

District Court, Holt County, Nebraska

Byron Terry “Stix” Steskal and Diana Steskal, et al.,

Plaintiffs,

v.

TransCanada Keystone Pipeline, LP,

Defendant.

No. CI 15-6

Hon. Mark D. Kozisek, District Judge

**Plaintiffs’ Opening Trial Brief
Constitutional Issues Presented
Attorney General Notified**

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Plaintiffs' Steskal et al. Opening Trial Brief

Jurisdictional Statement

1. Subject matter jurisdiction lies pursuant to *Neb Rev Stat* § 24-302, and the *Declaratory Judgments Act*, §§ 25-21,149 et seq. Injunctive relief is authorized by *Neb Rev Stat* § 25-1062 et seq. Constitutional questions are at issue. This Court has subject matter jurisdiction to decide those issues. *Thompson v. Heineman*, 289 Neb 798 (2015).

Statement of the Case

Nature of the Case

2. Plaintiffs contend LB 1161, *Laws of Nebraska 2012*, amending *Neb Rev Stat* §§ 57-1101, 57-1401, et seq., and 57-1503, and actions taken by the Governor on January 22, 2013, thereunder, are unconstitutional and void. TransCanada, the Defendant, is a private, for-profit company organized as a Delaware Limited Partnership and owned by Canadian or other foreign interests. TransCanada claims the power of eminent domain under LB 1161 and the Governor's January 22, 2013 letter to the U.S. President. Since LB 1161 violates the Nebraska Constitution, Plaintiffs seek 1) a declaratory judgment to strike the law as unconstitutional, 2) to enjoin TransCanada from proceeding with eminent domain proceedings under LB 1161, and 3) costs.

Issues for Decision

3. Is LB 1161 unconstitutional and void in one or more ways because:

First, 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 Public Service Commission** ("PSC")? Or,

Second, it lacks any provision for **judicial review**, contrary to *Neb Const* Art I § 3 and Art II § 1? Or,

Third, it contains **no reasonable governing standards**, contrary to the Constitution's requirements as required by *Neb Const Art II § 1*, as recognized by *State v. Ellis*, 281 Neb 571, 592 (2011)? Or,

Fourth, it **Delegates authority** to the Governor to empower use of eminent domain by a nongovernmental party contrary to *Neb Const Art II § 1* & *Neb Const Art V. § 1*? Or,

Fifth, it denies **due process of law** to Plaintiffs by depriving them of an evidentiary hearing at which the public may be heard concerning an application for a license, permit, or authorization to operate an enterprise, or activity as a common carrier, contrary to *Neb Const Art I § 13*, *Neb Const Art II § 1*, & *Neb Const Art V § 1*? Or,

Sixth, it unlawfully **pledges the credit** of the State and thereby violates the prohibition against such pledges set forth at *Neb Const Art XIII § 3*?

How the Issues Should Be Decided

4. LB 1161 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. The Governor's action under the invalid law is also invalid.

5. LB 1161 is unconstitutional because it lacks any provision for judicial review, contrary to *Neb Const Art I § 3* and *Art II § 1*. So is the Governor's action under it.

6. LB 1161 is unconstitutional because it contains no reasonable governing standards, contrary to the Constitution's requirements as required by *Neb Const Art II § 1* and recognized by *State v. Ellis*, 281 Neb 571, 592 (2011). So is the Governor's action under it.

7. LB 1161 unconstitutionally delegates authority to the Governor to empower use of eminent domain by a nongovernmental person or entity contrary to *Neb Const Art II § 1* & *Neb Const Art V § 1*. So is the Governor's action under it.

8. LB 1161 violates the due process guarantee of *Neb Const* Art I § 3 by depriving Plaintiffs an evidentiary hearing at which the public may be heard concerning an application for a license, permit or authorization to operate an enterprise, or activity as a common carrier and exercise the power of eminent domain. So is the Governor's action under it.

9. LB 1161 is unconstitutional because it includes an unlawful pledge of the state's credit contrary to *Neb Const* Art XIII § 3. The Governor's action under the invalid law is also invalid.

Standard of Review

10. The constitutionality of a statute presents a question of law. *Banks v. Heineman*, 286 Neb 390, 395 (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 (2014).

Propositions of Law

11. 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 (1989); *Burnett v. Central Neb PP & Irrig Dist*, 147 Neb 458 (1946).

12. “[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. Hous Auth of City of Omaha*, 137 Neb 582 (1940).

13. 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 (1960).

14. 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 (1972)(judicial review of DMV license revocations required).

15. “The legislature has 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 (1946).

16. “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 (2011)(emphasis added).

17. 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 NRD*, 273 Neb 779, 788 (2007).

Statement of the Facts

18. Plaintiffs are all individuals, companies, or corporations who own land located in Keya Paha, Holt, or Antelope Counties in the State of Nebraska affected by Defendant's pipeline project. Joint Stipulation (“Jt Stip”) 3.

19. TransCanada Corporation is organized under Canadian law and has its principal place of business in Calgary, Alberta, Canada and has an ownership interest in TransCanada Keystone Pipeline, LP. (E 14, Defendants Resp. to Request for Admission. (“Def's RRFA”) 3).

20. Defendant, TransCanada Keystone Pipeline, LP., is a for-profit limited partnership organized under Delaware law. Defendant seeks to construct a crude oil pipeline known as the Keystone XL pipeline across Nebraska. Defendant has filed eminent domain proceedings against each Plaintiff for its Keystone XL pipeline (“KXL”) project. Jt Stip 4.

21. TransCanada Keystone Pipeline, LP proposes to build a pipeline from Hardisty, Alberta to Steele City, Nebraska, called the KXL. E 14, Def’s RRFA 7.

22. Defendant seeks to acquire permanent easements with perpetual existences, across, through, and under real estate owned by Plaintiffs, for construction of its proposed KXL pipeline. E 14, Def’s RRFA 33 & 40; E 16 Def’s RRFA 52 & 53.

23. Defendant has no plan for crude oil to be loaded into or unloaded out of the KXL pipeline within the State of Nebraska. E 14, Def’s RRFA 8 & 9; E 16 Def’s RRFA 47 & 48.

24. The KXL Pipeline would be used by TransCanada Keystone XL Pipeline LP for purposes of common carriage for which it would charge a fee to its shipper customers. E 14, Def’s RRFA 13, 14 & 15.

25. Products proposed to be transported in the KXL Pipeline will not be refined within Nebraska. E 14, Def’s RRFA 16 & 17.

26. The State of Nebraska paid sums in excess of \$5 million to evaluate possible routes for the KXL across Nebraska at the request of Defendant. E 14, Def’s RRFA 45 & 46.

27. The funding amount set forth in LB 1161 is \$2 million. Jt Stip 11.

28. On April 18, 2012, TransCanada submitted the “Initial Report Identifying Alternative and Preferred Corridors for Nebraska Reroute” to NDEQ for evaluation of the proposed Keystone XL Pipeline project pursuant to Neb Rev Stat § 57-1503. Jt Stip 5.

29. On May 4, 2012, TransCanada filed an application with the State Department for a Presidential Permit for the construction and operation of the proposed Keystone XL Pipeline project at the U.S.-Canada border crossing in Montana. Jt Stip 7.

30. On or about September 5, 2012, TransCanada provided NDEQ with “TransCanada Keystone XL Pipeline Project Supplemental Environmental Report for the Nebraska Reroute.” Jt Stip 8.

31. On or about January 3, 2013, NDEQ submitted “Nebraska’s Keystone XL Pipeline Evaluation Final Evaluation Report” to the Governor. *See, Neb Rev Stat* § 57-1503(4). Jt Stip 9.

32. On January 22, 2013, the Governor gave his written approval of the proposed Keystone XL Pipeline route across Nebraska and communicated his approval to the President and the State Department. He did so pursuant to *Neb Rev Stat* § 57-1503(4). Jt Stip 10; E 33.

33. This lawsuit was filed to enjoin TransCanada from taking Plaintiffs’ land for its pipeline. 2d Amend Compl ¶¶ 1-2; Answer ¶ 2; E 1,2, & 37-71, affidavits of Plaintiffs.

34. The threat of eminent domain was immediate when Plaintiffs sued. Approximately four days after this suit was filed on January 16, 2015, TransCanada initiated eminent domain proceedings against every Plaintiff. *Id.*

35. TransCanada relies, as its authority to condemn property, upon LB 1161, and action thereunder by the Governor of Nebraska. TransCanada’s eminent domain proceedings reveal this is so. [LB 1161 is now codified in several locations, most notably for these purposes at *Neb Rev Stat* §§ 57-1101 and 57-1503].

36. In each condemnation case, TransCanada appended the Governor's January 22, 2013 letter to the President of the United States approving TransCanada's route, and construction of its KXL pipeline across the state. E 1, 2, & 37-71, affidavits of Plaintiffs.

37. Each condemnation filing alleges reliance by TransCanada on LB 1161 and the Governor's letter for power to condemn. E 1, 2, & 37-71, affidavits of Plaintiffs.

38. The condemnation actions temporarily enjoined, and sought to be enjoined permanently, seek easements, not fee simple title. E 14, Def's RRFA 33 & 40; E 16 Def's RRFA 52 & 53

39. Each of the condemnation proceedings sought to be enjoined expressly recites that LB 1161 and gubernatorial action under it are the basis for TransCanada's purported authority to condemn. *Id.*

40. Four (4) Justices of the Nebraska Supreme Court have expressed their opinions that LB 1161 and the Governor's action are unconstitutional and void. *Thompson v. Heineman*, 289 Neb 798 (2015). E 7. So did the only District Judge who has addressed the issue.

41. Three (3) Justices withheld any expression of an opinion on the constitutional issues, concluding that the Plaintiffs in the *Thompson* case were not suitable Plaintiffs and the case should return to the Nebraska Supreme Court for a decision by all seven (7) Justices when eminent domain proceedings were commenced. *Id.*

42. The Court has, before it now, the case that presents these issues.

Summary of Argument

43. The challenged law is rife with constitutional faults. The law improperly delegates regulatory control of common carriers, does so without legal standards, and empowers a branch of government other than the Legislature to decide precisely what entity can use eminent domain

and where it can use it, as an incident of its common carrier business. It provides for no procedural due process and no judicial review though it requires quasi-judicial decision making. And it does so with a pledge of the state's credit for private obligations.

44. The Nebraska Supreme Court's four (4) Judge plurality addressed only one of those grounds and ruled unanimously that Plaintiffs are correct in *Thompson v. Heineman*, 289 Neb 798 (2015).

45. 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. The decision to allow a person or entity to exercise eminent domain is a plenary legislative power that cannot be delegated.

46. 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* & *Neb Const Art II § 1*.

47. 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. The Governor's action under the invalid law is also invalid.

48. 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 cannot as argued separately, the Legislature's failure to identify standards to evaluate a common carrier's ability, fitness, competence, or plan of operations, make the statute unconstitutional. The law fails to provide reasonable, adequate, and definite guidance in the exercise of the power conferred. This deficiency violates *Neb Const Art I § 3* because it unlawfully delegates legislative authority.

49. LB 1161 requires the state to advance up to \$2 million to finance an evaluation of a proposed pipeline carrier's route. The applicant is to reimburse the state within sixty (60) days after notification of the cost. But, the statute pledges the state's revolving \$ 2 million line of credit to pay the bills of the private citizen, with the hope of collection. This is a pledge of the state's credit for the benefit of the private pipeline. It violates *Neb Const Art XIII § 3*.

50. Declaratory judgment striking LB 1161 and the Governor's actions under it, and enjoining their use, are in order.

Argument

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

51. LB 1161 is an unlawful delegation of Legislative authority for multiple reasons. First, policy and implementation power over common carriers cannot be delegated to the Governor. Second, policy control over the power of eminent domain, including who, where, and how it can be exercised, cannot be given to the Governor. Plaintiffs ask the Court to declare the law unconstitutional, void and to enjoin its enforcement. Constitutional issues are determined in Declaratory Judgment actions. *Trumble v. Sarpy County Board*, 283 Neb 486 (2012).

52. The challenged law improperly delegates regulatory control of common carriers, and it empowers a branch of government other than the Legislature to decide precisely what entity can use eminent domain as an incident of its common carrier business. The core improperly delegated Legislative responsibility is the regulatory control of common carriers; this control must either be exercised entirely by the Legislature, or by the PSC but not by the Governor. Also improperly delegated is the decisional trigger about which specific common carrier qualifies to exercise the power of eminent domain, and under what circumstances it can do so. The decision to allow a party to exercise eminent domain is a plenary legislative power that cannot be delegated. *State ex rel. Spire v. Nw. Bell Tel Co*, 233 Neb 262, 276-77 (1989). *State ex rel. State Railway Commission v. Ramsey*, 151 Neb 333,337-8, (1949).

53. The 4-Justice Opinion in *Thompson v. Heineman*, 289 Neb 798 (2015), lays out the case on this point. District Judge Stephanie Stacey's decision in *Thompson* is in accord. No useful purpose would be served by repeating, summarizing or attempting to restate what was written in *Thompson*. No sentence in the 3-Justice *Thompson* opinion expresses disagreement with the 4-Justice opinion on this issue. Then District Court Judge Stacey's decision for the landowners in *Thompson* is in accord with the 4-Member Opinion. Plaintiffs contend they should prevail on this issue and on the merits for the reasons stated in *Thompson* by the 4-Justices who voted on the merits, and by the District Judge who also did so.

II. No Judicial Review Provided

54. The judiciary is cut out of any role by LB 116. The challenged law is unconstitutional because it is completely devoid of any judicial process or 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. Cf., *State, Dept of Motor Vehicles v. Lessert*, 188 Neb 243, 246 (1972)(review

of DMV license revocations required); *Galyen v. Balka*, 253 Neb 270, 274 (1997). As expressed in Argument IV, the defective Bill also fails to provide for procedural due process in a hearing.

55. Judicial review is 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(2003); *Marshall v. Wimes*, 261 Neb 846 (2001). Due process cannot occur without judicial review:

In *Mathews v. Eldridge*, 424 US 319...(1976), the US 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 (2012), *review denied* (2012).

56. 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: What is the standard for the Governor's decision? Is there evidence to support the decision? Did the Governor decide after a procedurally sound hearing at which basic due process was observed, or is this aspect supplied by judicial review as in *Administrative Procedures Act* cases? Did the Governor act lawfully? Rationally? Constitutionally? What standard did he apply on the merits? What burden of proof did he impose? What sworn evidence, subjected to confrontation, supports the decision?

57. These questions cannot be asked 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. Nothing in LB 1161 guides this function. Judicial review is indispensable. *Jaksha v. State*, 241 Neb 106 (1992) (property tax unconstitutional for lack of judicial review); *Slack Nursing Home, Inc. v. Nebraska DHHS*, 247 Neb 452 (1995). The legislature cannot eliminate judicial review of quasi-judicial functions, and it cannot promulgate a standard of review that violates separation of governmental powers. *Lux v. Mental Health Bd of Polk County*, 202 Neb 106 (1979).

58. The Governor's decision under LB 1161 is guided by nothing but whim, sealed from judicial review. No checks. No balances. No scrutiny. No questions. And, no constitutional compliance. See also, Arguments III & IV. Once the gubernatorial decision is made, there is no judicial review. None. This is a fatal flaw that requires LB 1161 to be stricken.

III. LB 1161 Provides No Reasonable Standards by Which to Execute the Law

59. 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 bill. Standards are essential to assure that each department of government has a defined role to play and that the Legislature does its part in defining roles. *Neb Const Art II § 1*; *Yant v. City of Grand Island*, 279 Neb 935, 946 (2010).

60. 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 (1996) (quoting *Lincoln Dairy Co v. Finigan*, 170 Neb 777, 780-81 (1960)). Delegation to an agency is a delegation to the executive branch. In the case of common carriers, this delegation must be to the PSC. *Neb Const Art IV § 20*. In other instances of delegation, this analysis controls:

Neb Const. Art II, § 1, states that "no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted." This provision prohibits the Legislature from improperly delegating its own duties and prerogatives. The Legislature may enact statutes to set forth the law, and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, but 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. Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.

Davio v. Nebraska Dept of HHS, 280 Neb 263, 274 (2010).

61. LB 1161 is without such constitutionally required standards. Nothing says the Governor is to evaluate a pipeline permit application or route against “public necessity, convenience and advantage” as with bank charters, *Neb Rev Stat* § 8-122; or “for the purpose of protecting and insuring general public interest and safety” as with regulation of aeronautics, *Neb Rev Stat* § 3-109; or necessity and prudence “to protect shareholders, applicants for membership or for insurance, or the public” as with issuance of certificates of authority to insurance companies, *Neb Rev Stat* § 44-105; or assessing financial responsibility as with title insurers, *Neb Rev Stat* § 44-1987; or granting or refusing liquor licenses, *Neb Rev Stat* §§ 53-101--149; or compliance with criteria to be an automobile dealer, *Neb Rev Stat* § 60-1407 et seq.; or to establish rates or authority at the Public Service Comm’n, e.g., *Neb Rev Stat* §§ 75-110.01- 123.

62. First, “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.” *Ponderosa Ridge*, 250 Neb at 951. Second, even where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no constitutional delegation of legislative authority where the recipient of a delegation is a forbidden recipient. See *Bamford v. Upper Republican Nat Resources Dist*, 245 Neb 299 (1994). In every case, standards must be given by the Legislature to govern the delegee’s use of the power conferred. *Neb Const* Art II § 1.

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 (1979)(emphasis added).

63. “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 (2011) *cert denied*, 132 S Ct 463 (US 2011)(emphasis added).

64. Even if the Governor was to be deemed an eligible delegee for pipeline approval (and he is not), and even if Plaintiffs are wrong that only the PSC can be the delegee of such authority from the Legislature (and they are not), the delegation at issue here 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 actions of public officials and officers. *State v. Brennen*, 218 Neb 454, 356 NW2d 861 (1984)(warrant limits seizures).

65. A PSC or similar agency decision to grant or withhold common carrier status or similar licensure or authority, is quasi-judicial. This point is well settled.

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 Cal App 4th 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 Ass’n v. Dept of Banking*, 187 Neb 562, 566 (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.” The Court's holding was based upon its conclusion that the Department's determination was quasi-judicial. *First Fed Sav & Loan Assn v. Dept 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 (1998). Specifically of the PSC, the Supreme Court 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 (2005).

66. 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 (1998)(application to merge two banks); *Waskikowski v. Nebraska Quality Jobs Bd*, 264 Neb 403

(2002)(application for wage benefits credits). Compare, *Application of Kilthau*, 236 Neb 811 (1991)(defining review following hearing on application for common carrier authority) and *Samardick of Grand Island-Hastings, Inc. v. BDC Corp*, 183 Neb 229 (1968) (review of application for contract carrier permit), with *Chase 3000, Inc v. Public Svc Comm'n*, 273 Neb 133, (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.

67. A lawless Governor could have his/her way under LB 1161. For example, the Governor could approve a pipeline route under LB 1161 even if it violated the *National Environmental Policy Act*, 42 USC §§ 4321 et seq. The Governor could still blatantly act in the face of the federal law and a federal agency pronouncement since there is nothing in LB 1161 that requires the Applicant's proposed activity be *lawful*. Federal authorities might stop the Governor, but LB 1161 would not. The Governor could also ignore his own NDEQ recommendation and give eminent domain to his favorite pipeline applicant for his own reasons. Such untempered delegation by the Legislature is not permissible constitutionally. *Stoneman v. United Nebraska Bank*, above; *Nebraska Public Svc Comm'n v. Nebraska Pub Power Dist*, 256 Neb 479,491 (1999); *Slanksy v. Nebraska State Patrol*, 268 Neb 360, 386-87 (2004).

68. 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. LB 1161 attempts to give the Governor

decisional authority without any legal criteria to apply or measure his decision. Under the State Constitution and the Supreme Court's precedent, the Governor cannot be given authority from the Legislature without clear and definite standards. Here, none exist. LB 1161 is unconstitutional on this basis.

IV. The Decision to Trigger Eminent Domain Cannot Be Delegated to the Governor

69. *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. The Governor is given legislative decision making powers over who will and will not be granted eminent domain rights.

70. *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 a crude oil pipeline through Nebraska: 1) the gubernatorial pathway, and 2) the PSC pathway. Plaintiffs do not challenge the Legislature's authority to create a PSC path; TransCanada has not used the PSC. The Legislature

can impart authority to the PSC *only* if the subject matter is a common carrier. The gubernatorial pathway, however, is not constitutionally permissible under *Neb Const* Art IV § 20.

71. 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. 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.

72. *Neb Rev Stat* § 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. It improperly transfers both regulation of common carriers (Argument I above) and the trigger on the power of eminent domain to the Governor. "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 (1946).

73. There is no saving distinction between "Interstate" and "Intrastate" pipelines. Suggestions have been made previously that *Neb Const* Art IV § 20 does not address or protect PSC powers over interstate pipelines. These suggestions are not correct. The Supreme Court 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 (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. 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 (1957). 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.

74. The proposed 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. The Supreme 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 (1957). Both practical consideration and actual experience guide the interstate versus 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); *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)).

75. The grant of eminent domain cannot be justified in LB 1161 except for the public purpose of common carriage by pipeline company applicants, and the decision to permit a private, for-profit company to exercise eminent domain cannot be delegated to the Governor.

76. Finally, it is of no avail that before LB 1161 there was a statute permitting pipeline companies to exercise eminent domain. In fact, LB 1161 is invoked and used. TransCanada has said so. The day to deal with a different standard-less statute posing different issues may come, but this is not that day.

V. LB 1161 Denies a Public Hearing In a Contested Case

77. In Arguments I & III, Plaintiffs demonstrated that the PSC is the proper body to which the Legislature must delegate regulatory functions affecting common carriers under *Neb Const Art IV § 20*. This regulatory function is quasi-judicial. “An administrative agency is a neutral fact finding body when it is neither an adversary nor an advocate....” *In Re Application of Metro Util Dist of Omaha*, 270 Neb 494, 498 (2005).

78. LB 1161 provides no protocol for the discharge of quasi-judicial functions by the Governor. Separate and apart from its mistaken delegation of those responsibilities to the State Chief Executive, LB 1161 is constitutionally defective because it permits a standard-less quasi-judicial function to be performed without a public hearing or due process of law. Even if this function could be discharged by the Governor, both substantive standards for measuring the decision, and procedural safeguards to assure due process, are necessary. Three separate, but related flaws are present in LB 1161: 1) wrongful delegation to the Governor; 2) standard-less delegation for the decision to be made; and 3) no procedural due process requirements or criteria for the quasi-judicial context in which the decision-making is to occur. Arguments I, III and IV address the first two of these three problems. The third is taken up here.

79. The Governor is empowered by LB 1161 to grant permission for common carriage to occur, i.e., substantively, to grant a permit and a route. This is quintessential quasi-judicial action. “The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.” *Stoneman v. United Nebraska Bank*, 254 Neb 477, 484-85 (1998), quoting *Sommerfield v. Helmick*, 57 Cal App 4th 315, 320 (1997).

80. LB 1161 requires the Nebraska DEQ to conduct an investigation of a crude oil pipeline applicant’s proposed route. Public meetings were held on TransCanada’s application. But, oaths were not administered, testimony was not taken, the record was not made or certified, standards were not identified against which to measure the evidence, the evidence was not taken before the decisional fact finder or his/her statutory surrogate as is done with a hearing officer in some contexts, notice was not given of evidence to be considered or used, confrontation was not practiced or permitted, and, as noted in Argument II, judicial review is not provided.

81. LB 1161 improperly replaces the PSC with the Governor. The Governor is called upon to decide whether a private citizen be granted permission to use eminent domain and construct a crude oil pipeline across privately held Nebraska land. This decision, which affects the rights of the applicant and the rights of the landowners whose property will be at issue, is a decision on the merits of these and other questions: a) is there a public purpose; b) is the applicant fit; c) is the project in the public’s interest or for its convenience and advantage; and d) should the applicant be permitted to proceed with the proposed activity as a common carrier?

82. These decisions affect the substantive rights of the applicant and the landowners. Thus, the quasi-judicial responsibilities of the decision-making agency, (in the case of common carriers the PSC), must “provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.” See *Murray v. Neth*, 279 Neb 947, 955 (2010).

In formal agency adjudications, as in court proceedings, due process requires “a neutral, or unbiased, adjudicatory decision maker. Administrative adjudicators serve with a presumption of honesty and integrity. But combining prosecutorial and adjudicative functions presents a danger to the due process requirement of impartiality. When advocacy and decision-making roles are combined, “true objectivity, a constitutionally necessary characteristic of an adjudicator,” is compromised.

In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb 629, 644 (2012).

83. Separate and apart from its Art II §1 constitutional problems, here there is no hearing whatsoever. Due process is ignored. No citizen has a time, place, or hearing at which the fundamental device to sort loose talk from real evidence is invoked; that device is an oath in a judicial or quasi-judicial setting. The gubernatorial decision results in a decision that would be the result in a “contested case” in a proper agency delegation setting.

84. For purposes of the *Administrative Procedures Act*, a “contested case” is defined as “a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.” *Neb Rev Stat* § 84-901(3) (Reissue 1994). The court has held that “a proceeding becomes a contested case when a hearing is required.” The Court has also held that when an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings. Therefore, if the Department acted in a quasi-judicial manner, the instant case was “contested.” *Stoneman v. United Nebraska Bank*, 254 Neb 477, 484 (1998).

85. The pipeline issues committed to the Governor would be a contested case in a typical agency setting. None of the elements of procedural due process are present: Hearing; impartial hearing officer; confrontation, etc. Lack of specific notice to affected landowners is also an issue of concern. *Whitesides v. Whitesides*, 290 Neb 116, 123 (2015). LB 1161 also fails to authorize rule-making to accommodate the hearing process. This is a requirement of Art II § 1 and Art I § 3, as interpreted by the Supreme Court:

The final issue remaining for determination is whether or not constitutional due process requires that the Department of Banking be directed to establish procedural rules and regulations, including provisions for reasonable notice and hearing and governing the establishment of a branch office by a state chartered savings and loan association. The...statutes dealing with the regulation ... savings and loan[s]...and...Administrative Procedures Act may properly be considered in *pari materia* in determining whether or not due process of law has been afforded. Compliance with the mandatory provisions of section 84-913,...requiring an administrative agency to adopt appropriate rules of procedure for notice and hearing is necessary to give validity to its action when notice and hearing are essential to due process.

First Fed. Sav & Loan Ass'n, of Lincoln v. Dep't of Banking, 187 Neb 562, 568-69 (1971).

86. LB 1161 is flawed under the *First Fed Savings* doctrine because it empowers the Governor to make a quasi-judicial decision without notice, a hearing, and essential due process of law. Further, after agency or tribunal actions, the Supreme Court recognizes that review of procedural due process includes an inquiry into the jurisdiction of the agency, whether there was

reasonable notice and an opportunity for fair hearing, and whether the finding was supported by the evidence. *In re Appeal of Levos*, 214 Neb 507 (1983).

87. LB 1161 fails all aspects of procedural due process tests. It is unconstitutional.

VI. LB 1161 Unconstitutionally Authorizes an Unlawful Pledge of State Credit

88. LB 1161 requires an extension of the state's credit to a pipeline applicant. In fact, as used here, the Bill created a \$2 million revolving line of credit against which TransCanada effectively drew, and upon which it made occasional payments. Revolving loans inherently involve pledges of credit. *Heritage Bank v. Bruha*, 283 Neb 263, 270 & fn13 (2012). *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.”

Neb Const Art XIII, §3. LB 1161 violates this mandate. The Supreme Court 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 bonds a greater marketability and value; the Court observed that this constitutes an impermissible loan of the state's credit for a private party. *State ex rel Beck v. City of York*, 164 Neb 223 (1957), cited with approval, *Japp v. Papio-Missouri Riv NRD*, 273 Neb 779 (2007). LB 1161 suffers this same infirmity.

89. “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*, above. 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) (includes history of Art XIII, § 3).

90. 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...”

91. 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 pledge of assets to (in this case) a foreign, for-profit corporation that has no citizenship here and is not an agency or 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 Legislature pledged the state would pay in LB 1161. *Callan v. Balka*, 248 Neb 469, 476, 536 NW2d 47, 51 (1995) (defining credit of state). *Neb Const* Art VIII, § 3 prohibits what the Legislature did here.

92. LB 1161 requires the state to advance and pay for costs that would never be incurred but for the pipeline company’s application and request for a route determination. The amounts advanced are a loan; the applicant must pay it back. The loan is not collateralized; no Note is required. The state pledges to pay the costs when it accepts the pipeline company’s application; it hopes to recover what it loans when the evaluation is completed, whether favorable or not. This is an obvious impermissible pledge, and an equally impermissible loan, of

the public's credit and money. *Haman v. Marsh*, 237 Neb 699 (1991); *Lenstrom v. Thone*, 209 Neb 783 (1981); *United Community Services v. The Omaha Nat. Bank*, 162 Neb 786 (1956).

93. Legal encyclopedias and law they cite support Plaintiffs view of *Neb Const Art XIII, §3*. 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. 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. As the Supreme Court reasoned:

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 (1991).

94. 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 to aid the applicant by reducing its cash flow demands. Nebraska funds expenses that would otherwise be paid at once by the pipeline company for expenses and fees incurred during permit evaluation. LB 1161 appropriated \$2 million for the review process; ultimately over \$5 million was expended. The extension of funds that occurred under LB1161 was a revolving line of credit. It is not saved because the balance may have remained at or below \$2 million most of the time. Credit cannot be pledged. A line of credit, which is what was extended, inherently pledges every dollar of available credit up to the credit limit, all the time. See, *Heritage Bank v. Bruha*, 283 Neb 263, 270 & fn13 (2012)(revolving credit line case), citing 11 Am Jur 2d *Bills & Notes* § 84 at 463-64 (2009).

95. “*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.” 81A CJS *States* § 348 (citing cases, and distilling general holdings).

96. 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. LB 1161 is unconstitutional on the ground that it includes an unlawful pledge of state credit contrary to *Neb Const Art XIII § 3*.

Conclusion

97. TransCanada's misplaced reliance on LB 1161 as lawful authority for its exercise of eminent domain should be enjoined. So should its reliance on gubernatorial action under LB 1161. This is because the Legislative Bill is itself unconstitutional and void. It violates the doctrine of separation of powers, bypasses the PSC, unlawfully delegates and does so without standards, and denies due process of law. LB 1161 does all of these things while also simultaneously making no provision to allow judicial review. The Governor's action under LB 1161 are also void.

98. LB 1161 finances the unconstitutional scheme with a revolving public loan--also an unconstitutional misstep. The challenged statute is legal carbuncle stuffed full of constitutional infirmities. It is for this Court to lance, and drain LB 1161 out of Nebraska's statutes. A declaratory judgment to this effect, and an injunction against TransCanada to prohibit condemnation of Plaintiffs' lands, are respectfully requested

99. Plaintiffs seek costs.

August 31, 2015.

Terry Byron Steskal, et al, Plaintiffs



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