

Case No. S-14-000158

NEBRASKA SUPREME COURT

**Randy Thompson
Susan Straka, fka Susan Luebbe
Susan Dunavan**

Plaintiffs – Appellees,

v.

**Dave Heineman, Governor of Nebraska
Patrick W. Rice, Acting Director, Department of Environmental Quality
Don Stenberg, State Treasurer of Nebraska**

Defendants – Appellants.

**Appeal from District Court, Lancaster County, Nebraska
Hon. Stephanie F. Stacy
Case No. CI 12-260**

Appellees' Opening Brief & Brief on Cross Appeal

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Jurisdictional Statement

1. Appellees, three Nebraska landowners, challenged the constitutionality of LB 1161 (*Laws of Nebraska 102nd Leg 2d Sess*). (T2). The district court granted declaratory judgment and injunctive relief and declared LB 1161 unconstitutional. (T21). The district court had subject matter jurisdiction. *Neb Rev Stat* § 24-302 & §§ 25-24,129 *et seq.* An actual case and controversy exists under an enactment of the Legislature.

2. Defendants-Appellants (collectively “Heineman”) filed their Notice of Appeal on February 19, 2014, the same day the district court decided the case. The “Order” appealed, (T21), is a final judgment and disposed of all claims, issues, and interests of all parties. *Neb Rev Stat* § 24-1902. This Court has jurisdiction. *Neb Rev Stat* § 25-1912.

3. Standing, which is jurisdictional, is challenged on this appeal. The Plaintiffs-Appellees (collectively “Thompson”) have standing. See Argument I.

Statement of the Case

Nature of the Case

4. Three (3) Nebraska taxpayers and property owners sued to declare LB 1161 unconstitutional and void. (T2). The Appellees’ (“Thompson”) standing as taxpayers and property owners is established by their respective affidavits. (E 41, 1-4:4; E 42, 1:4; E43, 1-4:4). The challenged statute confers upon the Governor, instead of the Public Service Commission (“PSC”), power to authorize pipeline common carriers to do business in Nebraska. It commits the State’s credit to payment for certain expenses on behalf of an individual common carrier, and it constitutes special legislation. (T8-11). Thompson claims LB 1161 is unconstitutional on one (1) or more of these grounds:

4.1. Unlawful delegation of authority over common carriers and eminent domain.

- 4.2. Unlawful lack of judicial review in violation of due process.
- 4.3. Arbitrariness due to lack of requisite legal standards, and special legislation.
- 4.4. Involves an unlawful pledge of state credit for a private citizen.

Issues Presented Below

5. Trial occurred on stipulated facts and affidavits. Heineman contend the issues are:
 - 5.1. Do the Plaintiffs have standing and are their claims ripe?
 - 5.2. Is LB 1161 unconstitutional on one (1) or more of the foregoing grounds?

(Op Br 4). This is a fair summary of the core issues.

6. The unconstitutionality question is presented both by Heineman on appeal from the district court's adverse ruling declaring the law unconstitutional, and by Thompson in their cross appeal, *infra*. A Rule 9(e) Notice was filed by Thompson on March 14, 2014.

How the Issues Were Decided

7. The district court held that LB 1161 is unconstitutional because it violates *Neb Const* Art IV § 20 by conferring upon the Governor power to control or authorize action by an applicant for status as a common carrier, and fails to give this power to the PSC. (T21, 70).

8. The trial court declined to rule that LB 1161 is unconstitutional because a) it includes an unlawful pledge of the state's credit contrary to *Neb Const* Art XIII § 3, or b) it lacks any provision for judicial review, contrary to *Neb Const* Art I § 3 and Art II § 1, or c) it contains no reasonable governing standards, *State v. Ellis*, 281 Neb 571, 592 (2011), or d) constitutes special legislation contrary to *Neb Const* Art III § 18. See Cross-Appeal, below. (T21).

Scope of Appellate Review

9. This Court's review of a declaratory judgment regarding a question of law requires that it reach an independent conclusion. Whether a statute is constitutional is a

question of law. *Banks v. Heineman*, 286 Neb 390, 395, 837 NW2d 70, 76 (2013). A statute is presumed constitutional, and all reasonable doubt is resolved in favor of its constitutionality. *Id.* If clear, the Supreme Court gives a constitutional provision the meaning that laypersons would obviously understand it to convey. *Conroy v. Keith Co Bd of Equal.*, 288 Neb 196, 198, ___ NW2d ___ (2014). Jurisdictional questions not turning on a factual dispute present questions of law. *Id.*

Assignments of Errors Restated

10. See Heineman’s Open Brief. Thompson assigns errors in the Cross-Appeal.

Propositions of Law

11. “[A] resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.” *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb 379, 386, 810 NW2d 149, 157 (2012); *Myers v. Nebraska Inv Council*, 272 Neb 669, 681, 724 NW2d 776, 791 (2006).

12. Only common carriers, not private ones, can be empowered to use eminent domain. *Neb Const Art IV § 20*. *State ex rel Spire v. NW Bell Tel Co.*, 233 Neb 262, 445 NW2d 282 (1989); *Burnett v. Central Neb PP & Irrig Dist*, 147 Neb 458, 23 NW2d 661 (1946).

13. “[L]egislation being for a public purpose, the legislature may properly grant the right of eminent domain to housing authorities without constitutional violation, assuming, of course, that just compensation will be made to owners of property taken or damaged.” *Lennox v. Housing Auth of City of Omaha*, 137 Neb 582, 290 NW 451, 457 (1940).

14. Only the Legislature can delegate power of eminent domain. It cannot empower the Governor to delegate it. *Lincoln Dairy Co. v. Finigan*, 170 Neb 777, 780, 104 NW2d 227, 230 (1960).

Statement of Facts

15. Appellees are three (3) Nebraska landowners (E41, 1:4; E42, 1:4; E43, 1:4) (T4). Randy Thompson is a citizen, resident, taxpayer, fee payer, rate payer, and elector, of Lancaster County. He pays required state taxes. Land owned by him 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. He is interested in disbursements from the State Treasury. He purchased and sold vehicles and purchased tires, chemicals, etc. and to his knowledge, has engaged in transactions generating fees paid to, or collected for the State and payable to funds of its Department of Environmental Quality (“NDEQ”) from time to time. He is concerned about and has interests in NDEQ and other funds flowing in and out of the State Treasury under LB 1161. As a Nebraska taxpayer he accepts the burden of expenditures or allocations of such funds. (E41, 1-4:4)

16. Susan Dunavan is a citizen, resident, taxpayer, fee payer, rate payer, and elector of York County. Her interests are like Mr. Thompson’s. (E42, 1:4) Ms. Straka is a citizen, resident, taxpayer, fee payer, rate payer, and elector of Holt County. Her interests are like Mr. Thompson’s, too. (E43,1-4:4) Thompson sought and won declaratory and injunctive relief to prevent implementation of a Legislative Bill on constitutional grounds.

17. Trial to the court occurred on stipulated facts, affidavits and written exhibits. The lower court (T21-70) received Ex 1-25, 33, 34, 36, 37, 41-45. The court also considered E32 (T61, fn 215). A reference at T26 refusing E32 is a harmless scrivener’s error as is disclosed by the analysis at T61.

18. No public official, competing pipeline company, landowner, rate-payer, or other party with any interest except the interest of a taxpayer, is identified in the record by Heineman as a potential plaintiff with standing to challenge LB 1161. A facial challenge to LB 1161 is presented; no specific application for a specific pipeline or route is at issue. (T21)

19. **LB 1161.** The genesis for LB 1161 precedes the 102nd Legislature, 2nd Session, and requires examination of actions that occurred in the 102nd Legislature, 1st Special Session, which was held in November, 2011. LB 1 (*Laws of Nebraska 102nd Leg 1st Sess*) (*Neb Rev Stat § 57-1401 et seq.* Major Oil Pipeline Siting Act, “MOPSA.”) enacted a framework that committed the Public Service Commission (“PSC”) to be responsible for certain actions involving applications of major crude oil pipeline companies for establishment of a route and construction of its pipeline within, or across, Nebraska. (E44, 1-7:4; Stip ¶¶ 14–15).

20. LB 1161 (*Laws of Nebraska 102 Leg 2d Sess*) purports to amend LB 1 & 4 enacted at a 2011 Special Session. It does so unconstitutionally. LB 1161 was signed into law on April 17, 2012, and became effective then. (E44, 1-7:4; Stip ¶ 19). These are key provisions:

§1	<i>Neb Rev Stat § 57-1101</i> is amended to provide procedure for oil pipeline companies to, as conditions precedent to exercising the power of eminent domain in Nebraska, secure route approval from either: the Governor unilaterally, or the Public Service Commission (“PSC”) under MOPSA <i>if</i> the Governor does not approve. Condemnation must commence within two (2) years of approval by Gov or PSC.
§3	Provides that public documents will not be withheld unless withholding is authorized by § 84-712.05 of the <i>Public Records Act</i> or federal law.

§4	Eliminates part of LB 1 providing: “The [MOPSA] shall <u>not</u> apply to any major oil pipeline that has submitted an application to the United States Department of State pursuant to Executive Order 13337 prior to the effective date of this Act.”
§5	Defines “Commission” as the PSC. The term “Department” is not defined in LB 1161, but there is a reference in § 8 to the NDEQ.
§6	Provides “[i]f a pipeline carrier proposes to construct a major oil pipeline ... across Nebraska <i>after</i> the effective date of this . . . the pipeline carrier shall file an application with the [PSC]” If a carrier proposes a substantive change to a route ... [it] must file an application with the [PSC]...
§7	Empowers NDEQ to conduct an “evaluation” of a pipeline <u>or</u> a supplemental environmental impact study of proposed routes and make a report to the Governor. Section 7 amends LB 1 § 3, Art 4 to require the Governor must act on a submission within 30 days. If disapproved, Governor notifies the pipeline carrier it must seek approval from the Public Service Commission (PSC).
§8	\$2 million appropriated to aid in carrying out provisions of LB 1161.

21. Thompson presents a facial challenge to LB 1161. It was passed in the waning hours of a Regular Legislative Session, and it eviscerated laws enacted during a Special Session devoted to the subject of crude oil pipelines. LB 1161 is at E3, 1-12:2. Its legislative history is at E4, 1-142:2. While hearings were held on original LB 1161, the bill, passed out of committee after hearing, was nearly entirely supplanted by amendments on the floor. (E5, 1-2:2).

22. Standing is present. Each Plaintiff is a Nebraska resident and a taxpayer. (E44, 1-7:4; Stip ¶¶ 6-8). Each has established interests peculiar to them; each Appellee was, or still is, in the path of one or more proposed pipeline routes suggested by a carrier applicant who invoked

LB 1161. (E41, ¶¶1-6, 1-3:4; E42, ¶¶1-6, 1-3:4; E43, ¶¶1-6, 1-3:4). Each Plaintiff is affected by allocation of State resources, including employee time, toward tasks under LB 1161 and away from duties the NDEQ would otherwise perform. There is no suggestion in the record or Heineman’s brief about who, other than a taxpayer, is situated to challenge the LB at issue.

23. Heineman claims that a pipeline route applicant, TransCanada Keystone Pipeline Co., LP, has reimbursed the State for expenses. He says this defeats Thompsons’ standing. But this has nothing to do with Thompsons’ standing to sue. This case is not pipeline specific. Instead, Thompsons’ constitutional attack is on LB 1161 itself; this is not an “as applied” challenge to a law applied in an unconstitutional way. The law itself fails constitutional muster.

24. LB 1161 constitutional infirmities are demonstrated graphically, as was explained by this Court in *State ex rel Spire v. NW Bell Tel Co*, 233 Neb 262, 445 NW2d 284 (1989):

<u>Constitutional Manner of Delegation</u>	<u>LB 1161 – Unconstitutional Delegation</u>
Legislature has Authority to Delegate Power of Eminent Domain to PSC but makes policy	Legislature extends <i>Authority to Delegate</i> Power of Eminent Domain to Governor along with policy making power re public interests
Legislature Delegates Power to <i>Exercise</i> Eminent Domain to an Approved Party	Governor, not Legislature, grants power to <i>Exercise</i> Eminent Domain to approved Pipeline Carrier
The Approved Party then exercises the Power of Eminent Domain <i>within</i> Legislative constraints	Approved Pipeline Carrier exercises Power of Eminent Domain <i>without</i> Legislative constraints

25. LB 1161 infirmities are compounded by standard-less delegation to the Governor. LB 1161 permits a pipeline application to avoid the PSC and use a standard-less gubernatorial side track to an operating permit contrary to *Neb Const* Art IV § 20:

Step 1: Standard-less NDEQ Review
NDEQ <u>may</u> evaluate any route for an oil pipeline <u>within</u> , through, or across Nebraska, and for the stated purpose of being part of a federal ... agencies' NEPA review process, or collaborate with federal agencies. LB 1161 § 7 (E3, 8-9:2); <i>Neb Rev Stat</i> § 57-1503(1)(a)(i-ii)
Step 2: Governor Approval
Thirty (30) days after receiving the evaluation or the SEIS, the Governor shall indicate in writing to involved federal agencies that he or she approves the pipeline. In the event the Governor <u>does not approve</u> the project, then the applicant must go through MOPSA, and comply with PSC procedures. LB 1161 § 7 (E3, 11:2); <i>Neb Rev Stat</i> § 57-1503(4)

Summary of Argument

26. As resident taxpayers and fee payers, Thompson has standing to maintain this declaratory judgment action, under the holding of *Project Extra Mile, supra. Banks v. Heineman*, 286 Neb 390, 837 NW2d 70 (2013). Thompsons' claims that LB 1161 is constitutionally infirm are sound even though the Bill is entitled to the presumption of validity and all doubt about constitutionality must be resolved in favor of the law. LB 1161 is an unlawful delegation of Legislative authority because a) policy and implementation power over common carriers cannot be delegated to the Governor, and b) policy control over the power of eminent domain, including who, where, and how it can be exercised, cannot be given to the Governor.

27. Stated differently, the improperly delegated Legislative responsibilities are a)

regulatory control of common carriers, which must either be exercised entirely by the Legislature, or by the PSC but not by the Governor, and b) decisions concerning who can exercise the power of eminent domain and under what circumstances; the decision to allow a party to exercise eminent is a plenary legislative power that cannot be delegated.

28. The district court correctly held that LB 1161 violates *Neb Const* Art IV Sec 20.

Argument

I. Standing Is Present. Subject Matter Jurisdiction is Intact

29. Standing is jurisdictional. *State ex rel Reed v. State, Game and Parks Comm'n*, 278 Neb 564, 568, 773 NW2d 349, 353 (2009). Each Plaintiff is a Nebraska resident and a taxpayer. Each seeks declaratory judgment and to enjoin improper expenditure of public funds. *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb 379, 386, 810 NW2d 149, 157 (2012). Each Plaintiff is or was affected by a proposed crude oil pipeline. (E41; E42; E43) Thompson is affected by allocation of State resources, including employee time, toward tasks under LB 1161 and away from duties the NDEQ would otherwise perform when not distracted. *Id.* Heineman argues Thompson must show he is better situated than someone in the pipeline industry, or the oil industry, to be the proper party with standing to challenge LB 1161. Thompson disagrees. He must show, *prima facie*, that there is no one else to bring the challenge. *Field Club Home Owners League v. Zoning Bd of App of Omaha*, 283 Neb 847, 852-3, 814 NW2d 102, 106 (2012). This has been done. The burden then shifts to Heineman to prove otherwise where jurisdiction turns on a factual dispute. Cf., *Ameritas Inv Corp v. McKinney*, 269 Neb 564, 568, 694 NW2d 191, 198 (2005)(burden to establish *in personam* jurisdiction). The district court carefully analyzed the standing issue. (T32).

30. Heineman adduced no evidence to contest Thompson's standing. He asserts only

that Thompson has not proven standing. Heineman identify no candidate for this role, and articulate no rationale for a different company with an interest aligned with the pipeline industry to make such a challenge. This Court has consistently observed that, in such circumstances taxpayer standing is especially important because without it laws providing for unlawful expenditures of public funds, public employee time, focus or resources, would probably go unchallenged. *Id.* Jurisdictional questions not turning on a factual dispute present questions of law. *Conroy v. Keith Co Bd of Equal.*, 288 Neb 196*6, ___ NW2d ___ (2014).

31. Thompsons have standing as taxpayers to challenge LB 1161, which include the unlawful commitment of public funds. *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb 379, 386, 810 NW2d 149, 157 (2012) (“[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.”); *Myers v. Nebraska Inv Council*, 272 Neb 669, 681, 724 NW2d 776, 791 (2006) (Taxpayers have equitable interest in public funds & can sue to prevent unauth. appropriation.); *Rath v. City of Sutton*, 267 Neb 265, 281, 673 NW2d 869, 885 (2004) (“[I]rreparable harm ...assumed when...expenditure of public funds...contrary to law.”).

32. Taxpayers have standing to seek declaratory relief against state officials to prevent the unauthorized expenditure of public funds. *Project Extra Mile*, 283 Neb at 387, 810 NW2d at 158. Section 8 of LB 1161 appropriated \$2 million from the Nebraska Department of Environmental Quality Cash Fund to aid in carrying out the provisions of LB 1161. Under LB 1161, the NDEQ prepared an evaluation of a proposed pipeline route, and in the process, expended public time, resources, and funds. The NDEQ’s expenditure is for an unlawful purpose, i.e., to fund and carry out the operation of an unconstitutional statute. This expenditure gives the taxpayers standing. Heineman’s standing position reflects a misunderstanding that was

commonplace a decade ago, but has been put to rest by *Project Extra Mile* and similar cases in Nebraska and elsewhere. Even a decade ago, this was reasonably well understood. Nancy C Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L J 771 (2003)(collecting federal cases).

33. Heineman claims that a pipeline route applicant, TransCanada Keystone Pipeline Co., LP, has reimbursed the State for expenses. He says this defeats Thompsons' standing. But this has nothing to do with Thompsons' standing to sue. This case is not pipeline specific. Instead, Thompsons' constitutional attack is on LB 1161 itself; this is not an "as applied" challenge to a law applied in an unconstitutional way. The law itself fails constitutional muster.

34. Heineman argues the State was reimbursed by a specific pipeline applicant, TransCanada. Evidence discloses reimbursement of more than \$5 million (E34, 6:3, E45, 1-2:5, ¶¶4-6) *but the statute appropriates only \$2 million*. Something is amiss. Taxpayers have interests in these circumstances. Thompson mounts a facial challenge to prevent nefarious manipulation of public funds through unauthorized short term or other advances of the public's money to private interests. The trial court correctly rejected the notion that a viable claim can be rendered moot when a taxpayer attack is mounted by reimbursement of what was improperly advanced from the public's funds before suit. (T34-38) It also correctly rejected the same unpersuasive Ohio and Alabama cases cited by Heineman in his Brief to this Court. (T36)

35. Heineman argues Thompson failed to show that no one else is better situated to challenge LB 1161. Thompson is not required to prove a negative. "The plaintiff has the burden of proof as to the matters on which his or her right of action rests, but need not adduce proof to negative matters...." 93 CJS *Waters* § 112. *United States v. Denver & R G R Co*, 191 U S 84 (1903). Where evidence is not available to prove a negative, logic must be resorted to. Here,

there is no competitor, different regulator, or differently affected landowner to bring this suit. Nebraskans like Thompson are the only interested parties. Heineman suggests no one else. There is no one else to mount the challenge. The State belongs to the citizens, and they are its saving watchfulness. Subject matter jurisdiction is present. Standing is intact.

II. LB 1161 Unconstitutionally Grants Power Over Common Carriers to the Governor

36. The district court held that LB 1161 violates *Neb Const* Art IV, §20. T 59 *et seq.* Art IV, §20 provides:

There shall be a Public Service Commission.... 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 [PSC] shall exercise the powers and perform the duties enumerated in this provision.

This provision confers to the PSC general control over common carriers, subject to Legislative restrictions. The Legislature may divest the PSC of jurisdiction over common carriers to the extent that it, through specific legislation, preempts the PSC and regulates itself. *State ex rel Spire v. NW Bell Tel Co*, 233 Neb 262, 445 NW2d 284 (1989). But, the Legislature cannot constitutionally divest the PSC of jurisdiction over a class of common carriers by vesting a body of government, except the Legislature, with control over the class. *Id.* In *Spire*, the Legislature correctly enacted specific legislation “prescribing the method and manner in which the PSC will exercise its regulatory activities” and did not offend the Constitution as it does here by providing a gubernatorial route to bypass the PSC which allows an applicant for a crude oil pipeline route and the Governor to nullify PSC jurisdiction. 233 Neb at 279, 445 NW2d at 294.

37. This Court has distinguished legislative enactments that attempt to transfer common carrier regulation to an agency delegee within government separate from the PSC from statutes in which the Legislature has regulated on its own. As *Spire* 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.... 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.... *State ex rel. State Railway Commission v. Ramsey*, [151 Neb 333,337-8 (1949)] (unconstitutional attempt to vest [Dept of Aeronautics] with power to “control common carriers by air”); *Rivett Lumber & Coal Co. v. Chicago & NWR. Co.*, 102 Neb 492, 167 NW 570 (1918) (statute ... did not authorize the court to exercise control over ...railroad as a common carrier). However, a legislative act or statute may constitutionally divest the PSC of jurisdiction ... 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 NW 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”); *State v. Chicago & NW Ry. Co.*, [147 Neb 970, 977, 25 NW2d [824], 828 [(1947)]

Thus, while the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the PSC...[it] cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers.

State ex rel. Spire v. Nw. Bell Tel Co, 233 Neb 262, 276-77, 445 NW2d 284, 294 (1989). *State ex rel. State Railway Commission v. Ramsey*, 151 Neb 333,337-8, 37 NW2d 502, 505-506 (1949).

38. Heineman fails to observe this point. The district court understood it. (T59-62). It correctly held that crude oil pipelines are common carriers, and the Legislature was constrained by *Neb Const* Art IV § 20.

39. Heineman's argument for reversal and for a decision upholding LB 1161 as a lawful delegation of authority to the Governor turns on what is a "common carrier". He contends (Op Br 15) that LB 1161 does not regulate common carriers. LB 1161 contains telltale admissions that it does apply to common carriers. **First**, in §1 (E3, p3) it refers to "transporting or conveying" products "through or across" Nebraska. **Second**, §1 confers the power to extend eminent domain authority to approved pipeline carriers though this term does not appear until later. **Third**, the "Commission" is the PSC in §3 (E3, p4). See *Neb Rev Stat* § 57-1404. **Fourth**, §7(b) (E3, p8) uses the term "pipeline carrier". **Fifth**, the power of eminent domain is only exercisable when a taking is for a "public purpose". *Neb Const* Art I, § 21. Private property cannot be taken for a private use. *Sunderland Bros Co v. Chicago, B & Q R Co*, 104 Neb 319, 177 NW 156 (1920). Unless a major oil pipeline company, like TransCanada, is a common carrier, its use is not public, and eminent domain is not available to it. *Id.* This Court reached this conclusion in *Engelhaupt v. Village of Butte*, 248 Neb 827, 539 NW2d 430 (1995) when a

village sought to condemn more land than it required to expand its water system. This Court held the taking was not for a “public purpose” as to the excessive portion of the property sought to be condemned. See also, 2 P Salkin, *American Law of Zoning* §17.19 (WL updated May 2014); 17 Ia. Prac., *Real Estate Law and Practice* § 14:4 (WL 2013-2014 ed); 4 *Tiffany Real Property* § 1252 (WL 3d ed Sept 2013).

40. Evidence supports the trial court’s conclusion that LB 1161 permits takings only for pipeline common carriage purposes. (See, E10, 1-475:2; E18, 26:2; E32, 1-2:3) The trial court cited all this evidence (T62, fn215) and correctly concluded that LB 1161 applies to common carriers but gives the Governor authority that only the Legislature or PSC can exercise.

41. The conclusion that eminent domain can be exercised by a private pipeline company only for its common carrier functions has deep legal roots. First, the 1920 and 1995 cases cited in the immediate preceding paragraph are strong authority. Second, consider *Neb Rev Stat* § 57-1101 and *Bayard v. North Central Gas Co*, 164 Neb 819, 831-832, 83 NW2d 861, 868 (1957)(“... a common carrier may be defined...as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation....”). Second, only common carriers, not private ones, can be empowered to use eminent domain. *Id.*; *Neb Const* Art IV § 20. *Burnett v. Central Neb PP & Irrig Dist*, 147 Neb 458, 23 NW2d 661(1946); *Gustin v. Scheele*, 250 Neb269, 276 (1996). “[L]egislation being for a public purpose, the legislature may properly grant the right of eminent domain to housing authorities without constitutional violation, assuming, of course, that just compensation will be made to owners of property taken or damaged.” *Lennox v. Housing Auth of City of Omaha*, 137 Neb 582, 290 NW 451,457 (1940). Third, *Spire v. NW Bell* above, is strong precedent for Thompson’s position. Heineman fails to recognize these roots and their authority as law.

42. Heineman ignores the fact that pipeline companies transport products for hire... like trucking or telephone companies. He disputes that major crude oil pipeline carriers are common carriers and builds an artificial position with a meritless attempt to distinguish interstate from intrastate companies. The district court disposed of these same arguments. (T56-69)

43. Pipeline projects subject to LB 1161 are common carriers for all the reasons discussed above, and more.

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 (citations omitted). Transportation is the important fact, and the form or method thereof is immaterial (citations omitted). 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. *In re Application of Chicago, B. & Q. R. Co.*, 138 Neb 767, 295 NW 389; *State v. Union Stock Yards Co.*, 81 Neb 67, 115 NW 627. *State ex rel State Ry Com’n v. Ramsey*, 151 Neb 333, 338, 37 NW2d 502, 506 (1949).

44. TransCanada’s proposed Keystone XL crude oil pipeline will be “for hire”. It will carry the common crude oil of fee-paying TransCanada customers. TransCanada is not an oil company; it is a pipeline company. It offers pipeline structures for transportation services, like taxis offer rides to passengers for a fee, and truckers offer cartage for dollars per mile. The currently proposed pipeline is a structure that will transport crude oil for hire. (Ex 32, 2:3, “The \$12 billion system is 83 percent subscribed with long-term, binding contracts...”). TransCanada is a for-profit publicly traded company (E44 1-7:4; Stip ¶¶ 27 & 33). This is quintessential

common carriage.

45. Pipelines offering transportation of “petroleum, or petroleum components, products, or wastes, including crude oil or any fraction of crude oil,…” for hire are common carriers. The first invocation of LB 1161 is by Keystone XL Pipeline “to transport crude oil from Canada to the Texas Gulf Coast” (E17, 1-1831:2). Heineman’s argument that there has been no evidence establishing that TransCanada was “declared” a common carrier is incorrect. Thompsons mount a facial challenge to LB 1161, not an individualized attack on a single pipeline. Even if TransCanada goes home, LB 1161 lingers and remains constitutionally infirm.

46. *Neb Const* Art IV § 20 outlines powers of the PSC. These are the powers given to the PSC by the people of Nebraska who chose it as a tool to depoliticize decisions about common carriage by creating the PSC as a constitutional agency:

“...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.” (emphasis added).

LB 1161 accommodates two pathways for a potential permit to build crude oil pipeline through Nebraska: 1) the gubernatorial pathway, and 2) the PSC pathway. Thompsons do not challenge the Legislature’s authority to create a PSC pathway. And, Heineman does not assert that the PSC pathway is improper. The Legislature can impart authority to the PSC *only* if the subject matter is a common carrier. Thus, the assailed statute’s related provisions enacted in LB 1 and LB 4 in 2011 concerning delegation to the PSC themselves reveal the Legislature’s view that pipeline route applicants under statutes amended by LB 1161 will be common carriers. This conclusion springs from plain statutory language. The judiciary gives statutes their “plain and ordinary

meaning”. *Pinnacle Ent v. City of Papillion*, 286 Neb 322, 836 NW2d 588 (2013). This point is overlooked by Heineman.

47. LB 1, Laws 2011, in what is now *Neb Rev Stat* § 57-1101, allows only crude oil pipeline companies with PSC approval as common carriers to exercise eminent domain to build pipelines of six or more inches diameter. (E1, 1-7:2) LB 1161 says the PSC can be bypassed if the Governor says such a pipeline can be built. The Governor’s approval impermissibly allows the applicant the power to use eminent domain.

48. Heineman’s arguments are confused and inconsistent. He claims the pipelines governed by LB 1161 could be intrastate ones in some instances but concedes a Presidential border crossing permit is required. Section 57–1101’s plain impact is to allow all crude oil pipelines of six or more inches in diameter (as defined in §57–1404) to be built with gubernatorial approval, while leaving the PSC pathway as an alternative. LB 1161 overtly creates a PSC bypass for what the Legislature recognized to be common carriers only five months before the challenged bill was enacted in the law. This is an unconstitutional delegation of PSC authority to the Governor.

49. **There is No Saving Distinction Between “Interstate” and “Intrastate” Pipelines.** Suggestions are made to this Court that *Neb Const* Art IV § 20 does not address or protect PSC powers over interstate pipelines. The suggestion is that since the constitutional provision refers to common carriers, but not specifically to intrastate pipelines, or interstate pipelines, it has no relationship to PSC jurisdiction over these common carriers. The argument, supported by virtually no legal authorities, is wrong.

50. Suggestions are made to the effect that this Court has noted that Art IV § 20 authorizes the PSC to establish intrastate freight rates. See, e.g., *Erickson v. Metro Util Dist*, 171

Neb 654, 660, 107 NW2d 324 (1961). But, *Erickson* and similar cases do not hold that Art IV § 20 is limited to intrastate common carriers and that interstate carriers are excluded from this constitutional provision's ambit. Indeed, the Art IV § 20 is precisely to the contrary. The constitutional provision was enacted to regulate interstate railroads and has always been used to regulate interstate highway motor carriers. *Chicago B&Q R Co., v. Herman Bros., Inc.* 164 Neb 247, 259, 82 NW2d 395, 402 (1957).

51. The trial court found that LB 1161 is vague; it covers intrastate pipelines, and may cover interstate pipelines as well. Heineman claims this saves LB 1161 from constitutional infirmity. Heineman's position is without merit. The distinction he draws makes no difference in this case as the challenged statute fails as applied to both interstate and intrastate carriers. Expenditures of public funds are permitted, eminent domain is authorized, and bypass of the PSC is permitted by LB 1161 regardless of the interstate or intrastate nature of the carrier.

52. The statute provides no discovery mechanism to find out whether a pipeline will be an interstate carrier, an intrastate carrier, or sometimes one, and at other times, the other.

A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Perina*, 282 Neb 463, 804 NW2d 164 (2011). [One] can only succeed in a facial challenge by establishing 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. *Id.*

State v. Harris, 284 Neb 214, 221, 817 NW2d 258, 268 (2012).

In fact, LB 1161 specifically provides the NDEQ may evaluate any route for an oil pipeline within, through, **or** across Nebraska...(emphasis added). LB 1161 § 7 (E3, 8:2); *Neb Rev Stat* § 57-1503(1)(a)(i-ii). It is this evaluation that then passes to the Governor under LB 1161.

53. Heineman claims the Legislature limited the definition of common carriers to intrastate pipelines. He cites *Neb Rev Stat* § 75-501 and suggests it is the sole statute supplying jurisdictional authority that affects the PSC. Thompson disagrees. LB 1161 clearly applies to interstate carriers, and delegates authority to both the Governor and the PSC depending on the conditions. Since a permit from the President of the United States to cross an international border is required for the kinds of pipelines reached by LB 1161, (See *Neb Rev Stat* § 57-1404), and since no international border is closer than 2 US states removed from Nebraska, it is clear that the pipeline must come from outside Nebraska, and into Nebraska, to be affected by LB 1161. Heineman's reliance on §75-501 is either overstated, misplaced, or both and is without merit.

The language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Robertson v. Jacobs Cattle Co.*, 285 Neb 859, 830 NW2d 191 (2013). In other words, absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Hess v. State*, 287 Neb 559, 843 NW2d 648 (2014). And when construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.* The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible. *ML Manager v. Jensen*, 287 Neb 171, 842 NW2d 566 (2014).

Rodgers v. Nebraska State Fair, 288 Neb 92*6-9, 846 NW2d 195 (2014).

54. Heineman also argues the district court erred by assuming all crude oil pipelines are for hire. This contention is meritless. The district court found evidence that pipelines seeking permits under LB 1161 would be common carriers. It reached this conclusion for reason founded in facts and logic as noted above. See particularly ¶¶ 38-43 above. (T59 *et seq*).

55. Heineman ignores that a pipeline across Nebraska can move product both within and through the State. It is possible that a pipeline proposed under LB 1161 to traverse Nebraska could be used to move its contents from O'Neill to York, to be offloaded during one week, and to pass through the State with its load in route from Canada to the Gulf with no off-loading, the next week. Interstate and intrastate common carriage are easily mixed in a massive pipeline. This Court has long recognized that interstate commerce impacts intrastate activity and vice versa in matters involving common carriers. *Chicago B & Q R Co v. Herman Bros, Inc.*, 164 Neb 247, 251, 82 NW2d 395, 398 (1957). Both practical consideration and actual experience guide the interstate v intrastate analysis. Superficial intrastate action is not protected when interstate impacts are apparent. See, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 US 1, 41-42 (1937); see *Wickard v. Filburn*, 317 US 111, 122 (1942); *United States v. Lopez*, 514 US 549, 573(1995) (KENNEDY, J., concurring) (emphasizing “the Court's definitive commitment to the practical conception of the commerce power”). See also *North American Co.*, 327 US 686, 705 (1946)(cited in *Nat'l Fed of Indep Business v. Sebelius*, ___US ___, 132 S Ct 2566 (2012) (“Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities.” (citation omitted)). The trial court correctly perceived this fact, and saw through the legal fiction proposed by Heineman’s arguments in an effort to save a flawed statute. The grant of eminent domain

cannot be justified in LB 1161 except for the public purpose of common carriage by pipeline company applicants.

56. **Art IV, § 20 Reaches Route Selection.** A suggestion is also made that *Neb Const* Art IV § 20 fails to address or define the PCS's power over route selection. The trial court found otherwise, citing *Rivett Lumber & Coal Co., of Benson v. Chicago & NW Ry*, 102 Neb 492, 167 NW 570 (1918). Route decisions are an essential part of determining whether public convenience and necessity requirements have been satisfied under PSC criteria for Nebraska common carriage authority for many years. See *Application of Canada*, 154 Neb 256, 47 NW2d 507 (1951) (irregular routes). Accord, *Application of Priesendorf Transport, Inc.*, 169 Neb 693, 100 NW2d 865 (1960) (irregular routes); *Application of Moritz*, 153 Neb 206, 43 NW2d 603 (1950) (regular route). *In Application of Greyhound Corp*, 178 Neb 9, 131 NW2d 664 (1964), (route, including its reasonableness, at issue). These decisions are consistent with general understanding of Public Service Commission authority. Annot. *Power of Public Service Comm'n In... Alteration or Extension of Passenger Svc.*, 70 ALR 841 (Orig 1931)

57. Nebraska's PCS jurisprudence is replete with decisions concerning whether public necessity or advantage is served by particular routes by applicants for authority to engage in common carriage. Railroad, telephone companies, trucking companies, bus lines, and other common carriers have all been involved in these inquiries. Cf., *Canada v. Peake, Inc.*, 184 Neb 52, 165 NW2d 587 (1969) (extending routes). There is no merit in the argument that *Neb Const* Art IV § 20 does not reach routes used by common carriers.

III. **LB 1161 Improperly Delegates Authority Over Eminent Domain to the Governor**

58. The trial court declared LB 1161 unconstitutional, but not because of an unlawful delegation of eminent domain authority. The trial court struck the law solely because it delegates

regulatory oversight to the Governor and not the PSC, contrary to *Neb Const* Art IV § 20. The trial court erred when it failed to also recognize constitutional infirmity due to delegation of power to confer eminent domain authority on a private company to the Governor. (T55).

59. The trial court should be affirmed even if this Court concludes there was no unconstitutional failure to delegate to the PSC. This should occur because the power to exercise eminent domain is improperly passed to the Governor, who is, in turn, empowered by LB 1161 to decide when, how, and on what terms a private entity can exercise eminent domain.

60. In addition, the trial court should be affirmed for the reasons set forth in the Cross-Appeal, below. Those arguments are incorporated here. This Argument III is also incorporated into the Cross Appeal below.

61. *Neb Rev Stat* § 57-1101, as revised by LB 1161 § 1 expressly creates a gubernatorial trigger for “the power of eminent domain...” through *either* compliance with § 57-1503 and “the approval of the Governor...” or application approval by the PSC, if the Governor chooses not to act or a pipeline common carrier unilaterally chooses the PSC route. LB 1161, as codified at § 57-1503, provides an express bypass of the PSC for the political path through the Governor’s office for pipeline common carriers who choose politics over merit, and no standards, over the judicially testable action of the PSC. Simply, there can be no mistake the Governor is given legislative decision making powers over who will and will not be granted eminent domain rights. (E3, §§1,3,7).

62. Prior to LB 1161, the condition precedent to acquiring eminent domain rights was acquiring an approved application from the PSC pursuant to *Neb Rev Stat* 57-1401 *et seq.* LB 1161 adds a pathway to achieve eminent domain powers by allowing the choice of NDEQ evaluation plus Governor approval method. This, therefore, allows a pathway to sidestep the PSC

approval process. LB 1161 establishes the affirmative Governor approval of the NDEQ “evaluation” as the ultimate and final trigger vesting eminent domain rights under § 57-1101. But for LB 1161, the Governor would have no role in eminent domain decisions. This is what the people intended when they created the PSC.

63. While the Legislature can delegate the authority to exercise eminent domain to a county, city, or other political subdivision, or to a private party, it cannot delegate to the Governor the decision about whether a county, city, other political subdivision, or a private party can do so. *In re Appraisalment of Omaha Gas Plant*, 102 Neb 782, 169 NW 725, 726 (1918); *Annot. Power of Eminent Domain Conferred Upon Municipality...*, 79 ALR 515 (Orig 1932, updated weekly). “The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired....” *Burnett v. Cent. Neb Pub. Power & Irr. Dist.*, 147 Neb 458, 466, 23 NW2d 661, 666 (1946). The Legislature cannot give the Governor the authority to delegate the power of eminent domain authority to another party or entity. Doing so makes the Governor the legislature, not the executive. “The state Constitution is not a grant, but a restriction of legislative power.” *State ex rel. Stenberg v. Moore*, 249 Neb 589, 595, 544 NW2d 344, 349 (1996).

64. Any delegation of the power of eminent domain can only occur from the Legislature pursuant to specific statute, but not by the Governor under his or her whim at approving an oil pipeline route. LB 1161 creates an unlawful delegation of eminent domain-conferring powers to the Governor because the moment the Governor unilaterally approves an oil pipeline route, the power of eminent domain vests in the private oil pipeline company. *Burnett, supra*, (citing predecessor to 26 Am Jur2d §5, *supra*) (cited by Singer, *Sutherland Statutes & Statutory Construction*, Statutes Granting Power of Eminent Domain §64.6)(WL

Updated Nov 2012).

65. LB 1161 violates this constitutional principle by divesting the PSC of jurisdiction to regulate oil pipelines, including intrastate oil pipelines, and by delegating policy and implementation power in the Governor. The trial court concluded that LB 1161 does not delegate eminent domain authority to the Gov., but simply implements the previous grant of eminent domain authority to pipeline companies that appeared in the law before LB 1161 was enacted. (T57-58). This conclusion is not accurate. The previous grant of authority was by the Legislature to a carrier, and was not conditioned upon the carriers' procurement of a layer of approval from some party outside the Legislature. *Neb Rev Stat* § 57-1101. The new grant of authority is by the Legislature to a carrier, but it is conditioned upon the carriers' procurement of a layer of approval from the Governor – a party outside the Legislature. This fact creates constitutional infirmity and requires invalidation of LB 1161.

IV. Ex 32 Was Properly Used Below.

66. The lower court (T21-70) received Ex 1-25, 33, 34, 36, 37, 41-45. The court also considered E32 (T61, fn 215). A reference at T26 refusing E32 is a harmless scrivener's error as is disclosed by the analysis at T61. This Court is entitled to consider E32 in any event since its admissibility turns on a legal question and the sole objection was relevance. See, *Jeffres v. Countryside Homes*, 220 Neb 26, 29, 367 NW2d 728,729 (1985). Evidence, other than E32 was available, used, and relied upon by the trial court. Consideration of E32 was proper. And, other evidence supported the same conclusion for which the trial court reasoned. See, T62, E215. The judgment below should be affirmed.

Conclusion

67. This Court is respectfully urged to conclude that a) standing is present, so this court has subject matter jurisdiction, b) LB 1161 is unconstitutional and void. Costs, and attorney's fees, should be taxed to Heineman.

CROSS-APPEAL

Jurisdictional Statement: See Jurisdictional Statement in Answer Brief.

Statement of the Case: See Statement of Case in Answer Brief.

Assignments of Error

68. **Error 1.** The district court erred when it failed to hold that LB 1161 is unconstitutional and void because it fails to provide for judicial review and violates due process.

69. **Error 2.** The district court erred when it failed to hold that LB 1161 is unconstitutional and void because it confers upon the Governor the authority to grant a private entity power to exercise eminent domain.

70. **Error 3.** The district court erred when it failed to hold that LB 1161 is void because it lacks legal standards against which to test applications for authority to act as a common carrier and is arbitrary.

71. **Error 4.** The district court erred when it failed to hold LB 1161 is unconstitutional because it involves an unlawful pledge of state credit for a private citizen.

Standard of Review: See Answer Brief above.

Statement of Facts: See Statement of Facts in Answer Brief.

Propositions of Law

72. LB 1161 is unconstitutional because it is devoid of any judicial review. It

violates both the Due Process Clause, *Neb Const Art I*, § 3, and the doctrine of Separation of Powers. *Neb Const Art II*, § 1. *State, Dept of Motor Vehicles v. Lessert*, 188 Neb 243, 246, 196 NW2d 166, 168 (1972)(judicial review of DMV license revocations required).

73. “The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired....” *Burnett v. Cent. Neb Pub. Power & Irr. Dist.*, 147 Neb 458, 466, 23 NW2d 661, 666 (1946).

74. “Although the limitations of the power granted and *the standards* by which the granted powers are to be administered *must be clearly and definitely stated in the authorizing act*, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.” *State v. Ellis*, 281 Neb 571, 592, 799 NW2d 267, 289 (2011).

75. Article XIII, § 3, seeks to prevent the State from loaning its credit to an individual, association, or corporation with the possibility the state might ultimately pay that entity's obligations.” *Japp v. Papio-Missouri*, 273 Neb 779, 788, 733 NW2d 551, 558 (2007).

Summary of Argument

76. While the trial court struck LB 1161 as unconstitutional on an appropriate basis as is demonstrated by the Opening Brief, four other legitimate grounds for striking the statute as unconstitutional exist. Each of the following positions alone, and all of these in the aggregate, constitute independent bases for declaring that LB 1161 is unconstitutional and void.

77. LB 1161 requires that a decision be made on an application for authority to conduct business in Nebraska as a common carrier and to do so at a specific place and on specific terms. Yet, it provides for no judicial review of a decision by the Governor to grant this

authority if the gubernatorial route to approval of common carrier status is invoked under LB 1161. Without judicial review, the Governor's action is autonomous, though it is judicial in nature. Judicial review is a mandatory component; without it, LB 1161 is unconstitutional and void. It violates *Neb Const* Art I § 3 & Art II § 1.

78. The Legislature may not empower the Governor to confer the power of eminent domain on a private citizen. Yet, LB 1161 does so. This is an unlawful delegation of legislative responsibility to the Governor and is void.

79. LB 1161 lacks any legal standard by which an application for common carrier status is to be judged by the Governor. Assuming gubernatorial review could occur, though it could not as demonstrated above, the Legislature's failure to identify standards to evaluate a common carrier's ability, fitness, confidence, or plan of operations, make the statute unconstitutional and void. The statute fails to provide reasonable, adequate, sufficient, and definite guidance in the exercise of the power conferred. This is a legislative deficiency that invalidates the law. It violates *Neb Const* Art I § 3 and this Court's binding precedent because it unlawfully delegates legislative authority.

80. LB 1161 requires the state to advance up to \$2 million to finance a study of a proposed common carrier's pipeline application or route and operating plan. The applicant is to reimburse the state. But, the statute pledges the state's credit to pay the bills of the private citizen, with the hope of collection back. This is a pledge of the state's credit for the benefit of the private pipeline carrier applicant. The failure to provide security and accomplish this objective renders the statute unconstitutional and void. It violates *Neb Const* Art XIII § 3.

Argument

Assigned Error 1: LB 1161 Does Not Provide For Judicial Review & Violates Due Process

81. LB 1161 contains not so much as a single syllable about judicial review. The Governor's policy and implementation decision making authority is unfettered. It provides for no judicial review whatsoever. The Governor is empowered to decide how, when, and where a pipeline can be placed, and why. No citizen can pose these questions after the Governor grants a pipeline application under LB1161: Did the Governor act lawfully? Rationally? Constitutionally? This is because LB 1161 fails to provide for judicial review. Contrast this with the appeal procedure from PSC action under *Neb Rev Stat* § 57-1409. Granting or denying a license or application is a quasi-judicial function of the State, or its agencies or officers. See ¶¶ 96 et seq., below for authorities for this proposition.

82. LB 1161 is unconstitutional for being completely devoid of any judicial review. LB 1161 violates both the Due Process Clause, *Neb Const Art I*, § 3, and the doctrine of Separation of Powers. *Neb Const Art II*, § 1. Cf., *State, Dept of Motor Vehicles v. Lessert*, 188 Neb 243, 246, 196 NW2d 166, 168 (1972)(judicial review of DMV license revocations required); *Galyen v. Balka*, 253 Neb 270, 274, 570 NW2d 519, 523 (1997).

83. Judicial review is, of course, the foundation for all due process. Procedural due process "limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard." *Hass v. Neth*, 265 Neb 321, 657 NW2d 11 (2003); *Marshall v. Wimes*, 261 Neb 846, 626 NW2d 229 (2001). Due process cannot occur without judicial review:

In *Mathews v. Eldridge*, 424 US 319 ... (1976), the U S Supreme Court set forth a three-part balancing test to be considered in resolving an inquiry into the specific dictates of due process: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The Nebraska Supreme Court has adopted this *Mathews* analysis when determining whether an administrative procedure comports with due process.

Penry v. Neth, 20 Neb App 276, 287, 823 NW2d 243, 254 (2012), review denied (2012).

84. Heineman confuses a portion of Thompsons' due process argument below. Heineman focuses on what it characterizes as substantial public involvement during the NDEQ evaluation. This argument misses the mark. Heineman's due process violation regarding failure to provide notice to affected parties is at the gubernatorial level of the LB 1161 process. The actions taken by the NDEQ leading up to the evaluation being placed in the Governor's hands becomes irrelevant the moment the evaluation is provided to the Governor. After that moment, and until the Governor's ultimate decision, all happens in a vacuum with no mechanism for debate, questions, disclosure of analysis, or review of any kind. The Governor can do whatever he/she wants, and this is not constitutionally permissible. Heineman sites no contrary authority.

85. Under LB 1161, the Governor may approve or disapprove a pipeline for any reason. There is no requirement for evidence to be presented, a court reporter to be present for recording testimony by stenographic means, or even a hearing for people to attend. The

Governor need not follow, or even read, the NDEQ evaluation purportedly designed to contain the entirety of data relied upon by the Governor.

86. The Governor's decision is guided by nothing but whim, sealed from judicial review. No checks. No balances. No scrutiny. No questions. And, no constitutional compliance. This is a fatal flaw that requires LB 1161 to be stricken.

87. The trial court erred when it failed to declare LB 1161 unconstitutional because it fails to provide for judicial review, violates due process by doing so, and is also guided by nothing but whim and is without any standards to cover its application. Judicial review is not provided by the statute challenged. Agency review guided by no standards, and absence of judicial review are both constitutional, due process infirmities. The judgment below should be affirmed, but modified as to its analysis, for the reasons set forth in this Argument.

Assigned Error 2: Legislative Decision Making Over Eminent Domain

Cannot be Given to the Governor

88. *Neb Rev Stat* § 57-1101, as revised by LB 1161 § 1, expressly creates a gubernatorial trigger for “the power of eminent domain...” through *either* compliance with § 57-1503 and “the approval of the Governor...” or application approval by the PSC, if the Governor chooses not to act or a pipeline common carrier unilaterally chooses the PSC route. LB 1161, as codified at § 57-1503, provides an express bypass of the PSC for the political path through the Governor's office for pipeline common carriers who choose politics over merit and no standards over the judicially testable action of the PSC. There can be no mistake; the Governor is given legislative decision making powers over who will and will not be granted eminent domain rights. The trial court erred when it failed to declare LB 1161 unconstitutional and void on this basis.

89. Arguments in part III of the Answer Brief, above, are incorporated here.

90. Before enactment of LB 1161, the condition precedent to exercise of eminent domain for a pipeline company was an approved application from the PSC pursuant to *Neb Rev Stat 57-1401 et seq.* LB 1161 adds a gubernatorial pathway to eminent domain powers. It gives a permit applicant the choices of either NDEQ evaluation, or Governor approval method. This allows an applicant to circumvent the PSC approval process. Heineman's suggestion that the "Governor's authority is limited to siting decisions" under LB 1161 is not accurate. (Op Br 5). LB 1161 establishes affirmative Governor approval of the NDEQ "evaluation" as the ultimate and final trigger vesting eminent domain rights under § 57-1101. Without LB 1161, the Governor would have no role in eminent domain decisions. This is what the people intended when they created the PSC.

91. The Legislature can delegate power to use eminent domain to a county, city, or other political subdivision, or to a private party. But, it empowers the Governor to make the decision about whether a county, city, other political subdivision, or a private party can do so. *In re Appraisement of Omaha Gas Plant*, 102 Neb 782, 169 NW 725, 726 (1918); "The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired...." *Burnett v. Cent Neb Pub Power & Irr Dist*, 147 Neb 458, 466, 23 NW2d 661, 666 (1946). The Legislature cannot confer on the Governor decisional power to delegate the right to use eminent domain to another. As was discussed above, the Legislature cannot make the Governor the legislative decision maker instead of the executive. "The state Constitution is not a grant, but a restriction of legislative power." *State ex rel. Stenberg v. Moore*, 249 Neb 589, 595, 544 NW2d 344, 349 (1996).

92. Any delegation of the power of eminent domain can only occur from the Legislature pursuant to specific statute, but not by the Governor under his or her whim at approving an oil pipeline route. LB 1161 creates an unlawful delegation of eminent domain powers to the Governor because the moment the Governor unilaterally approves an oil pipeline route, the power of eminent domain immediately vests in the private oil pipeline company. *Burnett, supra*, (citing predecessor to 26 Am Jur2d §5, *supra*) (cited by Singer, *Sutherland Statutes & Statutory Const*, Statutes Granting Power of Eminent Domain §64.6 (WL Nov 2012).

93. LB 1161 violates this constitutional principle by divesting the PSC of jurisdiction to regulate oil pipelines, including intrastate oil pipelines, and by delegating policy and implementation power to the Governor. The trial court erred when it failed to declare LB 1161 unconstitutional on this ground. The judgment below should be affirmed, but modified as to its analysis, for the reasons set forth in this Argument.

**Assigned Error 3: LB 1161 Fails to Provide Reasonable Limitations or
Standards by Which to Execute the Law**

94. LB 1161 constitutes an unconstitutional delegation of authority because it is devoid of any clear and definite standards by which the Governor, in his or her sole capacity, shall evaluate or arrive at a decision of whether to approve or disapprove of an oil pipeline route evaluation. Not a single standard for the Governor's decision is given by LB 1161. Political whim will suffice under the challenged legislative bill. No judicial review is provided either.

95. When delegating power, the Legislature must provide clear and definite standards. In areas where so authorized, "[t]he Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations."

Ponderosa Ridge LLC v. Banner County, 250 Neb 944, 951, 554 NW2d 151, 157 (1996) (quoting *Lincoln Dairy Co v. Finigan*, 170 Neb 777, 780-81, 104 NW2d 227, 230-31 (1960)).

96. “The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act.” *Id.* Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority, unless the recipient of the delegation is a forbidden recipient. See *Bamford v. Upper Republican Nat Resources Dist*, 245 Neb 299, 512 NW2d 642 (1994). Standards must be given by the Legislature to govern the delegee’s use of the power conferred.

The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency ***must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it*** and must also be sufficient to enable those affected to know their rights and obligations. 1 Am Jur2d, Administrative Law, § 117, p. 923. The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases. 1 Am Jur2d, Administrative Law, § 118, p. 925.

State ex rel Douglas v. Nebraska Mortgage Fin Fund, 204 Neb 445, 465, 283 NW2d 12, 24 (1979)(emphasis added).

97. “Although the limitations of the power granted and *the standards* by which the granted powers are to be administered *must be clearly and definitely stated in the authorizing act*, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.” *State v. Ellis*, 281 Neb 571, 592, 799 NW2d 267, 289 (2011) *cert denied*, 132 S Ct 463 (US 2011)(emphasis added). Even if the Governor was to be deemed an eligible delegee for pipeline approval (and he is not), and even if Thompson are wrong that only the PSC can be the delegee of such authority from the Legislature (and they are not), the delegation is invalid unless accompanied by standards for use of the given powers. LB 1161 fails this requirement. It contains no guidelines, standards, tests, or measures of the exercise of the power delegated. LB 1161 gives the Governor a roving commission to do what he or she wants – unfettered by a test for legality or by judicial review. Standards set out in law serve the purpose of limiting legal the actions of public officials and officers. *State v. Brennen*, 218 Neb 454, 356 NW2d 861 (1984)(warrant limits seizures).

98. A PSC or similar agency decision to grant or withhold common carrier status or similar licensure or authority, is quasi-judicial.

Generally, “[t]he exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.” *Sommerfield v. Helmick*, 57 CalApp4th 315, 320, 67 Cal Rptr2d 51, 54 (1997). See, also, *J K & J, Inc. v. Nebraska Liquor Control Commission*, [194 Neb 413 (1975)]. In *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb 562, 566, 192 NW2d 736, 739 (1971), we held that the Department must hold a hearing when determining whether to approve or deny an application to establish a savings and loan pursuant to Neb Rev Stat “section 8–331, R.R.S. 1943.” This court's holding was based upon its conclusion that the Department's determination was

quasi-judicial. *First Fed. Sav & Loan Assn v. Department of Banking, supra*. In the instant case, the Department's approval of a banking application was once again required, and as such, its action was quasi-judicial.

Stoneman v. United Nebraska Bank, 254 Neb 477, 484, 577 NW2d 271, 277 (1998). Specifically of the PSC, this Court has said:

An administrative agency is a neutral fact finding body when it is neither an adversary nor an advocate of a party. See *Zalkins Peerless Co. v. Nebraska Equal Opp Comm*, 217 Neb 289, 348 NW2d 846 (1984).

In Re Application of Metro Util Dist of Omaha, 270 Neb 494, 498, 704 NW2d 237 (2005).

99. The quasi-judicial nature of PSC decisions or decisions of other agencies to grant or deny a license or permit is well established. *Stoneman v. United Neb Bank*, 254 Neb 477, 577 NW2d 271 (1998)(application to merge two banks); *Waskikowski v. Nebraska Quality Jobs Bd*, 264 Neb 403, 648 NW2d 756 (2002)(application for wage benefits credits). Compare, *Application of Kiltbau*, 236 Neb 811, 464 NW2d 162 (1991)(defining review following hearing on application for common carrier authority) and *Samardick of Grand Island-Hastings, Inc. v. BDC Corp*, 183 Neb 229, 159 NW2d 310 (1968)(review of application for contract carrier permit), with *Chase 3000 v. Public Svc Comm'n*, 273 Neb 133, 728 NW2d 560 (2007)(decision to decline to exercise rule-making authority is appealable, but only for arbitrariness since declination to make rules is legislative, not quasi-judicial conduct). These authorities establish that agencies must have standards to govern their quasi-judicial functions, including granting or denying permits. LB 1161 provides no such standards.

100. The Governor could approve the pipeline under LB 1161 even if it violated the National *Environmental Protection Act* and the Supreme Court of the United States so held. The

pipeline would not be built under the Supreme Court's mandate, but the Governor could still blatantly act in the face of the Supreme Court's pronouncement since there is nothing LB 1161 that requires the Applicant's proposed activity be *lawful*. The Governor can also ignore his own NDEQ and give eminent domain to his favorite pipeline applicant for his own reasons. Such untempered delegation is not permissible constitutionally. Authorities cited in the immediate preceding paragraphs establish this thesis.

101. The Governor cannot be given authority from the Legislature without clear and definite standards. Here, none exist and LB 1161 must be overturned as unconstitutional on this basis. The trial court erred, T49, when it failed to declare LB 1161 unconstitutional and void on these grounds. The judgment below should be affirmed, but modified as to its analysis, for the reasons set forth in this Argument.

102. The trial court failed to recognize that by permitting the Governor to approve a pipeline route and issue operating authority without PSC involvement, it was delegating the ultimate decision to allow a foreign pipeline company to use eminent domain in Nebraska to the Governor. This is impermissible. Only the Legislature can do so. The fact that a prior law gave eminent domain authority to some pipeline companies does not save LB 1161. The trial court incorrectly concluded to the contrary. (T55-59). Points set forth at Argument III of the Opening Brief above are incorporated in support of this assigned error.

**Assigned Error 4: LB 1161 Unconstitutionally Authorizes an
Unlawful Pledge of State Credit**

103. LB 1161 requires a loan of State funds to a pipeline applicant. *Neb Const Art XIII, §3* prohibits the State from pledging its credit or loaning funds:

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

LB 1161 violates this constitutional mandate. Heineman correctly note that there is a distinction between extending credit and loaning funds. But they overlook the fact that this Court has condemned as an unlawful extension of credit, an agreement by the State to obtain property for a private project financed by issuing revenue bonds in its name, with the hope that they will be repaid. Knowing this gives the bonds a greater marketability and value, the court observed that this action constitutes a loan of the state's credit for the benefit of a private party, and held this is not permissible. *State ex rel Beck v. City of York*, 164 Neb 223, 182 NW2d 269 (1957), cited with approval, *Japp v. Papio-Missouri Riv NRD*, 273 Neb 779, 733 NW2d 551 (2007).

104. "In summary, 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." *Japp v. Papio-Missouri*, 273 Neb 779, 788, 733 NW2d 551, 558 (2007). This view of *Neb Const* Art XIII, §3 is consistent with the general purposes of similar constitutional prohibitions in many states. 81A CJS *States* § 345. Roger D Colton, *Utility Financing of Energy Conservation: Can Loans Only Be Made Through an Investor-Owned Utility?* 64 Neb L Rev 189 (1985)(included history of Art XIII, § 3).

105. LB 1161 requires a State loan to advance and pay for costs that would never have occurred but for the pipeline company's application and request for a route determination. Efforts by the Heineman to support their incorrect view of Art XIII, § 3, are not supported by a read beyond the explanatory dicta in *Japp*. The *Japp* Court explained. So do a host of other

decisions. *Haman v. Marsh*, 237 Neb 699, 467 NW2d 836 (1991); *Lenstrom v. Thone*, 209 Neb 783, 311 NW2d 884 (1981); *United Community Services v. The Omaha Nat. Bank*, 162 Neb 786, 77 NW2d 576 (1956).

106. Nebraska's constitutional prohibition against committing the State's credit to private debt does not create a prohibition against a pledge by the State to pay a private debt that disappears after the pledge is fulfilled and the bill is paid with taxpayer funds. This construction of Art XIII, §3 is nonsensical. It would mean the taxpayers are protected when the State gives its word to pay a private debt, but are naked and unprotected by their constitution when the debt is actually paid with their funds. This is like saying the harm is in making a prohibited promise and salvation is in fulfilling the prohibited promise. No Nebraska bank would last long in business with this approach to credit. Legal encyclopedias and law they cite support Thompson on this point. See, 18A CJS *States* §§ 345,346 (WL updated March 2014); 63C Am Jur2d § 3 et seq & § 58 (WL updated May 2014)(citing *State ex rel Beck v. City of York, supra*).

The giving or lending of credit of the state, prohibited by a constitutional provision, occurs only when such giving or lending results in creation by the state of a legally enforceable obligation on its part to pay one person an obligation incurred or to be incurred in favor of that person by another person. No giving or lending of the state's credit occurs when the state does nothing but incur liability directly to a person in whose favor an obligation is incurred.

81A CJS *States* § 345. LB 1161 obligates Nebraska to pay third parties for costs to conduct an environment inquiry; it does not produce a liability incurred directly to a pipeline applicant. LB 1161 falls squarely within the parameters of the prohibition outlined above. The credit pledged by LB 1161 requires Nebraskans to pay for services and goods supplied by third parties;

Nebraska is to be reimbursed by the pipeline applicant. Nebraska arranges for goods or services to be rendered to it, and then pays for the goods and services, though all benefit is for the pipeline applicant. The applicant is to reimburse Nebraska down the road. Unless and until that occurs, Nebraska is on the hook for the debt. It has pledged the State's credit first, and then its funds for a third party. This offends *Neb Const Art XIII, §3*.

107. Prohibition of credit extension to a private pipeline company, engaged in private business, is the exact issue underlying the purpose of *Neb Const Art XIII, § 3* and similar constitutional provisions in other states:

It represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to *quasi*-public purposes, but actually engaged in private business.

Haman v. Marsh, 237 Neb 699, 719, 467 NW2d 836, 850 (1991).

108. Here, public funds are pledged to aid an enterprise devoted to a *quasi*-public purpose, but actually engaged in private business. Contrary to *Neb Const Art XIII, § 3*, LB 1161 § 7 pledges interest-free funds and credit of the State in aid of pipeline corporations for at least sixty (60) days under the hope the pipeline applicant later repays the State Treasury. The State's pledge to advance funds is clearly in aid of the corporation in that the funds and credit advanced would otherwise be debts of the pipeline company for expenses and fees incurred during the evaluation process of the company's proposed route. LB 1161 appropriated \$2,000,000 for the review process; ultimately over \$5,000,000 was expended. (E34, 1:3).

109. “*Credit*”, used in a constitutional prohibition of state pledges, loan or credits: ...generally means pecuniary involvement, to protect the state against pecuniary liability. The use of the term implies the imposition of some new financial liability upon the state which results in the creation of a state debt for private benefit. ...[G]enerally, in order to constitute a violation of the constitutional provision, it is essential that there be an imposition of liability directly or indirectly on the state. Accordingly, in such instances, there is no violation unless the credit or faith of the state is obligated.

81A CJS *States* § 348 (citing cases and distilling general holdings).

110. LB 1161 § 7, now *Neb Rev Stat* § 57-1503(1)(b) provides:

A pipeline carrier...shall reimburse the Department for the cost of the evaluation or review within sixty days after notification from the Department of the cost. The Department shall remit any reimbursement to the State Treasurer....

111. This is an extension of credit in the form of an obligation to pay in advance costs that are the ultimate obligation of a private party. This front-ending of costs initially requires that the State be committed to pay this costs; this is a pledge in advance of State credit. Then, the State must pay the costs, i.e., make a private loan to (in this case) a foreign, for-profit corporation that has no citizenship here and is not an agency political subdivision of the State. LB 1161 § 7 casts the State into the roles of guarantor, and then debtor, and then creditor. First it is obligated to pledge, then to pay, and finally to try to collect what the State is obligated by LB 1161 to advance payments, and later as creditor try to get them back. *Callan v. Balka*, 248 Neb 469, 476, 536 NW2d 47, 51 (1995)(defining credit of State). Art VIII, § 3 permits no such laws.

112. Reimbursement, or its possibility, proves that LB 1161 puts the State in the role of

banker for a pipeline applicant. This is not permissible constitutionally. The trial court erred, T41, when it failed to declare LB 1161 unconstitutional on the ground that it includes an unlawful pledge of state credit contrary to *Neb Const* Art XIII § 3. The judgment below should be affirmed, but modified as to its analysis, for the reasons set forth in this Argument.

Conclusion

113. While the trial court correctly struck LB 1161 on one constitutional basis, it failed to hold that the statute is also void because it (a) fails to provide for judicial review and violates due process, (b) constitutes an unlawful delegation of legislative authority to the Governor to grant a private entity the power to exercise eminent domain, (c) fails to provide standards to test applications for common carrier status, and is arbitrary, and (d) includes and constitutes an unlawful pledge of state credit for a private citizen.

114. In the event this Court does not affirm the trial court's decision below on the basis suggested in the Opening Brief above, then LB 1161 should be stricken as unconstitutional for each of the reasons presented in this cross-appeal.

115. The judgment of the district court should be affirmed, but modified. LB 1161 should be declared unconstitutional, and the reasons for doing so should be clarified and corrected by this Court's Mandate and Opinion.

116. Appellees' costs are respectfully requested.

June 20, 2014.

June ~~10~~ 2014.

Randy Thompson, Susan Straka, & Susan Dunavan,
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By:  _____

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