Sandra Zellmer  
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*Citizen’s Initiatives:  
*Nebraska Activists Making a Difference in the Keystone XL Fight*

**Risks to the Aquifer**

Because of local activists like Jane Kleeb of Bold Nebraska, the nation has begun to focus on Keystone XL’s implications for North America’s largest freshwater resource: the Ogallala.

- Nebraska’s economic backbone is based on agriculture. We are the number one state in the nation in irrigated acres, because of this vast resource.
- There has never been a worst-case scenario risk analysis for our water. Yet, TransCanada admits Keystone XL could spill at least 1.3 million gallons of tar sands and chemicals.
- Enbridge’s pipeline spill on the Kalamazoo River was about 1.3 million gallons. It’s been three years, the total cost is over $1 billion, and it is still not cleaned up because tar sands are clinging to the edges and bottoms of the Kalamazoo River.

Jane Kleeb Testimony to the House Subcommittee on Commerce, 9/19/13

**State Department’s EIS Process**

- The State Department (through its contractor) prepared a DEIS as part of the Presidential Permit review process in April 2010.
- Following the completion of the EIS, the State Department must determine whether the project serves *the national interest*.
- The DEIS was issued In response to comments, the State Department developed a Supplemental DEIS (SDEIS).
- Comments from the public and the EPA assert multiple inadequacies in the DEIS and SDEIS related to failure to disclose and consider GHG emissions from additional oil sands mining in Canada.
- In the FEIS, in August 2011, the State Department stated that
the pipeline would not result in any additional oil sands production in Canada, based on the assumption that other oil transport projects would be built if the pipeline was not permitted.
• In June 2012, State issued a public notice of its intent to prepare a supplemental EIS (SEIS) for the proposed Keystone XL pipeline.

U.S. EPA’s Review of the EIS: Environmental Objections—Insufficient Information

• *Keystone XL would be the largest pipeline* connecting the Canadian oil sands to the United States and “would open a new market on the Gulf Coast,” leading to increased oil sands production in Canada.
• There is a “reasonably close causal relationship between issuing a cross-border permit for the Keystone XL project and increased extraction of oil sands crude in Canada intended to supply the pipeline.”
• “Extraction and refining of Canadian oil sands crude are GHG-intensive relative to other types of crude oil.”

*EPA 2010*

• *As for pipeline spills*, unlike conventional oil, tar sands oil consists of heavy bitumen that is diluted into a transportable slurry, typically with benzene, naphtha or natural gas condensate (“dilbit”).
• The difference in *impacts and clean-up logistics* is significant, EPA notes by referring to the 2010 Enbridge spill in Michigan. The dissolved components of dilbit, including benzene, polycyclic aromatic hydrocarbons and heavy metals, could be released over a period of “many years.”

*EPA 2013*

Political Action: National & Local

• President Obama stated he would reject the pipeline if it would “significantly exacerbate” GHGs.
• “The pipeline has become both a powerful symbol and political
pawn this election year.
• It is also a Rorschach test of how Americans view energy issues: How do energy policies affect job creation, tax revenue and U.S. manufacturing competitiveness? How pressing are climate-change concerns, and how do we balance them with economic priorities?"
Steven Mufson, Wash. Post, June 30, 2012

• "TransCanada poured millions into the political process in Nebraska, passing an eleventh-hour pipeline routing law (LB 1161) that violates the state constitution and is currently in court. Eminent domain powers were granted solely to the governor who at one point had to return a campaign contribution from TransCanada."
Jane Kleeb, Bold Nebraska, Sept. 19, 2013
Testimony for U.S. House Energy & Commerce's Subcommittee on Commerce, Manufacturing and Trade

Pipeline deal was 'Hail Mary pass', Lincoln J-Star, Nov. 20, 2011
• During a special session in 2011, the Unicameral worried about its authority over the pipeline, and that if the pipeline were moved, TransCanada would be required to redo the 8-volume EIS for the entire route.
• Then Speaker Mike Flood overheard Professor Sandra Zellmer’s testimony to the Natural Resources Committee:
  • "Under federal law, only a supplemental EIS would be required [if the pipeline were re-routed] ... The findings of the initial EIS, and possibly the findings from the first Keystone EIS, could be utilized and ... and shed light on the new routing.
  • This, too, simply enhances the effectiveness of state and federal partnerships and cooperative federalism.
  • But there are no comprehensive federal regulations for routing of these pipelines. ... If Nebraska doesn't look at those issues ... no one will. It's a regulatory vacuum."
• Flood called Kerri-Ann Jones of the State Dept. to ask whether it was true. She said her office was going to order TransCanada to explore a route that wouldn't go through the
Sandhills.
• "I am confident that [we] will be able to efficiently work together in preparing any documents necessary to examine alternative routes that satisfy federal laws and any state law Nebraska may adopt," Jones wrote.

Local Citizen Action against LB 1161

Randy Thompson, et al. v. Heineman
• Funded by Bold Nebraska, Nebraska Sierra Club, and small donors from across the country

Ken Winston, Nebraska Sierra Club
• "Randy Thompson, Suz Luebbe, and Susan Dunavan stand up for fundamental American rights to protect our land and water from being taken by foreign pipeline companies without due process."

Washington Post, Aug. 4, 2013:
• Nebraska trial could delay Keystone XL pipeline!

Local Citizen Action against LB 1161

Theory: LB 1161 is unconstitutional under Nebraska law.
• Instead of having the state regulatory agency—the Public Service Commission—make the routing decision, the legislation allows Governor Heineman to approve the route, which he did earlier this year. His approval authorized Transcanada’s use of eminent domain to condemn private property along its path.
• The legislation unlawfully delegated to the Governor both the routing decision and the decision to allow eminent domain, without imposing any substantive safeguards or standards, thereby violating due process.
• In addition, it’s a piece of “special legislation,” enacted for the benefit of just one corporation, which violates equal protection principles.
• Finally, it denies citizens any avenues for meaningful judicial review (other than a constitutional challenge like this one).
• State’s motions to dismiss were denied; trial was held in Sept. 2013.
Citizen Action: A Federal Trilogy

   • Tribes lacked standing to challenge the permit for the 1st Keystone Pipeline under NEPA and the NHPA.
   • Concerns weren’t redressable because, even if the court were to invalidate the permit, the President would still have power to issue it again under his inherent authority to conduct foreign policy.
   • State Dept. lacked control over the President’s behavior.
   • Actions taken pursuant to an Executive Order, whereby the State Dept. approved a Presidential Permit for an international pipeline, were presidential in nature, and did not confer a private right of action under the APA.
   • President was the final actor in determining whether a permit should be issued.

Executive Order 13337

• E.O. 13337, issued President George W. Bush in 2004, details the procedures necessary for the approval of permits for certain types of pipelines that cross international boundaries into the United States.
• E.O. 13337 delegates the responsibility of receiving applications for the Presidential permits to the Secretary of State, who is authorized to approve or deny permits based on “national interest.”
• If any official who is required to be consulted under E.O. 13337, including the Environmental Protection Agency (EPA), disagrees with the Secretary’s determination, the application is forwarded to the President for consideration.
• The President retains the final authority to determine whether a permit should be issued.

The 2nd Defeat

agency's delegated power can be revoked is too speculative to defeat standing on redressability grounds," but
• E.O. 13337 does not create private right of action, and
• State Dept's issuance of the permit is not subject to judicial review
  • An agency action undertaken pursuant to a delegation of the President's inherent Constitutional authority over foreign affairs "is tantamount to an action by the President himself."

12 ¶ But there may still be a NEPA option
3. Sierra Club v. Clinton (D. Minn. 2010)
Sierra Club challenged Enbridge's "AC Pipeline" from Alberta, Canada, to Superior, Wisconsin.
• Sierra Club had Article III standing;
• State Department's issuance of final environmental impact statement (FEIS) under NEPA was a "final agency action" subject to judicial review; and
• Whether State Department's issuance of FEIS and presidential permit violated NEPA was factual issue that could not be resolved on a motion to dismiss.
• However, the FEIS need not consider potential cumulative impacts of tar sands development in Alberta, such as increased GHG's and climate change, because the causal relationship with the AC Pipeline is too attenuated.

13 ¶ Conclusion
Sandra Zellmer on CPRBlog

Nebraska Activists Making a Difference in the Keystone XL Fight

A Nebraskan activist? Wait, you say, isn’t that an oxymoron? But the typically stoic, non-litigious citizens of Nebraska are indeed standing up and taking notice, and the nation is starting to take notice of them.

A few days ago, a Washington Post headline predicted, “Nebraska trial could delay Keystone XL pipeline.” As you may already know from the news and my previous blogs, the State Department released a draft supplemental environmental impact statement (EIS) on the pipeline in March. It initiated this supplemental review to take into account a revised pipeline route through Nebraska (around 200 miles of the pipeline’s 1,179-mile route would be situated there).

The draft EIS concluded that Alberta’s oil sands would be developed with or without Keystone XL; as such, it indicated that the pipeline’s impacts on greenhouse gas emissions and climate change would be minimal. The Environmental Protection Agency’s comments on the draft EIS are extremely critical of its analysis of the project’s effect on climate change. The Agency also highlighted the State Department’s failure to consider alternative routes that avoid critical water resources, such as the Ogallala High Plains aquifer, in Nebraska and surrounding states.

President Obama stated that he would reject the pipeline if it would “significantly exacerbate” GHGs. The President has also expressed concern that the pipeline would do little to stimulate the economy or create jobs. Ironically, the economic impact on the Midwest could be
negative—the pipeline, which is designed to move crude oil to Gulf Coast refineries and then on to world markets, could actually make gas prices in the Midwest go up. So, the Midwest would get all of the downsides and few of the advantages if the pipeline were built.

The State Department’s final EIS, and the final decision by the President and Secretary John Kerry, is expected this fall.

Meanwhile, events in Nebraska are taking on a life of their own. A lawsuit filed by Nebraskan ranchers and a grassroots organization, Bold Nebraska, is pending in state court (Thompson v. Heineman, Neb. Dist. Ct., No. Cl 12-02060). Earlier this summer, the court rejected the state’s motion to dismiss their case, and set a Sept. 27 trial date.

The lawsuit alleges that the state legislation that established a new pipeline routing process is unconstitutional under Nebraska law. Instead of having the state regulatory agency—the Public Service Commission—make the routing decision, the legislation allows Nebraska Governor Dave Heineman to approve the pipeline route, which he did earlier this year. His approval also authorized Transcanada’s use of eminent domain to condemn private property along its path. The plaintiffs argue that the legislation unlawfully delegated to the Governor both the routing decision and the decision to allow eminent domain, without imposing any substantive safeguards or standards, thereby violating due process requirements. In addition, it’s a piece of “special legislation,” enacted for the benefit of just one corporation, which violates equal protection principles. Finally, it denies citizens any avenues for meaningful judicial review (other than a constitutional challenge like this one).

If the plaintiffs prevail on any one of these arguments, the Nebraska pipeline route would be tossed out, as would the legislation’s process for approving new routes. TransCanada would need to seek approval for its route from the Public Service Commission, and it could not exercise eminent domain over houses, farms, and ranches along the way until it had received all necessary approvals and permits. The decision would impact the decision-making process in

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Washington, DC, too, because the State Department could not issue a final EIS on the impacts of the pipeline when the route across Nebraska remains in doubt.

Those who question the need for activists, lawyers, and courts should take note. Litigation may be messy, expensive, and lengthy, and it’s an imperfect means of resolving disputes. But it’s one of the few effective slingshots that local “Davids” have against a well-heeled international Goliath like TransCanada.

CPR Scholar Sandi Zellmer: Senate Passes Wrong-Headed “States’ Water Rights Act” WRDA Amendment to Facilitate N.D. Fracking

The 2013 Water Resources Development Act (WRDA), as adopted by the Senate on May 13, S.601, would authorize $12 billion in federal spending on flood protection, dam and levee projects, and port improvements. A new version of WRDA is passed every few years, and it is the primary vehicle for authorizing U.S. Army Corps of Engineers’ water projects and for implementing changes with respect to the Corps’ water resource policies.

S.601 contains several notable provisions, not the least of which is the so-called “States’ Water Rights Act Amendment.” This amendment would bar the Corps from charging a storage fee for “surplus water” drawn from Missouri River reservoirs. For the purposes of Section 6 of the 1944 Flood Control Act, which governs Missouri River operations, “surplus water” is defined as water stored in a Corps of Engineers reservoir that is not required because the congressionally authorized need for the water never developed.
In the Dakotas, the water in question was originally intended for irrigation, but irrigated agriculture in this region did not develop to the extent anticipated in 1944.

In the midst of one of the most severe droughts seen by this region since the 1930’s, one has to wonder whether there could ever be such a thing as “surplus” water. Last summer, crops withered in the field, and low water levels on the Missouri threatened to shut down commerce on the Mississippi River and to disrupt shipments worth billions of dollars.

What kind of sleight of hand might this be?

**Full text**

**Topic:** CPRblog | **Date:** Jun 14, 2013 10:07 AM  
by Sandra Zellmer

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**Blistering Comments on State's Draft Keystone XL Environmental Impact Statement**

Monday was the deadline for public comment on the State Department's draft Environmental Impact Statement (EIS) on the Keystone XL Pipeline. Mine, which I submitted with the support of two of my University of Nebraska colleagues, are here. The State Department had initially announced that it would take the unusual path of refusing to make all of the comments available to the public absent a Freedom of Information Act request, but after a storm of criticism, the Department has reversed its decision to play hide and seek and now promises to post them all on a website.

Meanwhile, the Environmental Protection Agency has released its comments, which are extremely critical of the State Department's analysis of the project's effect on climate change and its failure to consider alternative pipeline routes that avoid critical water resources. The EPA's comments, together with the outpouring of opposition from environmentalists and others, could well carry the day on the merits, persuading the President to reject the project as contrary to the national interest. At minimum, they will serve as fodder...
for subsequent litigation against the construction of the pipeline, if it's approved.

The EPA is hardly alone in its criticism. In my comments, I focused on several problems with the State Department’s analysis. I write that the draft EIS failed to comply with the requirements of the National Environmental Policy Act (NEPA), a law that requires federal agencies to evaluate the harmful environmental consequences of their actions and to consider ways to carry out those actions so that they mitigate or avoid such consequences.

Full text

**Topic:** CPRblog  |  **Date:** Apr 23, 2013 3:26 PM  
**by** Sandra Zellmer

The CWA's Antidegradation Policy: Time to Rejuvenate a Program to Protect High Quality Water

*This post was written by CPR Member Scholars Robert Glicksman and Sandra Zellmer.*

Visual images of burning rivers, oil-soaked seagulls, and other grossly contaminated resources spurred the enactment of the nation’s foundational environmental laws in the 1970s, including the Clean Water Act (CWA). Similarly, evocative prose like Rachel Carson’s description of the “strange blight” poisoning America’s wildlife due to widespread use of pesticides played a critical role in alerting policymakers and the public to the need for robust legal protections for public health and the environment.

Environmental law, however, has always been about more than just repairing the damage wrought by past disasters or resource mismanagement. Senator Edmund Muskie, the principal sponsor of the CWA, was moved to action not only by the despoliation he witnessed but also by “[t]he beauties of nature . . . in almost pristine form” he marveled at while growing up.

*Antidegradation Goals*
The reasons to mandate the improvement of inferior quality natural resources are relatively obvious, and include ensuring that exposure to, or use of, those resources does not adversely affect human health, destroy critical wildlife or fish populations, or otherwise disrupt ecosystem functions. By contrast, no single goal explains legal mandates to prevent degradation of superior quality resources. Instead, antidegradation programs in the CWA and in other environmental laws rest on a variety of rationales, including the desire to protect special or unique resources, to provide a margin of safety to offset the risk that regulations will not provide enough protection due to imperfect knowledge or flawed regulatory implementation, to prevent the movement of industry to areas with superior environmental quality but more lenient requirements, to prevent interstate pollution, and to preserve opportunities for future generations and future growth.

Full text

**Topic:** Environmental Protection  |  **Date:** Oct 16, 2012 9:19 AM
**by** Sandra Zellmer

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Protecting Our Greatest Asset: Ratifying the Convention on Biological Diversity

**(a(broad) perspective)**

*Today’s post, co-authored by CPR Member Scholar Sandra Zellmer and Policy Analyst Yee Huang, is the fourth in a series on a recent CPR white paper, Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties. Each month, this series will discuss one of these ten treaties. Previous posts are here.*

**Convention on Biological Diversity**
- Adopted and Opened for Signature on June 5, 1992
- Entered into Force on December 29, 1993
- Number of Parties: 193
- Signed by the United States on June 4, 1993
- Sent to the Senate on November 20, 1993
- Reported favorably by the Senate Foreign Relations Committee on June 29, 1994
Biodiversity is the range of variations in all forms of life, from the genetic level to the species level to the ecosystem level. This diversity of life sustains all processes on the planet, built up over the several billion years of the planet’s existence. It has intrinsic as well as aesthetic, cultural, and spiritual values, and an economic value too. The diversity of plants and animals has contributed to more nutritious diets, an increased human lifespan, and treating treatable illnesses. Economists estimate that humans derive trillions of dollars’ worth of ecosystem services such as water retention and filtration from wetlands, air purification from trees, and agricultural productivity from healthy soils. Losing biodiversity means a devastating loss for current and future generations.

At present, 60 percent of the world’s ecosystem services are being degraded or over-exploited. According to the Millennium Ecosystem Assessment, the situation “could grow significantly worse during the first half of this century.” To combat the loss of biodiversity and ecosystem services, conservation strategies at the local or national level are nowhere near sufficient. It’s a global problem, and international partnerships are essential to addressing it.

By the mid-1980s, the need for broad international cooperation to safeguard the biodiversity of all animal and plant species and their habitats had become apparent. The United States led the effort to get the Convention on Biological Diversity (CBD) off the ground and into the diplomatic arena. For nearly a decade, the United States continued to work in support of the CBD through several different administrations of both political parties.

The three primary objectives of the CBD are to conserve biodiversity, to use biodiversity in sustainable ways, and to access and share the benefits (such as new pharmaceuticals) from biological resources. The CBD strives to meet these goals by having the parties to the treaty integrate conservation and sustainable use into their decision-making processes to avoid or at least minimize adverse impacts to biodiversity. Parties retain discretion in determining how to do this, and the CBD
explicitly states that they should use “customary and local efforts as appropriate.”

Full text

**Topic:** Environmental Protection  |  **Date:** May 30, 2012 10:53 AM

**by** Sandra Zellmer

The Pipeline That Refuses to Die

Last month, President Obama denied TransCanada’s permit application for the Keystone XL pipeline because a congressionally mandated deadline did not allow enough time to evaluate the project once Nebraska completed its analysis for re-routing of the pipeline around the Sand Hills.

A January 26-29 poll from Hart Research Associates found that, after hearing arguments for and against the pipeline, 47% of voters in four Presidential battleground states polled agree with President Obama’s decision while 36% disagree with it. Yet just this week, the U.S. Senate is considering whether to add language to an unrelated highway authorization bill to force the President to approve the Keystone XL tar sands pipeline.

The pipeline rider has the backing of 44 Republicans and one Democrat in the Senate. Passing it is a bad idea on several levels. For one thing, riders like this one short-circuit the congressional process. By inserting an unrelated substantive provision like this into an authorization or appropriation package, the provision doesn’t receive the scrutiny that it would if it were forced to stand on its own, and Senators who are against the pipeline might feel compelled to vote in favor of the package because it includes other benefits for their constituents. (For this reason, many state constitutions forbid appropriations riders, but the federal constitution does not.) For more on this see my article Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis.

Full text
TransCanada Says Nebraska Bill on Pipeline Rerouting Is Unconstitutional. Here's Why They're Wrong.

The Nebraska Legislature is in a special session currently to consider five bills concerning the proposed Keystone XL pipeline. The situation was shaken up by Thursday’s announcement from the Obama Administration that it was pushing back its decision on federal approval of the pipeline. This news may take away some urgency for the Nebraska Legislature, but considering that no options (including the original proposed route) have been taken off the table, the bills remain firmly relevant. Nebraska—and any other states that lack regulations for protecting state interests from the effects of oil pipelines—should move forward despite measures that may (or may not) be undertaken by the federal government on the Keystone XL pipeline.

This afternoon the full Nebraska legislature will begin debate on one of the bills currently under consideration, LB4, which would provide state authority to approve or reject pipeline routes within Nebraska. Specifically, a panel appointed by the Governor—to include the DEQ, the Public Service Commission, the Department of Natural Resources, and representatives from landowner groups and others—would determine whether the proposed pipeline route imposes unacceptable risks on the state’s natural resources, based on six statutory criteria designed to ensure that pipeline routes comply with the state’s Ground Water Management and Protection Act, its Nongame and Endangered Species Conservation Act, and other conservation oriented objectives (the criteria are specified in Section 7 of the bill).

TransCanada has made a number of arguments against the bill and others like it, including saying it is preempted by federal law, that it violates the dormant commerce clause of the
Constitution, and that requiring pipeline rerouting would be a “taking” in violation of the Fifth Amendment.

Last week I testified before the legislature’s Natural Resources Committee, arguing that a similar bill, LB1, passes Constitutional muster. (The primary difference between LB1 and the bill currently pending before the full legislature, LB4, is that LB1 gave authority to the Public Service Commission rather than a gubernatorial panel.) I believe that these bills are not just Constitutionally sound, but good policy: the exercise of state sovereignty over land use, soil and water conservation, and aesthetics is an important element of a viable federal-state partnership. Here are some of my responses to the critics:

Full text

**Topic:** Environmental Protection  |  **Date:** Nov 14, 2011 8:46 AM  
**by** Sandra Zellmer

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**Species Conservation Efforts Only a Scapegoat in Missouri River Flooding**

This post was written by CPR Member Scholar Sandra Zellmer and John H. Davidson, an emeritus professor of law at the University of South Dakota. It appeared first in the [Omaha World-Herald](http://www.omahaworldherald.com).

As the Missouri River nears the 500-year flood mark, we sympathize with those whose homes and businesses are flooded. And we recognize that it’s natural for the afflicted to cast blame on a scapegoat — a practice as old as recorded history. But those who blame the flooding on the U.S. Army Corps of Engineers’ efforts to conserve native wildlife species are deeply misinformed.

First, there is no legal basis for pointing fingers in this direction. The Flood Control Act of 1944 — the statute that authorized the big mainstem dams in North and South Dakota — prioritizes flood control and navigation. The Act also authorizes operations that benefit wildlife and, when it comes to listed species, the Endangered
Species Act (ESA) requires federal agencies to avoid jeopardizing species.

In operating the dams, the Corps is bound by both Acts. But the Corps has been whipsawed by lawsuits brought by both upstream states, which want to maintain high water levels in the spring to enhance the walleye fishery, and downstream states, which demand high summer and fall water levels to support the commercial navigation season and to cool their power plants. The corps’ management of the river has had far more to do with the demands of the states than the demands of tern and plover.

Full text

**Topic:** Environmental Protection  | **Date:** Jul 06, 2011 9:01 AM
**by** Sandra Zellmer

### Atrazine, Syngenta's Confidential Data, EPA's Review, and the Five Stages of Grief


I’ve done the five stages of grief, as introduced by Elisabeth Kübler-Ross in 1969, but not exactly as she described. It’s true that I initially felt denial: “I’m a lucky person; this can’t be happening.” Then I was angry and felt sorry for myself. Then, at least during my mother’s struggle with pancreatic cancer, I hit the bargaining table. Mom was a Sunday school teacher when I was little, so I pleaded with God: “Please let the diagnosis be wrong, please let the chemo work, please don’t let the good die young.” To hedge my bets, I occasionally promised, “if she can beat the odds, I’ll volunteer at the local cancer center and I’ll donate my life savings to research.” It didn’t work. In less than four months, she was dead.

Depression crept in, and this stage held me in its grip for a long time. I gained acceptance a year or two after my mother’s death—she would’ve wanted me to—but this stage eluded...
me with the loss of my father and my uncle. Now, I’m just angry. Outraged, in fact.

My father had stomach cancer. My uncle had prostate cancer. Both were farmers.

**Full text**

**Topic: Clean Science | Date: Jan 13, 2010 9:16 AM**

by Sandra Zellmer

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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RANDY THOMPSON,  
SUSAN LUEBBE, and  
SUSAN DUNAVAN,  

Plaintiffs   

VS.  

DAVE HEINEMAN, in his official capacity  
as Governor of the State of Nebraska;  
MICHAEL LINDE, in his official capacity  
as Director of the Nebraska Department of  
Environmental Quality; and  
DON STENBERG, in his official capacity  
as the State Treasurer of Nebraska,  

Defendants.  

CI12-2060  
ORDER ON MOTION TO DISMISS  

INTRODUCTION

This case is before the court on Defendants' Motion to Dismiss, which came on for hearing September 14, 2012. Plaintiffs appeared by Attorney David Domina, and Defendants appeared by Special Counsel to the Attorney General Katherine J. Spohn. Argument was heard, briefs were received, and the matter was taken under advisement. At the conclusion of the hearing, counsel was asked to advise the court of any developments which might impact the arguments supporting or opposing the pending Motion to Dismiss so additional briefing could be provided and considered. Neither Plaintiffs nor Defendants having advised the court that recent developments concerning the proposed pipeline impact the pending motion in any respect, the court now finds and orders as follows.

BACKGROUND

Plaintiffs bring this declaratory judgment action challenging the constitutionality of LB 1161, 102nd Leg., 2d Spec. Sess. (Neb. 2012) (hereafter “LB 1161”). LB 1161 amended the Major Oil Pipeline Siting Act (“MOPSA”) in several respects, and a brief overview of MOPSA is helpful to understanding the parties’ arguments concerning the constitutionality of LB 1161.

MOPSA was adopted in November of 2011, in a special legislative session called to consider legislation to regulate routing and construction of major oil pipelines in Nebraska. (LB 1, 102nd Leg., 1st Spec. Sess. (Neb. 2011)). MOPSA established a framework giving the Public Service Commission (“PSC”) responsibility for considering applications submitted by pipeline carriers
wanting to construct or re-route oil pipelines in Nebraska. (LB 1 §6). MOPSA requires pipeline carriers to submit an application detailing, among other things, the proposed route, the reasons for selecting the route, and providing evidence other routes were considered. (LB 1 § 6). The PSC then schedules a hearing on the application and publishes notice, and also gives notice to the governing bodies of the counties and municipalities where the proposed route is located. (LB 1 § 8). Prior to the hearing, certain agencies are required to file a report with the PSC in their areas of expertise, including the Department of Environmental Quality (“NDEQ”), Department of Natural Resources, Department of Revenue, Department of Roads, Game and Parks Commission, Nebraska Oil & Gas Conservation Commission, Nebraska State Historical Society, State Fire Marshal, and Board of Educational Lands and Funds. (LB 1 § 8(3)). The pipeline carrier has the burden to establish the pipeline is in the public interest, and MOPSA identifies the various criteria to be evaluated by the PSC in making that determination. (LB 1 § 8(4)). The PSC has seven months to issue its findings and either grant or deny the pipeline carrier’s application. Any party aggrieved by the PSC’s decision on the pipeline application may appeal pursuant to the Administrative Procedure Act. (LB 1 § 10). Under MOPSA, pipeline carriers are not authorized to exercise eminent domain authority until the PSC approves the application. (LB 1 §1).

LB 1161 was adopted in April of 2012, during a second special legislative session. (LB 1161, 102nd Leg., 2nd Spec. Sess.). LB 1161 amended MOPSA and, among other things, established an alternate procedure for oil pipeline carriers to obtain approval for pipelines larger than 8 inches in diameter, by submitting a route for evaluation or review to the NDEQ. LB 1161 authorizes the NDEQ to study the environmental, economic, social and other impacts of the proposed route, and requires the NDEQ to hold at least one public hearing to provide opportunities for public review and comment. (LB 1161 §7). The NDEQ then is required to submit to the Governor either a “supplemental environmental impact statement” (“SEIS”) or an evaluation of the proposed pipeline route, after which the Governor has 30 days to indicate whether he or she approves the route. (LB 1161 §7). If the Governor approves the route, LB 1161 authorizes the pipeline carrier to utilize eminent domain authority without applying for and receiving an order from the PSC under MOPSA. (LB 1161 §1). If the Governor does not approve the route, the pipeline carrier is notified it must file an application with the PSC pursuant to MOPSA if it wants approval of a route in Nebraska. (LB 1161 §§6 and 7).

**PLAINTIFFS’ COMPLAINT**

Plaintiffs’ Complaint seeks a declaratory judgment that LB 1161 is unconstitutional and seeks injunctive relief preventing its enforcement.

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1 Plaintiffs’ Complaint alleges: “This Court has subject matter jurisdiction of this action for declaratory judgment pursuant to Neb Rev Stat § 24-302 & Neb Rev Stat §§ 25-24,129 et seq. The latter statute is the Nebraska Declaratory Judgments Act.” (Complaint at ¶ 5). Although the Complaint contains a typographical error when citing to the declaratory judgment statutes, the remaining allegations and citations in the Complaint make clear Plaintiffs’ intention to bring this declaratory judgment action pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008).
Plaintiffs challenge the constitutionality of LB 1161 on several grounds, claiming the legislation:

1) Unlawfully delegates to the Governor powers over a common carrier contrary to Nebraska Constitution Article IV, § 20, which commits exclusively to the PSC the authority over common carriers and the regulation of common carriers when regulation is necessary (Complaint at ¶13.1);

2) Violates the doctrine of separation of powers by permitting action to occur without judicial review contrary to Nebraska Constitution Article II, §1 and Nebraska Constitution Article V, §1 et seq. and by failing to provide for notice to affected parties thereby depriving them of due process contrary to Nebraska Constitution Article I, § 3 (Complaint at ¶ 3.4 and 13.2);

3) Unlawfully delegates to the Governor the Legislature’s plenary authority over the power of eminent domain, by empowering the Governor to decide what company shall be approved to build a pipeline and use the power of eminent domain to acquire real property rights for a pipeline route in and across Nebraska, thereby violating Nebraska Constitution Article II, § 1; Article V, § 1, and the doctrine of separation of powers (Complaint at ¶13.3);

4) Constitutes special legislation for the benefit of an unconstitutional, substantially closed class of persons contrary to Nebraska Constitution Article III, § 18 and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution including Article I, § 3 (Complaint at ¶ 13.4);

5) Unlawfully allocates to the NDEQ the sum of $2.0 million to implement the unconstitutional provisions of LB 1161 and constitutes an unlawful expenditure of State funds (Complaint at ¶13.5); and

6) Unlawfully delegates legislative authority to the Governor because it fails to describe or prescribe standards, conditions, circumstances or procedures which are constitutionally mandatory for the action it purports to delegate, contrary to Nebraska Constitution Article II, § 1, and Article V, § 1 and standards prescribed by the Nebraska Supreme Court (Complaint at ¶13.6).

DEFENDANTS’ MOTION TO DISMISS

Defendants have moved to dismiss the Plaintiffs’ Complaint in its entirety, claiming a lack of subject matter jurisdiction pursuant to NEB. CT. R. PLDG. §6-1112(b)(1) and claiming the Complaint fails to state a claim upon which relief can be granted pursuant to NEB. CT. R. PLDG. §6-1112(b)(6). When a motion to dismiss challenges both subject matter jurisdiction and failure to state a claim, the court first should consider the subject matter jurisdiction challenge. Doe v. Board of Regents, 280 Neb. 492, 506-07 (2010); Anderson v. Wells Fargo Financial Acceptance
Defendants move to dismiss this case in its entirety claiming the court lacks subject matter jurisdiction over the Plaintiffs’ claims because: 1) Plaintiffs lack standing to challenge LB 1161 and; 2) Plaintiffs’ claims are not ripe for judicial review.

A. Analysis of Standing

A party must have standing before a court can exercise jurisdiction, and the question of standing can be raised by the parties, or the court, at any time during the pendency of the case. Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist., 280 Neb. 533, 539 (2010). “Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.” State ex rel. Reed v. Nebraska Game and Parks Comm’n, 278 Neb. 564, 568 (2009). The concept of standing relates to a court’s jurisdiction to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist., 280 Neb. at 541. “Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.” Id. Generally, “standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court’s jurisdiction and justify the exercise of the court’s remedial powers on the litigant’s behalf.” Chambers v. Lautenbaugh, 263 Neb. 920, 927 (2002). The Nebraska Supreme Court has “long held that in order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.” Ritchhart v. Daub, 256 Neb. 801, 806 (1999).

The general rules of standing apply somewhat differently in cases involving taxpayers. The Nebraska Supreme Court has recognized that while “standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent” a “resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.” Project Extra Mile v. Nebraska Liquor Control Comm’n, 283 Neb. 379, 386 (2012)(emphasis supplied). See also Chambers v. Lautenbaugh, 263 Neb. at 928 (taxpayer had standing to challenge allegedly illegal city council redistricting plan because city would spend money to implement plan), Professional Firefighters of Omaha Local 385 v. City of Omaha, 243 Neb. 166, 173 (1993)(taxpayer had standing to challenge city’s allegedly illegal withdrawal of firefighters from the airport because, as a result of the withdrawal, the city allocated $400,000 to build a new firehouse elsewhere).

The rationale for giving taxpayers standing to challenge unlawful expenditures of public funds without requiring them to show direct injury is recognition that “[a] good deal of unlawful government action would otherwise go unchallenged.” Project Extra Mile, 283 Neb. at 390 (citing
Sprague v. Casey, 520 Pa. 38 (1988)). In discussing the “taxpayer exception” to the general rule of standing, the Nebraska Supreme Court explains:

Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule. Other than challenges to the unauthorized or illegal expenditure of public funds, our more recent cases have narrowed such exceptions to situations where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action.

State ex rel Reed v. State Game and Parks Comm’n, 278 Neb. at 571 (emphasis supplied).

The Complaint in this case alleges the named plaintiffs are citizens, residents, electors and taxpayers of Nebraska, and either own or have a legal interest in Nebraska real estate. (Complaint at ¶ 2 and 7). The Complaint further alleges the two-million-dollar appropriation to NDEQ provided for in LB 1161 § 8 is an unlawful expenditure of taxpayer funds in light of LB 1161’s alleged constitutional infirmity, and should be enjoined. (Complaint at ¶¶ 10 and 13.5) As such, Plaintiffs’ Complaint alleges, on its face, sufficient facts to show Plaintiffs have standing as taxpayers to bring an action “to enjoin the illegal expenditure of public funds raised for governmental purposes.” Project Extra Mile, 283 Neb. at 386.

Defendants argue Plaintiffs lack standing as taxpayers because: 1) The appropriation provided for in LB 1161 comes from the NDEQ Cash Fund and not from general tax revenues; 2) No “expenditure” of public funds occurs because LB 1161 requires pipeline carriers to reimburse the NDEQ for the costs associated with the evaluation and review; and 3) There are other potential parties better suited to challenge LB 1161.

Defendants’ first argument focuses on the source of the public funds appropriated under LB 1161, and suggests the taxpayer-standing analysis should be different in this case because the two-million-dollar appropriation provided for in LB 1161 derives from the NDEQ Cash Fund rather than general tax revenues. See LB 1161, § 8. Defendants argue Plaintiffs have not alleged facts in their Complaint indicating how they have contributed to the NDEQ Cash Fund, and further argue the existing allegations regarding general taxpayer standing are not adequate to establish standing as taxpayers to challenge LB 1161.

Defendants have not directed the court to any legal authority supporting their assertion that the NDEQ Cash Fund is funded exclusively by monies collected as fees or charges (and Plaintiffs vigorously dispute this assertion in their briefing) but there is no suggestion whatsoever that the NDEQ Cash Fund is something other than “public funds raised for governmental purposes.” See Project Extra Mile, 283 Neb. at 386 (“a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes”); see also Project Extra Mile at 390 (recognizing “taxpayers have an equitable interest in public funds, including state public funds.”)(emphasis added). A review of the
Nebraska cases discussing taxpayer standing does not suggest an audit of the source of the “public funds” is a necessary prerequisite to determining whether Plaintiffs have, on the face of the Complaint, sufficiently alleged taxpayer standing. In this case Plaintiffs’ Complaint alleges the two-million-dollar appropriation required by LB 1161 is an “unlawful expenditure of taxpayer funds” (Complaint ¶ 13.5) and, as such, the Complaint contains facts sufficient to allege Plaintiffs have standing as resident state taxpayers to bring an action “to enjoin the illegal expenditure of public funds raised for governmental purposes.” Project Extra Mile, 283 Neb. at 386 (citing Myers v. Nebraska Investment Council, 272 Neb. 669 (2006)).

Next, Defendants argue LB 1161’s allocation of monies from the NDEQ Cash Fund is not really an “expenditure” of public funds because LB 1161 contains a provision requiring pipeline carriers to reimburse the department for the costs of evaluations or reviews. In that regard, LB 1161 provides:

A pipeline carrier that has submitted a route for evaluation or review pursuant to subdivision (1)(a) of this section shall reimburse the department for the cost of the evaluation or review within sixty days after notification from the department of the cost. The department shall remit any reimbursement to the State Treasurer for credit to the Department of Environmental Quality Cash Fund.

LB 1161 § 8 codified at Neb. Rev. Stat. § 57-1503(1)(b). Defendants argue that because the pipeline carrier—and not the taxpayer—ultimately bears the burden of paying the costs of any evaluation or review, LB 1161 does not involve a permanent “expenditure” of public funds. While this argument may have practical appeal, a plain reading of LB 1161 reveals no requirement that all of the costs associated with implementing LB 1161 are to be repaid by pipeline companies. Nor does the language of LB 1161 suggest the appropriated funds are to be used exclusively to perform evaluations and reviews that are subject to reimbursement by a pipeline carrier. Instead, LB 1161 simply provides:

There is hereby appropriated . . . $2,000,000 from the Department of Environmental Quality Cash Fund . . . to the Department of Environmental Quality . . . to aid in carrying out the provisions of Legislative Bill 1161.

LB 1161 § 8 (emphasis supplied). Defendants’ argument invites this court to speculate not only that the entire two-million-dollar appropriation was intended to fund nothing other than the costs of evaluations and reviews required by LB 1161, but also that pipeline carriers ultimately will reimburse all such costs in full, and that no further expenditure of public funds is necessary to carry out the provisions of LB 1161. The unsupported assertion that some portion of the challenged expenditure may be recouped by the State in the future is not sufficient, on a motion to dismiss, to divest the Plaintiffs of taxpayer standing to challenge an allegedly illegal expenditure of public funds raised for governmental purposes. Accord Myers v. Nebraska Investment Council, 272 Neb. at 680-682 (district court did not err in holding taxpayer litigants had standing to challenge the illegal
expenditure of public funds despite argument that the investments were not “expenditures” because they may be redeemed; plaintiff had alleged facts sufficient to survive a motion to dismiss).

Finally, Defendants argue Plaintiffs have not sufficiently alleged taxpayer standing because they have not shown there is no other potential party better suited to bring the action. Defendants argue the pipeline carriers are better suited to challenge LB 1161 since they are directly regulated by the act. (Defendants’ Reply Brief at 2-3). In making this argument, Defendants suggest the Supreme Court in Project Extra Mile imposed an additional standing requirement on all taxpayer plaintiffs to show the allegedly illegal action would “otherwise go unchallenged because no other potential party is better suited to bring the action.” See Project Extra Mile at 391 (holding taxpayers have standing to challenge unlawful regulations that reduce state revenues, but must show the unlawful failure to comply with the duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action). Defendants read the holding in Project Extra Mile too broadly.

In Project Extra Mile, the taxpayers were challenging the failure to collect tax revenue (rather than challenging an illegal expenditure of public funds) and the Court was called upon to determine whether the “taxpayer exception” to standing applied under those circumstances. Project Extra Mile, 283 Neb. at 389-90. The Court began its standing analysis by reiterating the rule that “common-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent...[b]ut a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.” Id. at 385-386 (emphasis supplied). The Court went on to consider whether the “taxpayer exception” to the standing requirement should be applied not only to claims that public funds are being expended illegally, but also to claims that state agencies have unlawfully promulgated rules that result in reduced tax revenues. Id. at 388-389. The Court concluded taxpayers do have standing to challenge a state official’s failure to comply with a clear statutory duty to assess/collect taxes, but they must show “the official’s unlawful failure ... would otherwise go unchallenged because no other potential party is better suited to bring the action.” Id. at 391. In so holding, the Court did not deviate from or qualify its earlier holdings on taxpayer standing to challenge an unlawful expenditure of public funds. Id. at 390. Accord State ex rel Reed v. State Game and Parks Comm’n, 278 Neb. at 571 (recognizing that “[o]ther than challenges to the unauthorized or illegal expenditure of public funds,” the Court’s more recent standing cases have narrowed such exceptions to situations where “matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action”).

In this case, Plaintiffs challenge an allegedly illegal expenditure of public funds rather than the failure to assess or collect taxes, and the holding in Project Extra Mile does not require Plaintiffs to show LB 1161 would go unchallenged unless taxpayers have the right to bring the action. That said, even if the additional requirement discussed in Project Extra Mile were to be imposed on all taxpayer plaintiffs (including those challenging the unlawful expenditure of public funds), Plaintiffs in this case appear able to satisfy such a requirement because, under the circumstances, the only group more directly affected by LB 1161 (the pipeline carriers) has no incentive to challenge the
allegedly unlawful expenditure of public funds being challenged by Plaintiffs. *Project Extra Mile, 276 Neb. at 391* Plaintiff's Complaint adequately alleges taxpayer standing to challenge an illegal expenditure of public funds and is sufficient to withstand a motion to dismiss on the issue of standing.

### 2. Analysis of Ripeness

Defendants argue that even if Plaintiffs have standing, their claims are not “ripen” for judicial review because they are contingent on future actions by the Governor, the NDEQ and the PSC. (Defendants’ Brief at 9-11). In *City of Omaha v. City of Elkhorn, 276 Neb. 70 (2008)* the Nebraska Supreme Court explained the concept of ripeness, and identified the proper factors to be considered by district courts when determining whether a claim is ripe:

> With regard to ripeness, we have recognized that if an action is not ready, or “ripen” for judicial determination, then the district court lacks subject matter jurisdiction to consider the case. *See Bonge v. County of Madison, 253 Neb. 903, 573 N.W.2d 448 (1998).* In the context of declaratory judgment actions, we have stated generally that “[a] court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination.... An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.” *Central Neb. Pub. Power v. Jeffrey Lake Dev., 267 Neb. 997, 1003, 679 N.W.2d 235, 241 (2004).* *Accord Ryder Truck Rental v. Rollins, 246 Neb. 250, 518 N.W.2d 124 (1994).* In a similar vein, we have noted that although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power. *Orchard Hill Neighborhood v. Orchard Hill Mercantile, 274 Neb. 154, 738 N.W.2d 820 (2007).*

A determination with regard to ripeness depends upon the circumstances in a given case. This is because “‘[t]he difference between an abstract question and a [case ripe for determination] is one of degree....”’ *See Nebraska Public Power Dist. v. MidAmerican Energy, 234 F.3d 1032, 1038 (8th Cir. 2000)* (quoting *Babbitt v. Farm Workers, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

*City of Omaha v. City of Elkhorn, 276 Neb. at 79.* The Nebraska Supreme Court went on to explain that determining judicial ripeness requires a two-part analysis: first the court must consider, as a jurisdictional matter, whether it can act at a certain time; then the court must consider, as a prudential matter, whether it should act at that time. *Id.* The first prong of the analysis involves considering whether the issues are fit for judicial decision, and protects against judicial review of hypothetical or speculative disagreements. The second prong of the analysis involves considering the hardship or harm to the parties if judicial consideration is withheld or delayed. *Id.* at 80.
1. The First Prong: Fitness for judicial decision

Defendants argue that although a pipeline route is being considered under LB 1161, the NDEQ has not yet submitted its “SEIS” or evaluation to the Governor, and Defendants suggest that until the review process required by LB 1161 plays out and the final decisions of the NDEQ and the Governor are clear, the court “should avoid a premature adjudication based on Plaintiffs’ alleged hypothetical future event.” (Defendants’ Brief at 11). Defendants’ argument would be more persuasive if Plaintiffs’ claims were dependent on a particular outcome regarding the pipeline route currently under consideration, but they are not.

Plaintiffs assert a facial challenge to LB 1161 in that they challenge the constitutionality of the operation of the statute itself, rather than its application under a particular set of facts. Plaintiffs seek a declaratory judgment challenging the constitutionality of the provisions of LB 1161 as they relate to allegedly illegal expenditures of public funds that already have commenced. “A declaratory judgment is by definition forward-looking, for it provides ‘“preemptive justice’ designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered.”’ Hauserman v. Stadler, 251 Neb 106, 110 (1996) (quoting Barelmann v. Fox, 239 Neb. 771, 788 (1992)). “The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.” Ryder Truck Rental, Inc. v. Rollins, 246 Neb 250, 257 (1994).

Public funds and time already are being expended by the NDEQ in implementing LB 1161. Plaintiffs’ Complaint challenges the lawfulness of those expenditures and the constitutionality of the process and procedure by which a pipeline route is approved and eminent domain authority is granted under LB 1161. These issues are neither hypothetical nor contingent on future decisions of the NDEQ or the Governor and are fit for judicial review at this time.

2. The Second Prong: Hardship if judicial consideration is delayed

Defendants argue that since no particular pipeline route has been recommended by NDEQ or approved by the Governor, withholding or delaying judicial review of Plaintiffs’ Complaint will not result in a hardship or harm. In this context, “‘Harm’ includes both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution.” City of Omaha, 276 Neb. at 80 (quoting Nebraska Public Power Dist. v. MidAmerican Energy, 234 F.3d at 1038). Plaintiffs’ Complaint alleges LB 1161 is unconstitutional and challenges the current expenditure of public funds and time to implement the legislation. Already, public funds have been appropriated “to aid in carrying out the provisions of Legislative Bill 1161,” (LB 1161 § 8), pipeline routes have been proposed and the
review process is underway. (Compl. at ¶ 16). It is unnecessary to delay judicial consideration of constitutional challenges which are unaffected by whether a particular pipeline route ultimately is approved or disapproved. Under the circumstances, Plaintiffs’ claims are ripe for judicial review and requiring the litigation to wait until a particular pipeline route is approved or denied by the Governor would result in unnecessary delay and relitigation of the constitutional issues presented, as well as continued uncertainty regarding the enforceability of LB 1161. Accord City of Omaha, 276 Neb. at 81-82 (recognizing that dismissal on ripeness grounds could “result in delay and the unnecessary expense of judicial resources” and “continued uncertainty regarding the enforceability” of challenged provisions which is “undesirable and unnecessary”).

Continued uncertainty regarding the enforceability of LB 1161 is undesirable and unnecessary. After consideration of both the jurisdictional and prudential aspects of ripeness, this court concludes the instant case is ripe for judicial consideration.

2. **Pleading a Claim Upon Which Relief Can Be Granted**

Defendants also seek dismissal of Plaintiffs’ Complaint on grounds it fails to state a claim upon which relief can be granted under NEB. CT. R. PLDG. § 6-1112(b)(6). When reviewing a motion to dismiss for failure to state a claim, this court is required to accept as true all facts which are well pled and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader’s conclusions. Central Neb. Pub. Power and Irrigation Dist. v. Jeffrey Lake Dev., Inc., 282 Neb. 762, 764-65 (2011); Zawaideh v. Nebraska Dep’t of Health and Human Servs. Reg. and Licensure, 280 Neb. 997, 1004 (2011). To survive a motion to dismiss for failure to state a claim, the Complaint must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face. Doe v. Board of Regents, 280 Neb. 492, 506 (2010). In cases where a plaintiff does not or cannot allege specific facts showing a necessary element, “the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.” Id.

Both parties, in their briefing, devote considerable argument to debating the substantive merits of the Plaintiffs’ various constitutional claims and predicting whether Plaintiffs ultimately can prevail on such claims. These arguments are based, in large part, on facts outside the Complaint and evidence not yet before the court. As such, the parties’ arguments will not be discussed in detail at this point, because a motion to dismiss for failure to state a claim is designed to test only the legal sufficiency of the Complaint, not the substantive merits of the claims. Britton v. City of Crawford, 282 Neb. 374, 379 (2011). “Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” Id.

This court has reviewed and considered the governing case law pertaining to each of the constitutional infirmities alleged in paragraphs 13 through 13.6 of the Complaint. Accepting as true
all facts well pled and the reasonable inferences drawn therefrom, this court concludes Plaintiffs' Complaint states plausible claims for relief that LB 1161 constitutes an unlawful/unconstitutional delegation of authority, a violation of separation of powers, a violation of due process, and a violation of the prohibition against special legislation. Obviously it remains to be seen whether Plaintiffs can meet their burden of proof regarding any of these alleged constitutional infirmities, but the face of the Complaint is sufficient as to these claims and does not indicate an insuperable bar to relief. Defendants' Motion to Dismiss should be denied as to the claims of unlawful/unconstitutional delegation of authority, violation of separation of powers, violation of due process, and violation of the prohibition against special legislation.

However, to the extent Plaintiffs also attempt to state a claim that LB 1161 violates the equal protection clause, this court concludes the allegations of the Complaint are insufficient to state a plausible claim for relief. As the Supreme Court explained in Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist., 280 Neb. 533 (2010):

> For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obliged to accept as true a legal conclusion couched as a factual allegation. A pleader’s obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions. Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.

*Id.* at 544. Plaintiffs' Complaint references equal protection twice: the first time in paragraph 3.3 where it is alleged simply that LB 1161 "denies equal protection of the law contrary to Neb Const Art I, § 3", and a second time in paragraph 13.4 where it is alleged "LB 1161 . . . constitutes special legislation for the benefit of an unconstitutional, substantially closed class of persons contrary to Neb Const Art III § 18 and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution including Neb Const Art I § 3." (Complaint ¶¶ 3.3 and 13.4). While the Complaint goes on to recite facts supporting Plaintiffs' claim that LB 1161 violates the prohibition against special legislation, no facts are pled in support of the legal conclusion that LB 1161 violates equal protection, and the existence of such facts cannot reasonably be inferred from allegations elsewhere in the Complaint. Under the circumstances Plaintiffs' Complaint fails to allege sufficient facts to state a plausible claim that LB 1161 violates equal protection. Defendants' Motion to Dismiss should be sustained as to the equal protection claim, and Plaintiffs should be given leave to amend their Complaint.

**IT THEREFORE HEREBY IS ORDERED:**

1. Defendants' Motion to Dismiss is sustained as to any claim that LB 1161 violates equal protection, and Plaintiffs are given 14 days from today's date to file an Amended Complaint, Defendants are given 14 days thereafter to Answer or otherwise plead;
2. Defendants' Motion to Dismiss is overruled in all other respects;

3. A progression hearing is set for **JANUARY 31**, 2013 at 4:00 p.m. to facilitate entry of a Progression Order establishing appropriate deadlines for discovery and dispositive motions, and setting dates for pretrial conference and trial.

Dated this **31st** day of December, 2012.

BY THE COURT:  

Stephanie F. Stacy  
District Court Judge
District Court, Lancaster County, Nebraska

Randy Thompson, Susan Luebbe, and Susan Dunavan,  

Plaintiffs,  

v.  

Dave Heineman, Governor of Nebraska, Michael J. Linder, Director, Nebraska Department of Environmental Quality, and Don Stenberg, State Treasurer of Nebraska,  

Defendants.  

No. CI 12-2060  
Judge: Stephanie Stacy  

Second Amended Complaint for Declaratory Judgment
Notice “Constitutionality of Statutes Challenged”

Plaintiffs allege for their Second Amended Complaint that:

Case Overview

1. LB1161 (Laws of Nebraska 102nd Leg 2d Sess) is challenged on the grounds that it, or parts of it, are unconstitutional. Declaratory judgment is sought declaring LB1161 unconstitutional and void.

2. Plaintiffs are real parties in interest with standing. Plaintiffs are taxpayers with interests in unlawful expenditures of state funds as required by LB1161. Defendants are the officials of Nebraska’s state government, sued in their official capacities. Each Defendant has a duty to execute LB1161, which became effective when approved by Defendant Heineman on April 17, 2012. Defendants are officials who have enforced, or threaten to enforce, the unconstitutional law.

3. LB1161 is unconstitutional in one or more of these ways. It:
3.1 Unlawfully delegates to the Governor, powers over a common carrier contrary to *Neb Const* Art IV, § 20.¹

3.2 Unlawfully delegates to the Governor the Legislature’s plenary authority and responsibility to decide what designees of the Legislature may exercise the power of eminent domain, which is an attribute of sovereignty, and thereby violates *Neb Const* Art II, § 1².

3.3 Violates the doctrine of separation of powers by permitting action to occur without judicial review contrary to *Neb Const* Art II, § 1 and *Neb Const* Art V, § 1³ *et seq.* and by failing to provide for notice to affected parties, thereby depriving them of due process of law, contrary to *Neb Const* Art I, § 3.

3.4 Constitutes special legislation contrary to *Neb Const* Art III, § 18⁴, and denies equal protection of the law contrary to *Neb Const* Art I, § 3.⁵

3.5 Unlawfully allocates to the Department of Environmental Quality the sum of $2.0 million to implement the unconstitutional provisions outlined above.

¹ *Neb Const* Art IV, § 20 provides:

There shall be a Public Service Commission, consisting of not less than three nor more than seven members, as the Legislature shall prescribe, whose term of office shall be six years, and whose compensation shall be fixed by the Legislature. Commissioners shall be elected by districts of substantially equal population as the Legislature shall provide. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

² *Neb Const* Art II, § 1 provides:

(1) The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

³ *Neb Const* Art V, § 1 provides:

The judicial power of the state shall be vested in a Supreme Court, an appellate court, district courts, county courts, in and for each county, with one or more judges for each county or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law. In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice. The Chief Justice shall be the executive head of the courts and may appoint an administrative director thereof.

⁴ *Neb Const* Art III, § 18

The Legislature shall not pass local or special laws in any of the following cases, that is to say: … In all other cases where a general law can be made applicable, no special law shall be enacted.

⁵ *Neb Const* Art I, § 3

No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws.
3.6 Unlawfully pledges funds and credit of the State for at least 60 days to a pipeline applicant who is to repay the funds later. Neb Const Art XIII, §3\(^6\) prohibits the State from pledging its credit or loaning funds in these circumstances.

4. LB1161 cannot remain law or be enforced because it violates the Nebraska Constitution. Statutes are subservient to the Constitution as "[a] constitution represents the supreme written will of the people regarding the framework for their government and is subject only to the limitations found in the federal Constitution. . . ." The state Constitution must be read as a whole."\(^7\) It is the supreme will of the people of Nebraska, as expressed in their State Constitution, that (A) matters involving public common carriers, including crude oil pipelines, be committed to the Public Service Commission, not to the Governor, as the Legislature directs; (B) the Public Service Commission, and the governor, are both constitutionally-created components of Nebraska State Government of equal constitutional stature. (C) The Office of Governor is not superior to the Public Service Commission. Instead, each must perform separate constitutionally assigned and authorized duties, functions and responsibilities. The Legislature may not override the supreme will of the people as expressed in their Constitution.

Jurisdiction, Venue, and Parties

5. This Court has subject matter jurisdiction of this action for declaratory judgment pursuant to Neb Rev Stat § 24-302 & Neb Rev Stat §§ 25-24,129 et seq. The latter statute is the Nebraska Declaratory Judgments Act. An actual case and controversy exists and arises under an enactment of the Legislature which is now a Nebraska statute.\(^8\) The controversy concerns, and calls into a question, LB1161's constitutional validity.

6. Venue is proper in Lancaster County, Nebraska where the Defendants reside, may be served, and are present, and where these claims arose upon enactment, and it is where gubernatorial execution approving LB1161\(^9\) occurred.

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\(^6\) Neb Const Art XIII, § 3 provides:

The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.


\(^8\) Neb Rev Stat § 25-21,150

\(^9\) Neb Rev Stat § 25-403.01
7. Plaintiffs are:

<table>
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<tr>
<th>Name</th>
<th>Description</th>
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<tbody>
<tr>
<td>Randy Thompson</td>
<td>Mr. Thompson is a citizen, resident, taxpayer, fee payer and elector, of Lancaster County, Nebraska. Mr. Thompson pays required state and federal taxes, owns real estate, and is interested in the disbursements of funds from the state treasury, and the adoption and execution of law in accord with constitutional mandates. He has engaged in transactions generating fees paid to the NDEQ Special Fund which may be used for LB1161 purposes.</td>
</tr>
<tr>
<td>Susan Luebbe</td>
<td>Ms. Luebbe is a citizen, resident, taxpayer, fee payer and elector, of Holt County, Nebraska. Mrs. Luebbe pays required state and federal taxes, is beneficiary of a trust holding Nebraska real estate, and is interested in the disbursements of funds from the state treasury, and the adoption and execution of law in accord with constitutional mandates and engaged in transactions generating fees like those paid by Mr. Thompson.</td>
</tr>
<tr>
<td>Susan Dunavan</td>
<td>Ms. Dunavan, a citizen, resident, taxpayer, fee payer and elector, of York County, Nebraska. Mrs. Dunavan pays required state and federal taxes, owns real estate, and is interested in the disbursements of funds from the state treasury, and the adoption and execution of law in accord with constitutional mandates and has engaged in transactions generating fees like those paid by Mr. Thompson.</td>
</tr>
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8. Defendants are:

<table>
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<tr>
<th>Name</th>
<th>Position; Role</th>
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</table>
| Heineman, Dave| Governor, Chief Executive of the State with a duty to “take care that the laws be faithfully executed.”
10                                                               |
| Linder, Michael J. | Director, Nebraska Department of Environmental Quality with the powers and duties imposed upon him and his Department. 11 |
| Stenberg, Don | State Treasurer, responsible to: 13 (1) To receive and keep all money of the state not expressly required to be received and kept by some other person; (2) To disburse the public money upon warrants drawn upon the state treasury according to law and not otherwise; and, (3) collect, hold, invest, and disburse Nebraska’s tax revenues, including those to be disbursed under LB1161. |

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10 *Neb Const* Art IV, § 6.
11 Created by *Neb Rev Stat* § 81-1502(6) & (7).
12 *Neb Rev Stat* § 84-1504 et seq. and provisions of LB1161 challenged in this case.
13 *Neb Rev Stat* § 84-602.
9. Plaintiffs assert the unconstitutionality of LB1161 with full awareness that the statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. Plaintiffs understand they bear this burden, and contend their claims meet and exceed it. The unconstitutionality of a statute must be clearly established before it will be declared void.¹⁴ Plaintiffs contend LB1161’s unconstitutionality is clearly established by its terms and provisions, and its repugnancy to the Constitution’s requirements.

10. LB1161 provides for the expenditure of funds for its implementation. The expenditure is for an unlawful purpose, i.e., to fund the operations of LB1161. Plaintiffs, as taxpayers, have standing to challenge LB1161 and this expenditure.¹⁵ Plaintiffs also have standing to challenge Defendant Heineman’s actions as Governor taken pursuant to LB1161. This includes his January 22, 2013 action reported in his letter to President Barack Obama and Secretary of State Hillary R. Clinton informing him of his decision to approve a route for TransCanada’s KeystoneXL Pipeline project through Nebraska under the authority of LB1161.

LB1161, Laws (2012)

11. The genesis for LB1161 precedes the 102nd Legislature, 2nd Session, and requires examination of actions that occurred in the 102nd Legislature, 1st Special Session, held in November 2011. LB 1 (Laws of Nebraska 102nd Leg 1st Sess) enacted a framework and structure that committed to the Nebraska Public Service Commission (“PSC”) responsibility for certain actions involving the applications of major crude oil pipeline companies for establishment of a route and construction of a crude oil pipeline within, or across, Nebraska. LB 1, which is not appended to this Complaint, is at http://nebraskalegislature.gov/FloorDocs/Current/PDF/Final/LB1_S1.pdf in its final, official form. It is incorporated here by reference at that location.

12. LB1161 (Laws of Nebraska 102nd Leg 2d Sess) purports to amend LB 1. It does so unconstitutionally. LB1161 was approved by the Governor and became the law of

¹⁴ Sarpy County Farm Bureau v Learning Community of Douglas & Sarpy Cos., 283 Neb 212, 808 NW2d 598 (2012); Kiplinger v Nebraska Dept of Nat Resources, 282 Neb 237, 803 NW2d 28 (2011).
¹⁵ Project Extra Mile v Nebraska Liq Control Comm’n, 283 Neb 379, 810 NW2d 149 (2012).
Nebraska, with the emergency clause, on April 17, 2012. The Bill’s title recites that it changes provisions of LB 1, 102nd Legislature First Special Session 2011. Summarized for general background, but not to serve as a substitute for LB1161’s terms, these are the provisions of the challenged statute:

<table>
<thead>
<tr>
<th>LB1161 §§</th>
<th>Summary</th>
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| §1 | *Neb Rev Stat § 57-1101 is amended to provide that the procedure is for oil pipeline companies to, as conditions precedent to exercising the power of eminent domain in Nebraska, secure route approval from either:*

  - the Governor, or
  - the Public Service Commission under the Major Oil Pipeline Oil Siting Act if the Governor does not approve.

Condemnation must commence within two (2) years of approval by the Governor for the PSC. |
<p>| §2 | Technical provision. No explanation required. |
| §3 | Provides that public documents will not be withheld unless withholding is authorized by § 84-712.05 of the Public Records Act or federal law |
| §4 | Eliminates a provision of LB 1 that provided: “The Major Oil Pipeline Siting Act shall not apply to any major oil pipeline that has submitted an application to the United States Department of State pursuant to Executive Order 13337 prior to the effective date of this Act.” |
| §5 | Defines Commission as the Public Service Commission. Note the term “department” is not defined in LB1161, but there is a reference in § 8 to the Nebraska Department of Environmental Quality. |</p>
<table>
<thead>
<tr>
<th>LB1161 §§</th>
<th>Summary</th>
</tr>
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<tbody>
<tr>
<td>§6</td>
<td>Provides that “[i]f a pipeline carrier proposes to construct a major oil pipeline to be placed in operation across Nebraska after the effective date of this Act and the pipeline carrier has submitted a route for an oil pipeline within, through, or across Nebraska but the route is not approved by the Governor . . . the pipeline carrier shall file an application with the commission . . .” If a carrier proposes a substantive change to a route submitted but not approved by the Governor, the carrier must file an application with the commission and receive approval pursuant to § 9 of the Act.</td>
</tr>
<tr>
<td>§7</td>
<td>Empowers the department (presumably the Department of Environmental Quality) to conduct an evaluation of the pipeline, including a supplemental environmental impact study of the proposed route and alternate routes, and make a report to the Governor. Section 7 amends LB 1 § 3, part 4 to require that the Governor must act on the submission within thirty (30) days or, if he does not approve any of the routes, notify the pipeline carrier that it must receive approval from the public service commission.</td>
</tr>
<tr>
<td>§8</td>
<td>$2 million appropriated to the DEQ.</td>
</tr>
<tr>
<td>§9</td>
<td>Severability clause.</td>
</tr>
<tr>
<td>§10</td>
<td>Repealer clause for inconsistent provisions.</td>
</tr>
<tr>
<td>§ 11</td>
<td>Emergency Clause.(^\text{16})</td>
</tr>
</tbody>
</table>

**Unconstitutionality**

13. LB1161 is unconstitutional and void. It suffers from individual and distinct constitutional infirmities each of which alone, and all of which collectively, require an adjudication that the Bill, and its pertinent provisions as described below or so much thereof as offends any constitutional guarantee, be declared null and void. The constitutional infirmities of LB1161 are:

13.1 **Unlawful Delegation of Authority.** LB1161 constitutes an

\(^{16}\) The slip law copy of *LB1161* may be read at [http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB1161.pdf](http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB1161.pdf)
unlawful delegation of authority over a common carrier to the Governor of Nebraska contrary to *Neb Const* Art IV, § 20. *Neb Const* Art IV, § 20 commits exclusively to the Public Service Commission the authority over common carriers and the regulation of common carriers when regulation is necessary. The Legislature is empowered to prescribe circumstances under which the PSC may regulate, or leave all regulatory control to the PSC, but the Legislature is powerless to delegate authority, dominion, or state sovereign control over common carriers to the Governor, or any organization or department of state government other than the PSC. Because LB1161 §§ 1-7 purport to do so, they are unconstitutional and void.

13.2 **Unlawful Delegation of Authority.** LB1161 constitutes an unlawful delegation of the Legislature’s plenary authority over the power of eminent domain.\(^\text{17}\) It does so by empowering the Governor to decide what company shall be approved to build a pipeline and use the power of eminent domain to acquire real property rights for a pipeline route in and across Nebraska. Only the Legislature has authority to delegate the power of eminent domain to individuals; it cannot lawfully assign this delegation responsibility or empowerment authority to the Governor or any other department of Nebraska state government.\(^\text{18}\) For these reasons, LB1161 also violates the unlawful delegation of authority provisions of *Neb Const* Art II, § 1, and Art V, § 1, and the doctrine of separation of powers. It also thereby violates *Neb Const* Art I, § 3 by failing to require notice before action by the Governor or by PSC, as due process of law requires.

13.3 **Separation of Powers; Due Process.** LB1161 is unconstitutional and void because it violates Nebraska’s requirement that state government be divided into executive, legislative, and judicial departments. It does so because it contains no provision for judicial review of decisions of the Governor to approve or to disapprove, or to decline to act upon applications for authority to acquire property and erect crude oil pipelines across Nebraska. Statutes that permit quasi-judicial functions to be exercised by boards but fail to provide for notice of hearing or judicial review are


unconstitutional and void. This infirmity is also present for the separate, distinct reason that LB1161 fails to provide for judicial review of action of the Public Service Commission.

13.4 Special Legislation. LB1161, in view of its restrictive provisions, and the circumstances under which it was enacted, constitutes special legislation for the benefit of an unconstitutional, substantially closed class of persons contrary to Neb Const Art III § 18 and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution including Neb Const Art I § 3. The class closed, and arbitrary classifications made by LB1161 substantially closed class membership to crude oil pipelines having sought to establish trans-Nebraska pipeline routes prior to November 2011, involving activity of the US Department of State, and therefore constituting pipelines that will cross a national border of the United States with a foreign nation. Only one such organization or company, i.e. TransCanada Pipeline Company proposes its Keystone XL Pipeline project to pump bitumen, also known as crude oil, extracted through environmentally damaging processes from sandy, tar laden geologic structures commonly referred as “tar sands.” LB1161 treats pipelines transporting crude oil differently from all other common carriers including, but not limited to, pipelines transporting other petroleum and non-petroleum products, communications companies, railroads, trucking companies and others engaged in common carriage. The statute challenged articulates no rational basis for this classification. No such rational basis exists on the face of the statute.

13.5 Unlawful Expenditure. LB1161 unlawfully allocates to the Department of Environmental Quality the sum of $2.0 million to implement the unconstitutional provisions outlined above. This constitutes an unlawful expenditure of taxpayer funds for all the reasons asserted for LB1161’s unconstitutionality. In addition, the Bill constitutes special legislation for the benefit of an unconstitutional class of persons contrary to Neb Const Art I, § 3, Neb Const Art IV, § 8, and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution.

19 First Fed Sav & Loan Ass’n v Department of Banking, 187 Neb 562, 568, 192 NW2d 736, 740 (1971).

20 LB1161 violates the Equal Protection clause in Neb Const Art I § 3 because it does not treat Plaintiffs equally under the law. “The equal protection guarantee simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.” Le v Lautrup, 271 Neb 931, 936, 716 NW2d 713, 719 (2006).
Plaintiffs have standing to challenge LB1161 and this expenditure. Only citizens of the State with interests in its environmental quality and the lawful expenditure of State funds are proper parties to challenge the Bill. The NDEQ has advanced more than $5 million dollars of public funds under LB1161. Although Neb. Rev. Stat. § 57-1503(1)(b) requires reimbursement from the applicant carrier within sixty days after notification from the department of the cost, there are no mechanisms for collection and no guarantee of repayment.

13.6 Pledge of State Credit. LB1161 § 8 pledges funds and credit of the State for at least 60 days to a pipeline applicant who is to repay the funds later. Neb Const Art XIII, § 3 provides:

The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.

Contrary to Neb Const Art XIII, § 3, the extension of credit and sixty (60) day reimbursement period in Section 7 of LB1161 unconstitutionally directs the State to lend funds to “borrower” pipeline carriers that have submitted a route for application or review:

A pipeline carrier...shall reimburse the department for the cost of the evaluation or review within sixty days after notification from the department of the cost. (emphasis added).

LB1161 § 7; Neb Rev Stat § 57-1503(1)(b)

This is an unconstitutional extension of credit by the State to a private corporation contrary to Neb Const Art XIII, § 3.

13.7 No Standards. LB1161 constitutes an unlawful delegation of legislative authority to the Governor because it fails to describe or prescribe standards, conditions, circumstances, or procedures which are constitutionally mandatory for the action it purports to delegate. By doing so, it constitutes an unlawful delegation of legislative authority contrary to Neb Const Art II, § 1, Art V, § 1, and standards prescribed by the Nebraska Supreme Court. It fails to require notice prior to action by

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21 Neb Const Art XIII, § 3 provides:

The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.

the Governor or Public Service Commission.\textsuperscript{23}

14. Plaintiffs have well-established rights not to be damaged and burdened by the execution of an unconstitutional public expenditure statute.\textsuperscript{24} There is no adequate remedy at law except for declaratory judgment. Requiring Plaintiffs to institute a legal action for damages imposes undue burdens and results in a net loss to the Plaintiffs in time and expense. It would be unjust to require Plaintiffs to pursue damages rather than to seek a declaration of LB1161’s unconstitutionality to prevent the executive officials of the State of Nebraska from acting upon LB1161 which is unconstitutional on its face, and as applied. Defendant Heineman’s actions as Governor, taken January 22, 2013, are also unconstitutional, null and void for each and all of the reasons that LB1161 is unconstitutional. The Governor’s action is predicated upon the validity of LB1161 and, its invalidity renders the conduct of the Governor’s invalid. This conduct includes his purported approval of the TransCanada KeystoneXL Pipeline project through Nebraska including his purported grant of the power of eminent domain to the pipeline company.

15. Permanent injunctive relief against the Defendants is sought pursuant to \textit{Neb Rev Stat} § 25-1062 \textit{et seq.,} but no temporary injunction is sought at the time of filing of this Complaint. Injunctive relief is also sought pursuant to 42 USC § 1983, a serviceable remedy in state court.\textsuperscript{25} Though Nebraska has no statute authorizing injunctive relief to prevent enforcement of an unconstitutional statute, the judicial power of the courts inherently authorizes issuance of such injunctions.\textsuperscript{26} Permanent injunctive relief is also sought against Defendant Heineman to enjoin any action pursuant to his January 22, 2013 conduct including any action purporting to empower TransCanada KeystoneXL Pipeline Co., LLP or any other entity to exercise eminent domain rights.

16. There is a high probability that Plaintiffs will prevail on the merits. The issues presented are legal issues and their presence is apparent on the face of LB1161. The Plaintiffs and the public will be harmed if the statute is permitted to operate while its

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Jaksha v State}, 241 Neb 106, 486 NW2d 858 (1992).

\textsuperscript{25} The state courts have jurisdiction to grant relief under 42 USC § 1983. \textit{Bauers v City of Lincoln}, 255 Neb 572, 586 NW2d 452 (1998). The federal courts, however, cannot assume jurisdiction of suits like this one to grant such relief because the Tax Anti-Injunction Act prevents them from doing so. 28 USC § 1341; \textit{Fair Assessment in Real Estate Ass’n, Inc., v McNary}, 454 U S 100 (1981).

\textsuperscript{26} “[T]he court’s power to enjoin unconstitutional acts... is inherent in the Constitution itself”, \textit{Hubbard v EPA,} 809 F2d 1,11 n15 (DC Cir 1986). See also, \textit{Hartman v Moore}, 547 US 250, 126 S Ct 1695, 1701 (2006). Accord, \textit{Marbury v Madison,} 5 US 137 (1803); \textit{Mitchum v Hunt,} 73 F3d 30 (3d Cir 1995).
constitutional infirmities are litigated. This probability of harm is great because a non-
Nebraska company purporting to plan to build a transnational pipeline across the United
States and Nebraska threatens to invoke LB1161 forthwith. It has made a public
announcement of a route and dispatched representatives to meet with members of the public
who are potentially affected landowners in Keya Paha, Boyd, Holt, Antelope, Boone, Nance,
Merrick, York and other Counties in Nebraska.

17. The threat of harm is great and irreparable. If eminent domain is used
and land is taken, it is committed to pipeline use and potential remedial cost will be great.
Lands with common ownership will be severed by the easements sought; uses and rights to
use land will be diminished. The land will be adversely affected on a long-term basis. On the
other hand, the harm to Defendants is not great and delay assures that only lawfully enacted
statutes are enforced. Defendant Heineman has publicly declared his support for the proposed
pipeline even before the company threatening to apply has made any filings in Nebraska. He
threatens to act to approve a pipeline and allow use of eminent domain if not enjoined. This
Court’s doctrinal pronouncement concerning the validity or invalidity of LB1161 is
necessary to deal with the issues raised in this verified Petition. The courts of Nebraska are
well equipped to deal with issues like those raised in this Complaint with due deliberation and
reasonable responsiveness.29

Attorney’s Fees

18. Upon successful resolution of this case, declaring LB1161
unconstitutional, Plaintiffs assert they are entitled to recover, and do request, reasonable
compensation for the services of their lawyers. They invoke Neb Rev Stat § 24-204.01 and 42
USC §§ 1983 & 1988, and authorities related thereto, for this purpose. They respectfully
contend the right to recovery of fees as prevailing parties under the uniform course of practice

29 Indeed, passing on such controversies expeditiously is the duty of the states courts. Their ability to perform is
the basis for the Federal Anti-Injunction Act. See, Home Builders Ass’n of Miss., v City of Madison, 143 F3d
1006 (5th Cir 1998).
of law in Nebraska.  Nebraska’s Supreme Court has awarded fees in cases involving the unconstitutionality of statutes.

**Requests for Relief**

19. On the foregoing basis, Plaintiffs request relief as follows:

19.1 A Declaratory Judgment be rendered declaring LB1161 is unconstitutional and is null and void, and an Injunction be rendered preventing its enforcement.

19.2 A Declaratory Judgment be rendered declaring LB1161 violates *Neb Const* Art I, § 3, Art II §1, Art III § 18, Art IV § 20, Art V § 1, Art XIII, § 3, and *US Const* amend XIV, and is unconstitutional and void.

19.3 A Declaratory Judgment be rendered declaring that Governor Heineman’s actions of January 22, 2013, which are predicated upon LB1161, and are not authorized by any other law, are all also unconstitutional, null and void.

19.4 Court costs and attorney’s fees be awarded to Plaintiffs pursuant to 42 *USC* §§ 1983 and 1988 and pursuant to the extent allowed by case law and customs and usages of the Courts and law of Nebraska.

19.5 An injunction preventing enforcement of LB1161, and preventing any action pursuant to the Governor’s January 22, 2013 action described in the Complaint, and declaration that this action is null and void.

19.6 Additional relief as the Court finds just, equitable, and proper.

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30 A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees. *Elkmeyer v. City of Omaha*, 280 Neb 173, 783 NW2d 795 (2010).

31 *Hamann v Marsh*, 237 Neb 699, 467 NW2d 836 (1991); *Neb Rev Stat* § 24-204.01.
March 18, 2013

Randy Thompson, Susan Luebbe, and Susan Dunavan, Plaintiffs

By

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