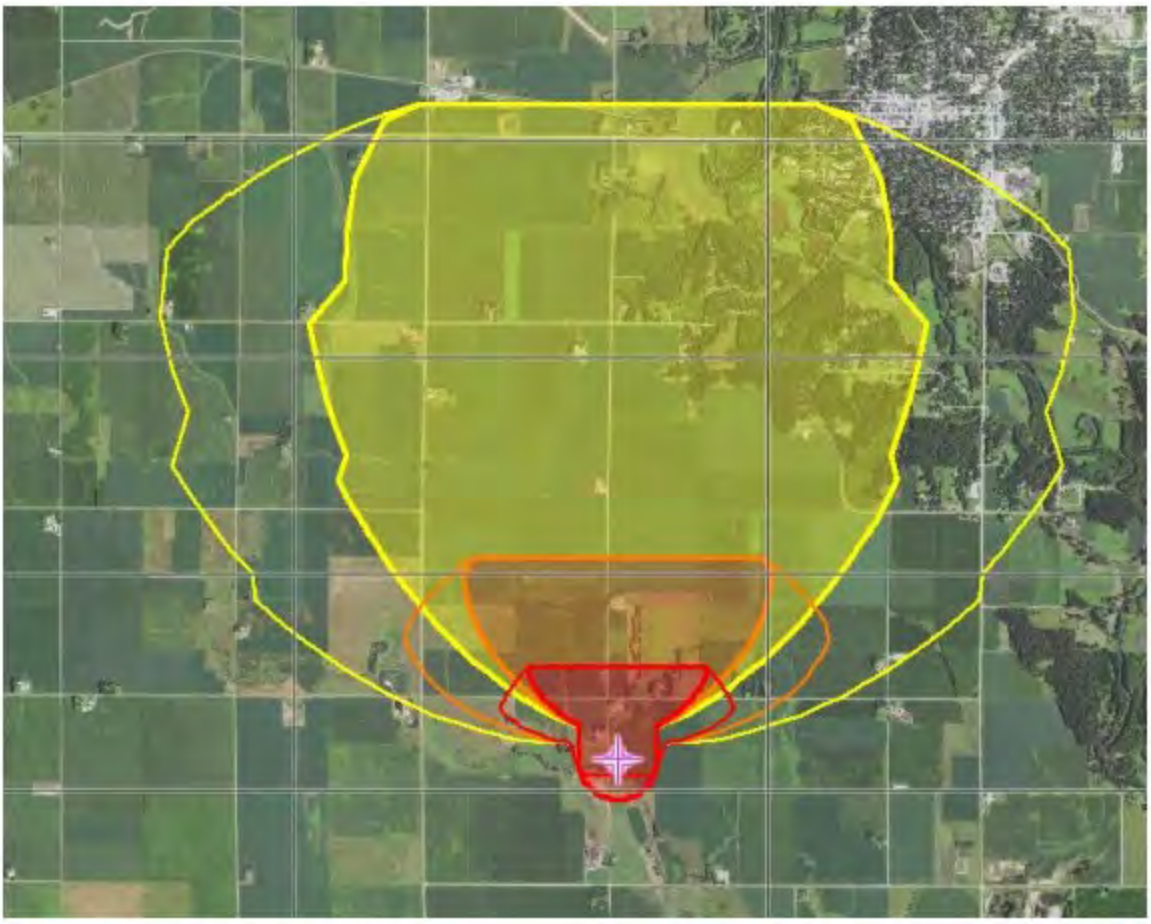


Figure 5: This Chart Shows the Plume Model Data Generated by the National Weather Service/NOAA - The Model Indicates the Direction a Plume or Cloud of CO_2 Would Have Followed from Ground Level While Dissipating, According to Atmospheric Data at the Time of the Release - Each Ring is 10 Kilometers (Satartia is Less Than Two Kilometers Northwest of Release Site, Indicated by the Star)[8]

Iowa Landowners utilized available software to run their own risk analysis after over a year of being stone-walled by Summit from the most basis safety related information. Nancy Erickson provided her findings at JLO Ex. 298. The plume modeling software Summit said Landowners and First Responders could use and rely upon, showed CO2 concentration levels of 150,000 ppm as far as 1,795 feet away from the pipeline rupture site for a release from a 20-inch diameter CO2 pipeline. 150,000 ppm exposure is certain death. Hazard Level 2 CO2 concentration levels of 40,000 ppm were detected at 1.1 miles, or 5,808 feet, from the rupture location. Here is one illustration of the modeling software's analysis:



Chemical Name: CARBON DIOXIDE
Wind: 6 miles/hour from S at 3 meters

THREAT ZONE

Red	888 yards	105000 ppm = Default LOC-3
Orange	1.1 miles	40000 ppm = Default LOC-2
Yellow	3.5 miles	5000 ppm = Default LOC-1

It is important to note the above model is arguably conservative in that the wind speed input was 6 miles per hour. The more wind, the more assistance to disperse and decrease the concentration levels. Had this been modeled at a lower wind speed the results could have been worse.

However, we have industry insider data as to risk and the ability for a toxic plume to travel at concentration from Navigator Heartland Greenway pipeline ("Navigator"), Summits prior competitor, who to its credit, publicly released most of its risk modeling in both South Dakota and Illinois. Now, we can safely assume Navigator's data and conclusions are conservative given it intended the results to be used to help it get its project approved in multiple states before giving up realizing pursuing these CO2 pipeline projects is hopeless.

JLO Ex. 645 is the Navigator CO2 Air Dispersion Guidance as released in the Illinois Commerce Commission hearing. "This Document is intended to outline Navigator CO2 Ventures' ("NCO2V") Heartland Greenway System ("HGS") guidance and philosophy for carbon dioxide ("CO2") air dispersion modeling, as a tool for risk analysis."[87] In developing this data, the highest level of risk was established to mimic the Potential Impact Radius ("PIR") calculation and method found at 49 CFR 192 (192.903).[88]

"The worst-case release scenario is defined as a guillotine rupture (e.g., failure of a girth weld) which has caused the pipe to separate and discharge the pipeline contents into the atmosphere."[89]

Navigator's modeling for its proposed supercritical CO2 pipeline determined a 105,000 ppm CO2 concentration exposure to be Hazard Level 4, and **40,000 ppm CO2 concentration level is Hazard Level 2** with Hazard Level 1 equating to 30,000 ppm CO2 concentration exposure. They publicly released these hazard distance findings[90]:

[87] JLO Ex. 645 pg. 3
[88] *Id.*
[89] *Id.* at pg. 7
[90] *Id.* at pg. 10

Nominal Pipe Diameter	Hazard Level 4	Hazard Level 3	Hazard Level 2	Hazard Level 1
6”	321’	[redacted]	1,240’	1,971’
8”	417’	[redacted]	1,855’	2,753’
12”	[redacted]	[redacted]	[redacted]	3,291’
16”	[redacted]	[redacted]	[redacted]	3,644’
20”	1,029’	[redacted]	2,920’	4,250’

The input categories and values leading to each of these Hazard Level distances can be found at JLO Ex. 645 pg. 14-18. Summit failed to produce a similar document for consideration and failed to provide their risk analysis inputs.

In Iowa, Summit proposes 6” diameter pipe up to 24” diameter pipe. See JLO 644. However, all their Exhibit H eminent domain requests seek Board approval for up to 24” diameter pipe everywhere in Iowa. As is obvious from the Navigator Hazard Chart above, the hazard distance in feet increases as the diameter of the pipe increases because more volume of toxic CO2 is being transported. Mr. Bryan Louque testified for Summit and provided the formula to calculate volume – “[t]he volume of any cylinder is proportional to the radius squared times the length.”[91] It takes more than fifteen (15) 8” diameter pipelines to carry the same volume of one 24” pipeline.[92] A twenty (20) mile long segment of 24” pipeline if full of CO2 could fill 1,880 Olympic size swimming pools.[93]

The hazard distance for Summit’s 24” diameter pipeline is significantly larger than the distances for a 20” pipeline across all Hazard Levels, but the known 2,920-foot hazard distance for a much smaller 20" pipeline should be frightening enough. And using Mr. Louque’s volume

[91] Tr. 3009
[92] JLO Attachment No. 14, pg. 6
[93] I*d.*

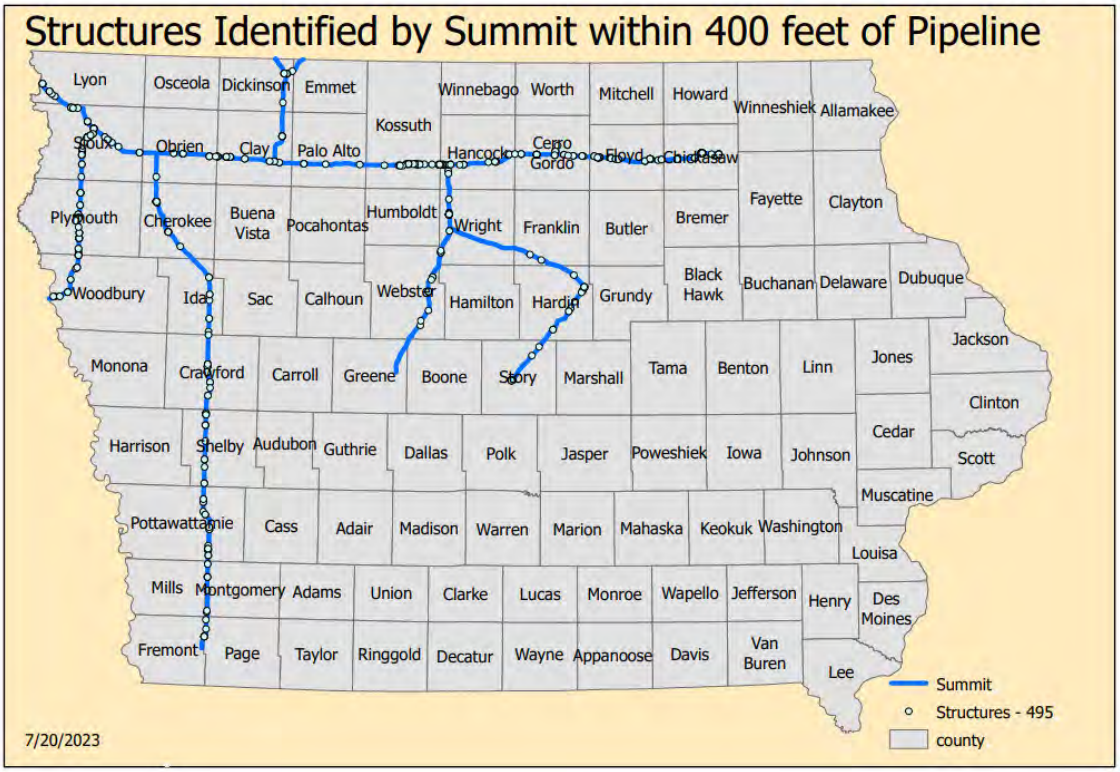
calculation we know that a 24" diameter pipeline will hold 44% more volume of CO2 than a 20" diameter pipeline. If we were to apply that 44% more volume to the 2,920-foot hazard zone that would give be 4,204.8 feet.

This evidence informs the Board that it is not appropriate to approve a location or route of this pipeline anywhere that an occupied structure, such as a residence, business, school, nursing home, place of worship, or similar presently exists within at least 2,920 feet along every inch of the proposed Summit route. Jorde Landowners also argue that in places near towns, cities, or areas with development potential, it would be inappropriate to approve any route now that would act as a chilling effect on future economic development and growth of those particular communities. See numerous examples discussed below.

Summit admitted in response to a Farm Bureau discovery request there are 495 structures within 400 feet of the proposed route.[94] That is 495 too many. **A mere 6-inch CO2 pipeline is capable of Hazard Level 4 concentrations to 321 feet** or more from the pipeline. See Navigator Hazard Chart above. **Hazard Level 4, human exposure at 105,000 ppm, can be fatal to healthy persons within less than one (1) minute**.[95]

[94] FB Johnson Direct Ex. 10
[95] JLO Pre-filed Testimony Attachment 11 pg. 3

IFBF Johnson Direct Exhibit 10
Page 1 of 1



Summit witness, Erik Schovanec, testified Summit looked at all structures within 400 feet of Summit's proposed pipeline, considered all landowners, stakeholders and farms on the route.[96] Summit did not identify all above ground wells as "structures" withing 400 feet of its proposed pipeline. One example is the well of the Benita A. Schiltz Revocable Trust. The buffer distance from the pipeline to the well measures only 139 feet.[97] Is Summit unconcerned about potential damage to well and water contamination?

But the fact Summit failed to consider ANY dispersion and plume risk data BEFORE they determined their proposed route is grossly negligent at best and more likely an intentional act because they knew what a study for CO2 would likely show. Rationalizing a 400-foot

[96] Tr. page 2224, lines 8-10; page 2223, lines 3-5; page 2224, lines 23-24; page 2286, lines 14-15; page 2071, lines 1-3; Tr. page 6889, lines 17-25 & page 6890, lines 1-5
[97] Tr. page 6928, line 10

screening distance because that is what Dakota Access (DAPL)[98], an entirely different kind of pipeline, used is unreasonable. DAPL is not comparable to what is proposed here, as should be painfully obvious by now.

The Navigator generated CO2 hazard distances discussed herein are supported by the expert opinion of Dr. John Abraham, perhaps the world's leading expert on computational dynamic fluids modeling. See JLO Ex. 641 page 24 and JLO Ex. 474. Dr. Abraham confirms that a plume from a 20-inch CO2 pipeline can travel more than 2,800 feet at 40,000 ppm concentration levels.

But accurate plume modeling is not just important for people. A significant amount of Animal feeding operations exists in Iowa, unlike the Summit proposed pipeline, and there are many CAFOs within 1,000 feet of the proposed hazardous pipeline route. See FB Johnson Direct Exhibit 8. 1,000 feet is too close to these existing businesses.

iii. Keep Sataria in Mississippi

Satartia Mississippi foreshadows Iowa's fate in many ways. Denbury Gulf Coast, LLC, the owner of the exploded Satartia pipeline and affiliate of a well-established and publicly traded multi-billion-dollar company, Denbury, Inc. – not a start-up like Summit, filed for bankruptcy on July 30, 2020, less than six months from when the CO2 rupture and release occurred on February 22, 2020.[99] However, even before the Sataria disaster, this CO2 pipeline had other troubles. "On November 9, 2018, the Delhi Pipeline experienced a girth weld rupture at a valve location during pipeline reloading activities, and not attributed to

[98] Tr. 2223
[99] *Id* pg. 9

natural force damage, which means despite following minimum federal standards in construction, this pipeline still failed.[100] in this incident the pipe failed to perform as intended "due to chilling from the CO2, causing the girth weld connecting the pipeline to the valve body to rupture."[101]

JLO Ex. 565 is the Pipeline and Hazardous Materials Safety Administration ("PHMSA") Failure Investigation Report for the Denbury Gulf Coast Pipelines, LLC pipeline rupture, also known as the Satartia, Yazoo County, Mississippi rupture of February 2020. The failed Denbury CO2 pipeline, like 100% of Summit's Exhibit H requests, was 24-inches in diameter.[102] The maximum operating pressure (MOP) of the Denbury pipeline was 2,160 pounds per square inch (psig) but at the time of the rupture was only operating at approximately 1,400 psig.[103] There were approximately 9.55 miles of pipe between the two existing remotely operated main line block valves.[104] This means that all of the negative effects of the Denbury rupture were from carbon dioxide within a 9.55 mile by 24-inch diameter pipeline operating at 64.8% of MOP.

The soil at the failure site in Sataria is loess soil which is a "silty and clayey" soil which indicates the soil is prone to absorb water and can collapse or slump under the right conditions.[105] "Loess soil has a relatively high porosity (typically around 50-55%) …"[106] Many Landowners testified of either having this exact same soil here in Iowa or describe

[100] JLO Ex. 565, pg. 5
[101] JLO Ex. 565, pg. 5
[102] JLO Ex. 565, pg. 3
[103] JLO Ex. 565, pg. 4
[104] JLO Ex. 565, pg. 4
[105] JLO Ex. 565, pg. 13
[106] See Footnote 10 at JLO Ex. 565, pg. 13

their soil with similar features.[107] Alan Boeck testified about his loess soil confirming it is highly erodible, as Satartia found out, and that, "[I]t is unique in that it is wind deposited. When it comes to the Loess Hills in particular, which is the deepest portion of loess, there are only two places in the world it's found. One in China and along the Missouri River between Sioux City and Omaha."[108] The properties of loess soil make it susceptible to drainage issues once it has been disturbed.[109] Dennis Graham described his topsoil as Steinauer clay, which is a type of loess soil. He recalled that Ms. Ryon has asked a couple of Summit executives what that is, if they knew what it was, and they said they did not.[110] Loess soil is unique. "If it's dry, it blows in the wind. If it's wet, it flows with the water. And if it's semi-moist, you can do the ball test like the Iowa State professor, Mr. Liebman, was talking about. And it forms a hard ball very quickly."[111] Sherri Webb added, "In fact, Shelby County, as a whole, is 95 percent no till because of the loess soils that we have in the entire county. Harrison County and Shelby County, you know, they share that fate of that glacier that came down and blew the soil over hundreds and hundreds of years into our areas. And you have to keep it -- you have to keep it intact. It will blow away."[112] Satartia taught the world it is unwise to locate a CO2 pipeline in loess soils or similar soils. Don't make the same mistake in Iowa.

Like Summit, Denbury identified some geohazards but lacked specific and substantive geohazard identification across the entire proposed route such that approval of

[107] JLO Ex. 629 pg 3
[108] JLO Ex. 655; Tr. 7244
[109] Tr. 7278
[110] Tr. 5822
[111] Tr.5849
[112] Tr. 6125

Summit's route without this information could prove fatal.[113] Summit has not conducted necessary Phase II geohazard analysis in Iowa.[114]

Despite the 24-inch hazardous CO2 pipeline being tunneled 30-feet under the highway, the explosion was so violent that it created a 40-foot crater exposing the pipeline as depicted below:[115][116]

[113] JLO Ex. 565, pg. 14
[114] Tr. 1685, 1757
[115] JLO Ex. 565, pg. 9
[116] JLO Attachment No. 14, pg. 8

The failed 24-inch CO2 pipeline ruptured at 7:06 p.m. but it was not until 7:43 p.m. that Incident Command (IC) was able to confirm the pipeline had in fact ruptured; however, no one could get close to the release site due to the ongoing release of CO2.[117] At least 21,873 barrels of liquid CO2 had been released from the pipeline rupture.[118] For reference, there are 42 gallons in one barrel so the CO2 released was equivalent to 918,666 gallons of CO2.

Although the pipeline was shut down by 7:15 pm, and the main line block valves at both ends were closed, the remaining contents of the pipe continued to vent to the atmosphere for several hours.[119] Because CO2 vapor is 1.53 times heavier than air, and displaces oxygen, it can act as an asphyxiant to humans and animals.[120] In Satartia, the CO2 followed a path downhill and as the discharged volume increased the CO2 plume moved over the crest of a hill and then into a valley reaching Satartia and its citizens.[121] Hazardous CO2 continued out of the crater one mile over a hill and into the town, although pre-construction modeling showed Satartia would not be affected.[122]

Prior to this 2020 explosion, this CO2 pipeline had another earlier accident in 2011, and prior to that accident Denbury hired a third party to determine the affected radius area for a potential CO2 release from its pipeline.[123] That model was used to develop “could affect” areas also referred to as high consequence areas or HCAs.[124] However, that analysis failed to

[117] JLO Ex. 565, pg. 6
[118] JLO Ex. 565, pg. 7
[119] JLO Ex. 565, pg. 11
[120] JLO Ex. 565, pg. 3
[121] JLO Ex. 565, pg. 11
[122] *Id.* pg. 8
[123] JLO Ex. 565, pg. 12
[124] *Id.*

show that the town of Sataria and its people could be adversely affected if a CO2 rupture were to occur.[125] The modeling and inputs failed to illustrate exactly how far as CO2 plume can travel. The rupture location was 1.24 miles, or 6,547.2 feet, from the center of Sataria, where the entire town was evacuated.[126] People otherwise enjoying the evening having a backyard barbecue had all collapsed and were lying on the ground.[127] One of the first responders, Terry Gant, who had been going door to door searching for victims had to go to the hospital for medical care.[128]

The National Institute for Occupational Safety and Health has established that **concentrations of 40,000 parts per million (ppm) are immediately dangerous to life and health**."[129] (emphasis added). Recall the Navigator Hazard Chart released "worst-case" data showing a 40,000-ppm plume could travel at least 2,920 feet from a 20" diameter CO2 pipeline, well real-world facts show us a CO2 plume can travel at least 6,547.2 feet from a 24" diameter CO2 pipeline.[130] Denbury's modeling had underestimated the hazard distance more than three times what it was. *See* Figure 6 page 13 of JLO Ex. 565 – distance from redline to outskirts of Sataria.

Underestimating the hazard distances as Denbury did, and as Summit has here, leads to dangerous consequences. Chief Gerald "Jerry" Briggs, the Warren County Mississippi Fire EMS Chief and 911 Chief, observed "several people laying on the ground with shortness of breath and vomiting."[131] And, this was after these people had been rescued from Sataria,

[125] JLO Ex. 565, pg. 2
[126] JLO Ex. 487 pg. 8, Attach. No. 2
[127] JLO Ex. 487, pg. 9
[128] *Id.*
[129] JLO Ex. 565, pg. 3
[130] JLO Ex. 565, pg. 13
[131] JLO Ex. 487 pg. 9

transported five miles away from the town to the checkpoint, and had time to normalize their CO2/O2 exposure, and were waiting for ambulances to arrive.[132]

Chief Briggs, who assisted in the Sataria response and rescue efforts, testified that fire trucks would not run they were unable to go the most efficient route to respond to the disaster because the engines didn't have sufficient oxygen to operate because the CO2 was displacing the oxygen.[133] Chief Briggs personally observed multiple vehicles stopped in the middle of the highway or in the middle of the road with their headlights on doors wide open.[134]

Chief Briggs observed a "small sedan in the middle of the road with headlights on doors closed with three victims inside of it."[135] Chief Briggs had been driving a UTV at the time, but it was not running well so they had to get out of the UTV and respond on foot, with their 60-75 pound SCBAs on their backs.[136] **Chief Briggs then "observed a male slumped over the rear seat did not appear to be breathing and was foaming out of the mouth and then the front seats were the same - two individuals appeared not to be breathing with frothy stuff coming out of their nose and their mouth and their vehicle was still in drive and the radio was on."[137] These victims "absolutely unconscious – unresponsive. It did not appear that they were even alive so my first instinct was to break the glass to get gain access to the victims to verify that they were alive."[138]**

[132] *Id.* and pg. 12
[133] JLO Ex. 487, pg. 1 and 5 – Testimony of Jerry Briggs
[134] *Id.* at pg. 6
[135] JLO Ex. 487 pg. 10
[136] *Id.* pg. 8 and 10
[137] *Id.* pg. 10
[138] *Id.* pg. 10-11

In checking to see if the CO2 exposure victims were alive or conscious, Chief Briggs and his crew "did the sternum rub just the knuckles in the chest to try to get some response out of them and we didn't get anything. If any of them had been semi-conscious you would expect them to make some groan or some noise once somebody rubs on their sternum" but they didn't move, "[t]here was nothing."[139] **"I didn't expect them to live through the night."[140]**

In search of more victims, Chief Briggs and crew spread out their search and travelled 3 miles away from the rupture site and found victims experiencing shortness of breath.[141]

A total of approximately 200 people had to be evacuated for safety and health concerns related to the pipeline rupture and CO2 plume that travelled towards the town of Satartia.[142] Individuals driving on the roadway near the migrating CO2 vapor cloud experienced engine issues and failures due to the CO2 concentration displacing oxygen.[143] When trying to locate persons affected by rupture, Chief Briggs testified the self-contained breathing apparatuses (SCBA) lasted about 10 minutes a piece.[144] Summit has failed to commit to furnish every fire and rescue and EMS department and personnel near and along its proposed route with a sufficient number of SCBAs.

At least two people who attempted to investigate the CO2 vapor cloud succumbed and passed out. At least 45 people sought medical attention at local hospitals.[145]

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[139] *Id.* pg. 11-12
[140] *Id.* pg. 11
[141] *Id.* pg. 14
[142] JLO Ex. 565, pg. 7
[143] JLO Ex. 565, pg. 7
[144] *Id.* at pg. 7
[145] JLO Ex. 565, pg. 7-8

Thankfully no fatalities occurred due in large part to the fact there was a “rotten eggs” odor associated with the CO2 release and gas plume.[146] The odor, like that of natural gas transported by hazardous pipeline, allows potential victims and first responders to be alert and aware and forewarned that danger exists and to move further away from the CO2 concentration as they were able. Unfortunately, Summit refuses to put in even this most basic and widely recognized safety precaution.

“Fortunately the entire area [of Satartia] of the where the plume traveled was very scattered rural communities. **I couldn't imagine this type of severity of an incident happening somewhere closely populated**. (emphasis added). I think they're fortunate that it happened on a Friday night at about seven o’clock, so most people went to the nearest town to eat or go out or whatever it was and not everybody being at home.”[147]

PHMSA’s investigation revealed, like with Summit, Denbury failed to address the risks of geohazards appropriately and thoroughly, underestimated the potential affected areas that could be impacted by a release in its CO2 dispersion modeling, and failed to notify local responders of a potential failure and possible outcomes.[148]

Lastly, should Summit claim or allude that somehow trace presence of H2S, hydrogen sulfide, in the Denbury Satartia pipeline differentiates it from Summit’s proposed pipeline – i.e., Summit will be safer – this is bogus. The PHMSA Report and H2S Chart at Attachment No. 4 of JLO Ex. 487, aka JLO Ex. 490, confirms PHMSA reviewed the CTEH air monitoring results and did not identify any observed readings of H2S by monitoring

[146] JLO Ex. 565, pg. 8
[147] JLO Ex. 487 pg. 15
[148] JLO Ex. 565, pg. 3 and 15

equipment. The monitoring equipment used had a detection limit for H2S was 0.1 parts per million.[149] In sum, it is uncontroverted H2S was not a contributing factor to the rupture and was not a contributing factor to any reported symptoms or personal injuries.

Chief Briggs summed up the issue confronting large parts of Iowa that would be affected should the Board approve the Permit Petition when asked if he thought addition of a warning odorant would be helpful:

> "Certainly, yes as to I believe it is more likely faster reporting will occur and individuals would have a better chance of getting out of that area if there is an odorant they can detect. However, if you're not in a big city you have to wait on the big city to come to you. So that doesn't hold very well for the people that are trapped in their house or in their car or not breathing waiting on the City EMS or others to come with their response teams. So, to a degree it will definitely help but for those in more rural areas if they are in need of help you better hope the local first responders are fully trained and equipped with all the tools and techniques and technology to minimize victim impact and injury."[150]

CO2 pipelines are more dangerous that natural gas pipelines:

> "All hazardous pipelines are dangerous but the one difference is the weight of the product with CO2 that is not going to go straight up in the atmosphere it's going to sink. And it's going to sink in your lower line areas and remain invisible and odorless. You can smell natural gas and it will dissipate faster. Oil is obvious when you see it and it is more localized and predicable once out of the pipeline as it is not affect by the changing air streams like CO2 is. **I am not aware of a natural gas rupture directly affecting persons three or more miles away from the leak or rupture site as the CO2 did in Satartia**."[151]

The only expert opinion the Board can rely upon in the record as to safe CO2 siting distance to residents and the public at large was expressed by Chief Briggs in this question and answer:

[149] JLO Ex. 487 pg. 18-19, Attach. No. 4; JLO Ex. 565 PHMSA Report
[150] JLO Ex. 487 pg. 20
[151] *Id.* pg. 21

> **Q:** Based on your experience, education, training and background how far away should these CO2 pipelines be placed, if they are going to be sited at all, in relation to populated areas.
>
> **A: Just in my experience for what I've seen in Yazoo County, a couple miles at least that's where we stopped seeing victims in that three to three and half mile range.**

As discussed throughout this Post-hearing Brief and as obvious from the aerial maps showing Summit's proposed routing below, if the Board were to approve its Permit Petition, which is should not, then there must be a significant number of re-routes ordered around towns and communities that should not be risked as collateral damage to Summit's billions in private profits.

Summit spends millions of dollars promoting an image it can't back up while instead perfecting double-talk and concealing important safety and risk information from the public and first responders. If Summit's behavior to date has been their "job interview" the Board should let them know they aren't hired.

L. Unintelligent Routing Permission Sought

In Summit's "Dispersion Buffer Disclaimer" in fine print, See JLO CONFIDENTIAL Ex. 583, it identifies some of the inputs it used to calculate what is visually depicted in on the 112 pages of maps within JLO Ex. 583. Two factors chosen are interesting – "

[redacted]"[152] Summit claims to have used "

[153] However, there is no supporting data to indicate this is true. In the Navigator Model, JLO Ex. 645, page 18, for a 20" CO2 pipeline, the inputs leading to the worst results

[152] JLO CONFIDENTIAL Ex. 583, pg. 1
[153] *Id.*

shows, that is the largest distance in feet 40,000 ppm CO2 is likely to be experienced, 2,920 feet, include Atmospheric Stability Class F, which is the most stable, i.e. the least windy or volatile weather. This input is one necessary to model "worst-case" because greater winds speed and turbulence assists in dispersing CO2 molecules and helps to reduce relative concentration levels. Also, the Navigator model used a relatively low wind speed of 3.3 mph, which, as an aside, the true "worst-case" would be measured at 0 mph for the reasoning stated above. Another input Navigator used was to model the rupture in a pipe with five (5) feet of cover on top – not a release "at grade" as indicated by Summit.

On page 2 of JLO Ex. 583 Summit depicts likely plume dispersion and risk distance from the center of an 8" diameter pipe to be almost exactly a from either side of the centerline of the pipeline. Contrast what with Navigator's "worst-case" rupture and hazard distance from an 8" pipeline to be 1,855' – quite a difference. In fact, look no further than page 2 of JLO Ex. 583 and the town of New Hampton with Summit's version of a 40,000-ppm overlay and note the swirly blue/gray shapes intended to depict additional plume location. Now, imagine increasing the buffer coverage areas by more than percent.

Regardless of what number of feet the Board wants to consider for the 40,000-ppm Hazard Level, even if we agree with Summit's low and unreasonable hazard distance projections, Summit proposes its hazardous pipeline be located directly in (indicated by 0 feet from pipeline) or very near these communities[154]:

[154] FB Johnson Direct Ex. 7

Other Population Areas within 1000 feet of Proposed Pipeline Route

Jurisdiction	County	Feet from Pipeline
Mason City	Cerro Gordo	0
New Hampton	Chickasaw	0
Denison	Crawford	227
Superior	Dickinson	41
Charles City	Floyd	0
Roseville CDP	Floyd	947
Shenandoah	Fremont	0
Irvington CDP	Kossuth	0
Inwood	Lyon	788
Merrill	Plymouth	596
Earling	Shelby	131
Nevada	Story	0
Sioux City	Woodbury	953
Eagle Grove	Wright	428
Goldfield	Wright	0

New Hampton as currently situated but also where the obvious growth is going show an obviously ill-planned route with equally obvious re-route options:

As depicted by Summit:	Less Terrible Re-Route:
REDACTED	**REDACTED**

Summit's proposed route bisecting Charles City infuses unnecessary risk and may stifle local development and the natural and continuous growth of that community. Using Summit's data, which intentionally has the dispersion buffer zone depicted in a faint light blue color, so it is barely intelligible to downplay the terrible route they have submitted (contrast with JLO Ex. 506 where the Hazard Distances are clearly shown), illustrates a Charles City re-route is necessary:

REDACTED

While we don't have enough pages to go through every single instance of unintelligent route selection, Jorde Landowners ask the Board to consider a few facts and the logical conclusion flowing therefrom:

- Summit's initial screening distance was 400 feet from structures because that is what a completely different kind of pipeline, Dakota Access, used.
- The current proposed route was NOT informed by dispersion modeling.
- Only after over a year of pressure to release modeling data and visual depictions, these surfaced DURING THE HEARING, and only "confidentially," once it was too late for any other party to develop counter evidence.

So, with just these discrete and undeniable facts, Jorde Landowners ask the Board if they really believe in Summit's "Dispersion Buffer" illustration that consistently and ever so conveniently shows a CO2 release stopping just short of any "other populated area" of Charles City?[155]

[155] JLO Ex. 583, pg 6

REDACTED

The timing of this "evidence" confidential disclosure and its results are a little too convenient, underestimate the actual risk and effects, and are simply not believable or reliable. In other words, Summit's data does not pass the smell test. If this Permit is approved, a significant re-route around Charles City should be ordered.

The community of Rockford, see JLO Ex. 583 page 8, is another example of Summit's underreporting of true affected areas. The red lines are added to better show Summit's purported limits of CO2 dispersion:

REDACTED

Jorde Landowners argue at least half the town of Rockford would be impacted by a rupture and that the southern red line above, which tracks Summit's buffer, should be moved at least 500 feet south to capture a more likely worst-case scenario. Again, the center of Satartia was about 5,280 from the pipeline, above Summit shows Rockford less than feet from its proposed pipeline.

The entire community of Irvington could be wiped out by a rupture[156]:

REDACTED

[156] JLO Ex. 583, pg. 19

Even in Summit's woefully low hazard zone, Rodman is already fully succumbed by the potential deadly plume[157]:

REDACTED

[157] JLO Ex. 583, pg. 22

Using the more reasonable Navigator hazard distances, all of Inwood would be covered in a toxic CO2 plume[158]:

REDACTED

[158] JLO Ex. 583, pg. 39

Goldfield residents can “take one for the team” as well[159]:

REDACTED

[159] JLO Ex. 583, pg. 55

Superior may want to change its name to Inferior[160]:

REDACTED

[160] JLO Ex. 583, pg. 75

For Terril, a rupture would be terrible[161]:

REDACTED

[161] JLO Ex. 583, pg. 70

It's as if Summit targeted Earling, despite having open land and numerous routing options for miles north and south of town, but why not go right through town instead[162]:

REDACTED

Earling, like so many of these targeted communities, are located in close proximity to many Ex. H landowners. For instance, for the Benita A. Schiltz Trust land, Earling is their hometown, community and where first responders are located[163]. Schiltz Trust intervenors own homes in Earling, are first responders with the Earling Volunteer Fire Department and serve

[162] JLO Ex. 583, pg. 88
[163] JLO Pre-filed Testimony, page 18; Tr. page 6914 lines 1-17

on Earling's City Council[164]. Despite Summit claiming transparency and stating safety is Summit's number one priority[165] not a single testifying landowner believed that to be true and none had experiences showing this was true. On the contrary, again as an example, Summit has not contacted first responders or the Mayor of Earling about safety and pipeline proximity to Earling despite concerns being raised in October 2021[166]. James Powell testified[167] stating Earling was not a high-consequence area and not being aware of objections related to Earling. When asked about moving the pipeline away from Earling, James Powell testified[168] they have no intention to move the pipeline.[169] Buck Grove would be consumed in a CO2 cloud[170]:

REDACTED

[164] JLO Pre-filed Testimony, page 18 & 19
[165] James Pirolli, May 25, 2023, Direct testimony, page 7, lines 14-15
[166] JLO Pre-filed Testimony, page 19; Tr. page 6976, lines 20-23
[167] Tr. page 1736, lines 23-25 & page 1737, line 1-8; Tr. Page 1737, lines 14-19; page 1760, lines 22-25 & page 1761, lines 1-2
[168] Tr. page 1738; lines 10-22
[169] Tr. page 1738, lines 16-22; Tr. page 6906, lines 2-6
[170] JLO Ex. 583, pg. 89

Again, Summit's late and begrudgingly revealed analysis just happens to show the town of Quimby protected by its invisible town boundary as if a line that exists only on zoning maps will stop the CO2 plume[171]:

REDACTED

[171] JLO Ex. 583, pg. 98

Germantown, another example of invisible town limits repelling a CO2 plume[172]:

REDACTED

[172] JLO Ex. 583, pg. 102

Like all the above misplaced and ill-thought-out routes, Summit had no reasonable justification for its Sioux City and Sergeant Bluff route[173]:

REDACTED

Unfortunate Merrill must defend a three-sided attack[174]:

REDACTED

[173] JLO Ex. 583, pg. 104
[174] JLO Ex. 583, pg. 108

The insanity of the above few examples of outrageous routing selection require the IUB deny Summit's Permit Petition.

M. Fool Iowa Once, Shame on Summit; Fool Iowa Twice, Shame on the IUB

It is neither convenient nor necessary for an unfit operator to be granted permission to construct thousands of miles of experimental pipeline. The universe of Summit's misrepresentations is too vast to fully grasp but a handful are highlighted here[175]:

- Summit misleading the public and the Kossuth County Board of Supervisors on safety and danger aspects inducing them to believe that only a person on a tractor near or on top of the pipeline would be in danger or in the "hot zone" if a rupture were to occur. See JLO Ex. 577/577R page 4 and source data: https://youtu.be/LpqkedfgQ6I .
- Summit misleading the public and the Ida County Board of Supervisors that the risks associated with a leak or rupture of the proposed Summit pipeline is not nearly the same as with the Mississippi [Sataria Denbury] pipeline. See JLO Ex. 557/557R pg. 5 and source data: As quoted in the Ida County Auditor's records.
- Summit misleading the public and the Ida County Board of Supervisors that "[T]he Mississippi pipeline also pumped other toxic chemicals along with carbon which led to the explosion." However, as Summit is aware, there is zero evidence in the PHMSA Failure Investigation Report (JLO Ex. 565) to suggest this statement is true. See JLO Ex. 577/577R page 6 and source data: As quoted in the Ida County Auditor's records.

[175] See JLO Ex. 577/577R

- Summit misleading the Kossuth County Board of Supervisors and the public stating that the cause of the Satartia CO2 pipeline rupture was because it was cold outside and the line was carrying hydrogen sulfide and other toxins. See JLO Ex. 577/577R page 14 and source data: https://youtu.be/LpqkedfgQ6I . However, as Summit is aware, there is zero evidence in the PHMSA Failure Investigation Report (JLO Ex. 565) to suggest their statement is true.
- Summit misleading the Kossuth County Board of Supervisors and the public stating that for CO2 to be dangerous, it has to be at an incredibly, incredibly high concentration. See JLO Ex. 577/577R page 9 and source data: https://youtu.be/LpqkedfgQ6I . Compare with the facts that exposure levels depend upon an individual's personal health situation and that levels of 30,000 ppm to 50,000 ppm present a “serious health risk.” See JLO Ex. 568.
- Summit troubling statement to the Kossuth County Board of Supervisors and the public stating that if minor leaks [on the Summit pipeline] are not repaired, no one will notice. See JLO Ex. 577/577R page 12 and source data: https://youtu.be/LpqkedfgQ6I .
- Summit’s troubling and misleading statement to the Kossuth County Board of Supervisors and the public stating that pinhole leaks don't pose a threat, they leak slower than the ethanol plants. See JLO Ex. 577/577R page 13 and source data: https://youtu.be/LpqkedfgQ6I .

- Summit's wild claim to the Kossuth County Board of Supervisors and the public stating that its pipeline will not fail. See JLO Ex. 577/577R page 23 and source data: https://youtu.be/LpqkedfgQ6I .
- Summit's knowingly false claim restated to the Fremont County Board of Supervisors and the public that dispersion studies show that within 300ft it is completely dissipated. See JLO Ex. 577/577R page 44 and source data: https://drive.google.com/file/d/1RT82_mOFSS1S8IgfMwazDKjQOfPj-KFH/view
- Summit's knowingly false denial when asked: "[redacted] See JLO Ex. 577 page 69. Contrast with JLO Ex. 549, Deposition of James Pirolli[176] and Pirolli Hearing testimony.
- Summit's knowingly false denial when asked: "Admit that under your business model you are not transporting CO2 from any ethanol plant located in Iowa." See JLO Ex. 577/577R page 70. Contrast with JLO Ex. 549, Deposition of James Pirolli and Pirolli Hearing testimony.
- Summit's knowingly false denial when asked: "Admit that under your Offtake Agreements you are not transporting CO2 [redacted] from any ethanol plant located in Iowa." See JLO Ex. 577/577R page 72. Contrast with JLO Ex. 549, Deposition of James Pirolli and Pirolli Hearing testimony.

[176] For the record, the deposition of James Pirolli was never marked nor designated as "Confidential." In any event, Jorde Landowners have redacted certain portions the publicly filed version of this Opening Brief even though they did not have to do so.

- Summit's knowingly false denial when asked: "Admit that no state has approved any route application or petition for permit as previously filed by you or your affiliated entities or any application currently pending." See JLO Ex. 577/577R page 78.

III. Any IUB Grant of Eminent Domain Would be Unconstitutional Because Summit is Not a Common Carrier

Iowa Code chapter 479B gives the Board authority to grant pipeline companies the right to use eminent domain to condemn private land for proposed hazardous liquid pipelines. Iowa Code §§ 479B.1, 479B.16. This authority is subject to the limitations on use of eminent domain on agricultural lands contained in Iowa Code §§ 6A.21 and 6A.22, and the constitutional protections against taking private property contained in Iowa Constitution article I, section 18. *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829, 842-53 (Iowa 2019); *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 253 Iowa 1143, 1147, 114 N.W.2d 622, 624 (1962).

A. The Burden of Proof for Eminent Domain Claims.

A pipeline company has the burden of proving to the Board that it has a right to use eminent domain and will operate its proposed pipeline as a common carrier pipeline within the meaning of Iowa Code 6A.22(2)(a)(2). In a judicial challenge to a Board grant of eminent domain, the Board would bear the burden "to prove by a preponderance of the evidence that the finding of public use, public purpose, or public improvement meets the definition of those terms." Iowa Code § 6A.24(3). "A preponderance of the evidence is the evidence 'that is more convincing than opposing evidence' or 'more likely true than not true.'" *Interest of K.D.*, 975 N.W.2d 310, 320 (Iowa 2022); *Martinek v. Belmond–Klemme*

Cmty. Sch. Dist., 772 N.W.2d 758, 761 (Iowa 2009) (quoting *Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 63–64 (Iowa 2004)).

B. Iowa Statutory Limitations on Use of Eminent Domain.

In order to have the right of eminent domain, a proposed hazardous liquid pipeline must be a "public use," "public purpose," or "public improvement" within the meaning of Iowa Code §§ 6A.21 and 6A.22. The Iowa legislature has made clear that a "private development," including "commercial or industrial enterprise development," generally is not a "public use," "public purpose," or "public improvement." Iowa Code § 6A.21(1)(c), (d). However, the legislature made an exception to this general rule for "utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board," Iowa Code § 6A.21(2), but the purpose for the projects proposed by these entities must fall within one of the categories contained in Iowa Code § 6A.22(2)(a). The only category that applies to proposed non-utility hazardous liquid pipelines is in Iowa Code § 6A.22(2)(a)(2), which authorizes the use of eminent domain where "necessary to the function of a common carrier…" Therefore, the Board may grant the right of eminent domain over agricultural land to a non-utility hazardous liquid pipeline company only if the company proves that it will operate its pipeline as a "common carrier." Iowa Code § 6A.22(2)(a)(2); *Puntenney* at 842-43. Summit has not proven this.

C. Iowa Constitutional Limitations on the Use of Eminent Domain.

A proposed pipeline must be a "public use" under article I, section 18 of the Iowa Constitution.[177] *Puntenney* at 844-53; *Mid-America*, 253 Iowa at 1147, 114 N.W.2d at 624.

[177] Article I, section 18 states: "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who

The *Puntenney* Court considered the scope of state constitutional limitations on takings for private hazardous liquid pipeline developments in the context of the Board's 2016 approval of a permit for the Dakota Access Pipe Line ("DAPL"). *Id*. at 833. The court defined "public use" consistent with Justice O'Connor's dissent in *Kelo v. City of New London*, 545 U.S. 469, 494, 125 S. Ct. 2655, 2671, 162 L.Ed.2d 439 (2005), thereby prohibiting takings based solely on the potential "secondary benefits" of a project, such as increased economic activity and taxes, because:

> almost any lawful use of private property will generate some secondary benefit and, thus, if "positive side effects" are sufficient to classify a transfer from one private party to another as "for public use," those constitutional words would not "realistically exclude *any* takings."

Id. at 845 (emphasis in original). The court cited with approval Justice O'Connor's recognition of three general categories of "public use":

> First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. [Third] . . . in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

Id. citing Kelo at 497–98, 125 S. Ct. at 2673 (citations omitted). The court decision expressly held that hazardous liquid pipelines "fall[] into the second category of traditionally valid public uses cited by Justice O'Connor: a common carrier akin to a railroad or a public

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shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

utility." *Puntenney* at 848. Therefore, in order for a hazardous liquid pipeline company to be granted eminent domain authority under the Iowa Constitution, it must operate as a common carrier.

Next, the *Puntenny* decision reviewed a number of other state court decisions that adopted "public use" definitions similar to that of Justice O'Connor. For example, the court discussed *Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 643, 647 (Okla. 2006), which overturned a county decision to take land for three water lines, two of which would serve a privately-owned electric generation plant, with the third to be built by the generation plant developer to improve existing public water service. *Puntenney* at 847. The *Muskogee* court looked beyond the fig leaf provided by the third water line and found that "the purpose of the takings was for the construction and operation of the privately owned energy company," and that "economic benefits alone would not suffice to satisfy the public use requirement." *Muskogee* at 649.

The decision then discussed Iowa precedent recognizing that the purpose of "[t]he public-use requirement is to prevent abuse of the power for the benefit of private parties." *Puntenney* at 847-48, siting *Clarke County Reservoir Commission v. Robins*, 862 N.W.2d 166, 171–72 (Iowa 2015). While the courts grant deference to "what governmental activities will advantage the public," it recognized that "[w]ere the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff." *Puntenney at 848*, quoting *Kelo*, 545 U.S. at 497, 125 S. Ct. at 2673). Therefore, a legislative grant of eminent domain rights to private entities, including the grant to carbon dioxide pipelines permitted by the Board under Iowa Code chapter 479B, remains

subject to the constitution requirement that such grants are limited to public uses. Accord, *Mid-America*, 253 Iowa at 1147, 114 N.W.2d at 624.

The court summarized its holding as follows:

> In sum, because we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickle-down benefits of economic development are not enough to constitute a public use. . . . But here there is more. . . . the record indicates that it also provides public benefits in the form of cheaper and safer transportation of oil, which in a competitive marketplace results in lower prices for petroleum products. As already discussed, the pipeline is a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans.

Thus, the Puntenney holding identified two necessary elements in the Iowa constitutional standard for granting the right of eminent domain to a private pipeline company: (a) it must operate as a common carrier, and (b) its operation must provide a substantial public benefit, such as "safer transportation" and "lower prices" for all Iowans. *Puntenney* at 849. But, this analysis must be read in light of the court's warning against "hortatory fluff." *Puntenney* at 848. Since many purely private projects may increase safety and/or reduce the prices of consumer products, the key safeguard in this analysis is that the pipeline must operate as a common carrier, because only this element embodies "public use" as opposed to mere public benefit. This safeguard is in accord with the legislature's enactment in 2017 of additional limitations on the exercise of eminent domain powers contained in Iowa Code 6A.22(2)(a)(2), which limits use of eminent domain to pipelines that perform "the function of a common carrier." 2017 Acts, ch. 170, §§ 58-60, as amended by 2018 Acts, ch. 1026, § 4.

That the common carrier requirement is a constitutional requirement also arises from the decision in *Mid-America*, 253 Iowa 1143, 114 N.W.2d 622, where the court found that a proposal to construct a natural gas pipeline that would handle "only its own products" was not a common carrier. 253 Iowa at 1146, 114 N.W.2d at 624. It recognized that the statute granting pipeline companies the right to eminent domain stressed safety as a public benefit,[178] but found such benefit alone was not sufficient to make the project a public use. *Id*. Based on the fact that the pipeline would be operated solely to transport the company's own product and therefore for a private purpose, it held that the company did not have a right to eminent domain. 253 Iowa at 1147, 114 N.W.2d at 624.

The common carrier constitutional prerequisite for use of eminent domain for new pipelines is the critical element in determining whether or not such pipeline provides a "public use," because all proposed pipelines could be claimed to provide economic benefits to consumers. It distinguishes a private purpose pipeline from one that serves more than just its owner's purposes. That the *Puntenney* court ("this [DAPL pipeline] case falls into the second category of traditionally valid public uses cited by Justice O'Connor: a common carrier akin to a railroad or a public utility") and Iowa Code § 6A.22(2(A)(2) ("'Public use', 'public purpose', or 'public improvement' means . . . [t]he acquisition of any interest in property . . . necessary to the function of a common carrier") both require common carriage reinforces the conclusion that only common carrier pipelines may be granted the right of eminent domain in Iowa.

[178] The court did not consider whether the proposed project would provide economic benefits, such as lower natural gas prices, though that might have been argued.

D. The Definition of "Common Carrier" Under Iowa and Federal Law

Unlike oil pipelines[179], carbon dioxide pipelines are not regulated by the Federal Energy Regulatory Commission ("FERC"), because they do not fall within the jurisdiction of the Interstate Commerce Act, 49 U.S.C. § 60501 *et seq*. (2023) ("ICA")[180]; 49 App. U.S.C. § 1 *et seq*. (1988); or the Natural Gas Act. 15 U.S.C. § 717(b) ("NGA").[181] Further, carbon dioxide pipelines are not regulated by the federal Surface Transportation Board ("STB").[182] Therefore, no federal agency will determine whether or not Summit's proposed pipeline is a common carrier under federal law. Consequently, federal law does not govern the proposed Summit pipeline's common carrier status, and the Board will not be able to rely on a federal determination of the pipeline's compliance with federal common carrier requirements, as both it and the courts did in their approvals of DAPL's common carrier status.[183]

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[179] E.g., FERC determined that the commercial agreements underpinning the Dakota Access Pipe Line ("DAPL") complied with federal common carrier standards.

[180] 49 U.S.C. § 60502 states: "The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or an officer or component of the Interstate Commerce Commission." The ICA, as it exists today, and as it applies to other forms of transportation currently regulated by the ICC, is not the Act that applies to oil pipelines. Rather, regulation of oil pipelines is governed by the version of the ICA as it stood on the date of enactment of the Department of Energy Organization Act. In 1978, the ICA was partially repealed and recodified. However, Public Law No. 95-473, § 4(c); 92 Stat. 1466-1470 (1978) provides that those portions of the old ICA that were repealed and recodified in 1978, nevertheless remain in effect as they existed on October 1, 1977, to the ·extent that these laws relate to the movement of oil by pipeline and the rates and charges related thereto. Thus, the ICA relating to oil pipeline regulation is found as an appendix to Title 49 of the United States Code and is cited accordingly.

[181] *Cortez Pipeline Company*, 7 F.E.R.C. ¶ 61,024 (1979).

[182] The STB is an independent federal administrative agency within the Department of Transportation and is responsible for economic regulation of certain common carrier interstate transportation. This responsibility primarily relates to railroad transportation, but also includes interstate transportation by pipeline of commodities "when transporting a commodity other than water, gas or oil, with the term "gas" undefined. 49 U.S.C. §15301(a). The Interstate Commerce Commission ("ICC"), the STB's predecessor, specifically disclaimed jurisdiction over carbon dioxide pipelines in 1981. In an ICC proceeding involving the same pipeline project as the FERC decision, *Cortez Pipeline Co.*, the ICC determined that it lacked jurisdiction over carbon dioxide pipelines. *Cortex Pipeline Co.*, 46 Fed. Reg. 18,805 (1981).

[183] DAPL pipeline's status as a common carrier under federal law was confirmed by a FERC Declaratory Order issued on December 24, 2014, shortly after the DAPL project developer filed its October 2014 petition with the Board, almost a full year before the Board's evidentiary hearing in that matter. At the time of the Board's DAPL decision, the pipeline's status as a common carrier under federal law was not in dispute. *Dakota Access, LLC, Energy Transfer Crude Oil Company, LLC*, 149 FERC ¶ 61,275 (Dec. 24, 2014) (Declaratory Order in Docket No.

Here, Iowa common law governs the Board's determination of whether or not this pipeline is a "common carrier" within the meaning of Iowa Code §6A.22(2)(a)(2) and under the Iowa Constitution. *Puntenney* at 843; *Mid-America Pipeline*, 253 Iowa at 1147, 114 N.W.2d at 624. Even though federal law is not here applicable, the Board may consider federal law and FERC common carrier practice for oil pipelines to be guidance for its state common carrier analysis.

No Iowa statute defines the term "common carrier" for the purposes of § 6A.22(2)(a)(2).[184] Instead, as discussed below, the Iowa courts have developed a common law definition for "common carrier" for use in agency and judicial decisions. *E.g.*, *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 774-75 (Iowa 2016). Accordingly, the state common law definition of "common carrier" is provided, below, followed by a discussion of federal common carrier pipeline law and practice, as guidance.

i. Iowa Common Carrier Law

"Iowa law adheres to a common law test for determining whether a particular conveyance is a common carrier or private carrier." *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 810 (1996); *United Suppliers*, 876 N.W.2d at 774-75. The *Wright* court provided the following definition and description of a "common carrier":

> Iowa law has defined a common carrier as "one who undertakes to transport, indiscriminately, persons and property for hire." *Employers Mut. Cas. Co. v. Chicago & North Western Transp.*

OR14-42-000). Both the Board and the Supreme Court relied on this federal status in their findings that DAPL was a common carrier pipeline. *Puntenney* at 843.

[184] Iowa Code § 123.3 defines the term "air common carrier" to mean "a person engaged in transporting passengers for hire in interstate or foreign commerce by aircraft and operating regularly scheduled flights under a certificate of public convenience issued by the civil aeronautics board." Iowa Code § 452A.2 defines the terms "common carrier" and "contract carrier" to both mean "a person involved in the movement of motor fuel or special fuel from the terminal or movement of the motor fuel or special fuel imported into this state, who is not an owner of the motor fuel or special fuel." Neither of these definitions are applicable to the matter at hand.

> *Co.*, 521 N.W.2d 692, 693 (Iowa 1994). We have ruled that the distinctive characteristic of a common carrier is that it holds itself out as ready to engage in the transportation of goods or persons for hire, as public employment, and not as a casual occupation. *Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533, 535 (Iowa 1974). A common carrier holds itself out to the public as a carrier of all goods and persons for hire. We, however, have also recognized that a common carrier need not serve all the public all the time. *Id*. A common carrier may combine its transportation function with other vocations and still be considered a common carrier. *Id*. at 538.

Wright at 811-12. An earlier Supreme Court decision, *Circle Exp. Co. v. Iowa State Commerce Commission,* cited 13 C.J.S. § 3, p. 26 for the following similar enumerated test:

> The test by which it is determined whether a party is a common carrier of goods is: (1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry to the methods by which his business is conducted, and over his established roads. (4) The transportation must be for hire.

249 Iowa 651, 658-59, 86 N.W.2d 888, 893 (1957).

To further elucidate the "for hire" requirement, the Iowa Supreme Court adopted the federal "primary business test." *United Suppliers*, 876 N.W.2d at 775. This test determines whether a carrier's "primary business" is supplying transportation for compensation or some other non-transportation activity. *Id.* at 776. Where a business transports goods, but only incidental to its primary business, then the carrier is a "private carrier" and not a common carrier. *See id*. at 776. The "primary business test" includes the following twelve factors in this analysis.

1. Whether the carrier is the owner of the property transported.

2. Whether orders for the property are received prior to its purchase by the carrier.
3. Whether the carrier utilizes warehousing facilities and the extent of this use as a storage place.
4. Whether the carrier undertakes any financial risks in the transportation-connected enterprise.
5. Whether the carrier includes in the sale price an amount to cover transportation costs and its relation to the distance the goods are transported.
6. Whether the carrier transports or holds out to transport for anyone other than itself.
7. Whether the carrier advertises itself as being in a noncarrier business.
8. Whether its investment in transportation facilities and equipment is the principal part of its total business investment.
9. Whether the carrier performs any real service other than transportation from which it can profit.
10. Whether the [carrier] at any time engages for-hire carriers to effect delivery of the products, as might be expected, for example, when it is called upon to fill an order and its own equipment is otherwise engaged.
11. Whether the products are delivered directly from the shipper to the consignee (*i.e.*, without intermediate warehousing).
12. Whether solicitation of the order is by the supplier rather than the truck owner.

876 N.W.2d at 776-77. The court found that United Suppliers was a wholesale distributer of agricultural fertilizers and chemicals that operated a fleet of 95 trucks to deliver its own products for a fee. *Id*. at 767. The court determined that eleven of the factors weighed toward common carrier status, and particularly noted that the company transported only its own chemicals and generated only about five percent of its profits from its transportation services. Therefore, it held that United Suppliers' transportation activities were not the company's "primary business," such that it was not a "for hire" common carrier and instead

was a private carrier. *Id*. at 777-78. Because it only delivered products it sold to its customers, it was not a common carrier.

The *United Suppliers* decision is consistent with *Mid-America* decision, in which the court found that a proposed pipeline would transport only natural gas owned by the pipeline's owner, such that it was not a common carrier, instead was a private carrier, and as a consequence could not be granted the right to eminent domain under the Iowa Constitution. 253 Iowa at 1146-47, 114 N.W.2d at 624. The *Mid-America* court held:

> Taking the allegations of the petition, Northern is a private corporation intending to operate the proposed pipe line for private purposes. This may not be done; and any statute giving such a right is beyond the pale of constitutional authority. The power of eminent domain may be granted and exercised only where a public use is involved. *Abolt v. City of Fort Madison*, 252 Iowa 626, 108 N.W.2d 263, 267, and citations. We must agree that the grant of the power of eminent domain for a strictly private purpose and use, as Chapter 490 seems to authorize, is beyond legislative authority and when the commission attempts to follow the statute in granting such right it is acting illegally and beyond its jurisdiction. It has no right to put into effect unconstitutional provisions of a statute.

Id.; accord *Mountain Valley Pipeline, LLC v. McCurdy,* 238 W.Va. 200, 793 S.E.2d 850 (2016). (pipeline intended to carry natural gas almost exclusively produced by its own affiliates not a common carrier); *Progressive Northwestern Insurance Co. v. Martinez*, 125 N.M. 46, 956 P.2d 845, 846-47 (Ct.App.1998) (sand and gravel excavator that transported only its own products not a common carrier); *Gambino v. Jackson*, 150 W.Va. 305, 145 S.E.2d 124, 129 (1965) (lime distributor that transported only its own product not a common carrier). The fact that a carrier transported only its own products was a critical factor in

determining that a carrier was private and not common carrier in both the *United Suppliers* and *Mid-America* decisions.

The *Puntenney* court referenced Iowa common carrier precedent, but it did not methodically apply Iowa's common law definition of "common carrier." 928 N.W.2d at 843. Instead, the court appeared primarily to rely on DAPL's confirmed status under federal law as a common carrier pipeline, and referenced Iowa precedent to confirm that DAPL's federal common carrier status was in accordance with the Iowa common carrier definition. *Id*. Thus, the *Puntenney* decision does not provide a detailed application of Iowa common carrier law.

In the Board's common carrier pipeline decision making, the scope and weight of the evidence must be adequate to prove (a) all of the elements in Iowa's common law common carrier definition and (b) that a pipeline will have a substantial direct public benefit under the Iowa Constitution. *Puntenney* at 849; *Mid-America*, 253 Iowa at 1147, 114 N.W.2d at 624. Moreover, such evidence must be "competent and substantial," *Circle*, 249 Iowa at 653, 86 N.W.2d at 890. When evaluating the certainty of pipeline company commitments to operate in the future as a common carrier, the Board should rely primarily on the contents of executed legally binding contracts between a pipeline company and third-party shippers. The Board should give little weight to company aspirations, expectations, and statements of intent, because such nonbinding statements are not "competent and substantial" evidence. In the absence of substantial evidence proving by a preponderance of the evidence a company's common carrier status, the Board should find that the company has not met its burden of proof, determine that a proposed pipeline is not a common carrier, and deny the company the right to eminent domain.

With regard to judicial review of agency common carrier decisions, the Supreme Court has stated that "[i]t is a question of law for the court to determine what constitutes a common carrier, but it is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity." *Wright* at 810; see also *Circle,* 249 Iowa at 653, 86 N.W.2d at 890 ("It is a question of law for the court to determine what constitutes a common carrier, and so we may examine the record here to see if the proper concept of this service was applied."). When reviewing agency common carrier decisions, the courts "should only examine the evidence submitted to determine whether there is any competent and substantial evidence to support the findings." *Id*. Iowa Code § 6A.23 makes clear that the courts weigh this evidence under the preponderance of the evidence standard.

Typically, the courts have applied the common law standard where carriers' operations were ongoing, such that the courts could consider evidence of both actual carrier operations and executed contracts between the carrier and its third-party shippers. *E.g.*, *State ex rel. Bd. of R. R. Com'rs v. Rosenstein*, 252 N.W. 251, 252-53 (Iowa 1934); *Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Commission*, 160 N.W.2d 825, 834-35 (1968). The *Puntenney* and *Mid-America* decisions are notable exceptions, since pipeline common carrier decisions are made before pipelines are constructed. In such cases, the courts will likely rely either on federal findings of common carrier status, as in the *Puntenney* decision, or conduct a searching review of reliable record evidence proving common carrier status, such as executed contracts and other legally binding commitments, to confirm a carrier's future commitments.

ii. Federal Common Carrier Law

As discussed, no federal agency has jurisdiction to determine the common carrier status of carbon dioxide pipelines. As a result, the Board will not be in a position, as it did in its decision related to DAPL[185], to rely on a federal common carrier determination. Instead, the Board must independently determine whether Summit is a common carrier within the meaning of state law. However, the Board may treat federal common carrier law and practice as guidance in its decision making.

Federal law requires that all interstate oil pipeline companies be common carriers. 49 App. U.S.C. § 1(3)(a) ("[t]he term 'common carrier' as used in this chapter shall include all pipe-line companies . . . engaged in such transportation aforesaid as common carriers for hire."). Under federal law, all common carrier oil pipelines must "provide and furnish transportation upon reasonable request therefor.'' 49 U.S.C. app. 1(4). As stated by FERC in *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219, at P 12 (2017), "[b]y definition, a pipeline is a common carrier, and is bound by the ICA to ship product as long as a reasonable request for service is made by a shipper.'' An oil pipeline common carrier must provide "for hire" transportation services to third-parties.[186] To comply with federal common carrier requirements, a pipeline operator's rates and practices – for all classes of shippers – must be just, reasonable, and not unduly discriminatory.[187] These common carrier standards exist because a failure to comply with them would allow a pipeline operator to impose carriage

[185] *Puntenney* at 843.
[186] FERC does allow limited transportation of product by pipeline affiliates, but recognizes the risk of approving pipelines that ship only product owned by affiliates. *Proposed Policy Statement on Oil Pipeline Affiliate Committed Service*, 87 Fed. Reg. 78670 (Dec. 22, 2022).
[187] 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1).

terms that unjustly limit public use, allow unjust and unreasonable rates, and thereby render a pipeline operator a common carrier in name only.

Although FERC does not issue permits for oil pipelines, for practical reasons all proposed interstate oil pipelines acquire FERC confirmation of their common carrier status and approval of their commercial agreements with shippers early in the development process, because absent such approval FERC would not approve any tariffs and a pipeline operator could not charge its shippers for transportation services. Pipeline developers, their shippers, and investors need certainty that the commercial agreements underpinning pipeline revenues comply with federal law before making the substantial investments needed for construction. Therefore, pipeline developers typically seek a FERC declaratory order confirming that a pipeline's commercial arrangements comply with federal common carrier standards long before construction start. FERC requires that pipeline developers provide it with substantial evidence in the form of executed transportation service agreements, descriptions of open seasons, and proposed tariffs to prove that a pipeline will operate as a common carrier.

Dakota Access filed its Petition for Declaratory Order on September 26, 2014. This petition contained detailed evidence of the commercial agreements underpinning the DAPL. FERC reviewed this evidence and on December 24, 2014 (approximately one year before the Board's DAPL decision), issued a Declaratory Order in Docket No. OR13-42-000. *Dakota Access, LLC,* 149 FERC ¶ 61,275 (Dec. 24, 2014). Before finding that DAPL would comply with federal common carriage requirements, FERC considered the following:

- evidence that DAPL completed an initial open season to allocate this capacity, and on identical terms initiated an expansion open season, which together resulted in execution of a number of ship-or-pay (firm) transportation service agreements

("TSAs"), through which third-party shippers made capacity commitments to ship approximately 320,000 barrels of oil owned by them per day;

- a detailed description of the executed TSAs and resulting tariff structure and terms to confirm that DAPL's committed shippers agreed to the arrangements and would receive just, reasonable, and not unduly discriminatory transportation services;
- evidence that DAPL reserved 10 percent of capacity for "new shippers' uncommitted volumes," including a description of tariff terms needed to ensure that new, uncommitted shippers would also receive just, reasonable, and not unduly discriminatory transportation services; and
- evidence related to a number of other matters, including but not limited to the terms for pro-rationing to allocate capacity among committed and uncommitted shippers in the event of over-subscription during any month of operation.

DAPL's petition was not based on vague statements of future intentions, possible commercial structures, and a draft TSA. Instead, it provided detailed hard evidence. FERC did not merely assume that DAPL would be operated as a common carrier. Instead, it carefully reviewed the binding contract terms underpinning the project in light of federal common carrier standards to determine whether the proposed commercial terms, shipper classes, and tariffs complied with federal law. Such information provided FERC with sufficient evidentiary assurance that, following construction, Dakota Access would be required by its contracts to operate its pipeline as a common carrier.

A review of the 2014 FERC Declaratory Order makes clear that the *Puntenney* decision misapprehended federal common carrier requirements when the court found that

reservation of 10 percent capacity is "all the Federal Energy Regulatory Commission requires of a common carrier." *Puntenney* at 843. FERC requires much more. Federal common carrier requirements mandate that pipeline operators offer long-term firm service on nondiscriminatory and reasonable terms following an open season offering, to ensure that a pipeline operator is serving the public. Both the 90 percent of capacity reserved for firm contracts and the 10 percent capacity reserved for walkup shippers complied with federal common carrier requirements. FERC would not have issued a declaratory order finding compliance with federal common carrier requirements if Dakota Access had filed speculative commercial terms contained in draft unexecuted TSAs and an informal and undefined commitment to reserve 10 percent capacity for new unidentified uncommitted shippers. Under federal law, such evidence would be inadequate proof that a pipeline will in the future be operated in accordance with FERC common carrier requirements.

The *Puntenney* Court incorrectly assumed that only long-term firm contracts could support new pipeline construction, and that "[i]t would be unrealistic to require a $ 4 billion pipeline to depend entirely on walkup business." *Puntenney* at 843. The court's finding that, "[t]he key is whether spot shippers have access, and the federal agency with expertise in the matter has concluded that 10% is sufficient" is simply not a correct statement of federal law or FERC practice. The DAPL Declaratory Order confirms that FERC reviewed DAPL's committed and uncommitted commercial terms and found they comply with federal common carriage requirements. The court's understanding is also contradicted by FERC in its Proposed Policy Statement on Oil Pipeline Affiliate Contracts, 87 Fed. Reg. at 78671, which summaries the history of FERC's approval of the use of long-term firm contracts:

> Under the ICA, an oil pipeline is a common carrier that must provide transportation to shippers upon reasonable request. A pipeline has the burden to demonstrate that its proposed rates and services are just, reasonable, and not unduly discriminatory or preferential. Historically, pipelines have offered transportation service on a walk-up basis without having contracts with shippers. Since the mid-1990s, however, the Commission has also approved oil pipeline transportation rates and terms of service pursuant to long-term contracts with ship-or-pay obligations. Because committed contract shippers are not similarly situated to uncommitted shippers, they may receive service as defined by the contract (contractual committed service) that differs from uncommitted service. Contractual committed service complies with the ICA's common- carriage and nondiscrimination requirements when the same rates and terms are offered in a public open season where all interested shippers have an equal opportunity to obtain the committed service. When the open season results in an arm's-length agreement, the Commission presumes the contractual committed service is just and reasonable and non-discriminatory. In such cases, the presence of one or more nonaffiliated contracting shippers supports a presumption of reasonableness and nondiscrimination because the Commission assumes that nonaffiliated shippers are sophisticated parties that can be relied upon to protect their own interests from those of the pipeline, ensuring the agreement responds to competitive conditions.

(Emphasis added, footnotes omitted.) Prior to the mid-1990s, all construction of FERC-regulated oil pipelines was underpinned by month-to-month transportation contracts, and such contracts remain common. For example, the largest pipeline system in the U.S., the Enbridge Lakehead Pipeline System from Alberta to multiple locations around the Great Lakes, was constructed and has been expanded via construction of multiple new pipelines supported only by month-to-month contracts. Multiple development models are available to Summit.

The Board should not interpret the *Puntenney* decision's statement that a pipeline carrier need only reserve 10 percent of its capacity for uncommitted shippers as the applicable standard under federal law, much less Iowa law. This statement must be understood to be *dicta*. Instead, the Board must apply Iowa's common law to determine if Summit will operate as a common carrier.

Although the Board's determination of whether the proposed Summit carbon dioxide pipeline is a common carrier is not subject to federal pipeline common carrier standards and process, the Board should consider FERC practice and law as guidance for its common carrier decisions. In particular, the Board should base its decision not on statements of intent, but on executed contracts, detailed descriptions of commercial terms, and other substantial evidence. Otherwise, there is a risk that Summit's commercial aspirations will fail and the pipeline will not operate as a common carrier.

E. Description of Summit's Existing and Proposed Commercial Structures and Proposed Findings of Fact.

Iowa law requires that Summit provide "competent and substantial evidence" that it will operate its proposed pipeline as a common carrier. *Circle*, 249 Iowa at 653, 86 N.W.2d at 890. Summit has described three distinct commercial structures that it claims will underpin its proposed carbon dioxide pipeline project:

- carbon dioxide offtake and revenue sharing agreements between Summit and 13 ethanol partners in Iowa and an additional 20 in other states, in which Summit would acquire title to the plants' carbon dioxide at the point that it would pass into carbon capture equipment owned by Summit's carbon capture subsidiary and then ship this self-owned carbon dioxide through pipelines owned by Summit's

transportation subsidiary to a sequestration site owned by Summit's sequestration subsidiary, whereby Summit and its contracted ethanol plants would share revenues generated by this scheme from either the federal tax credit provided by 26 U.S.C. § 45Q (for carbon capture and sequestration) or 26 U.S.C. § 45Z (clean fuel production tax credit), supplemented by revenue from sales of low carbon fuel credits;

- a proposed long-term committed shipper structure between Summit and yet-to-identified non-ethanol carbon dioxide emitters, such as coal power plants and cement plants, to which no shippers have yet contractually committed; and
- a proposed reservation of 10 percent of capacity for yet-to-be identified uncommitted shippers pursuant to a yet to be finalized uncommitted shipper tariff agreement.

Following a brief description of the relationships among Summit's corporate affiliates, each of these arrangements are described below based on evidence in the record. Landowners request that the Board consider the following to be proposed findings of fact for the Board's decision on whether or not Summit will operate the proposed pipeline system as a common carrier under Iowa law.

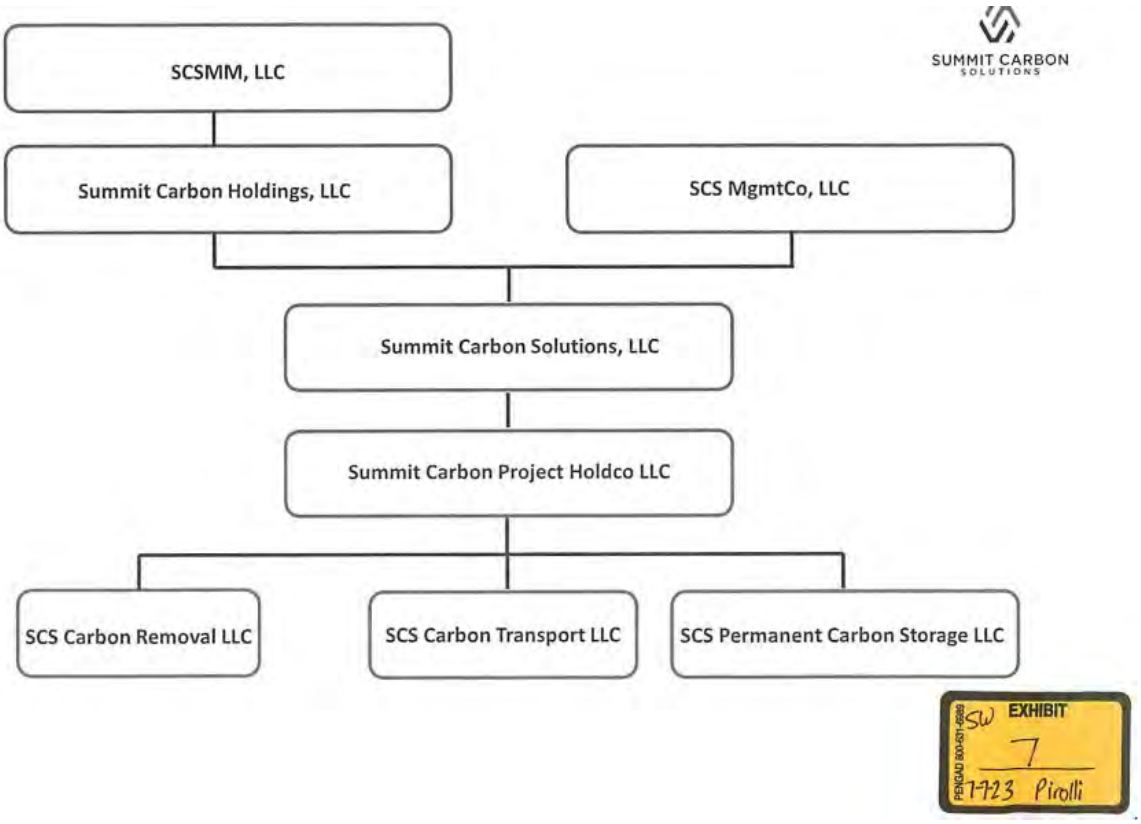
i. Summit's Corporate Affiliates

Summit's proposed project will be owned and managed through a number of wholly owned subsidiaries. The overall parent corporation is Summit Carbon Solutions, LLC (the project applicant), which will wholly own a holding company named Summit Carbon Project

Holdco, LLC, that will in turn wholly own three corporations that will wholly own different infrastructure components all of which are necessary for project operation:

- SCS Carbon Removal, LLC, which will own the carbon capture equipment to be attached to and installed adjacent to contracted ethanol plants;
- SCS Carbon Transport, LLC, which will own the proposed pipeline between the capture facilities and sequestration sites; and
- SCS Permanent Carbon Storage, LLC, which will own planned injection wells and the sequestration sites in North Dakota.

Hearing Transcript at 1886 line 4 to 1887 lines 9. See also Pirolli deposition exhibit 7 which was received as non-confidential evidence at the hearing:



Although different parts of the project infrastructure would be owned by lower-level affiliates, the projects, as a whole, will be owned and controlled by Summit Carbon Solutions, LLC, such that all commercial relationships between a Summit affiliate and third-party carbon dioxide producers would nonetheless be a relationship with Summit Carbon Solutions, LLC. The moment the CO2 molecules make contact with SCS Carbon Removal, LLC's equipment (capture equipment) there are no unrelated third parties involved in any part of the capture, transportation, or storage of the CO2. Summit captures, transports, and stores CO2 it owns.

ii. Evidence Related to Summit's Offtake and Revenue Sharing Agreements

a) According to the testimony and deposition of James Pirolli, Chief Commercial Officer for Summit Carbon Solutions, the company has entered into long-term "Offtake Agreements" with its 13-ethanol plant "partners" in Iowa, and an additional 20 ethanol partners in other states. Pirolli Direct at 9, lines 7-13, Pirolli Deposition at 13, lines 11-12, at 40 lines 22-25, and at 41 lines 1-8.

b) Summit executed Offtake Agreements with all but one of its ethanol plants in or before 2021. Pirolli Deposition at 6 line 13 to 7 line 18.

c) Under the Offtake Agreements, Summit is a "full service" carbon dioxide management company that provides carbon capture, impurities removal, transportation, and storage services. Pirolli Deposition at 30 lines 6-19.

d) The Offtake Agreements provide that Summit and its ethanol partners will share in the revenues and operating costs of the project. Pirolli Deposition at 27 lines 8-11. According to Mr. Pirolli, "Generally speaking, the CO_2 offtake

agreements are revenue-share agreements…we share that revenue stream." Pirolli Deposition at 27 lines 8-11; 30 lines 15-19.

e) The revenues shared under the Offtake Agreements will come from either the federal 45Q or 45Z tax credits, depending on which is more lucrative in a given year, as well as revenues from low carbon fuel standard carbon credit sales. Broghammer Cross at Tr. 2019 lines 4-8. The right to a 45Q carbon sequestration tax credit may only be claimed by the owner of capture equipment, which is Summit. See Summit Offtake Agreements Confidential Exhibits 1-13, aka JLO Ex. 548 and Pirolli Cross at Tr. 1942 lines 4-5. The 45Z clean fuel tax credit may only be claimed by a producer of clean fuel, which under the Offtake Agreement is an ethanol producer. Pirolli Cross at 1942 lines 5-6 and at 1943 lines 4-9. The 45Z tax credit at present will only be available from 2025 to 2027. Pirolli Cross at 1930 lines 8-13. The 45Q and 45Z tax credits cannot both be claimed in the same years for the same facility, such that the Offtake Agreement partners

Pirolli Cross at 1942 lines 6-8 and at 1944 lines 11-17. If a claim by Summit of the 45Q tax credit is more lucrative, then Summit would

. Pirolli Cross at 1944 lines 5-20.

f) Operating costs to be shared by the partners under the Offtake Agreements include "capture, compression, transportation, and sequestration" costs. Pirolli Deposition at 98 lines 14-17.

g) The Offtake Agreements are distinct from fee-for-service transportation agreements – they are "a revenue-share model." Pirolli Deposition at 49 lines 22-25.

h) The Offtake Agreements are structured specifically for Summit's ethanol partners and not for other types of carbon dioxide emitters. Pirolli Deposition at 30 lines 6-8 and at 69 lines 8-13; Pirolli Cross at 1964 line 22 to 1965 line 19. Other types of carbon dioxide emitters are not eligible to use the Offtake Agreements. Pirolli Deposition at 30 lines 8-11 and at 69 lines 14-19.

i) The ethanol partners will provide carbon dioxide to the project, and Summit will finance, design, construct, own, operate, and maintain all of the carbon capture, pipeline (trunk and laterals), and sequestration infrastructure. Pirolli Direct Testimony at 10-12; Pirolli Deposition at 36 lines 12-19.

j) Offtake Agreement Section 3.02 provides that Summit

of carbon dioxide. Pirolli Deposition at 35 line 12 to 36 line 5.

k) Offtake Agreement Section 8.01 defines the "title transfer point" for the title to the carbon dioxide as follows: "

..."

"…[W]e actually take custody of the CO2 at the scrubber that comes off of the fermentation process at the ethanol plant."

Pirolli Deposition at 62 lines 3-6; Powell cross at 1630 lines 18-20.

l) Offtake Agreement Section 8.1 also provides that:

Pirolli Deposition at 62 lines 6-10.

m) The transfer point is located near the top of each ethanol plant's current emissions point (at the outlet of the smokestack). Pirolli Deposition at 62 line 20 to 63 line 2.

n) Summit did not enter into these Offtake Agreements through an open season, but rather via individual marketing. Pirolli Deposition at 14 lines 4-9. Summit has an ongoing effort to enter into new Offtake Agreements with additional ethanol partners. Pirolli Deposition at 29 lines 15 to 25.

o) The exact terms in years of the Offtake Agreements are not public information, but are more than ten years in length, and they automatically renew unless either party terminates the agreement. Pirolli Deposition at 34 line 19 to 35 line 7; Broghammer Deposition at 66 lines 20-24.

iii. Evidence Related to Summit's Proposed Committed Shipper Transportation Services.

a) Summit claims that any carbon dioxide emitter may enter into a transportation service agreement to transport carbon dioxide from the emitter to Summit's sequestration facility in North Dakota. Pirolli Rebuttal at 5 lines 13-22.

b) Summit has provided into the record a draft unexecuted transportation service agreement. Pirolli Deposition at 47 line 22 to 49 line 1.

c) Summit has not yet entered into a transportation service agreement with any third-party shipper. Pirolli Deposition at 52 lines 8 -18. Mr. Pirolli stated: "like I said, we don't have any of those signed or executed yet." Pirolli Deposition at 53 lines 3-10. During cross examination, Mr. Pirolli stated: "Well, we don't have any transportation agreements signed yet." Pirolli Cross at 1964 lines 20-21.

d) As Summit has yet to enter into transportation services agreements with shippers, the possible terms of such agreements are not known but they would be in terms of years. Pirolli Cross at 1971 line 21 to 1972 line 6.

e) Under a transportation services agreement the shipper would pay for transportation and storage services, but it would also be obligated to itself pay for construction of its own carbon capture facility. Pirolli Deposition at 66 lines 22-25.

f) Construction of a single carbon capture facility is between fifteen to sixty million dollars.[188]

g) Under a transportation services agreement, the shipper would own title to the carbon dioxide, whereas under an Offtake Agreement the title to the carbon dioxide transfers to Summit. Pirolli Deposition at 66 lines 1-9.

h) Under a transportation services agreement, the shipper would own the carbon capture equipment and so claim the 45Q tax credit and pay Summit a fee for its transportation services. Pirolli Cross at 1965 lines 16-19.

[188] Tr. 1914 ln 17 to 1915 ln 6

i) No shippers have yet signed transportation services agreements because of uncertainty about total project costs and revenues and project complexity. Pirolli Cross at 1965 line 20 to 1966 at line 22. The cost of capturing carbon at ethanol plants is relatively lower than at most other industrial facilities, because the gas stream from ethanol plants is 97 percent pure carbon dioxide, whereas the stream from fertilizer plants is only 80 percent carbon dioxide, and the stream from combustion (heat and power) plants is 4 to 10 percent carbon dioxide. The cost of removing impurities (gases other than carbon dioxide) increases project costs, so the lower the percent carbon dioxide the higher the capture costs, which significantly impacts the financial viability of carbon capture projects that might be considered by regional emitters. Pirolli Cross at 1967 lines 3-23.

j) Summit intends to conduct an opens season to sell capacity via long-term transportation agreements, but as of the evidentiary hearing it had not yet initiated an open season and Mr. Pirolli did not know when Summit might do so. Pirolli Cross at 1968 lines 9-13. Mr. Pirolli stated: “my understanding there’s certain specific and more formal processes that go along with a formal open season that were going to conduct at some point in the future.” Pirolli Cross at 1968 lines 7-10.

iv. Evidence Related to Summit's Proposed Uncommitted Shipper Transportation Services.

a) Summit intends to reserve 10 percent of the capacity of its pipeline system for uncommitted future "walk-up" shippers. Pirolli Rebuttal at 6 lines 15-17; Pirolli Deposition at 55 lines 3-8; Pirolli Cross at 1971 lines 15-20.

b) Summit states that it would provide transportation services to uncommitted shippers "if we have an agreement in place ..." Pirolli Deposition at 59 lines 6-16.

c) An uncommitted shipper would need to fund and install its own capture equipment. Pirolli Deposition at 59 line 23 to 60 line 6.

d) Uncommitted shippers would retain ownership of the carbon dioxide they capture at their facilities. Pirolli Deposition at 61 lines 3-9.

e) Summit would need to build a lateral pipeline to connect uncommitted shippers to its pipeline system and agree to terms whereby the shipper would pay for such pipeline. Pirolli Deposition at 55 lines 19-25.

f) Summit has not planned for any receipt points on its pipeline system that would accept carbon dioxide transported from an emitter to the pipeline by truck. Pirolli Deposition at 56 lines 1-19.

g) Summit has not executed any contracts with uncommitted shippers.

F. Summit Has Failed to Provide "Competent and Substantial Evidence" that Its Proposed Pipeline System Will Function as a Common Carrier.

Iowa law authorizes the Board to grant the right of eminent domain to carbon dioxide pipelines, but also limits this right only to those that "function as a common carrier." Iowa

Code 6A.22(2)(a)(2). Before granting eminent domain rights to Summit, the Board must find, based on "competent and substantial evidence," that Summit will operate as a common carrier. *Puntenney* at 843; *Circle*, 249 Iowa at 653, 86 N.W.2d at 890. Summit has failed to provide such evidence and, therefore, has failed to meet its burden of proof. Accordingly, the Board must deny Summit the right to eminent domain.

The common carrier standard applicable in this proceeding is the common law standard provided by the Iowa courts: a common carrier is one who transports, indiscriminately, persons or property of others for hire. *Wright* at 811-12. Application of this test to proposed interstate pipelines necessitates careful investigation of the commercial relationships between a carrier and its shippers. Evidence of such relationships should be in the form primarily of executed commercial contracts and related documentation describing how these contracts will ensure future common carriage. Statements of company aspirations and intent and company commercial goals are not substantial evidence. A failure to require substantial evidence proving common carrier status risks having eminent domain be used for a private purpose. The Board should evaluate such evidence under the preponderance of the evidence standard, keeping in mind that eminent domain rights is a limited infringement of the sacred right to private property ungirding the strength of the United States and the freedom of Americans. Eminent domain should not be granted to a private party without either clear legislative authorization and investigation to confirm full compliance with Iowa law.

Summit has provided evidence of three types of commercial relationships that it claims make it a common carrier:

- carbon dioxide offtake and revenue sharing agreements between Summit and 13 Iowa ethanol producers and 20 producers in other states;
- long-term take-or-pay (firm) committed shipper transportation service agreements between Summit and yet-to-be contracted non-ethanol carbon emitters; and
- short-term uncommitted or "walk-up" shipper agreements implemented through tariff between Summit and yet-to-be contracted non-ethanol carbon emitters.

The evidence about these existing and potential commercial arrangements shows that Summit will not function as a common carrier, because:

a) the Offtake Agreements do not create a carrier-shipper relationship, Summit will [redacted] before it enters the pipeline system, and Summit will not operate as a "for hire" carrier; and

b) both the committed and uncommitted shipper arrangements are not based on executed transportation service agreements or negotiated tariffs, despite Summit's two-year long attempt to engage non-ethanol carbon dioxide emitters, such that Summit's committed and uncommitted shipper arrangements are too commercially undeveloped to provide reliable evidence that such relationships will come into existence at all, and even if they eventually do, it is impossible to know whether the terms of such transportation agreements would provide common carrier services.

The following discusses each of Summit's commercial arrangements in turn.

i. Summit Does Not Function as a Common Carrier Under the Offtake Agreements, Because the Offtake Agreement Creates a Joint Venture Relationship Between Summit and its Partner Ethanol Producers.

The Offtake Agreements bear no resemblance to common carrier contracts. Instead, they are in the nature of joint venture agreements. Under Iowa law, "[a] joint adventure is defined as an association of two or more persons to carry out a single business enterprise for profit; also as a common undertaking in which two or more combine their property, money, efforts, skill or knowledge." *Peoples Trust & Sav. Bank v. Security Sav. Bank*, 815 N.W.2d 744, 756 (Iowa 2012).

Here, the ethanol plant partners contribute to the venture

[redacted] Summit retains title to the carbon dioxide throughout transportation and sequestration. For its part, Summit through its subsidiaries processes this carbon dioxide to prepare it for transportation and then transports and disposes of the carbon dioxide via sequestration injection wells. The ethanol partners and Summit share in operational costs of carbon capture, transportation, and sequestration. The ethanol plant "partners" and Summit also share all project revenues that may be generated by Summit via the 45Q tax credit and by the ethanol partners via the 45Z tax credits and/or low carbon fuel credits. Summit will own title to the capture, transportation, and sequestration infrastructure and earn revenue from its undivided interest in the combined operations of all of this infrastructure. The ethanol "partners," will also earn revenue from all project operations and bear their share of operational costs, including presumably maintenance of Summit's infrastructure. As such, the ethanol "partners" will have an equitable interest in operation of the capture facilities, pipelines, and sequestration sites. Thus, the Offtake

Agreements are not transportation agreements and do not create a carrier-shipper relationship between Summit and its ethanol plant partners. Instead, the Offtake Agreements create joint venture relationships between and among Summit and each of its ethanol plant "partners."

In contrast, in a common carrier transportation agreement, the shipper owns the product shipped, the carrier owns the means of transporting the product, and the shipper pays the carrier for transportation services. According to evidence adduced from Mr. Pirolli's deposition and public testimony, the Offtake Agreements do not create such a relationship.

Summit's transportation affiliate, SCS Carbon Transport, LLC, will own the pipeline and serve as a "carrier," but it will operate on behalf of and to the benefit of all of the "partners" in this joint venture, including both its corporate parent and the ethanol plant "partners." Further, SCS Carbon Transport, LLC will transport carbon

Summit Carbon Solutions, LLS, and it will deliver this carbon dioxide to sequestration sites also owned by Permanent Carbon Removal, LLC, wholly owned subsidiary of Summit Carbon Solutions, LLC. Since under the Offtake Agreements SCS Carbon Transport, LLC will serve only the joint venture entities and will not serve any entities outside of this joint venture, it is a private carrier and does not function as a common carrier.

ii. Summit Does Not Function as a Common Carrier Under the Offtake Agreements, Because Summit Will Transport Carbon Dioxide

To be a common carrier, a carrier must transport a product owned by others. "He must be engaged in the business of carrying goods for others ..." *Circle*, at 249 Iowa at 658, 86 N.W.2d at 893. The *Mid-America* decision considered a petition by a natural gas pipeline proposed to be constructed in Iowa, found that it would transport "only its own products" and

found that it was "not a common carrier of such products." 253 Iowa at 1146, 114 N.W.2d at 624. Accordingly, the court found that the pipeline company was "a private corporation intending to operate the proposed pipe line for private purposes" and denied it the right to eminent domain. 253 Iowa at 1147, 114 N.W.2d at 624. Subsequently, the pipeline company elected to pursue construction without the right of eminent domain. *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 255 Iowa 1304, 1306, 125 N.W.2d 801, 802 (1964). Similarly, in *Mountain Valley*, 238 W.Va. 200, 793 S.E.2d 850 (2016), the court found that a proposed pipeline intended to carry natural gas almost exclusively produced by its own affiliates, and so held that it was not a common carrier. Transportation of products for others is a necessary element in the definition of "common carrier," because a carrier that transports only its own products does not serve anyone else, much less the public, and also cannot offer for-hire services to others.

As such, under the first *Mid-America* decision, Summit is a private carrier and not a common carrier, and it is not entitled to the right of eminent domain.

It could be argued here that, pursuant to the Offtake Agreements Summit transports carbon dioxide from 33 ethanol plants, such that it is providing transportation services to these companies. This argument fails, because: (a) Summit carbon dioxide; (b) and SCS Carbon Transport, LLC, serves only entities with an equitable interest

in, and that provide financial support to operate and maintain its pipelines. The joint venture developed by Summit may transport carbon dioxide sourced from many ethanol companies, but that fact does not make SCS Carbon Transport a common carrier – it's the private carrier entity in a very large unified private venture.

Summit bears a stronger relationship to United Suppliers, a wholesale distributor that purchased agricultural chemicals from petrochemical companies in bulk, then sold and transported these chemicals to its customers using its self-owned fleet of 95 semi-tractors. 876 N.W.2d at 766. The chemicals may have come from many manufacturers, but the source of the products is irrelevant to whether United Suppliers was functioning as a common carrier. It was serving only its own interests. Accordingly, the court found that it was not a common carrier. Summit also acquires product from many sources, albeit via profit sharing, processes this product so it may be shipped, and then transports it to its disposal sites. Just as was found in *United Suppliers*, Summit does not serve any third-party shippers. Therefore, Summit would be a private carrier and not a common carrier.

iii. Summit Does Not Function as a Common Carrier Under the Offtake Agreements, Because It's Primary Business Is Not Transportation.

Application of the "primary business test" to Summit shows that the primary business created by the Offtake Agreements is a "full-service" carbon management company, of which transportation of carbon dioxide is just one part. Application of the "primary business test" adopted by the *United Suppliers* decision, 876 N.W.2d at 776-777, confirms this conclusion. First, Summit would be the owner of all the property transported. Second, since Summit acquires carbon dioxide via long-term Offtake Agreements, it does order the carbon dioxide prior to its "purchase" because its carbon acquisition is part of a larger business scheme.

Third, Summit does not have upstream storage, but it ships the carbon dioxide to downstream storage facilities, such that it does not accept or receive product from other transportation companies via intermediate storage. Fourth, Summit owns and takes financial risks in its transportation affiliate, meaning that the transportation affiliate does not exist apart from the business Summit-ethanol plants joint venture.

Sixth, through the Offtake Agreements,

owned by other entities. Seventh, Summit advertises itself as being a full-service carbon dioxide disposal company that offers services other than transportation. Eight, it is unknown whether Summit's pipeline infrastructure represents the principal part of its business. Ninth, Summit's profits derive primarily from monetizing the 45Q tax credit, which does not provide benefits for transporting carbon dioxide, but rather for capturing and disposing of carbon dioxide; it receives no revenue stream from pipeline operations. It could also profit from revenue sharing of 45Z tax credit for production of clean fuel and from low carbon fuel credit sales, both of which would be generated by its ethanol partners and not its transportation subsidiary. Tenth, Summit does not engage for-hire carries, because none exist that that could transport carbon dioxide from its carbon capture facilities to its sequestration facilities, and alternative carriers will likely exist because Summits Offtake Agreements create a private, closed internally integrated joint venture that prevent use of alternative carriers. Eleventh, since Summit Carbon Solutions is both the shipper and consignee for shipments on SCS Carbon Transport, no intermediate storage or carriers will exist. Twelfth, the Offtake Agreements are essentially continuing supply orders by Summit Carbon

Solutions, and these orders are not made by SCS Carbon Transport, which never takes orders.

Most if not all of the "primary business test" factors indicate that Summit's primary business through its Offtake Agreements is not transportation, and instead is full-service carbon management, of which transportation is just one element. Moreover, the Offtake Agreements do not offer opportunities for

Summit bears closer resemblance to the agricultural chemical supplier in United Suppliers than it does to conventional common carriers, such as railroads, trucking companies, and delivery services. Through the Offtake Agreements, it acquires title to chemicals and then transports them using its own transportation equipment from its own capture facilities to its own sequestration facilities. Accordingly, the primary business created by the Offtake Agreements is not a transportation business, but a carbon management business, and its transportation services are not available

Because (a) the Offtake Agreements create a joint venture commercial relationship and not a carrier-shipper relationship; (b) the carbon dioxide acquired via the Offtake Agreements will be entirely owned by Summit; and (c) Summit does not provide transportation service for hire to third parties, the Offtake Agreements do not result in Summit functioning as a common carrier. Instead, these agreements mean

exclusively, and it will therefore be a private carrier.

iv. Summit's Evidence for its Committed and Uncommitted Shipper Programs Is Not "Competent and Substantial" and Does Not Prove by a Preponderance of the Evidence that Summits Proposed Pipeline System will Function as a Common Carrier.

Summit claims that any non-ethanol carbon dioxide emitter may enter into either a committed or uncommitted shipper transportation service agreement, and that these shipping options prove that its proposed pipeline will function as a common carrier. Contrary to Summit's claim, the evidence related to these potential options proves only that they are both too commercially underdeveloped to rely on for the Board's common carrier determination. Despite at least two years of marketing and efforts to enter into shipper contracts, Summit has not produced any executed contracts. Moreover, it has not even scheduled an open season through which it would sell committed capacity. Summit did provide draft transportation service agreements prepared by its counsel, but the terms of these drafts may or may not be accepted by shippers, assuming such shippers even materialize. Even assuming that Summit finds potential shippers, the terms of any draft could be changed substantially by contract negotiations that would likely precede execution.

In the absence of executed contracts, Summit's evidence for its committed and uncommitted shipper programs is founded on management's aspirational statements. Such statements provide no assurance Summit will successfully enter into common carrier relationships. This evidence is neither competent nor substantial.

According to Summit witness Pirolli, its lack of success is due to the complexity of developing major carbon capture projects. Potential shippers would need to develop, design, and finance individual carbon capture facilities, as well as develop, design, and finance lateral connecting pipelines in cooperation with Summit, before negotiating committed or

uncommitted shipper transportation service agreements. The economics of these projects would depend on a number of complex factors, including but not limited to emitter type, facility-specific design and engineering needs, the distance and size of a needed lateral connector pipeline, financing options, and other factors. These development challenges represent substantial hurdles to market entrance that may not be overcome for years by non-ethanol emitters for years, if at all.

Summit's evidence pales in comparison to the evidence provided by Dakota Access to FERC in its September 26, 2014, Petition for Declaratory Order, which FERC reviewed and approved in December 2014, approximately one year before the Board evidentiary hearing for that pipeline. FERC and the Board received evidence that Dakota Access had entered into a number of executed committed shipper transportation service agreements following two open seasons that sold hundreds of thousands of barrels of capacity over long terms. They also received evidence about how DAPL's 10 percent uncommitted shipper set aside would operate, assuring that this program would not be discriminatory. At the time of the DAPL hearing, FERC had already reviewed DAPL's executed transportation service agreements, draft tariffs, and other descriptions of its committed shipper program, and confirmed that these terms complied with federal common carrier requirements. Therefore, the Board there was able to rely on "competent and substantial" evidence that DAPL would function as a common carrier in accordance with federal law. The *Puntenney* court agreed that this evidence was sufficient to prove that DAPL was a common carrier and upheld the Board's grant of eminent domain rights to Dakota Access.

Here, Summit has not presented the Board with any executed transportation service agreements for committed or uncommitted shippers. As such, there is no binding contractual

evidence proving that Summit's pipeline system will function as a common carrier over its commercial life. Moreover, Summit's failure to enter into any such contracts after two years of effort casts substantial doubt on the timing and viability of Summit's committed and uncommitted shipper programs. Given the complexity of carbon capture developments, it is possible that years could pass before such agreements are executed. It is also possible that such agreements may never be executed. Even if shipper agreements are eventually executed, at present it is impossible for the Board to know what terms they might contain. This lack of evidence is especially critical, because unlike FERC, which has ongoing jurisdiction over oil pipeline rates and tariffs, the Board has no jurisdiction to regulate the rates and tariffs of carbon dioxide pipelines. Therefore, it will not conduct future administrative hearings in which to review such contractual arrangements to ensure that they create common carrier relationships, nor will it have an opportunity to fix any contract and tariff problems that might arise, which should be expected for such novel project.

The evidence provided by Summit's about its committed and uncommitted shipper programs is not "competent and substantial." The lack of executed transportation service agreements means that the Board has no evidence of the number of shippers, the total committed capacity, or the terms of the programs. They are too undeveloped to provide reliable evidence. The speculative nature of these commercial arrangements provides a grossly inadequate foundation for determining whether or not the proposed pipeline system will function as a common carrier for the purposes of Iowa Code 6A.22(2)(a)(2), in accordance with the state's common law definition of "common carrier." Therefore, Summit has not met its burden to prove that these commercial options will allow its proposed

pipeline system to function as a common carrier, such that the Board may not grant Summit the right to use eminent domain based on these programs.

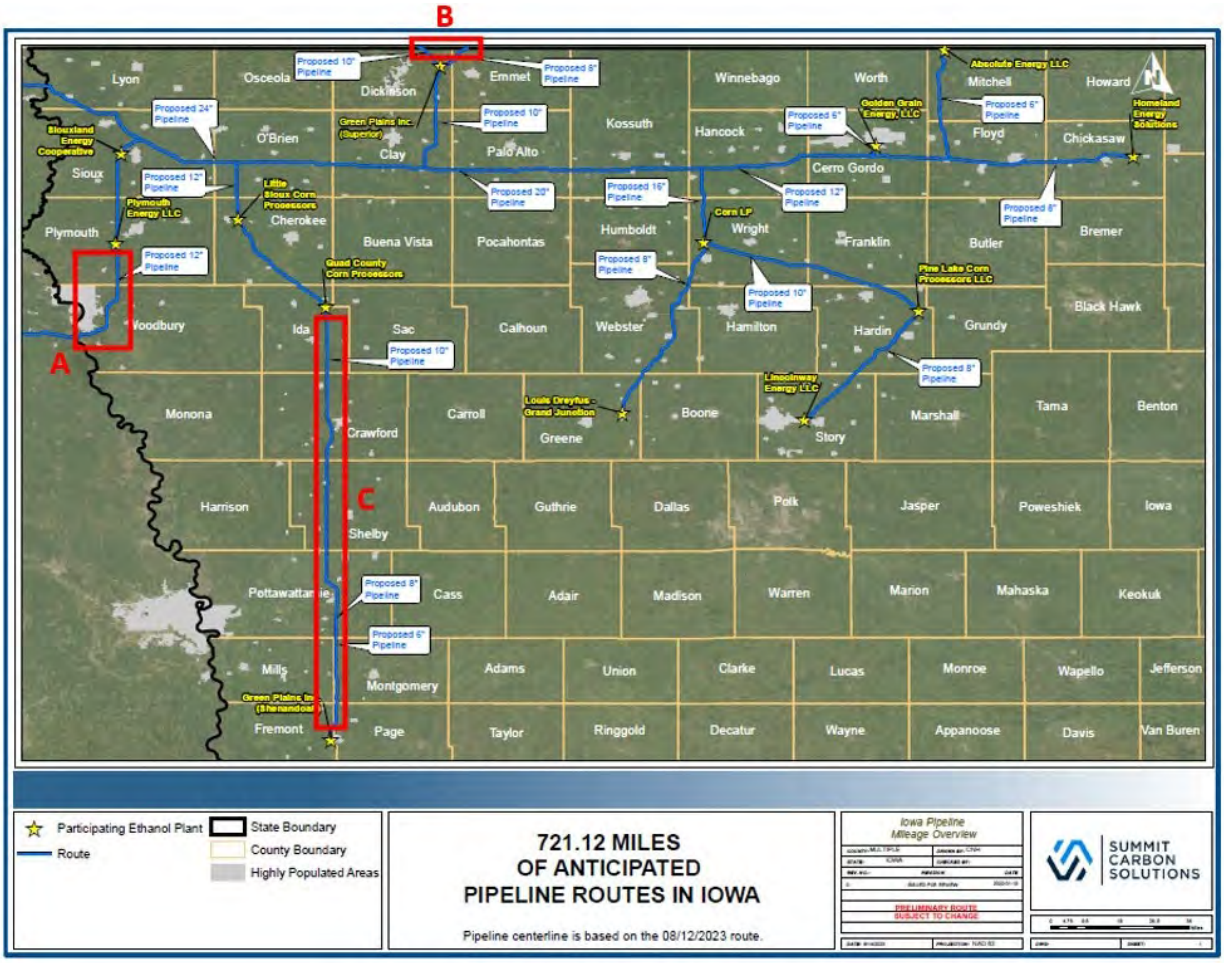
Since the proposed pipeline will not operate as a common carrier under the Offtake Agreements because

[189] and since the committed and uncommitted shipper programs are not developed and not based on competent and substantial evidence, the Board may not find that the proposed pipeline system will function as a common carrier, and it may not grant Summit the right to eminent domain over any Exhibit H parcel.

IV. Summit's Petition Does Not Comply With Chapter 479B.1 Because Project Impacts are Unduly Burdensome and Proposed Route is not the Least Invasive

[189] JLO Ex. 576 pg. 36

As a threshold matter, JLO Ex. 644, Summit's proposed Iowa Route map, show three areas that are particularly objectionable and cannot be approved:



Summit's entire proposed route is problematic in total but specifically in three areas. Indicated above as A, B, and C, are route segments that should not be approved for any reason. Area A depicts the entirety of the proposed route in Woodbury County and the portion of route south of Plymouth Energy LLC's ethanol plant. Summit failed to prove why it is either convenient or necessary to suffocate future growth of Sioux City and failed to prove any benefit this segment has to Woodbury County or southern Plymouth County residents. Summit testified this portion of their route would bring CO2 in from Nebraska exclusively. This portion of the

route does nothing for any Iowa business or ethanol plant. Summit produced no evidence of why this Nebraska on-ramp into Iowa was necessary nor do they prove why they could not instead locate their Nebraska route entirely within Nebraska and connect to their pipeline in southeastern South Dakota. Absent persuasive justification as to why Woodbury and southern Plymouth counties should host this hazardous pipeline solely for a handful of possible CO2 emitters in Nebraska for the presently non-existent and un-approved Nebraska route, this portion of the route should be denied.

The two routes in Area B on the map above should be denied for the same reasons. Area B highlights two routes originating in Minnesota and terminating at the norther boundary of the Green Plains Inc., Superior ethanol plant in Dickinson County. Summit offered no evidence why its non-existent and un-approved Minnesota route impact northern Dickinson County as depicted. Summit could serve this Green Plains plant without impacting any land to the north to the Minnesota border. Additionally, Summit already has a different planned route from Minnesota into North Dakota where it seeks to permanently store CO2, Iowa need not be further scarred.

Area C depicts an over 120-mile expanse from Ida County to Fremont County of proposed pipeline to connect to a single ethanol plant, the Great Plains, Inc. plant, in Shenandoah. Summit presented no evidence why connecting to this single plant is either publicly convenient or necessary and no justification of eminent domain needs over land in between Quad County Corn Processors in Ida County and Green Plains in Fremont County. The entirety of the proposed route south of Quad County Corn Processors facility should be denied.

A. Failure to Relocate

Despite guidance of the Board, see Attachment No. 2 to most Jorde Landowners' pre-filed testimony page 16, "IUB Pipeline Procedures" which states "[i]f a voluntary easement cannot be negotiated, the pipeline company will either **relocate the route of the pipeline** or file a request with the IUB for the power of eminent domain over the property as part of the petition." (emphasis added). In this case, the overwhelming majority of Jorde Landowners' and others affected established that Summit did not relocate the route of the pipeline when a voluntary easement could not be located – no, instead in nearly every instance Summit simply requested the Board grant it eminent domain powers rather than respect the Landowners' wishes.

Further, Jorde Landowners' have followed Board guidance, see further in Attachment No. 2 to most Jorde Landowners' pre-filed testimony at page 17, "A landowner should be prepared to negotiate for any specific requirements that the landowner wants in the easement **and should not agree to an easement if the landowner does not agree with conditions requested by the pipeline company**." (emphasis added). What more is there to say?

B. Pipeline Depth to Surface Inadequate

If a picture is worth a thousand words, then this JLO Ex. 558 tells us that the absolute minimum acceptable distance from the ground surface to the top of a hazardous pipeline running through agricultural land is 6 feet. See back rear tire fully submerged:

When cross-examined about any load analysis that has been done by Summit, there was no definitive answer as to what load rating their proposes pipeline has at varying depths. Jorde Landowners specifically asked Summit engineer Eric Schovanec: "How much weight can be driven across the easement at four foot of cover and not adversely affect the pipeline?"[190] The ultimate answer provided was: "I can't imagine that anyone is going to know those exact figures off the top of their head. And certainly, none of the other witnesses that I'm aware of would know that information."[191]

Landowners testified their farm equipment routinely weighs 80,000 – 90,000 pounds or more.[192] [193] And when landowners have asked Summit for the same information in the months prior to the IUB Hearing, they got the same response: "…[W]e've asked if there's going

[190] Tr. Vol. 8 pg. 2086 ln 4-6
[191] Tr. Vol. 8 pg. 2087 ln 2-5
[192] Tr. Vol. 15 pg. 4142 ln 9-11
[193] Tr. Vol. 16 pg. 4526 ln 20-25

to be weight restrictions or what can we safely expect to be able to cross, you know, these pipelines with. And kind of the stage answer is, "Oh, well, you know, that's something that we can look into and we'll get back to you on that." And then it's -- well, we're still waiting. A lot of unanswered questions is what I'm getting at." See further support at page 16 of most Jorde Landowners' pre-filed testimony.

Nearly every Jorde Landowner familiar with the level of cultivation in their respective area testified in pre-filed testimony that the depth is "at least six (6) feet below ground level."[194] Summit provided no evidence to the contrary. Given that Federal law requires "… all pipe must be buried so that it is below the level of cultivation"[195] if the IUB were to approve a Permit, a condition should be uniform depth of cover to ground level to top of pipe of at least six (6) feet everywhere in Iowa.

C. What About Iowa – Sequester Locally

If capturing and storing CO2 is so good, why not simply do it right here in Iowa and eliminate the need to travel all the way to North Dakota to pick up a single ethanol plant in the entire state of North Dakota? The answer to this question directly affects the proposed Iowa route and because Summit failed to prove it is publicly convenient and necessary for its pipeline to traverse Iowa for the purposes of going to North Dakota, Summit has failed to prove it has applied for the least invasive route.

Summit claims "Iowa does not have the geological formations needed for CO2 sequestration."[196] When asked if Illinois may have suitable sequestration summit responded

[194] See Jorde Landowner pre-filed testimony generally at pgs. 41-51
[195] See 49 CFR § 195.248 Cover over buried pipeline.
[196] JLO Ex. 576R, pg. 28

"[B]ased on privileged, confidential, and proprietary analysis summit determined that sequestration in North Dakota was preferable sequestration in Illinois."[197] If you read Summit's response carefully you conclude that "preferable" means more profitable because of the dual revenue potential of payment for sequestration and later payment for EOR use of the CO2. The reason "privileged, confidential, and proprietary" are claimed is so that the truth this is purely profit driven and not for some alleged good of the environment or Iowa can be kept a secret.

In any event, Summit's vague claims that Iowa isn't suitable for CO2 sequestration is not in alignment with testimony from the State of Iowa. See testimony of Ryan Clark, Isenhart Hearing Exhibits 7 and 8.

D. Failed "Restoration" Looms Large

Virtually all Jorde Landowners enclosed documented damage to property and land and failed construction practices related to TransCanada's Bison Pipeline. See Jorde Landowners' Pre-filed Testimony Attachment No. 21. It is not only yield loss but overall property damaged and devaluation post-pipeline. Landowners are left to hope the pipeline company will come back and attempt to repair the damage or compensate landowners fairly to do so – however, the landowners time and stress and inconvenience is NEVER compensated. Therefore, it is always a NET NEGATIVE economic experience even if Summit were to pay a contractor the cost of work to repair or fix damages done. The unwanted job of policing and chasing down Summit or its contractors or subcontractors and the constant run around is never reimbursed. Dr. Neil Dahlquist, Palo Alto landowner, testified about his recent negative experience with

[197] *Id.*

Xcel Energy who during eminent domain activities on his Minnesota property killed many of his fruit trees. Dr. Dahlquist tried to work with the company and they ignored him. He spent time and money on experts to prove his damages and the company ignored him. He hired an attorney at his cost and expense and filed a case in small claims court and the company ignored him. Then the company offered $6,000 to settle his claim – far less than the true cost and the offer did not include reimbursement for Dr. Dahlquists out-of-pocket expenses and his own time and frustration.[198] A preview of what Iowans have to look forward to if the Board approves Summit's Petition.

199

[198] Tr. 7147 ln 25 to 7149 ln 12
[199] JLO Pre-filed Testimony Attach No. 21 – Bison Pipeline failed reclamation

Water erosion after elevation changes post-Bison pipeline construction[200]:

A more recent negative and ongoing costly unreimbursed experience of Iowa landowners and outcome was Board approved DAPL JLO Ex. 579 includes 87 pages of documented disastrous DAPL contractor work – many of the same contractors Summit would use. You see the contractors don't care about the soil or fertility or the future – they care about getting paid to slam the pipeline in as quickly as possible.

[200] *Id.* pg 11

V. Jorde Landowners and Julie Kaufman, Marvin Leaders, Kohles Family Farms, LLC, Allen and Christine Hayek, Douglas and Jill Williamson, and Kathryn Josephine Byars Parcel Specific Briefs

This section is devoted to each of the testifying Jorde Landowners' parcel specific briefs related to their opposition to Summit's eminent domain requests. Because the Landowner opposition was numerous and extensive it is likely that this section will have to be separated into multiple separate documents to be of a size suitable for uploading and filing with the IUB. So, the parcel specific briefing will be contained in separate documents separately filed from this main brief and indicated as **Volume No. X – Jorde Landowners' Parcel Specific Briefs**. There are 19 separate volumes with typically five (5) landowner briefs per volume. However, each such landowner specific brief is incorporated here by reference and those arguments and facts are adopted here as if they were all physically a part of this brief.

When evaluating whether or not eminent domain should be granted on a particular parcel the Board must ask and answer several questions with respect to every single Ex. H parcel incorporated into this section. It is not the case that if the Board were to approve the Permit Petition that eminent domain automatically triggers – that is not the law. This is obvious in that it is a two-part process, review of the Permit Petition on the public convenience and necessity standard then second, analysis of eminent domain appropriateness on a per parcel basis. It is entirely possible the Board could grant a Permit with conditions and NOT grant eminent domain upon any of the Ex. H parcels.

Should Summit argue a particular landowner did not offer an alternative route, the Board cannot short circuit to Eminent Domain approval. The landowner has no burden of proof.

Regardless of if Summit proposed a route – the lack of alternative route suggestion by a targeted landowner does not negate the Board's duty to evaluate the proposed route for all the factors discussed herein and make specific findings as to why the board believes each eminent domain request over each specific Ex. H parcel satisfies every 479B.1 and 479B.16 requirement.

If the Board approves the Permit Petition, then the Board must review all of Summit's record-breaking Ex. H eminent domain requests on a per parcel basis with these questions in mind:

- Does Summit's Permit Petition comply with the purposes of Chapter 479B as expressed in 479B.1?
    - Has Summit proven that the pre-construction, construction, operation, and maintenance, of its proposed hazardous pipeline on a route at the locations as contemplated will "protect [ALL Ex. H] landowners and tenants from environmental or economic damages which may result…"? 479B.1.

    - Has Summit proven its proposed hazardous pipeline's location and route are the least invasive to every Exhibit H landowner? 479B.1.

- Has Summit proven that it is "necessary" for the Board to grant each and every request for the right of eminent domain across every inch of every Exhibit H parcel per 479B.1?
- Has Summit proven what is "the extent necessary" for Summit to be vested with the right of eminent domain across each Exhibit H parcel per 479B.16?

Jorde Landowners can save the Board (and Staff) a lot of time. Summit has not proven any of their burdens relative to these questions on any of the Jorde Landowners' Exhibit H

parcels or upon any of the Exhibit H parcels of Julie Kaufman, Marvin Leaders, Kohles Family Farms, LLC, Hayek Family Farms, Douglas and Jill Williamson, or Kathryn Josephine Byars.

VI. Conclusion

"We are getting ahead of ourselves on [CO2] pipelines. For billions of dollars, you make smart people do incredibly stupid things."[201]

Summit is not fit to be granted a Permit. Summit reeks of disingenuous self-serving double talk which is obvious to anyone not handcuffed by political fear or ambition[202]. Unlike its proposed hazardous pipeline, the start-up LLC must already have a warning odorant because any reasonable person can smell what is coming at least three miles away.

Summit's Permit Petition must be denied. Alternatively, elimination of portions of proposed routes and significant other re-routes must be ordered but in no case should eminent domain be granted on a single parcel. Summit is not a common carrier – this fate was sealed when financial engineering chasing the CO2 pot of gold superseded legal analysis during origination of their business model. But, even if Summit were a common carrier, it was failed to demonstrate public use and necessity and the extent of that alleged necessity over each Exhibit H parcel for which it requests IUB enabled forever dominance and control.

Jorde Landowners respectfully request Summit's Permit Petition be denied by a vote of 3-0. For the integrity of the legal process and the reverence of the IUB itself, only a 3-0 denial will confirm that not even Bruce Rastetter can force an ill-advised project with a 12-year future upon his fellow citizens. Summit will come back, as they have in North Dakota after a 3-0 denial, and as they likely will in South Dakota after a 3-0 denial there. And when they come

[201] JLO Attachment No. 14, pg. 13 – Richard Kuprewicz, Pipeline Engineering Expert
[202] See JLO Ex. 572, evidence of Gov. Renyolds and Bruce Rastetter's cozy relationship

back to the IUB, perhaps they will have a better transparent plan and not an historic amount of opposition and unprecedented amount of outstanding Exhibit H parcels.

Summit has shown us who they are – so, like the North Dakota PSC and the South Dakota PUC before you who evaluated the same Summit project, the same Summit witnesses, the same Summit evidence, and the same Summit talking points, go ahead and give Summit an opportunity for a second chance - as North and South Dakota have.

Vote 3-0 to deny Summit's Permit Petition.

Respectfully submitted,

Jorde Landowners, Julie Kaufman, Marvin Leaders, Jean Kohles of Kohles Family Farms, Allen and Christine Hayek, Douglas and Jill Williamson, and Kathryn Josephine Byars

By: /s/ *Brian E. Jorde*
Brian E. Jorde, AT0011638
Christian T. Williams, AT0011109
DOMINALAW Group
2425 S. 144th Street
Omaha, NE 68144
(402) 493-4100
bjorde@dominalaw.com

Jorde Landowners' Lawyers
Julie Kaufman, Marvin Leaders, Jean Kohles of Kohles Family Farms, Allen and Christine Hayek, Douglas and Jill Williamson and Kathryn Josephine Byars's Lawyers