IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RANDY THOMPSON, SUSAN LUEBBE, and SUSAN DUNAVAN,	)	
Plaintiffs	)	**CI 12-2060**
vs.	)	**ORDER**
DAVE HEINEMAN, in his official capacity as Governor of the State of Nebraska; PATRICK W. RICE, in his official capacity as the Acting Director of the Nebraska Department of Environmental Quality; and DON STENBERG, in his official capacity as the State Treasurer of Nebraska,	)	
Defendants.	)	

INTRODUCTION

TransCanada's Keystone XL pipeline has become a political lightning rod for both supporters and opponents of the pipeline, but the issues before this court have nothing to do with the merits of that pipeline. This case involves the constitutionality of LB 1161— a bill passed in 2012 to amend the pipeline siting laws enacted by the Nebraska Legislature in 2011. The constitutional issues before this court will not require consideration of the current pipeline debate, nor will the decision in this case resolve that debate. Decisions regarding the merits of TransCanada's Keystone XL Pipeline are properly left to others. This court's task is to apply settled principles of law to determine whether LB 1161 is constitutional.

In this case, Plaintiffs seek a declaratory judgment that LB 1161 is unconstitutional on a variety of grounds. To understand the various constitutional issues before this court, it is helpful to begin with a general discussion of LB 1161 and the pipeline siting laws which it amended.

LB 1161[1] was enacted in 2012, and amended two bills adopted during the Fall 2011 Special Session of the Nebraska Legislature: LB 1[2] and LB 4[3].

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[1] LB 1161, 102nd Legislature, Second Session (Neb. 2012).

[2] LB 1, 102nd Legislature, 1st Special Session (Neb. 2011).

[3] LB 4, 102nd Legislature, 1st Special Session (Neb. 2011).

Summary of LB 1

LB 1 established the Major Oil Pipeline Siting Act ("MOPSA").[4] The Legislature's stated purpose in enacting MOPSA was to, among other things, "[c]onsider the lawful protection of Nebraska's natural resources in determining the location of routes of major oil pipelines within Nebraska; [and] [e]nsure that a major oil pipeline is not constructed within Nebraska without receiving the approval of the [Public Service Commission]."[5] MOPSA established a formal process by which pipeline routes through Nebraska were to be evaluated and approved. Under MOPSA, any pipeline carrier proposing to construct a major oil pipeline or make a substantial change to the route of an existing major oil pipeline was required to file an application with the Nebraska Public Service Commission ("PSC"), and would not be permitted to begin construction, or exercise eminent domain authority, unless and until the PSC approved the pipeline route.[6] Before MOPSA, pipeline carriers wanting to acquire property for building or operating a pipeline had been able to exercise eminent domain authority in Nebraska without any pre-authorization.[7] With the enactment of MOPSA, oil pipeline carriers were—for the first time—required to get approval of a proposed pipeline route before exercising eminent domain authority.[8]

MOPSA established a very specific procedure for evaluating and approving a pipeline route application. Upon request from the PSC, MOPSA obligates the following agencies to provide a report on the impact of any proposed pipeline: Department of Environmental Quality, Department of Natural Resources, Department of Revenue, Department of Roads, Game and Parks Commission, Nebraska Oil and Gas Conservation Commission, Nebraska State Historical Society, State Fire Marshal, and Board of Educational Lands and Funds.[9] MOPSA requires the PSC to schedule a public hearing within 60 days of receiving an application, and allows additional public meetings to be scheduled. Under MOPSA the pipeline carrier applicant has the burden to establish the proposed pipeline route will serve the public interest.[10] In determining whether the pipeline carrier has met its burden, the PSC is to consider a list of specific factors, including whether any other utility corridor could feasibly be used for the route, evidence of the pipeline route's impact due to intrusion on natural resources, evidence of the pipeline carrier's compliance with all applicable laws, rules and

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[4] MOPSA is now codified at NEB. REV. STAT. §§ 57-1401 to 57-1413 (Cum. Supp. 2012).

[5] LB 1, § 3(1)(b), (c), *codified at* NEB. REV. STAT. § 57-1402(b), (c).

[6] *Id.* at § 6(1), *codified at* NEB. REV. STAT. § 57-1405(1).

[7] *See* NEB. REV. STAT. § 57-1101 (Reissue 2010).

[8] NEB. REV. STAT. § 57-1101 (Cum. Supp. 2012); *see also* LB 1161, § 1.

[9] LB 1, § 8(3), *codified at* NEB. REV. STAT. § 57-1407(3).

[10] *Id.* at § 8(4), *codified at* NEB. REV. STAT. § 57-1407(4).

regulations, and the various reports received from state agencies.[11] MOPSA requires the PSC to either approve or deny the application within 7 months after it is received, and any order approving an application must state that the pipeline application is "in the public interest."[12] Any party aggrieved by the decision of the PSC regarding an application under MOPSA (including a decision on whether the application is in the public interest) may appeal the PSC's decision pursuant to the Administrative Procedure Act.[13]

MOPSA also provided the PSC with authority to promulgate rules and regulations to carry out the act.[14] In addition, the Legislature created the "Public Service Commission Pipeline Regulation Fund," and required the PSC to assess and be reimbursed by the applicant for expenses reasonably attributable to the investigation and hearing regarding an application, including expenses billed by agencies filing reports at the request of the PSC.[15]

MOPSA applies to "major oil pipelines," or those pipelines with inside diameters greater than six inches constructed in Nebraska "for the transportation of petroleum, or petroleum components, products, or wastes, including crude oil or any fraction of crude oil, within, through, or across Nebraska."[16] At the time of its enactment, MOPSA did not apply to any major oil pipeline that had submitted an application to the United States Department of State ("State Department") pursuant to Executive Order 13337 prior to MOPSA's effective date.[17] At the time MOPSA was enacted, the only major oil pipeline to fit within this statutory exemption was the TransCanada Keystone XL Pipeline.

LB 1 was passed with an emergency clause, approved by the Governor, and took effect November 23, 2011.

Summary of LB 4

LB 4 applies to oil pipelines with an inside diameter greater than eight inches, constructed

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[11] *Id.*

[12] *Id.* at § 9(1), *codified at* NEB. REV. STAT. § 57-1408(1).

[13] *Id.* at § 10, *codified at* NEB. REV. STAT. § 57-1409 (amended by LB 545, 103rd Leg., 1st Sess. (Neb. 2013)). As amended, section 57-1409 now provides for appeals to be taken in the same manner as appeals from the district court pursuant to NEB. REV. STAT. § 75-136.

[14] *Id.* at § 11, *codified at* NEB. REV. STAT. § 57-1410.

[15] *Id.* at §§ 7 & 12, *codified at* NEB. REV. STAT. §§ 57-1406 & 57-1411.

[16] *Id.* at § 5(2), *codified at* NEB. REV. STAT. § 57-1404(2).

[17] *Id.* at § 3(3), *formerly codified at* NEB. REV. STAT. § 57-1402(3).

in Nebraska for the transportation of petroleum products, including crude oil, within, through or across the State.[18] LB 4 authorized the Nebraska Department of Environmental Quality ("NDEQ") to collaborate with the federal government in the preparation of a supplemental environmental impact statement ("SEIS") under the National Environmental Policy Act[19] ("NEPA"), when reviewing proposals for the construction of such oil pipelines.[20] The stated objective of the collaborative review authorized by LB 4 was to "ensure adequate information gathering, full and careful agency and public review, objective preparation of a [SEIS], adherence to a defined schedule, and an appropriate role for a pipeline carrier which avoids the appearance of conflicts of interest," and, to further such objectives, the Legislature determined the State would fully fund NDEQ's participation in the SEIS process; no fees were required of the pipeline applicant under LB 4.[21]

LB 4 required that once the SEIS was completed, NDEQ was to submit the SEIS evaluation to the Governor, who then had 30 days to indicate to the federal agency whether he or she approved of any of the proposed routes.[22]

LB 4 was passed with an emergency clause, approved by the Governor, and took effect on November 23, 2011—the same day as LB 1.

Summary of LB 1161

On April 17, 2012, the Nebraska Legislature passed, and the Governor approved, LB 1161,[23] which amended LB 1 and LB 4 in several respects. The Legislature determined LB 1161 was necessary to "provide a mechanism for [NDEQ] to continue its pipeline route evaluation that was authorized in LB 4, passed last fall during the 2011 special session" and:

> to clarify the law a pipeline carrier is to follow depending on the date an application is made for a Presidential Permit from the State Department [and to provide] for a process that would authorize [NDEQ] to conduct an environmental impact study of a pipeline route going through Nebraska to be used for a federal permit application

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[18] LB 4, § 2(2), *codified at* NEB. REV. STAT. § 57-1502(2) (Cum. Supp. 2012).

[19] National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*

[20] LB 4, § 3(1). Before entering into the "shared jurisdiction" arrangement, NDEQ was required to enter into a "memorandum of understanding" ("MOU") with the applicable federal agency setting forth each agency's responsibilities.

[21] *Id.* at § 3(2).

[22] *Id.* at § 3(4), *codified at* NEB. REV. STAT. § 57-1503(4).

[23] LB 1161, 102nd Leg., 2nd Sess. (Neb. 2012).

when there is no federal permit application pending.[24]

LB 1161 amended LB 1 and LB 4 in order to establish an alternative method for oil pipeline carriers to seek review and approval of a proposed pipeline route through Nebraska, in addition to the PSC review process established in LB 1. Specifically, LB 1161 allows pipeline carriers to seek and obtain approval of a proposed pipeline route from Nebraska's Governor, following a self-funded environmental review by NDEQ.[25] LB 1161 also amended MOPSA to provide that if a pipeline carrier submits a route for evaluation by NDEQ but does not thereafter receive the Governor's approval, the pipeline carrier is required to file an application with, and receive approval from, the PSC through the MOSPA process.[26]

LB 1161 also amended the eminent domain provisions amended previously under MOPSA, to require that once a pipeline carrier obtains approval of a pipeline route from either the Governor or the PSC, the pipeline carrier must commence condemnation procedures within two years thereafter, or the eminent domain rights expire.[27]

The alternative method of obtaining eminent domain authority by securing NDEQ review and Governor approval of a proposed route is the result of LB 1161's amendments to LB 4. LB 1161 amended LB 4 to permit the NDEQ to conduct an evaluation of any oil pipeline route within, through, or across Nebraska submitted by a pipeline carrier for the stated purpose of being included in a federal NEPA review process.[28] The amendments to LB 4 removed federal collaboration as a necessary prerequisite to NDEQ's evaluation of a proposed pipeline route, but the original federal collaboration authority was left in place. The additional NDEQ evaluation authority includes public hearing and comment requirements, and requires NDEQ's evaluation to "include, but not be limited to, an analysis of the environmental, economic, social, and other impacts associated with the proposed route and route alternatives in Nebraska."[29]

LB 1161 also amended LB 4 to require pipeline carrier applicants to reimburse NDEQ for costs associated with the evaluation or review, and to do so within sixty days after being notified of the cost.[30] To aid in carrying out the provisions of LB 1161, the Legislature appropriated

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[24] Ex. 4; COMMITTEE STATEMENT: LB 1161, 102nd Neb. Leg., 2nd Sess. (Feb. 16, 2012).

[25] LB 1161, §§ 1 and 7, *codified at* NEB. REV. STAT. § 57-1101 and § 57-1503 (Cum. Supp. 2012).

[26] *Id.* at § 6, *codified at* NEB. REV. STAT. § 57-1405(1) (Cum. Supp. 2012).

[27] *Id.* at § 1, *codified at* NEB. REV. STAT. § 57-1101.

[28] *Id.* at § 7, *codified at* NEB. REV. STAT. 57-1503(1)(a)(i).

[29] *Id.*

[30] *Id.* at § 7, *codified at* NEB. REV. STAT. § 57-1503(1)(b).

$2,000,000.00 from the Department of Environmental Quality Cash Fund for fiscal year 2012–2013.[31]

Finally, LB 1161 amended LB 1 to remove the exemption in MOPSA for major oil pipelines that had submitted an application to the State Department prior to November 23, 2011 (the effective date of MOPSA).[32] As a result of LB 1161, MOPSA (which previously had applied to all pipeline carriers except those with applications pending before the U.S. State Department at the time MOPSA was enacted) was expanded to apply to any pipeline carrier proposing to construct and place a major oil pipeline in operation in Nebraska after November 23, 2011.

LB 1161 became effective April 18, 2012. Plaintiffs instituted this declaratory judgment action soon after, on May 23, 2012.[33] The court now turns to an examination of the facts pertinent to Plaintiffs' lawsuit.

The Trial

Trial on stipulated facts was held September 27, 2013. Plaintiffs were present with counsel David Domina and Brian Jorde. Defendants appeared by Assistant Attorneys General Katherine Spohn, Ryan Post, and Blake Johnson. The court received without objection Plaintiffs' Exhibits 1 through 21, 37, and 44, and Defendants' Exhibit 45. Plaintiffs also offered Exhibits 22 through 36, and Exhibits 38 through 43, to which Defendants objected based on relevance. The court took Defendants' objections under advisement pending additional briefing. Having now reviewed the parties' briefs, the court finds Defendants' relevancy objections to Exhibits 26 through 32, 35, and 38 through 40 should be sustained. Defendants' objections to Exhibits 22 through 25, 33, 34, 36, and 41 through 43 are overruled, and those exhibits are received.[34]

Being fully advised in the premises, having reviewed the evidence, the parties' briefs, and having considered the arguments of counsel, the court now finds and orders as follows.

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[31] *Id.* at § 8.

[32] *Id.* at § 4.

[33] In May of 2012, Plaintiffs filed an application with the Nebraska Supreme Court seeking to commence this as an original action before the State's highest court and, when the Supreme Court denied that request, the lawsuit proceeded in the district court.

[34] To the extent some of the exhibits may contain information which is not relevant to the legal issues before this court, the court has considered only those portions which are relevant and admissible. *Gibson v. Lincoln*, 221 Neb. 304, 311 (1985).

FACTS

The parties entered into a joint stipulation of facts[35] which serves as the foundation for the court's recitation of the facts.

Parties

Plaintiffs are residents and taxpayers of the State of Nebraska. Each Plaintiff owns land or is the beneficiary of a trust holding land that was, or still is, in the path of one or more proposed pipeline routes suggested by TransCanada Keystone Pipeline, LP ("TransCanada"), a pipeline carrier applicant who has invoked LB 1161. Plaintiff Randy Thompson owns real estate in Merrick County, Nebraska. Plaintiff Susan Luebbe, now Susan Straka, is the beneficiary of a trust holding real estate in Holt County, Nebraska. Plaintiff Susan Dunavan owns real estate in York County, Nebraska.

Defendant Dave Heineman is the duly elected Governor of the State of Nebraska. Defendant Patrick W. Rice is the Acting Director of the NDEQ and, by agreement of the parties, Mr. Rice has been substituted for Michael J. Linder, the former Director of NDEQ. Defendant Don Stenberg is the duly elected Treasurer of the State of Nebraska.

Relevant History

The President of the United States has exclusive jurisdiction to issue Presidential Permits for pipelines crossing international borders pursuant to his power over foreign affairs vested in Article II, Section 2 of the U.S. Constitution. Pursuant to Executive Order 13337, the State Department is directed to assist the President in matters involving applications for international border crossings.[36]

In 2008, TransCanada filed its first Presidential Permit application with the State Department seeking to construct a pipeline across the border between the United States and Canada at a location in Montana. If permitted to cross the U.S.-Canada Border, TransCanada proposed to construct and operate a transcontinental pipeline that would cross through Nebraska from its South Dakota border in Keya Paha County to its Kansas border in Jefferson County. The proposed route would cross through all or parts of the Nebraska Counties of Keya Paha, Boyd, Holt, Antelope, Boone, Nance, Merrick, Polk, York, Fillmore, Saline, and Jefferson.

On October 24, 2011, Governor Heineman announced he was calling a Special Session of the Nebraska Unicameral to "determine if siting legislation can be crafted and passed for pipeline

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[35] Exhibit 44.

[36] *See* Executive Order 13337, 65 Fed. Reg. 25299 (April 30, 2004).

routing in Nebraska."[37]

The 2011 Special Session began November 1, 2011, and concluded November 22, 2011. Both LB 1 (MOPSA) and LB 4 were enacted during that Special Session, and both were signed by the Governor and took effect on November 23, 2011.[38]

On November 10, 2011, the State Department announced it was delaying its decision on the Presidential Permit application.[39] Approximately two months later, on January 18, 2012, the President of the United States denied TransCanada's Presidential Permit application.[40] Thus, as of January 18, 2012, TransCanada no longer had an active and pending presidential permit application, and TransCanada would be subject to the MOPSA PSC Review process if it reapplied for a Presidential Permit and/or a route through Nebraska.

On January 19, 2012, LB 1161 was introduced by Senator Jim Smith.[41] Exhibit 4 is a copy of LB 1161's full legislative history. LB 1161 was signed into law on April 17, 2012, and became effective April 18, 2012.[42]

On April 18, 2012, TransCanada submitted its "Initial Report Identifying Alternative and Preferred Corridors for Nebraska Reroute" to NDEQ for evaluation of the proposed Keystone XL Pipeline project pursuant to LB 1161.[43] NDEQ established a website for the public to view documents and submit comments relating to the Department's Keystone XL Pipeline Evaluation.[44]

On May 4, 2012, TransCanada filed a new application with the State Department seeking a Presidential Permit for the construction of an international border crossing for the proposed Keystone XL Pipeline at the U.S.-Canada border crossing site in Montana. The President has not yet acted on TransCanada's new application.

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[37] Exhibit 44, ¶ 14.

[38] Exhibits 1 and 2.

[39] Exhibit 22.

[40] Exhibit 44, ¶¶ 16, 17; Exhibit 23.

[41] Exhibits 3–5.

[42] Exhibit 3.

[43] Exhibit 44, ¶ 20.

[44] *See* https://ecmp.nebraska.gov/deq-seis/.

On May 24, 2012, NDEQ entered into a Memorandum of Understanding ("MOU") with the State Department.[45]

On July 16, 2012, NDEQ issued "Nebraska's Keystone XL Pipeline Evaluation Feedback Report."[46]

On September 5, 2012, TransCanada filed a report with NDEQ entitled "TransCanada Keystone XL Pipeline Project Supplemental Environmental Report for the Nebraska Reroute."[47]

On January 3, 2013, NDEQ submitted "Nebraska's Keystone XL Pipeline Evaluation Final Evaluation Report" to the Governor pursuant to LB 1161.[48] NDEQ's evaluation was included in the State Department's draft Supplemental Environmental Impact Statement available at http://keystonepipeline-xl.state.gov/draftseis/index.htm.

On January 22, 2013, the Governor, pursuant to LB 1161, indicated in writing his approval of the evaluation of the proposed Keystone XL Pipeline route, and asked that NDEQ's evaluation be included in the federal SEIS report.[49] The Governor's January 22, 2013 approval was the last act of any Defendant taken pursuant to LB 1161 regarding the Keystone XL Pipeline, other than involvement in this lawsuit.

BURDEN OF PROOF

In considering the Plaintiffs' challenge to the constitutionality of LB 1161, this court is "guided by familiar general principles governing the degree of deference which must be given to a legislative enactment alleged to be unconstitutional."[50] As the Nebraska Supreme Court has explained:

> A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. The burden of establishing the unconstitutionality of

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[45] Exhibit 8.

[46] Exhibit 9.

[47] Exhibit 10.

[48] Exhibit 18; *See* NEB. REV. STAT. § 57-1503(4).

[49] Exhibit 21; *See* NEB. REV. STAT. § 57-1503(4).

[50] *Kiplinger v. Nebraska Dep't of Natural Resources*, 282 Neb. 237, 250 (2011).

a statute is on the one attacking its validity. The unconstitutionality of a statute must be clearly established before it will be declared void."[51]

ANALYSIS

In this declaratory judgment action, 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;[52]

2) 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;[53]

3) 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;[54]

4) 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;[55]

5) Constitutes special legislation because it utilizes an arbitrary and unreasonable classification and it creates an unconstitutional, substantially closed class of persons contrary to Nebraska Constitution Article III, § 18;[56]

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[51] *Id.* at 250.

[52] Second Amended Complaint at ¶13.1.

[53] *Id.* at ¶13.2.

[54] *Id.* at ¶ 13.7.

[55] *Id.* at ¶¶ 3.3 and 13.3.

[56] *Id.* at ¶13.4.

6) Unlawfully allocates to NDEQ the sum of $ 2.0 million to implement the unconstitutional provisions of LB 1161 and constitutes an unlawful expenditure of State funds;[57] and

7) Unlawfully pledges funds and credit of the State for at least 60 days to a private corporation who is to repay the funds later contrary to Nebraska Constitution Article XIII, § 3.[58]

Plaintiffs seek a declaration that LB 1161 is unconstitutional and void on its face and ask that any actions taken by NDEQ and the Governor pursuant to LB 1161, including the Governor's action on January 22, 2013 indicating his approval of TransCanada's proposed pipeline route, be declared null and void. Plaintiffs also seek a permanent injunction to enjoin Defendants from enforcing LB 1161.

In response, Defendants argue Plaintiffs have failed to establish standing to challenge LB 1161. Absent standing, Defendants argue this court lacks subject matter jurisdiction, and should dismiss the case without passing judgment on the merits. Additionally, Defendants argue Plaintiffs' claims were rendered moot on January 22, 2013, when the Governor approved the Keystone XL Pipeline route. And finally, Defendants argue that even if Plaintiffs have established standing and their claims are not moot, they have failed to meet their burden of proving LB 1161 is unconstitutional.

I. Jurisdictional Analysis

A. Standing

Defendants' standing arguments have been addressed and overruled twice before in connection with ruling on Defendants' motions to dismiss the Original and Second Amended Complaints. Now that the issues have been tried and all the evidence is before the court, Defendants suggest a more searching, factual examination of the standing issue is warranted. This court agrees.

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.[59] "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."[60] The concept of standing relates to a court's jurisdiction to address the issues presented and serves to identify those disputes which are

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[57] *Id.* at ¶ 13.5.

[58] *Id.* at ¶ 13.6.

[59] *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533, 539 (2010).

[60] *State ex rel. Reed v. Nebraska Game and Parks Comm'n*, 278 Neb. 564, 568 (2009).

appropriately resolved through the judicial process.[61] "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."[62] 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."[63] 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."[64]

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."[65]

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."[66] In discussing the "taxpayer exception" to the general rule of standing, the Nebraska Supreme Court has explained:

> 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.[67]

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[61] *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. at 541.

[62] *Id.*

[63] *Chambers v. Lautenbaugh*, 263 Neb. 920, 927 (2002).

[64] *Ritchhart v. Daub*, 256 Neb. 801, 806 (1999).

[65] *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).

[66] *Project Extra Mile*, 283 Neb. at 390 (citing *Sprague v. Casey*, 520 Pa. 38 (1988)).

[67] *State ex rel. Reed v. State Game and Parks Comm'n*, 278 Neb. at 571 (emphasis supplied).

In the present case, Plaintiffs claim standing to challenge LB 1161 under both a traditional standing analysis and under a taxpayer standing analysis.

1. Traditional Standing

With respect to traditional standing, the evidence demonstrates each Plaintiff is a citizen, resident, elector, and taxpayer of Nebraska, and each Plaintiff either owns or has a legal interest in Nebraska real estate that "was, or still is, in the path of one or more proposed pipeline routes suggested by a pipeline carrier applicant who has invoked LB 1161."[68] Certainly it would appear that owning or holding legal interests in agricultural, income-producing land in the path of the current pipeline route evaluated and approved pursuant to LB 1161 establishes a personal stake in the outcome of this controversy beyond that which is common to all members of the public, and Defendants do not suggest otherwise. However, given the manner in which each Plaintiff's affidavit is phrased, this court is unable to determine, from the evidence presented, whether the Plaintiffs' property sits on the current pipeline route which was approved by the Governor, or instead sits on a route previously proposed. Under traditional standing analysis, one must demonstrate an "injury in fact" which is "concrete in both a qualitative and temporal sense."[69] The alleged injury "must be actual or imminent, not conjectural or hypothetical."[70] On the affidavit evidence presented, this court is unable to determine whether Plaintiffs' alleged injury—as it regards land in the path of the pipeline—is actual and imminent, or merely conjectural and hypothetical. Under the circumstances, Plaintiffs have failed to prove they presently meet the requirements for establishing traditional standing, and so the court proceeds to consider whether Plaintiffs have met the requirements for establishing taxpayer standing.

2. Taxpayer Standing

Plaintiffs assert 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 is sufficient to confer taxpayer standing. Defendants argue Plaintiffs lack taxpayer standing because: 1) there are other potential parties better suited to challenge LB 1161; and 2) no "expenditure" of public funds has occurred because the funds appropriated to aid in carrying out LB 1161 have been fully reimbursed by TransCanada.

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[68] Exhibit 41 ¶ 1; Exhibit 42 ¶ 1; Exhibit 43 ¶ 1.

[69] *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. at 542.

[70] *Id.*

Relying on language in *Project Extra Mile*,[71] Defendants argue taxpayer standing is inappropriate in this case because Plaintiffs have failed to show the allegedly unlawful action would "otherwise go unchallenged because no other potential party is better suited to bring the action."[72] Specifically, Defendants argue pipeline carriers are better suited than taxpayers to challenge LB 1161, since pipeline carriers are directly regulated by the act, and because the act imposed new hurdles to what previously had been unfettered eminent domain authority provided to pipelines.[73] In a prior order, this court analyzed, and rejected, Defendants' suggestion that the Supreme Court in *Project Extra Mile* imposed an additional standing requirement on all taxpayer plaintiffs, concluding Defendants were reading the language of the opinion 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.[74] The Court began its standing analysis by reiterating the rule that "[c]ommon-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."[75] 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 unlawfully have promulgated rules that result in reduced tax revenues.[76] 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."[77] In so holding, the Court did

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[71] *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb. 379 (2012).

[72] *Id.* 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).

[73] *Compare* NEB. REV. STAT. § 57-1101 (Reissue 2010) *with* NEB. REV. STAT. § 57-1101 (Cum. Supp. 2012).

[74] *Project Extra Mile*, 283 Neb. at 389–90.

[75] *Id.* at 386 (emphasis supplied).

[76] *Id.* at 388–389.

[77] *Id.* at 391.

not deviate from or qualify its earlier holdings on taxpayer standing to challenge an unlawful expenditure of public funds.[78]

In the present case, Plaintiffs challenge an allegedly illegal expenditure of public funds to implement LB 1161 rather than the failure to assess or collect taxes, and this court concludes the holding in *Project Extra Mile* does not require Plaintiffs to show LB 1161 would otherwise 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), this court concludes Plaintiffs have satisfied such a requirement in the present case. The issues involved in this case are of great public concern and, under the circumstances, the only group arguably 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.[79] In fact, the evidence reveals that TransCanada, the only pipeline carrier to have invoked the provisions of LB 1161, testified in favor of the bill's passage.[80]

Lastly, in arguing that Plaintiffs lack taxpayer standing, 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 NDEQ for the costs of evaluations or reviews, and because all expenses incurred in carrying out the provisions of LB 1161 have, in fact, been reimbursed by TransCanada. 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.[81]

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.

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[78] *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").

[79] *Project Extra Mile*, 283 Neb. at 391.

[80] Exhibit 4; *Natural Resources Committee Hearing: LB 1161*, 102nd Leg., 2nd Sess. at 18–23 (Feb. 16, 2012) (testimony of Robert Jones, Vice President, TransCanada Keystone Pipeline, L.P.).

[81] LB 1161, § 7, *codified at* NEB. REV. STAT. § 57-1503(1)(b).

Defendants rely on cases from Ohio and Alabama to support their position that taxpayers lack standing to challenge LB 1161 because the pipeline carrier is responsible for reimbursing all costs associated with the evaluation and review of a proposed pipeline route. In *Brinkman v. Miami Univ.*,[82] the plaintiff taxpayer challenged the state university's provision of health insurance to employees' same-sex partners as unconstitutional. The university paid for these benefits from an account containing tax money from the state's general revenue fund and then reimbursed that sum from an account containing only unrestricted gifts to the university. Under those circumstances, the Ohio Court of Appeals found the plaintiff lacked taxpayer standing because he showed no injury-in-fact based on his taxpayer status. Under Ohio law, "a taxpayer challenging expenditures from the state's general revenue fund, as opposed to some special fund, must show 'that such complained of action has affected her pecuniary interests differently than the general taxpaying public.'"[83]

Similarly, in *Broxton v. Siegelman*,[84] the Alabama court concluded the plaintiff lacked taxpayer standing to challenge proposed landscaping changes near the state capitol as an unlawful expenditure of public funds. Under Alabama law, "the right of a taxpayer to sue 'is based upon the taxpayer's equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.'"[85] Because the state funds at issue in *Broxton* were reimbursed by federal grant funds, the court concluded the plaintiff lacked standing "because the taxpayer will not face the liability of replenishing the state funds."[86]

This court is not persuaded that the holdings in *Brinkman* or *Broxton* provide meaningful guidance when analyzing taxpayer standing under Nebraska law. The legal standards relied upon by the Ohio and Alabama courts are different and more onerous than the analysis applied by Nebraska courts. Whereas the *Brinkman* court required a taxpayer challenging an allegedly illegal expenditure of general revenue funds to show an injury to themselves different in character from that sustained by the general public, the Nebraska Supreme Court consistently has held 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."[87] Also, unlike the Alabama court in *Broxton*, the Nebraska Supreme Court has not made a taxpayer's liability to replenish state

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[82] *Brinkman v. Miami Univ.*, 2007 Ohio 4372 (Ohio Ct. App. 2007).

[83] *Id.* at 37 (quoting *Andrews v. Ohio Bldg. Auth.*, 1975 Ohio App. LEXIS 8467 (Ohio Ct. App. 1975)).

[84] *Broxton v. Siegelman*, 861 So.2d 376 (Ala. 2003).

[85] *Id.* at 385 (quoting *Hunt v. Windom*, 604 So. 2d 395, 396–97 (Ala. 1992)).

[86] *Id.*

[87] *Project Extra Mile*, 283 Neb. at 386 (emphasis supplied).

funds the touchstone of the taxpayer standing analysis.[88] Rather, the Nebraska Supreme Court has recognized that "taxpayers have an equitable interest in public funds and their proper application. In fact, the public's interest in the proper appropriation of public funds is the main impetus behind the relaxation of standing requirements in this area."[89]

While Nebraska appellate courts do not appear to have directly addressed the question of what effect private reimbursement of allegedly unlawful public expenditures should have on taxpayer's standing analysis, this court is not persuaded that taxpayer standing should turn on something as manipulable as whether a public expenditure is fully repaid. Nor should courts, in analyzing taxpayer standing, be required to resort to forensic accounting methods to determine whether all public expenditures have been reimbursed. In analyzing the question of taxpayer standing, the Nebraska Supreme Court has remarked:

> Actions brought to enjoin an alleged illegal expenditure, misappropriation, transfer, or diversion of public funds by public boards or officers, are in their nature public proceedings to test the constitutional or statutory validity of official acts, and courts in passing upon the taxpayer's right to maintain such actions will be guided by applicable legal principles and not by the factual question of whether or not the particular taxpayer or the public will actually gain or lose by the relief sought to be awarded.[90]

In arguing Plaintiffs were divested of taxpayer standing once the state recouped the expenditures incurred in carrying out the provisions of LB 1161,[91] Defendants overlook that the purpose of taxpayer standing is not only to challenge unlawful expenditures, but also to challenge allegedly unlawful appropriations, transfers and diversion of public funds. The evidence before this court demonstrates that $2,000,000.00 was appropriated to carry out the provisions of LB 1161 and

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[88] *See Broxton*, 861 So.2d at 385.

[89] *Rath v. City of Sutton*, 267 Neb. 265, 279 (2004) (citations omitted); *see also Niklaus v. Miller*, 159 Neb. 301, 303 (1954) ("[E]ach taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation."); *Rein v. Johnson*, 149 Neb. 67, 70 (1947) ("[R]esident taxpayers of the state have an equitable interest in the public funds of the state and in their proper application.").

[90] *Rein v. Johnson*, 149 Neb. at 71.

[91] Defendants' argument that Plaintiffs lost any standing in the midst of this litigation as a result of TransCanada reimbursing all expenses incurred by NDEQ in conducting its evaluation under LB 1161, is perhaps more properly viewed as a mootness argument. It has been recognized that a plaintiff's personal interest in the litigation is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter. *Myers v. Neb. Inv. Council*, 272 Neb. 669, 682–83 (2006).

Plaintiffs have challenged that appropriation as unlawful.[92] Moreover, according to the evidence presented, TransCanada has been invoiced and has repaid the State a total of $5,145,005.16 pursuant to the reimbursement provisions of LB 1161.[93] This court is not persuaded that private reimbursement of a public expenditure should, or does, divest Nebraska taxpayers of standing. Simply put, while private reimbursement of public expenditures may be good fiscal policy, it should not be used as a legislative tool to insulate allegedly unconstitutional laws from taxpayer challenge, particularly when the appropriation of significant public funds is necessary to implement the law.

To the extent Defendants invite this court to conclude taxpayer standing cannot exist to challenge an allegedly unlawful public expenditure which ultimately is repaid from private funds, such a position is rejected as inconsistent with existing Nebraska case law on taxpayer standing and contrary to the purpose for recognizing taxpayer standing in the first place. This court concludes Plaintiffs have established taxpayer standing to bring a constitutional challenge to LB 1161.

B. Mootness

Defendants next argue Plaintiffs' claims were rendered moot on January 22, 2013, when Governor Heineman approved the Keystone XL route. In essence, Defendants argue that because the Governor's approval marked the conclusion of the state action necessary to implement LB 1161 regarding TransCanada's Keystone XL route, meaningful relief no longer is available.

Mootness is a justiciability doctrine that can prevent courts from exercising jurisdiction.[94] "Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation."[95] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—in other words, a case in which the issues presented are no longer alive.[96] The central question when analyzing mootness is "whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief."[97] "A case is not moot if a court can fashion

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[92] LB 1161, §8 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."

[93] *See* Exhibit 34, p. 6; and Exhibit 45 ¶¶ 4, 5, and 6.

[94] *Blakely v. Lancaster County*, 284 Neb. 659, 670 (2012).

[95] *Id.* at 671 (citing *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200 (2011)).

[96] *Id.*

[97] *Id.* (citing *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137 (2009)).

some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances."[98]

Defendants rely on the case of *Rath v. City of Sutton*[99] to argue that when the action a party seeks to enjoin has been completed prior to the court's review, a request for injunctive relief is rendered moot. In *Rath* and the cases cited therein, the Court emphasized that "'injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.'"[100] However the situations presented in *Rath*, and other similar cases cited therein, involved requests to enjoin governmental action on grounds the government improperly had exercised its authority, not on grounds the statutes pursuant to which they acted were unconstitutional.[101]

Unlike in the cases cited and relied upon by Defendants, Plaintiffs seek an order declaring LB 1161 unconstitutional on its face and enjoining Defendants from enforcing LB 1161. It long has been the law in Nebraska that "[a]n unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations."[102] As the Nebraska Supreme Court has explained:

> When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.[103]

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[98] *Id.*

[99] *Rath v. City of Sutton*, 267 Neb. 265 (2004). *See also, Putnam v. Fortenberry*, 256 Neb. 266 (1999), and cases cited therein.

[100] *Rath*, 267 Neb. at 272–73 (quoting *Putnam*, 256 Neb. at 270).

[101] *See Rath v. City of Sutton, supra* (action to enjoin city from awarding public works contract to bidder based on failure to comply with Nebraska's competitive bidding statutes); *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637 (2003) (plaintiff losing bidder on a public contract to construct a service department warehouse sought injunctive relief because of alleged irregularities in the bidding process); *Putnam v. Fortenberry, supra* (action to enjoin sale of Lincoln General Hospital to private entity by city based on argument that city not legally authorized to do so); *Koenig v. Southeast Community College*, 231 Neb. 923 (1989) (action to enjoin college from implementing resolutions to close down one campus and reallocate space and funds to a different campus based on college board's lack of authority to do so).

[102] *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 906 (1994).

[103] *Board of Educational Lands & Funds v. Gillett*, 158 Neb. 558, 561–62 (1954) (quoting *Whetstone v. Slonaker*, 110 Neb. 343, 345–46 (1923)).

Because unconstitutional statutes are absolutely null and void, a request for injunctive relief with respect to actions taken pursuant to an allegedly unconstitutional statute is not rendered moot simply because governmental officers or agencies already have duly executed the duties imposed on them by the challenged statute. For instance, in *State ex rel. Stenberg v. Douglas Racing Corp.*,[104] the Attorney General sought a declaration that LB 718 (a bill authorizing telewagering at teleracing facilities) was unconstitutional. The Attorney General also sought a declaration that a teleracing license which had been issued by the State Racing Commission pursuant to the challenged law was void, and sought to permanently enjoin the racing company from acting pursuant to the license previously issued, even though the teleracing facility had been operating pursuant to the license for several months. After finding LB 718 unconstitutional, the Court recited the long-standing rule that an unconstitutional statute is null and void from its enactment, and explained:

> Accordingly, having declared all of the aforementioned statutes unconstitutional to the extent they authorize telewagering at teleracing facilities, we also declare that the license issued to Douglas Racing Corp. by the State Racing Commission for the operation of the Bennington facility is void, since Douglas Racing Corp. acted pursuant to an unconstitutional statute when it licensed the track. Respondent is hereby enjoined from acting pursuant to the license issued by the commission.[105]

Under Nebraska law, the reality that NDEQ and the Governor duly performed the duties LB 1161 required of them, and in fact have completed their statutory duties under LB 1161 as it pertains to the Keystone XL project, does not render moot Plaintiffs' request for an injunction preventing enforcement of LB 1161, or Plaintiff's request to enjoin Defendants from acting pursuant to the Governor's January 22, 2013 approval of TransCanada's Keystone XL Pipeline project.

Nor was Plaintiffs' request for a declaratory judgment rendered moot by Governor Heineman's January 22, 2013 action approving the Keystone XL pipeline route. "[A] declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action."[106] The facial constitutionality of LB 1161 and the validity of actions taken pursuant to the legislation still exist, and all parties have a legally cognizable interest in the determination of those issues.

Accordingly, this court concludes Plaintiffs' claims for declaratory and injunctive relief were not rendered moot by the fact that, during the pendency of this litigation, NDEQ and the Governor

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[104] *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901 (1994).

[105] *Id.* at 906–907.

[106] *Myers v. Neb. Inv. Council*, 272 Neb. 669, 683 (2006).

duly performed the duties required of them under the statutory scheme which Plaintiffs claim is unconstitutional and void.[107]

The court now turns to the merits of Plaintiffs' various challenges to the constitutionality of LB 1161.

II. Constitutionality of LB 1161

Plaintiffs allege, renumbered and restated, that LB 1161 is unconstitutional because it: (1) is an unconstitutional pledge of the State's credit; (2) violates the prohibition against special legislation; (3) constitutes an unlawful delegation of authority; and (4) violates the doctrine of separation of powers and the right to due process.

Whether a statute is constitutional presents a question of law.[108] A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[109] Plaintiffs bear the burden of establishing the unconstitutionality of LB 1161, and its unconstitutionality must clearly be established before it will be declared void. "All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature."[110]

A. Pledge of State Credit

Nebraska's Constitution prohibits the State from giving or loaning its credit to private parties, and provides in relevant part:

> The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . .[111]

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[107] While certainly not binding on this court, the Minnesota Court of Appeals has considered a mootness argument in a case involving a challenge to an oil pipeline routing permit. In *Minnesota Center for Environ. Advocacy v. Minn. Pub. Utilities Comm.*, 2010 Minn. App. Unpub. LEXIS 1176 (unpublished opinion), the court concluded even though the challenged pipeline had been built and was fully operational by the time the case was decided, the plaintiff's claims were not moot because a controversy still existed for which relief could be provided. The court reasoned that if completion of the challenged action were to render a case nonjusticiable, "'entities could merely ignore the requirements of [the National Environmental Policy Act], build [their] structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.'" *Id.* at p. 7 (*quoting Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001)).

[108] *State ex rel. Bruning v. Gale*, 284 Neb. 257, 271 (2012).

[109] *Id.* at 271.

[110] *In re Interest of J.R.*, 277 Neb. 362, 368 (2009).

[111] NEB. CONST. art. XIII, § 3.

Plaintiffs claim LB 1161 violates this constitutional provision by "pledg[ing] funds and credit of the State for at least 60 days to a pipeline applicant who is to repay the funds later."[112] Specifically, Plaintiffs' challenge that portion of LB 1161 which 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.[113]

Defendants deny that LB 1161 results in an unconstitutional loaning of the State's credit, and argue that Plaintiffs' position confuses the loaning of State funds, which is constitutionally permissible, with extending the State's credit, which is not.

"Article XIII, § 3, of the Nebraska Constitution prevents the state or any of its governmental subdivisions from extending the state's credit to private enterprise. Article XIII, § 3 is designed to prohibit the state from acting as a surety or guarantor of the debt of another."[114] Stated another way, Article XIII, § 3 "seeks to prevent the state from loaning its credit to an individual, association, or corporation with the concomitant possibility that the state might ultimately pay that entity's obligations."[115]

Those claiming a violation of Article XIII, § 3 must prove three elements: "(1) The credit of the State (2) was given or loaned (3) in aid of any individual, association or corporation."[116] The Nebraska Supreme Court has explained the difference between loaning state funds, and loaning the state's credit:

> "The state's credit is inherently the power to levy taxes and involves the obligation of its general fund . . . . There is a distinction between the loaning of state funds and the loaning of the state's credit. When a state loans its funds it is in the

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[112] Second Amended Complaint at ¶13.6.

[113] LB 1161, § 7, *codified at* NEB. REV. STAT. § 57-1503(1)(b).

[114] *Japp v. Papio-Missouri River Nat. Res. Dist.*, 273 Neb. 779, 787 (2007) (citing *Haman v. Marsh*, 237 Neb. 699 (1991) and *Callan v. Balka*, 248 Neb. 469 (1995)) (footnote omitted).

[115] *Id.* at 788.

[116] *Id.* at 787.

position of creditor, whereas the state is in the position of debtor upon the loan of credit."[117]

As such, while the terms "loaning funds" and "loaning credit" may be used interchangeably in everyday conversation, those terms have very specific, and distinctly different, meanings in the context of Article XIII, § 3.

The provisions of LB 1161, § 7 require NDEQ to pay, initially, the costs associated with NDEQ's evaluation of a pipeline route, with the requirement that the pipeline carrier applicant reimburse NDEQ within 60 days after being notified of the costs. The reimbursement scheme in LB 1161 does not require the State to act as a surety or guarantor for a pipeline carrier's debt to another. A "surety" is defined as "someone who agrees to be legally responsible if another person fails to pay a debt or to perform a duty."[118] LB 1161 does not require the State to guarantee payment of a pipeline carrier's debts to others. Rather, it creates the pipeline carrier's obligation to reimburse the State for the NDEQ evaluation. That obligation is owed by the pipeline carrier to the State of Nebraska, as opposed to an obligation owed to some other entity which the State is guaranteeing. To use the example articulated by the Supreme Court in *Japp v. Papio-Missouri River Nat. Res. Dist.*,[119] the reimbursement provisions of LB 1161 put the State in the position of a creditor having loaned its funds, and not a debtor having loaned its credit.[120]

On the evidence presented, this court finds LB 1161 does not constitute an unlawful pledge of state credit in violation of Article XIII, § 3.

B. Special Legislation

Plaintiffs allege LB 1161 constitutes special legislation by utilizing an arbitrary and unreasonable classification and creating an unconstitutional, substantially closed class of persons contrary to Nebraska Constitution Article III, § 18.[121] In relevant part, NEB. CONST. art. III, § 18 provides:

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[117] *Id.* at 788 (quoting *Haman v. Marsh*, 237 Neb. at 719–20) (finding the state did not extend its credit to private developers by agreeing to pay for the construction of dams, because the state did not use its credit to secure capital for a private project or agree to act as a guarantor for a private company).

[118] MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/surety.

[119] *Japp*, 273 Neb. at 788.

[120] While not as specific as the collection provisions contained in LB 1, *see, e.g.*, LB 1, §§ 7 & 12, *codified at* NEB. REV. STAT. §§ 57-1406 & 57-1411, the reimbursement provisions of LB 1161 clearly put the State in the position of a creditor rather than a debtor.

[121] Second Amended Complaint at ¶13.4.

> The Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

The Nebraska Supreme Court has described the purpose of the constitutional safeguard against special legislation as follows:

> By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. . . . General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted.[122]

The prohibition against special legislation, however, does not necessarily preclude all legislation benefitting a single entity or a closed class:

> [T]he Legislature has the power to enact special legislation where "the subject or matters sought to be remedied could not be properly remedied by a general law, and where the [L]egislature has a reasonable basis for the enactment of the special law." In fact, unless specifically prohibited by article III, § 18, the Legislature is not prohibited from passing local or special laws.[123]

For instance, in *State, ex rel. Spillman, v. Wallace*,[124] the Nebraska Supreme Court upheld a law that discriminated between counties which had made efforts to eradicate tuberculosis in cattle and those which had not. The Court in *Spillman* recognized that although a general law could have been passed that applied to all counties, to do so would have been to lose the benefits accrued by the efforts of certain counties.[125] "Because the matter was one of promoting a reasonable public policy

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[122] *Haman v. Marsh*, 237 Neb. 699, 709 (1991) (citations omitted).

[123] *Yant v. City of Grand Island*, 279 Neb. 935, 941 (2010) (quoting *State, ex rel. Spillman, v. Wallace*, 117 Neb. 588, 594 (1928)).

[124] *State, ex rel. Spillman, v. Wallace*, 117 Neb. 588 (1928).

[125] *Id.* at 595.

and because special laws pertaining to the regulation of cattle were not specifically prohibited by article III, § 18, the law was found to be constitutional special legislation."[126]

Similarly, in *Yant v. City of Grand Island*,[127] the Court found legislation relocating the Nebraska State Fair from Lincoln to Grand Island did not create an unconstitutional closed class because the Legislature had a reasonable basis for enacting a special law in furtherance of a legitimate public policy. The Court reasoned that specifying a single site for the state fair was a legitimate legislative function and that a general law was not feasible because relocation of the fair necessarily involved selecting a single location.[128] Additionally, the Court noted the law did not confer any special benefit or privilege because the fair was intended to benefit the entire state.[129] The Court concluded the Legislature had a reasonable basis for enacting the law in light of the information before it concerning the state fair's critical financial situation and information from the two studies authorized by the Legislature looking at alternatives for the state fair.[130]

Most recently, in *Banks v. Heineman*,[131] the Court considered a tax credit available to only one entity, Elkhorn Ridge, which had paid personal property taxes on a wind generation facility prior to enactment of a new taxing scheme for such facilities. While the legislation at issue created a closed class, the Court concluded it was constitutional special legislation because a general law could not be enacted to achieve the Legislature's purpose. The Court reasoned:

> The record establishes that the Legislature had a reasonable basis for enacting the credit provision, as it did so in order to address what it correctly perceived as a harsh and unfair consequence of its decision to change the law regarding taxation of property used for wind generation of electricity. The nameplate capacity tax was clearly intended to be instead of, not in addition to, the personal property tax on wind energy generation equipment. But without the credit, Elkhorn Ridge would be required to pay both personal property tax and the nameplate capacity tax on the same equipment. Thus, the credit does not arbitrarily benefit or grant special favors to Elkhorn Ridge, but, rather, achieves tax equity by requiring it to pay only the

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[126] *Yant*, 279 Neb. at 941 (citing *State, ex rel. Spillman, v. Wallace*, 117 Neb. 588 (1928)).

[127] *Id.*, 279 Neb. 935 (2010).

[128] *Id.* at 941–42.

[129] *Id.* at 943.

[130] *Id.* at 944.

[131] *Banks v. Heineman*, 286 Neb. 390 (2013).

> equivalent of the nameplate capacity tax, in the same manner as all other commercial operators of wind generation facilities.[132]

As these cases illustrate, the focus of the prohibition against special legislation requires more than just determining whether legislation creates a closed class or benefits a specific class: "[t]he focus of the prohibition against special legislation is the prevention of legislation which *arbitrarily* benefits or grants special favors to a specific class."[133]

Generally there are two ways a legislative act can violate the prohibition against special legislation in Article III, § 18: "(1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class."[134] In this case, Plaintiffs claim LB 1161 amounts to impermissible special legislation under either analysis.

In support of their special legislation argument, Plaintiffs point to the chain of events leading up to the introduction and passage of LB 1161, and argue LB 1161 amounts to a special law granting a special favor to a single company: TransCanada. A summary of those events is useful to understanding and analyzing the Plaintiffs' arguments.

The chain of events to which Plaintiffs refer began when a special session of the Legislature was called in November 2011 to deal solely with major oil pipeline siting legislation.[135] The 2011 Special Session resulted in passage of LB 1 (MOPSA), with the stated purpose to "[e]nsure that a major oil pipeline is not constructed within Nebraska without receiving approval of the [PSC]" and to "[e]nsure that the location of routes for major oil pipelines is in compliance with Nebraska law."[136] Yet despite this stated purpose, the Legislature exempted from MOPSA's PSC review process "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."[137] The evidence shows that as of the effective date of MOPSA, only one company, TransCanada Keystone Pipeline LP, had submitted an application for a Presidential Permit pursuant to Executive Order 13337.[138] The Legislative history makes clear that when enacting LB 1 and LB 4, the Legislature intended MOPSA's mandatory PSC review process to apply prospectively to all future major oil pipelines, and intended TransCanada's Keystone XL Pipeline route would be evaluated by NDEQ and the

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[132] *Id.* at 402.

[133] *Id.* at 400 (emphasis added).

[134] *Henry v. Rockey*, 246 Neb. 398, 404 (1994) (citing *Haman v. Marsh*, 237 Neb. 699 (1991)).

[135] Exhibit 44, ¶ 14.

[136] LB 1, § 3(1)(c), (d), *codified at* NEB REV STAT § 57-1402(1)(c),(d).

[137] *Id.* at § 3(3), *formerly codified at* NEB. REV. STAT. § 57-1402(3)

[138] Exhibit 44, ¶¶ 12, 13.

Governor using the alternative procedure established by LB 4.[139]

On January 18, 2012, when the President denied TransCanada's first Presidential Permit application,[140] the practical impact was that if TransCanada reapplied for a Presidential Permit seeking approval of it's Keystone XL pipeline route through Nebraska, the route would be subject to the PSC Review process under MOPSA.

On January 19, 2012, the day after TransCanada's Presidential Permit application was denied, LB 1161 was introduced by Senator Jim Smith.[141] On February 16, 2012, LB 1161 had its first hearing in front of the Natural Resources Committee.[142] Senator Smith opened his prepared statements by saying: "LB1161 is a simple amendment to LB1 and LB4 . . . [and] LB1161 is not intended to generate new discussion or debate on the merits of the pipeline's construction, the economics of the project, or the legalities associated with federal versus state regulations."[143] In referring to the President's recent decision to deny TransCanada's permit, Senator Smith noted "Unfortunately we could not have anticipated the circumstances and the actions that occurred at the federal level that now jeopardize the agreements we reached last year."[144] Continuing Smith stated:

> Following me in testimony today will be Robert Jones, vice president for Keystone Pipeline at TransCanada. I have asked Mr. Jones to again join us and to provide the committee with an update of their plans with regard to Nebraska. Also following me will be Mr. Jim White, federal regulatory counsel for TransCanada, who can provide this committee with some insight into the federal process that has or that will occur with regard to Keystone XL going forward. I believe it is very important for the state of Nebraska to continue to move forward with respect to the Keystone project and

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[139] *See Natural Resources Committee Hearing: LB 4*, 102nd Leg., 1st Spec. Sess. 3--4 (Nov. 8, 2011) (Statement of Senator Flood: "LB4 is the specific process . . . that would apply to TransCanada's Keystone XL. . . . [LB 1] sets up a long-term plan on how we deal with the next oil pipeline . . . ."); Floor Debate on LB 1, 102nd Leg., 1st Spec. Sess. (Nov. 17, 2011). *See also* comments of Senator Hadley, Floor Debate on LB 1, 102nd Leg., 1st Spec. Sess. (Nov. 17, 2011) at p. 15: "We have LB1 and LB4 in front of us. LB1 is prospective after the Keystone Pipeline, the way I understand it; and LB4 deals with the Keystone XL pipeline." While the legislative history pertaining to LB 1 and LB 4 was not offered as an exhibit, Defendants cited to these legislative records in their brief. (Defendants' Trial Brief at 18). The court takes judicial notice of the legislative history of LB 1 and LB 4, as it may. *See Dairyland Power Coop. v. State Brd. of Equalization & Assessment*, 238 Neb. 696, 704 (1991).

[140] Exhibit 44, ¶ 17; Exhibit 23.

[141] Exhibits 3–5.

[142] Exhibit 4, p.2.

[143] *Id.*, p.3.

[144] *Id.*, p.3.

to adhere to the process that we worked so hard to develop just a few months ago.[145]

LB 1161 amended MOPSA by eliminating section 3(3) of LB 1, the provision which had exempted TransCanada's Keystone XL pipeline from MOPSA,[146] and amending LB 4 so that any "oil pipeline" carrier seeking approval of a pipeline route through Nebraska could utilize the NDEQ/Governor approval process as an alternative to the PSC approval process under MOPSA.[147]

LB 1161 was signed into law by the Governor April 17, 2012, and became effective April 18, 2012.[148] The same day, April 18, 2012, TransCanada submitted its "Initial Report Identifying Alternative and Preferred Corridors for Nebraska Reroute" to NDEQ for evaluation of the proposed Keystone XL Pipeline project pursuant to LB 1161, utilizing the alternative process created by LB 1161.[149]

On May 4, 2012, after LB 1161 was in place, TransCanada filed a new application with the State Department for a Presidential Permit for construction of an international border crossing for the proposed Keystone XL Pipeline at the U.S.-Canada border crossing site in Montana.[150]

1. Closed Class

Plaintiffs claim LB 1161 amounts to special legislation by serving a closed class. As Plaintiffs characterize it, "[o]nly a pipeline carrier who submitted a pipeline route prior to April 17, 2012, and is currently proposing to construct a major oil pipeline with[in], through, or across Nebraska to be put in service after November 23, 2011, benefits from LB 1161's PSC bypass."[151]

With respect to closed classes, the Nebraska Supreme Court has explained:

> "[t]he rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future

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[145] *Id.*, p.4.

[146] LB 1, § 3(3), *formerly codified at* NEB. REV. STAT. § 57-1402(3), 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."

[147] LB 1161, §§ 6 and 7, *codified at* NEB. REV. STAT. §§ 57-1405(1) and 57-1503.

[148] Exhibit 44, ¶ 19.

[149] Exhibit 44, ¶ 20; *See also* LB 1161, § 7, *codified at* NEB. REV. STAT. § 57-1503.

[150] Exhibit 44, ¶ 21.

[151] Plaintiffs' Trial Brief at 24.

growth or development, is special, and a violation of [Article III, § 18]."[152]

In the past, the Supreme Court has noted "that a number of legislative acts, which were applicable only to a present situation, have been held not to be inimical to [Article III, § 18, because] in such cases the acts were so framed that it was *possible* for others to come within the classification."[153] In *Haman v. Marsh*,[154] the Supreme Court explained that a special legislation challenge based on a closed class in violation of Article III, § 18, requires the court to "consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment."[155]

Plaintiffs rely on the sequence of events surrounding the adoption of LB 1161 to argue the law was enacted solely for TransCanada's benefit, and to suggest no other pipeline carrier realistically will benefit from LB 1161's alternative NDEQ/Governor approval process. This argument simply mischaracterizes LB 1161. While it is true LB 1161 was passed at a time when only TransCanada's Keystone XL pipeline was seeking approval of a route through Nebraska, LB 1161's applicability is not limited to pipeline carriers submitting routes prior to the enactment of LB 1161, as Plaintiffs suggest.[156] Rather, LB 1161 makes the NDEQ/Governor approval method available to *all* oil pipelines that satisfy the eight-inch inside diameter requirement contained in LB 4, § 2.[157] In fact, rather than creating a closed class, LB 1161 had the practical effect of expanding the class of pipeline carriers that could utilize the alternative NDEQ/Governor approval method. It is both possible and probable other pipeline carriers will come within LB 1161's provisions, and the law, as worded, does not limit its application only to a present condition. Under the circumstances, the court does not find LB 1161 creates an unconstitutional closed class in violation of NEB. CONST. art. III, § 18.

2. Arbitrary and Unreasonable Classification

Based on the sequence of events and legislative history, Plaintiffs also argue LB 1161 was enacted solely for TransCanada's benefit to streamline route approval and construction across Nebraska in the event its second Presidential permit application was granted. Specifically, Plaintiffs argue LB 1161 was enacted as "the vehicle to get TransCanada's [Keystone XL] pipeline state

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[152] *Haman v. Marsh*, 237 Neb. 699, 716 (1991) (quoting *City of Scottsbluff v. Tiemann*, 285 Neb. 256, 262 (1970)).

[153] *State v. Gering Irrigation District*, 114 Neb. 329, 334 (1926) (emphasis added).

[154] *Haman v. Marsh*, 237 Neb. 699 (1991) .

[155] *Id.*, 237 Neb. at 717–18.

[156] *See* LB 1161, § 1, *codified at* NEB. REV. STAT. § 57-1101.

[157] *See Id.* at, §§ 1, 6, *codified at* NEB. REV. STAT. §§ 57-1101 and 57-1405(1).

review and approval and trigger for eminent domain rights out of the PSC and MOPSA and in to the hands of the Governor and the NDEQ."[158] Plaintiffs argue the Legislature did not express a reasonable basis for enacting this special law to favor a single pipeline company and did not identify how such legislation would further a legitimate public policy.

"While it is true that the Legislature may classify where reasonable, it may not do so in an arbitrary manner."[159] The Nebraska Supreme Court has articulated the test for determining the constitutionality of classifications as follows:

> A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.[160]

A classification will be proper "'if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.'"[161] The question for the court is "whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act."[162] Under a special legislation inquiry, the analysis "focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation."[163] As such, it is recognized that "[t]he Legislature has the power to enact special legislation where the subject or matters sought to be remedied could not be properly remedied by a general law and where the Legislature has a reasonable basis for the enactment of the law."[164] A legislative act runs afoul of the prohibition against special legislation "[w]hen the Legislature confers privileges on a class arbitrarily selected from a large number of

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[158] Plaintiffs' Trial Brief at 26–27.

[159] *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 608 (1980) (citation omitted).

[160] *City of Scottsbluff v. Tiemann*, 185 Neb. at 266 (citations omitted). *See also Natural Gas Pipeline Co. v. State Bd. of Equalization & Assessment*, 237 Neb. 357 (1991) (applying test and finding no real distinction between railroads and other common carriers which would justify exemption of the former's personal property but not that of the latter).

[161] *State ex rel. Douglas v. Marsh*, 207 Neb. at 609 (quoting *Campbell v. City of Lincoln*, 195 Neb. 703, 709 (1976)).

[162] *Campbell v. City of Lincoln*, 195 Neb. at 709.

[163] *Hug v. City of Omaha*, 275 Neb. 820, 826 (2008).

[164] *Banks*, 286 Neb. at 400.

persons standing in the same relation to the privileges, without reasonable distinction or substantial difference."[165]

Before analyzing the classifications created by LB 1161 under the authority articulated above, this court first addresses Defendants' argument that the special legislation issue is not properly before this court. Specifically, Defendants argue LB 1161 did not establish any new classes of oil pipelines or pipeline carriers; rather, those classes were established previously in LB 1 and LB 4 (neither of which have been challenged by the Plaintiffs in this declaratory judgment action). Defendants' argument in this regard is not entirely correct, because LB 1161 did amend the classes established in LB 1 and LB 4 in some respects. For instance, LB 1161 removed the exemption under LB 1, § 3(3) and, as a result, the class of "major oil pipelines" established in MOPSA was expanded to include *all* major oil pipelines larger than six inches, rather than excluding those pipelines that had submitted an application to the State Department pursuant to Executive Order 13337 prior to MOPSA's effective date.[166] Similarly, LB 1161 had the practical effect of expanding the class of "oil pipelines" over eight inches that could use the alternate NDEQ/Governor review process. Under LB 4 only "oil pipelines" that were undergoing a federal SEIS review could utilize the collaborative NDEQ review/Governor approval method for a route through Nebraska. LB 1161 expanded that classification—and expanded NDEQ's authority— so that any pipeline carrier who wanted approval of an "oil pipeline" route through Nebraska could request an evaluation by NDEQ and approval by the Governor (even without a federal SEIS review)[167] instead of applying for PSC review/approval under MOPSA.[168] Even though Defendants mischaracterize LB 1161 when they suggest it did not alter the classifications established by the Legislature in LB 1 or LB 4, the proper focus isn't merely on whether LB 1161 modified the classes of pipeline carriers established previously, but "whether the things or persons classified by [LB 1161] form by themselves a proper and legitimate class with reference to the purpose of the act."[169] In other words, this court must focus "on the Legislature's purpose in creating the class and [ask] if there is a substantial difference of circumstances to suggest the expediency of diverse legislation."[170]

In this case, it is important to recognize that when the Legislature enacted MOPSA it created a classification between those pipelines which had submitted a Presidential Permit application prior

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[165] *Hug*, 275 Neb. at 826.

[166] LB 1161, § 4.

[167] LB 1161, § 7, *codified at* NEB. REV. STAT. § 57-1503(1)(a)(i).

[168] *Id.* at § 6, *codified at* NEB. REV. STAT. § 57-1405(1).

[169] *Campbell v. City of Lincoln*, 195 Neb. at 709.

[170] *Hug*, 275 Neb. at 826.

to November 23, 2011, and those which had not.[171] That original classification was part of LB 1 and LB 4, neither of which have been challenged in the present litigation. Instead, Plaintiffs argue LB 1161's reclassification of those pipelines that could use the alternate NDEQ/Governor approval method was arbitrary because—once the Presidential Permit application was denied—TransCanada could have utilized the PSC review process under MOPSA for any new application and there was no reasonable basis for the Legislature to reclassify pipeline carriers as it did.

As the Supreme Court has explained:

> If the Legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified.[172]

The evidence suggests the purpose behind LB 1161 was to allow NDEQ's evaluation of TransCanada's proposed reroute of the Keystone XL Pipeline (a process which began pursuant to LB 4 and was underway) to continue after TransCanada's Presidential Permit was denied.[173] The question becomes whether that is a reclassification based upon "some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified."[174] In considering this question "[t]he Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality."[175] Also, this court will "not reexamine independently the factual basis on which a legislature justified a statute, nor will [this]

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[171] *See* LB 1, § 3(3), *formerly codified at* NEB. REV. STAT. § 57-1402(3). *See also Natural Resources Committee Hearing: LB 1*, 102nd Leg., 1st Spec. Sess. (Nov. 7, 2011); *Floor Debate on LB 1 and LB 4*, 102nd Leg., 1st Spec. Sess. (November 17, 2011).

[172] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 943 (2003).

[173] *See* Exhibit 4; *Natural Resources Committee Hearing: LB 1161*, 102nd Leg., 2nd Sess. (Feb. 16, 2012). Specifically, Senator Dubas asks: "So when we left here in November . . . it was with the understanding that LB 4 was for this project that TransCanada has proposed [and] LB 1 was for anything in the future, any new project, any new company coming in. Is what you are trying to achieve with [LB 1161] in any way changing the intent of where I think we all understood we were at when we left here in November?" *Id.* at p. 11. To this question, Senator Smith responds: "I do not believe it is, Senator Dubas. It is staying with the spirit of what was in LB 4. For the TransCanada pipeline we want to make certain [it] is outside of the Sandhills and we want to look at alternative routes. Unfortunately, things occurred at the federal level that created a situation where [NDEQ] struggled with being able to continue under LB 4. So we wanted to modify it so [NDEQ] could continue on the path they were following." *Id.* at pp. 11–12.

[174] *City of Scottsbluff v. Tiemann*, 185 Neb. at 266.

[175] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. at 942 (citing *Prendergast v. Nelson*, 199 Neb. 97 (1977)).

court independently review the wisdom of the statute."[176]

When considering a claim that the Legislature has enacted special legislation, the Supreme Court has cautioned courts to afford deference to legislative fact-finding and avoid second-guessing the wisdom of the challenged legislation:

> It is not this court's place to second-guess the Legislature's reasoning behind passing the act. Likewise, "it is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted." Because we give deference to legislative factfinding and presume statutes to be constitutional, any argument that the record contains evidence that the act was not wise or necessary when it was enacted does not change the analysis.[177]

Although LB 1 and LB 4 are not being challenged in this case, it nevertheless is appropriate to note the historic circumstances which prompted the Governor to call the 2011 special session, and the problems the Legislature was seeking to solve in enacting LB 1 and LB 4. TransCanada had submitted its Presidential Permit application proposing a route through Nebraska, and while the consensus was that federal law would preempt any state law attempting to regulate the safety of such an oil pipeline,[178] it likewise was the consensus that Nebraska could enact siting statutes to govern the route of an oil pipeline through that State, as many other states had done.[179] With the Keystone XL Presidential Permit application pending and the federal review process already underway, the Legislature's charge was to see whether it could agree upon and pass siting legislation that would allow Nebraska to have immediate input into the ongoing federal review process regarding the Keystone XL Pipeline application and—for future pipeline projects—establish a regulatory procedure to give Nebraska control over the route oil pipelines would take through the State. The Legislature eventually passed LB 1 (which established the PSC route approval process) and LB 4 (which authorized NDEQ to cooperate with the federal government's SEIS review of a pipeline

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[176] *Id.*

[177] *Id.* at 943 (quoting *Verba v. Ghaphery*, 552 S.E.2d 406, 412 (W. Va. 2001)).

[178] *See, e.g. Natural Resources Committee Hearing: LB 1*, 102nd Leg., 1st Spec. Sess. 4–5 (Nov. 7, 2011) (Statement of Senator Dubas: "This act is intended to deal solely with the issue of siting, totally apart from safety considerations, and recognizes the expressed preemptions stated in the Federal Pipeline Safety Act of 1994"); *Natural Resources Committee Hearing: LB 4*, 102nd Leg., 1st Spec. Sess. (Nov. 8, 2011). *See also*, LB 1, § 3(2), *codified at* NEB. REV. STAT. § 57-1402(2). *See also* Exhibit 18 p. 24 ("to provide consistency across the nation, pipeline safety is regulated by the federal government. U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) is responsible for safety regulations pertaining to the construction, operation, maintenance, and spill-response planning for pipelines, including the proposed Keystone XL Pipeline. Federal regulations governing pipeline safety are described in 49 CFR Parts 190 through 199.")

[179] Natural Resources Committee Hearing: LB 1, 102nd Leg., 1st Spec. Sess. (Nov. 7, 2011) (Statement of Senator Dubas: "States do have siting authority and that is supported by laws that are on the books in other states.") *See also*, LB 1, § 3(2), *codified at* NEB. REV. STAT. § 57-1402(2).

project and authorized the Governor to approve the pipeline route after reviewing the SEIS). The legislative history makes clear that legislators intended the pending Keystone XL route to be evaluated pursuant to the process established by LB 4, and expected all future pipeline routes to be evaluated using the PSC approval process established by LB 1.[180]

So while LB 1161 and the classifications it created were, quite clearly, enacted with TransCanada's Keystone XL Pipeline in mind, that does not compel the conclusion that there was no sound public policy reason for enacting LB 1161. Deferring to the Legislature's fact-finding, as this court must, it is reasonable to conclude the Legislature enacted LB 1161 to further the public policy goals identified previously when enacting LB 4.[181] The Legislative history of LB 1161 supports this conclusion.[182]

Additionally, the evidence supports the conclusion that LB 1161 was intended to further the Legislature's original policy determination that MOPSA's PSC review process should not apply to the Keystone XL Pipeline. Prior to the enactment of LB 1161, the Legislature made a determination that MOPSA ought not apply to TransCanada's Keystone XL Pipeline project, and fashioned an alternative, presumably quicker, route-approval procedure in LB 4. The Legislative history supports the conclusion that when circumstances changed as a result of the President denying TransCanada's permit application, the Legislature determined LB 1161 was necessary to further the Legislature's original purpose in enacting LB 1 and LB 4.[183] It is not this court's place to second-guess the Legislature's reasoning in passing LB 1 and LB 4, or to determine whether—after Keystone's Presidential Permit application was denied—the legislation continued to meet the purposes for which it originally was enacted. The Legislature clearly determined LB 1161 was necessary to "clarify the law a pipeline carrier is to follow depending on the date an application is made for a Presidential Permit from the State Department" and to provide for "a process that would authorize [NDEQ] to conduct an environmental impact study of a pipeline route going through Nebraska . . .when there is no federal permit application pending."[184] In light of the deference courts are to give to Legislative factfinding, Plaintiff's argument that LB 1161 was unnecessary does not change the analysis.

Given the presumption of constitutionality and the deference courts give to the factual basis on which the Legislature justifies a statute, this court concludes the class of oil pipeline carriers

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[180] *See* discussion at fn. 139.

[181] While the Legislature made specific factual findings in connection with LB 4, *see* LB 4, § 1, *codified at* NEB. REV. STAT. § 57-1501, it made no new or additional factual findings in connection with LB 1161.

[182] Exhibit 4.

[183] *See* discussion at fn. 173. Additionally, the Legislative history suggests that at the time LB 1161 was being considered, NDEQ was viewed as being in a better position to complete the evaluation it already had underway, than the PSC was to begin a new evaluation under MOPSA. *See* Exhibit 4; *Natural Resources Committee Hearing: LB 1161*, 102nd Leg., 2nd Sess., pp 16–17, 21 (Feb. 16, 2012).

[184] Ex. 4; COMMITTEE STATEMENT: LB 1161, 102nd Neb. Leg., 2nd Sess. (Feb. 16, 2012).

created by LB 1161 forms a proper and legitimate class with reference to the purpose of the act and, when considering the Legislature's purpose in creating the class, concludes there is "a substantial difference of circumstances to suggest the expediency of diverse legislation."[185] The classification (or reclassification) of oil pipelines in LB 1161 was not arbitrary, but rather was based on the same difference in situation which prompted the Legislature to enact LB 1 and LB 4 in the first place, a classification which has not been challenged in this lawsuit. Under the circumstances, the Legislature's classification, or reclassification as the case may be, was not arbitrary or unreasonable and, in enacting LB 1161, the Legislature did not violate the constitutional safeguard against special legislation.

C. Unlawful Delegation

Plaintiffs allege LB 1161 represents an unlawful delegation of power under three different theories. First, Plaintiff's argue LB 1161 unconstitutionally delegates legislative authority over eminent domain to the Governor. Next, Plaintiffs argue LB 1161 unconstitutionally divests the PSC of authority over common carriers, and delegates such authority to the Governor. And finally, Plaintiffs claim LB 1161 is unconstitutional because it fails to provide sufficiently clear and definite standards by which the Governor is to exercise the authority delegated by the act.

1. Delegation of Legislative Decision Making over Eminent Domain

Plaintiffs claim LB 1161 constitutes an unlawful delegation of the Legislature's authority over the power of eminent domain. Specifically, Plaintiffs contend LB 1161 unconstitutionally vests the Governor with authority to delegate 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."[186]

"Eminent domain is defined generally as the power of the nation or a state, or authorized public agency, to take or to authorize the taking of private property for a public use without the owner's consent, conditioned upon the payment of just compensation."[187] The power of eminent domain is a sovereign power which exists independently of the Nebraska Constitution. [188] The Constitution provides:

> The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature, of the property and franchises of incorporated companies already organized, or hereafter to be organized,

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[185] *Hug*, 275 Neb. at 826.

[186] Second Amended Complaint at ¶ 13.2.

[187] *City of Omaha v. Tract No. 1*, 18 Neb. App. 247, 251 (2010).

[188] *Id.*

and subjecting them to the public necessity the same as of individuals.[189]

This constitutional provision serves as "a limitation on the exercise of the power and in no sense of the word a grant of the power."[190] "The Legislature has the right to delegate [the power of eminent domain] and to restrict or limit the extent of its use."[191] "The right to authorize the exercise of [eminent domain] power and the mode of the exercise thereof is legislative."[192] As the Nebraska Supreme Court has explained:

> "Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the legislature has delegated the power can exercise the right and it must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the legislature."[193]

The Supreme Court has articulated the following rules regarding delegation of eminent domain authority. The Legislature may delegate the authority to exercise eminent domain not only to counties, cities, political subdivisions, or other public agencies, but also to private parties.[194] The right to exercise the power of eminent domain to build a pipeline "depends on the legislative grant."[195] "Proceedings to subject the property of another for public use under the doctrine of eminent domain must be conducted in the manner prescribed by the statute delegating the power."[196] And finally, "[s]tatutes conferring and circumscribing the power of eminent domain must be strictly construed."[197]

Prior to MOPSA and LB 1161, the Legislature had granted the power of eminent domain to pipeline carriers in NEB. REV. STAT. § 57-1101:

> Any person engaged in, and any company, corporation, or association formed

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[189] NEB. CONST. art. X, § 6.

[190] *Burnett v. Central Nebraska Public Power & Irrigation Dist.*, 147 Neb. 458, 465 (1946).

[191] *Id.* at 466.

[192] *Little v. Loup River Pub. Power Dist.*, 150 Neb. 864, 869 (1949).

[193] *Spencer v. Wallace*, 153 Neb. 536, 544 (1951) (quoting *State ex rel. Nelson v. Butler*, 145 Neb. 638, 646 (1945)).

[194] *See Gustin v. Scheele*, 250 Neb. 269, 276 (1996) ("Railroads, although they are private corporations, also can acquire land by eminent domain for their use. NEB. REV. STAT. § 74-308 (Reissue 1990).").

[195] *Missouri Valley Pipe Line Co. v. Neely*, 124 Neb. 293, 295 (1933).

[196] *Spencer v. Wallace*, 153 Neb. at 544.

[197] *Burlington Northern & Santa Fe Ry. v. Chaulk*, 262 Neb. 235, 241 (2001).

> or created for the purpose of transporting or conveying crude oil, petroleum, gases, or other products thereof in interstate commerce through, or across the State of Nebraska, or intrastate within the State of Nebraska, and desiring or requiring a right-of-way or other interest in real estate, and being unable to agree with the owner or lessee of any land, lot, right-of-way or other property for the amount of compensation for the use and occupancy of so much of any lot, land, real estate, right-of-way or other property as may be reasonably necessary for the laying, relaying, operation and maintenance of any such pipeline or the location of any plant or equipment necessary to operate such pipeline, shall have the right to acquire the same for such purpose through the exercise of the power of eminent domain. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.[198]

This authority for crude oil pipeline carriers to exercise eminent domain free of pre-authorization or review by any state agency had been in place since 1963.

With the enactment of MOPSA and, subsequently, LB 1161, all pipeline carriers were required to get approval of the proposed pipeline route prior to exercising eminent domain authority. MOPSA and LB 1161 amended NEB. REV. STAT. § 57-1101 to provide that:

> for any major oil pipeline as defined in section 57-1404 to be placed in operation in the State of Nebraska after November 23, 2011, any such person, company, corporation, or association shall comply with section 57-1503 and receive the approval of the Governor for the route of the pipeline under such section or shall apply for and receive an order approving the application under the Major Oil Pipeline Siting Act, prior to having the rights provided under this section.[199]

Considering the provisions of LB 1161, this court concludes Plaintiffs mischaracterize the impact of LB 1161 when they suggest it provides the Governor with authority to make decisions regarding a pipeline carrier's use of eminent domain. Simply put, the amendments to the eminent domain provision ushered in by MOPSA, and then amended further by LB 1161, did not affect a change in the Legislature's prior delegation of eminent domain authority. Pipeline carriers previously had, and continue to have, eminent domain authority after MOPSA and LB 1161. Under the provisions of MOPSA and LB 1161, the Legislature simply postponed the authorization to exercise eminent domain until a pipeline carrier first has its proposed route reviewed and approved by NDEQ and the Governor, or by the PSC. As the Supreme Court has recognized, "[t]he Legislature has the right to delegate [the power of eminent domain] and to restrict or limit the extent of its use."[200] The court finds the Legislature simply restricted or limited the extent of pipeline

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[198] NEB. REV. STAT. § 57-1101 (Reissue 2010).

[199] NEB. REV. STAT. § 57-1101 (Cum. Supp. 2012); *see also* LB 1161, § 1.

[200] *Burnett v. Central Nebraska Public Power & Irrigation Dist.*, 147 Neb. at 466.

carriers' use of eminent domain through LB 1161 and concludes LB 1161 does not unconstitutionally delegate eminent domain authority as alleged by Plaintiffs.

2. Delegation of Control over Common Carriers from the PSC to the Governor

Plaintiffs argue LB 1161 unconstitutionally divests the PSC of jurisdiction to regulate oil pipelines, including intrastate oil pipelines, and wrongfully vests control of such pipelines in the Governor. The PSC is a regulatory body created by the Nebraska Constitution. Its powers are defined in Nebraska Constitution, Article IV, § 20, which states:

> 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.[201]

The PSC "is an independent regulatory body under the Nebraska Constitution, and its jurisdiction to regulate common carriers may be restricted by the Legislature only through 'specific legislation.'" [202] The Legislature's ability to enact "specific legislation" limiting the scope of the PSC's powers has been explained as follows:

> "[T]he Legislature has the right by law to prescribe how the commission shall proceed and what authority it may exercise in the regulation and general control of common carriers. Therefore, when specific legislation is enacted upon a subject in relation thereto, such legislation preempts the field so occupied and thereby prescribes and controls the powers and duties of the commission."[203]

In further explaining the concept of "specific legislation" regarding authority over common carriers, the Nebraska Supreme Court has said:

> "The right to regulate 'as' the Legislature may provide means the right to regulate in the manner in which the Legislature provides. . . . The word 'specific' in the phrase 'in the absence of specific legislation' is synonymous with the word 'particular.' The term implies a definite restriction on the kind and extent of legislation over common carriers which is permissible by the Legislature. It [specific] is defined in 58 C. J., Specific, p. 826 as follows: 'Definite, or making definite; limited or precise; precisely formulated or restricted; tending to specify or make particular. Although the term is

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[201] NEB. CONST. art. IV, § 20. *See also* NEB. REV. STAT. § 75-109.01 (Cum. Supp. 2012) (setting forth the jurisdiction of the PSC).

[202] *Schumacher v. Johanns*, 272 Neb. 346, 365 (2006).

[203] *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 275 (1989) (quoting *Chicago & N. W. Ry. Co. v. County Board of Dodge County*, 148 Neb. 648, 653 (1947)).

> a relative one, it is limited to a particular, definite, or precise thing, and hence is the very opposite of "general".' It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers."[204]

As such, under settled Nebraska law, "[i]n the absence of specific legislation, the powers and duties of the [PSC], as enumerated in the Constitution, are absolute and unqualified."[205] Stated another way, the constitutionally prescribed powers of the PSC are plenary and self-executing in the absence of any specific legislation on the subject.[206]

a. Oil pipeline carriers as "common carriers"

Before considering Plaintiffs' claim that LB 1161 divests the PSC of authority over common carriers, it is necessary to determine whether the oil pipeline carriers subject to regulation under LB 1161 are "common carriers" under Nebraska law. This is because "'the powers enumerated in article IV, § 20, apply only to common carriers."[207]

Article IV, § 20 does not expressly define "common carrier" but the courts have recognized "[t]he term 'common carriers,' as used in article IV, § 20, is coextensive with the meaning of that phrase at common law."[208] When summarizing the various ways in which the term "common carrier" has been defined at common law, the Nebraska Supreme Court explained:

> any person, corporation, or association holding itself out to the public as offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire, is a common carrier in the particular spheres of such employment.[209]

Under the common law, two elements are essential to "common carrier" status: the entity must hold itself out to the public generally as being engaged in the business of transporting from

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[204] *Id.* at 276 (quoting *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 344 (1949)).

[205] *Myers v. Blair Tel. Co.*, 194 Neb. 55, 59 (1975) (citing *State ex rel. State Railway Comm'n. v. Ramsey*, 151 Neb. 333 (1949)).

[206] *Id.* at 60.

[207] *Nebraska Pub. Serv. Comm'n v. Neb. Pub. Power Dist.*, 256 Neb. 479, 491 (1999).

[208] *Id.* at 491 (observing the PSC's constitutional authority over common carriers did not extend to "contract carriers" because they were not considered "common carriers" at common law).

[209] *Bayard v. North Central Gas Co.*, 164 Neb. 819, 830 (1957) (citing *State ex rel. Winnett v. Union Stock Yards Co.*, 81 Neb. 67 (1908)).

place to place, and must do so "for hire."[210] In the context of NEB. CONST. art. IV, § 20, the definition of "common carrier" is flexible, as the Supreme Court explained in *State ex rel. State Railway Comm'n. v. Ramsey:*

> The term "common carriers" includes all forms of transportation for hire, and the amendment providing for the commission was intended to control the common carrier business to which it relates at all times and under all developments. It was determined in this state more than half a century ago that a street railway company became a common carrier by undertaking the transportation of passengers for hire. Transportation is the important fact, and the form or method thereof is immaterial. The commission since its creation has had jurisdiction and power of control by virtue of the Constitution when the problem presented involved regulation of public transportation service. A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable.[211]

Applying the legal authority cited above to the evidence presented, it appears the class of oil pipelines to which LB 1161 applies properly are considered "common carriers" under Nebraska common law. This conclusion is bolstered by the fact that, prior to legislative amendments in 1963, Nebraska statutes expressly declared crude oil pipelines to be "common carriers":

> Any company, corporation or association, formed or created for the purpose of transporting . . . crude oil, petroleum or the products thereof . . . from one point in the State of Nebraska to another point in the State of Nebraska for a consideration, is hereby declared to be a common carrier."[212]

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[210] *See Id.* at 830–32 (and cases cited therein).

[211] *State ex rel. State Railway Comm'n. v. Ramsey*, 151 Neb. 333, 337–38 (1949) (citations omitted).

[212] NEB. REV. STAT. § 75-601 (Reissue 1943). In 1963, the Legislature undertook a complete recodification of the statutes relating to the State Railway Commission (now the PSC) to better organize all the statutes into one chapter, but not to make any new substantive changes. *See* LB 82, Laws 1963, c.425, 73rd Sess., Reg. Sess. (Neb. 1963); *Judiciary Committee Hearing: LB 82*, 73rd Sess., Reg. Sess. (March 29, 1963); COMMITTEE STATEMENT ON LB 82, 73rd Sess., Reg. Sess. (Neb. 1963). Former NEB. REV. STAT. § 75-601 (Reissue 1958) was inadvertently left out of the main bill, LB 82, recodifying the statutes relating to the Commission, and so was recodified as NEB. REV. STAT. § 57-1101 in LB 789, Laws 1963, c. 323, 73rd Sess., Reg. Sess. (Neb. 1963). LB 789 was intended to keep the "present utility rights for pipe lines for eminent domain . . . as it is but it will [be] in a different section of the statutes." *Floor Debate on LB 789*, 73rd Sess., Reg. Sess. 1691 (Neb. 1963). Even though the version of NEB. REV. STAT. § 57-1101 created by LB 789 left out the language declaring intrastate crude oil pipelines to be common carriers subject to Commission regulation contained in former NEB. REV. STAT. § 75-601 (Reissue 1958), the legislative history of LB 789 indicates that the Legislature did not intend to change the substance of the law regarding crude oil pipelines, including their common carrier status.

But perhaps the most telling evidence that oil pipeline carriers properly are characterized as "common carriers" under Nebraska law is the fact that, for more than 50 years, the Legislature has afforded oil pipeline carriers eminent domain authority "for the purpose of transporting or conveying crude oil, petroleum, gases or other products thereof in interstate commerce through, or across the State of Nebraska, or intrastate within the State of Nebraska."[213] The authority to exercise eminent domain is one of the quintessential indicia of common carrier status. And while the mere fact that a company has been given eminent domain authority does not conclusively establish common carrier status under Article IV § 20,[214] when evidence of eminent domain status is added to evidence of transporting crude oil for hire, it is difficult to come to any conclusion other than the pipeline carriers regulated by LB 1161 are "common carriers" under Nebraska common law. Indeed, it is difficult to reconcile the evidence in this case with any other conclusion.[215]

Defendants present no argument suggesting oil pipeline carriers are not properly considered "common carriers" under the common law of Nebraska, but instead argue Plaintiffs have not proven TransCanada's Keystone XL Pipeline is a "common carrier" as that term is defined in NEB. REV. STAT. § 75-501, which provides:

> Any person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska intrastate commerce shall be a common carrier subject to commission regulation. The commission shall adopt promulgate and enforce reasonable rules and regulations establishing minimum safety standards for the design, construction, maintenance and operation of pipelines which transport liquified petroleum gas or anhydrous ammonia in intrastate commerce by common carriers.[216]

While Defendants are correct that section 75-501 does not expressly reference crude oil pipelines,

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[213] *See* NEB. REV. STAT. § 57-1101 (Reissue 2010).

[214] *See Bayard*, 164 Neb. at 829 (concluding that although the Defendant gas company had exercised the right of eminent domain under NEB. REV. STAT. § 75-609 (Reissue 1943), that did not make the gas company a common carrier for purposes of subjecting it to the natural gas rates fixed by the commission, because the gas company had not transported gas for consideration, and because the gas company had exercised eminent domain as an interstate pipeline carrier and not an intrastate carrier subject to the commission's rates).

[215] Defendants suggest there has been no evidence presented establishing the "for hire" nature of the TransCanada Keystone XL Pipeline project. To the contrary, Exhibit 32, a letter dated August 6, 2010, from TransCanada to Governor Heineman, indicates TransCanada's proposed crude oil pipeline will be "for hire." (Ex. 32 at p. 2 ("The $12 billion system is 83 percent subscribed with long-term, binding contracts . . . .")). Moreover, in its Final Evaluation Report, NDEQ discussed the nature of the products to be transported by TransCanada's Keystone XL Pipeline and explained that "[t]hese products would not be created by Keystone but by the producers in Western Canada. Keystone is the common carrier of the product and is hired by the producers/shippers to transport their crude oil." (Ex. 18 at ES-26). As further explained in TransCanada's Supplemental Environment Report, "[t]he Project will transport crude oil production from the Western Canadian Sedimentary Basin and the Bakken supply basin in Montana and North Dakota to . . . allow for delivery of that production to existing refinery markets on the Texas Gulf Coast." (Ex. 10, § 1.2 at p.5).

[216] NEB. REV. STAT. § 75-501 (Reissue 2009).

the absence of such a reference is immaterial to determining whether the PSC has plenary jurisdiction over oil pipelines, because "[i]n the absence of specific legislation, the powers and duties of the [PSC], as enumerated in the Constitution, are absolute and unqualified."[217]

Prior to enacting LB 1161, when the Legislature enacted MOPSA through LB 1, it amended the statutory provisions relating to the PSC's authority over pipelines to make clear that the "Public Service Commission shall have jurisdiction, as prescribed, over . . . Pipeline carriers and rights-of-way pursuant to the Major Oil Pipeline Siting Act, the State Natural Gas Regulation Act, and sections 75-501 to 75-503."[218] As such, at the time LB 1161 was enacted, the PSC had plenary jurisdiction over oil pipelines as common carriers, and had jurisdiction over pipeline carriers pursuant to MOPSA. Accordingly, this court concludes oil pipelines subject to LB 1161 are "common carriers" as that term is used in NEB. CONST. art. IV, § 20.

b. Divestment of PSC control

Having concluded oil pipeline carriers subject to LB 1161 are common carriers, the question becomes whether LB 1161 unlawfully divests the PSC of control over routing decisions involving such common carriers. As the Nebraska Supreme Court has explained:

> Our prior decisions regarding interpretation of NEB. CONST. art. IV, § 20, seem to draw a distinction between statutes by which the Legislature attempted to transfer regulation of common carriers to an agency distinct from the PSC and statutes by which the Legislature itself "occupies the field" and becomes, in effect, the regulatory body which exercises control over common carriers. The Legislature cannot constitutionally divest the PSC of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers. *State ex rel. State Railway Commission v. Ramsey*, *supra* (unconstitutional legislative attempt to vest the Nebraska Department of Aeronautics with power to "control common carriers by air"); *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492, 167 N.W. 570 (1918) (statute designed to produce reasonable rail service did not authorize the court to exercise control over service by a railroad as a common carrier). However, a legislative act or statute may constitutionally divest the PSC of jurisdiction over common carriers to the extent that the Legislature, through specific legislation, has preempted the PSC in control of common carriers. *See*, *Rodgers v. Nebraska State Railway Commission*, 134 Neb. 832, 844, 279 N.W. 800, 807 (1938) ("[T]he plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field");

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[217] *Myers v. Blair Tel. Co.*, 194 Neb. at 59 (1975) (citing *State ex rel. State Railway Comm'n v. Ramsey*, 151 Neb. 333 (1949)).

[218] LB 1 § 14, *codified at* NEB. REV. STAT. § 75-109.01(6) (Cum. Supp. 2012).

State v. Chicago & N. W. Ry. Co., supra at 977, 25 N.W.2d at 828 ("The legislative act under consideration clearly deprives the Nebraska State Railway Commission of any power to act to the extent that it occupies the field").

> Thus, while the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the PSC from some control over a class of common carriers, the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers. For example, legislation which directs that the PSC cannot exercise its constitutionally granted power over a particular common carrier or a class of common carriers, or which dictates that the Legislature shall not enact regulatory statutes concerning a common carrier or class of common carriers, violates NEB. CONST. art. IV, § 20. If such abandonment or abolition of regulatory control were permitted, the protection afforded to Nebraska citizens by the constitutionally created and empowered PSC would cease to exist. NEB. CONST. art. IV, § 20, requires that the power to regulate common carriers exist either in the PSC or the Legislature.[219]

Plaintiffs argue LB 1161 divests the PSC of jurisdiction over oil pipeline routing decisions and improperly vests that power with NDEQ and the Governor. Specifically, Plaintiffs allege LB 1161 gives NDEQ and the Governor authority to evaluate and approve "any route for an oil pipeline within, through, or across the state"[220] and in so doing completely divests the PSC of authority over the routing decision of an entire class of common carriers—those oil pipelines which elect to submit an application for evaluation by NDEQ and approval by the Governor.

In response, Defendants present two arguments. First, Defendants argue LB 1161 (along with its predecessors LB 1 and LB 4) were concerned only with the route of a pipeline, and Defendants suggest routing/siting decisions do not fall within the PSC's constitutionally enumerated powers over "the regulation of rates, service, and general control of common carriers."[221] Next, Defendants suggest LB 1161 does not completely divest the PSC of jurisdiction over common carriers, but rather creates a sort of shared jurisdiction by authorizing an alternative process for pipeline carriers to obtain approval of pipeline routes.

In considering the arguments of the parties, this court is guided by the delegation cases cited previously, and by the Supreme Court's analysis in cases involving past Legislative attempts to divest the PSC's predecessor, the State Railway Commission, of authority over classes of common carriers. For instance, in *State ex rel. State Railway Comm'n v. Ramsey*,[222] the Legislature enacted

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[219] *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. at 276–77.

[220] LB 1161, § 7, *codified at* NEB. REV. STAT. § 57-1503(1)(a)(i).

[221] NEB. CONST. art. IV, § 20.

[222] *State ex rel. State Railway Comm'n v. Ramsey*, 151 Neb. 333 (1949).

a law providing that "[t]he Department of Aeronautics shall exercise general control over all aeronautics within this state, including the regulation of rates and services in connection with aeronautics for hire" and "the commission shall have and exercise no control over aeronautics."[223] The Nebraska Supreme Court concluded the law violated NEB. CONST. art. IV, § 20 because the "Legislature has no power to divest the State Railway Commission of its constitutional jurisdiction to regulate and control common carriers by air by transferring it to another body or jurisdiction."[224]

In *Rivett Lumber & Coal Co. v. Chicago & N.W. Ry. Co.*,[225] the plaintiff sought an order compelling the defendant railroad company to construct a sidetrack for plaintiff's use, relying on a statute purporting to give the courts jurisdiction to hear and determine that kind of proceeding, and to grant any appropriate relief. The defendant railroad company claimed the court was without jurisdiction to enter such order since it amounted to establishing a station where there was none and such a determination was within the State Railway Commission's jurisdiction. The Supreme Court agreed with the defendant, reversed the judgment of the district court, and dismissed the case. In explaining its decision, the Court stated:

> While the Constitution authorizes the legislature to provide by law how these powers and duties of the commission shall be exercised, it was clearly not intended that the legislature should confer the general power to regulate rates, service or control generally of common carriers upon some other body or jurisdiction. If the legislature under the Constitution could confer jurisdiction upon the courts either to regulate rates or service or to control generally common carriers, it follows that it could confer jurisdiction to do all of the things enumerated in the railway commission statute, and the constitutional provision establishing a railway commission would then become nugatory. . . .
>
> It seems clear to us that the object of plaintiffs' action is not to prevent discrimination between persons and associations, but to regulate the service of the railroad company, and is therefore entirely within the jurisdiction of the state railway commission.[226]

Cases like *Rivett* suggest decisions involving *where* a common carrier locates its services properly fall within the PSC's jurisdiction to regulate the service and exercise general control over common carriers. Where, geographically, a common carrier establishes its operations is a basic component of its service, particularly with pipelines, and authority over where such operations may

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[223] *Id.* at 336.

[224] *Id.* at 347.

[225] *Rivett Lumber & Coal Co. v. Chicago & N.W. Ry. Co.*, 102 Neb. 492 (1918).

[226] *Id.* at 495–97.

be located fits squarely within the concept of "general control of common carriers."[227] Indeed, given federal preemption in the area of regulating the operation, maintenance, and safety of interstate oil pipelines, decisions regarding the routing of such pipelines is one of the few regulatory controls the State can exercise over interstate oil pipeline carriers.[228]

Having concluded that evaluation and approval of an oil pipeline route through Nebraska is within the PSC's constitutionally enumerated powers, the question becomes whether LB 1161 totally divests the PSC of control over pipeline routes and vests it in NDEQ and the Governor. In arguing this issue, both the Plaintiffs and the Defendants mischaracterize, to some extent, the practical effect of LB 1161.

Plaintiffs characterize LB 1161 as granting the PSC only "secondary jurisdiction to review oil pipeline routes under MOPSA, unless the Governor approves the route."[229] However, this is not an entirely accurate depiction of LB 1161's effect. The plain language of LB 1161 does not require a pipeline carrier seeking route approval to begin with either the NDEQ/Governor approval process, or the PSC review process. Nor did LB 1161's amendment of the eminent domain statute have the effect of requiring pipeline carriers to first seek route approval from the Governor rather than the PSC. LB 1161 amended NEB. REV. STAT. § 57-1101 as follows:

> except that for any major oil pipeline as defined in section 57-1404 to be placed in operation in the State of Nebraska after November 23, 2011, any such person, company, corporation, or association shall comply with section 57-1503 and receive the approval of the Governor for the route of the pipeline under such section *or* shall apply for and receive an order approving the application under the Major Oil Pipeline Siting Act, prior to having the rights provided under this section.[230]

Due to the Legislature's use of the disjunctive "or" in section 57-1101, the amendment does not

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[227] *See Rivett Lumber & Coal Co. v. Chicago & N.W. Ry. Co.*, 102 Neb. 492 (holding that question of whether a train station should be established in a particular location was within State Railway Commission's exclusive jurisdiction as it involved regulation of service); *cf. Ritums v. Howell*, 190 Neb. 503, 507–08 (1973) (finding statute authorizing creation of a city transit authority to operate city's public transportation system did not delegate the Commission's "general control" or rate-making jurisdiction to the transit authority and it was "not disputed that the Transit Authority had administratively construed the law to require it to submit rate and *route-making* powers to the Public Service Commission" (emphasis added)).

[228] *See* discussion at fn. 178. Additionally, the court takes judicial notice of the fact that, pursuant to MOPSA, the PSC has adopted rules and regulations for evaluating the routes of major oil pipelines through Nebraska. *See* NEB. ADMIN. CODE, Title 291, Chapter 9, §§ 023 through 023.12C2 (2013).

[229] Plaintiffs' Trial Brief at 12.

[230] NEB. REV. STAT. § 57-1101 (emphasis added); LB 1161, § 1.

require a pipeline carrier to seek approval from NDEQ and the Governor rather than the PSC.[231] Additionally, it is significant that when LB 1161 amended the language of NEB. REV. STAT. § 57-1503, it created permissive, rather than mandatory, authority in NDEQ to evaluate a route submitted by a pipeline carrier.[232] As such, there is nothing about the language of LB 1161 which compels the conclusion that it requires pipeline carriers to seek approval of a pipeline route through the NDEQ/Governor procedure rather than the PSC procedure under MOPSA. In theory, after LB 1161, an oil pipeline carrier seeking approval of a route through Nebraska may select either statutory approach as its starting point. As a practical matter, however, starting initially with the NDEQ/Governor process provides a pipeline carrier with the opportunity for a second review through the PSC in the event the Governor withholds approval of the route.[233]

Defendants claim giving the pipeline carriers the option of choosing either the NDEQ/Governor approval method or the PSC approval method actually insulates LB 1161 from a facial challenge. Specifically, Defendants suggest that because LB 1161 created an alternative to MOPSA's PSC approval process, but did not make use of the alternative NDEQ/Governor process compulsory, LB 1161 does not completely divest the PSC of jurisdiction, and so does not offend Article IV, § 20. In making this argument, Defendants correctly point out that Plaintiffs are mounting a facial challenge to LB 1161, and a party challenging the facial validity of a legislative act must demonstrate that no set of circumstances exists under which the act would be valid, "i.e., that the law is unconstitutional in all of its applications."[234] Defendants argue that because it is possible to implement LB 1161 in such a way as to permit the PSC to exercise power over the routing decision of common carriers, the "no set of circumstances" test cannot be satisfied and any facial challenge to LB 1161 must fail. Basically, Defendants' argument suggests the existence of a constitutional alternative in a bifurcated statutory scheme will protect any allegedly unconstitutional portion from a facial challenge. The court finds such an argument unpersuasive.

First, Defendants' argument applies the "no set of circumstances" test to the entire statutory scheme (both MOPSA and LB 1161), rather than applying the test to only that portion of the statutory scheme being challenged as unconstitutional and, in so doing, stretches the test beyond its logical application. Plaintiffs have challenged only LB 1161 and the NDEQ/Governor approval

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[231] *See Liddell-Toney v. Nebraska Dep't of Health & Human Servs.*, 281 Neb. 532, 537 (2011) ("The word 'or,' when used properly, is disjunctive.").

[232] NEB. REV. STAT. § 57-1503(1)(a)(i) (providing "[t]he department may . . . evaluate any route for an oil pipeline"); *see also* LB 1161, § 7.

[233] LB 1161 added language to MOPSA to provide: "If a pipeline carrier proposes to construct a major oil pipeline to be placed in operation in Nebraska after November 23, 2011, 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 pursuant to section 57-1503, the pipeline carrier shall file an application with the commission and receive approval pursuant to section 57-1408 prior to beginning construction of the major oil pipeline within Nebraska." NEB. REV. STAT. § 57-1405 (emphasis added); *see also* LB 1161, § 6.

[234] *Lindner v. Kindig*, 285 Neb. 386, 391 (2013).

process it created; Plaintiffs raise no challenge to the constitutionality of that portion of the statutory scheme which authorizes PSC evaluation and approval of pipeline routes pursuant to MOPSA. It makes little sense to apply the "no set of circumstances" test to a portion of the statutory scheme which no party challenges as unconstitutional, and then argue the constitutional portion of the scheme insulates the unconstitutional portion from a facial challenge. There is no doubt the law permits courts to consider and determine whether only specific parts of a statutory scheme violate the Constitution.[235] Indeed, the Legislature included a severability clause in LB 1 and in LB 1161 so that if portions of those acts were deemed unenforceable, the enforceable portions could remain in effect.

In the present case, this court concludes the existence of the alternative PSC method of approval does not shield the NDEQ/Governor approval method from constitutional scrutiny under a facial challenge.

Under LB 1161, both the PSC and the Governor have been empowered by the Legislature to exercise authority over the evaluation and approval of proposed oil pipeline routes through Nebraska. This court found no authority indicating such a shared authority scheme constitutes proper "specific legislation" limiting the PSC's authority, and Defendants have cited none. The language of LB 1161 clearly restricts the PSC's power over those pipeline carriers which elect to use the NDEQ/Governor approval option. Whether the PSC's restriction of power is temporary or permanent is contingent on whether the Governor approves, or disapproves, the pipeline route.[236] If the Governor approves the route, the PSC has been divested permanently of authority over the location of that oil pipeline route.

Supreme Court jurisprudence involving NEB. CONST. art. IV, § 20 has drawn a stark distinction between statutes where the Legislature attempts to transfer regulation of common carriers to an agency distinct from the PSC, and statutes where the Legislature itself "occupies the field" and becomes, in effect, the regulatory body which exercises control over common carriers.[237] It is clear the Legislature cannot, consistent with Article IV, § 20, divest the PSC of jurisdiction over a class of common carriers and vest such power in another governmental agency, body of government, or branch of government, *except* the Legislature.[238] And while the Legislature may enact "specific

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[235] *See United States v. Salerno*, 481 U.S. 739, 744–45 & n.3 (1987) (rejecting facial constitutional challenge to that portion of the Bail Reform Act which permitted pretrial detention on the ground that the arrestee is likely to commit future crimes but "intimat[ing] no view on the validity of any aspects of the Act that are not relevant to respondents' case").

[236] *See* LB 1161, § 7, *codified at* NEB. REV. STAT. § 57-1503(4) ("If the Governor does not approve any of the reviewed routes, he or she shall notify the pipeline carrier . . . to obtain approval . . .[from] the [PSC] pursuant to [MOPSA].")

[237] *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. at 276–77.

[238] *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333 (1949) (unconstitutional legislative attempt to vest Nebraska Department of Aeronautics with power to "control common carriers by air"); *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492 (1918) (statute designed to produce reasonable rail

legislation," which preempts the PSC's control over common carriers and "occupies the regulatory field" over a class of common carriers,[239] the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers.[240] It is clear that "legislation which directs that the PSC cannot exercise its constitutionally granted power over a particular common carrier or a class of common carriers" violates NEB. CONST. art. IV, § 20.[241] As such, "NEB. CONST. art. IV, § 20, requires that the power to regulate common carriers exist either in the PSC or the Legislature."[242]

Because LB 1161 has the effect of either temporarily or permanently divesting the PSC of control over the routing decisions of oil pipelines subject to the act, and because LB 1161 vests such regulatory control over common carriers not in the Legislature but in NDEQ and the Governor, the evidence before this court clearly establishes LB 1161 violates NEB. CONST. art. IV, § 20, and therefore is unconstitutional. Furthermore, the court finds there is no set of circumstances under which such provisions could be constitutional.

In light of this conclusion, it is unnecessary to address Plaintiffs' remaining constitutional challenges to the NDEQ/Governor review process established in LB 1161. Specifically, it is unnecessary to address Plaintiffs' remaining claim that LB 1161 unconstitutionally delegates regulatory decision-making power over common carriers to the Governor without providing sufficient standards by which to exercise the power, and it is unnecessary to address Plaintiffs' claim that LB 1161 violates due process and separation of powers for failing to provide judicial review of the Governor's decision.

D. Requested Relief

Plaintiffs seek a declaration that LB 1161 is unconstitutional and void in its entirety[243] and ask

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service could not authorize courts to exercise control over service by a railroad as a common carrier).

[239] *See, Rodgers v. Nebraska State Railway Comm'n*, 134 Neb. 832, 844 (1938) ("[T]he plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field"); *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 977 (1947) ("The legislative act under consideration clearly deprives the Nebraska State Railway Commission of any power to act to the extent that it occupies the field").

[240] *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. at 276–77.

[241] *Id.* at 277.

[242] *Id.*

[243] As a general rule, "when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions." *State ex rel. Jon Bruning v. John A. Gale*, 284 Neb. 257, 277 (2012) (citing *Jaksha v. State*, 241 Neb. 106 (1994)). Although LB 1161 includes a few minor provisions amending LB 1 which were not related directly to the NDEQ/Governor approval process declared to be unconstitutional, neither party has requested or argued for severability in this case, nor did Plaintiffs or Defendants

that any actions taken by NDEQ and the Governor pursuant to LB 1161, including the Governor's action on January 22, 2013—indicating approval of TransCanada's proposed pipeline route—be declared null and void. Plaintiffs also seek a permanent injunction to enjoin enforcement of LB 1161.

"An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations."[244] As the Nebraska Supreme Court has explained:

> When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.[245]

Having found LB 1161 violates NEB. CONST. art. IV, § 20, by divesting the PSC of control over the routing decisions of oil pipelines subject to the act and vesting such regulatory control over common carriers in NDEQ and the Governor, the court finds Plaintiffs' request for declaratory judgment should be granted, and LB 1161 must be declared unconstitutional and void.

Furthermore, because the Governor's actions of January 22, 2013, in approving the Keystone XL Pipeline route were predicated on an unconstitutional statute,[246] the court also finds the Governor's actions in that regard must be declared null and void. Such a declaration should not be misconstrued as an indictment of the work done by NDEQ in conducting the comprehensive evaluation required by LB 1161, or the conclusions reached by the Governor after reviewing NDEQ's Final Evaluation Report and approving the Keystone XL Pipeline route.[247] However, having found LB 1161 to be unconstitutional, governmental actions taken pursuant to that act, no

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suggest in their briefing that any portion of LB 1161 should be severed in the event LB 1161 is declared unconstitutional. As such, the issue of severability is not properly before this court.

[244] *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 906 (1994); *State ex rel. Stenberg v. Omaha Exposition and Racing, Inc.*, 263 Neb. 991, 1002 (2002).

[245] *Board of Educational Lands & Funds v. Gillett*, 158 Neb. 558, 561–62 (1954).

[246] The Governor clearly relied upon the authority of LB 1161 in approving the Keystone XL Pipeline route, and Defendants have directed this court to no other statutory provision under which the Governor's approval may have been authorized. *See* Exhibit 21, p. 3 ("I, hereby, in accordance with Neb. Rev. Stat. § 57-1503(4), approve the route reviewed in the Final Evaluation Report conducted pursuant to Neb. Rev. Stat. § 57-1503(1).").

[247] The law presumes government officials and administrative agencies act in good faith, with honest motives and for the purpose of promoting the public good when discharging their official duties under the law, *see Ludwig v. Board of County Comm'rs*, 170 Neb. 600, 606 (1960), and the evidence in this case supports such a presumption.

matter how carefully performed, cannot stand.[248]

Finally, the court finds Plaintiffs are entitled to injunctive relief, and Defendants should be permanently enjoined from enforcing the provisions of LB 1161, and permanently enjoined from acting pursuant to the Governor's January 22, 2013 approval of the Keystone XL Pipeline route.

IT THEREFORE IS ORDERED, ADJUDGED, AND DECREED:

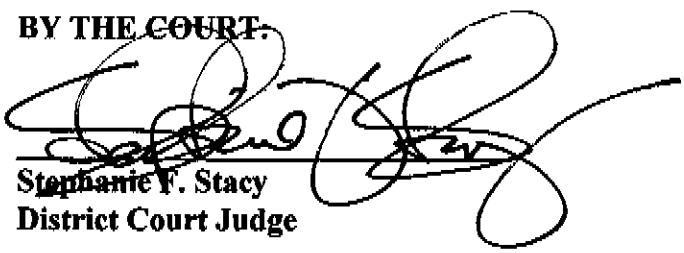
1. LB 1161 violates NEB. CONST. art. IV, § 20 by divesting the PSC of control over the routing decisions of oil pipelines subject to the act and vesting such regulatory control over common carriers in NDEQ and the Governor. Plaintiff's request for declaratory judgment is granted, and LB 1161 is declared unconstitutional and void. Furthermore, the Governor's actions of January 22, 2013, having been predicated on an unconstitutional statute, are declared null and void.

2. Plaintiff's request for injunctive relief is granted, and the Defendants are permanently enjoined from enforcing LB 1161 and from taking any action on the Governor's January 22, 2013 approval of the Keystone XL Pipeline route;

3. Any request for relief by any party which has not specifically been granted by this Order, is denied.

DATED this 10th day of February, 2014.

BY THE COURT:



Stephanie F. Stacy
District Court Judge

[248] *See, e.g., State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901 (1994) (finding statute authorizing telewagering at teleracing facilities to be unconstitutional, and declaring null and void license previously issued by State Racing Commission pursuant to unconstitutional statute, and enjoining any further action pursuant to the license); *State ex rel. Stenberg v. Omaha Exposition and Racing, Inc.*, 263 Neb. 991 (2002) (finding telephonic wagering statutes unconstitutional and declaring null and void licenses previously issued to conduct telephonic wagering).