

**District Court, York County, Nebraska**

**Susan Dunavan, William Dunavan,  
Terri Harrington, and Jim Tarnick**

**Plaintiffs,**

**v.**

**TransCanada Keystone Pipeline, LP, and  
Andrew Craig,**

**Defendants.**

**No. CI 15-\_\_\_\_\_**

**Judge:\_\_\_\_\_**

**Complaint for Declaratory Judgment  
Temporary and Permanent Injunction**

**Notice “Constitutionality of Statutes  
Challenged”**

Plaintiffs allege for their Complaint that:

**Case Overview**

1. LB1161 (*Laws of Nebraska 102<sup>nd</sup> Leg 2d Sess*) is challenged on the grounds that it, or parts of it, are unconstitutional. Declaratory judgment is sought declaring LB1161 unconstitutional and void and to prevent action by Defendants, TransCanada Keystone Pipeline, LP, (“TransCanada”) and Andrew Craig, (“Craig”) thereunder, including action to take property from Plaintiffs under color of LB1161 and a purported gubernatorial authorization or approval under it. Temporary and permanent injunctions are sought against Defendants who seeks to take or attempt to take property and property rights from the Plaintiffs under the provisions of the challenged law. Because the challenged law is unconstitutional and void, the Defendants are without authority to proceed and must be enjoined.

2. Plaintiffs are real parties in interest with standing. Plaintiffs have ownership interests in real estate Defendants intend, by their own declarations, to take from Plaintiffs by using the power of eminent domain for the purpose of constructing TransCanada’s Keystone XL pipeline (“KXL”) for the transportation of tar sands or other crude oil. Defendants claim TransCanada was granted eminent domain powers under LB

1161 and as a result of a purported authorization, permit, or approval granted to TransCanada by the Nebraska Governor pursuant to LB 1161. Plaintiffs contend this occurred in violation of provisions of the Nebraska Constitution. Plaintiffs also have standing because they are taxpayers with interests in unlawful expenditures of state funds as required by LB1161, and because the issues raised in this Complaint and are matters of great public concern to the citizens of Nebraska, and the United States, and involve, directly, requested action of the President of the United States, the United States Department of State, and, the United States Congress.<sup>1</sup>

3. LB1161 is unconstitutional in one or more of these ways. It:

3.1 Unlawfully delegates to the Governor, powers over a common carrier contrary to *Neb Const Art IV, § 20*.<sup>2</sup>

3.2 Unlawfully delegates to the Governor the Legislature's plenary authority and responsibility to decide what designees of the Legislature may exercise the power of eminent domain, which is an attribute of sovereignty, and thereby violates *Neb Const Art II, § 1*.<sup>3</sup>

3.3 Violates the doctrine of separation of powers by permitting action to occur without judicial review contrary to *Neb Const Art II, § 1* and *Neb Const Art V, § 1*<sup>4</sup> *et seq.* and by failing to provide for notice to affected parties, thereby

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<sup>1</sup> *Thompson v Heineman*, 289 Neb 798 (2015).

<sup>2</sup> *Neb Const Art IV, § 20* provides:

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

<sup>3</sup> *Neb Const Art II, § 1* provides:

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

<sup>4</sup> *Neb Const Art V, § 1* provides:

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

depriving them of due process of law, contrary to *Neb Const* Art I, § 3.

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

3.5 Unlawfully pledges funds and credit of the State for at least 60 days to a pipeline applicant who is to repay the funds later. *Neb Const* Art XIII, §3<sup>5</sup> prohibits the State from pledging its credit or loaning funds in these circumstances.

4. LB1161 cannot remain law or be enforced because it violates the Nebraska Constitution. Statutes are subservient to the Constitution as “[a] constitution represents the supreme written will of the people regarding the framework for their government and is subject only to the limitations found in the federal Constitution. . . .” The state Constitution must be read as a whole.”<sup>6</sup> It is the supreme will of the people of Nebraska, as expressed in their State Constitution, that (A) matters involving public common carriers, including crude oil pipelines, be committed to the Public Service Commission, not to the Governor, as the Legislature directs; (B) the Public Service Commission, and the governor, are both constitutionally-created components of Nebraska State Government of equal constitutional stature. (C) The Office of Governor is not superior to the Public Service Commission. Instead, each must perform separate constitutionally assigned and authorized duties, functions and responsibilities. The Legislature may not override the supreme will of the people as expressed in their Constitution.

5. The Governor’s actions are invalid because they were taken under authority of LB1161. TransCanada is without eminent domain authority or an approved pipeline route across Nebraska because LB1161 and the Governor’s actions are TransCanada’s sole basis for claiming an approved route or power of eminent domain.

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Court and shall be exercised by the Chief Justice. The Chief Justice shall be the executive head of the courts and may appoint an administrative director thereof.

<sup>5</sup> *Neb Const* Art XIII, § 3 provides:

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

<sup>6</sup> *Jaksha v State*, 241 Neb 106, 110, 486 NW2d 858, 863 (1992); *accord, Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb 173, 710 NW2d 609 (2006).

**Jurisdiction, Venue, and Parties**

6. This Court has subject matter jurisdiction of this action for declaratory judgment pursuant to *Neb Rev Stat* § 24-302 & *Neb Rev Stat* §§ 25-24,129 *et seq.* The latter statute is the *Nebraska Declaratory Judgments Act*. An actual case and controversy exists and arises under an enactment of the Legislature which is now a Nebraska statute.<sup>7</sup> The controversy concerns, and calls into a question, LB1161’s constitutional validity.

7. Venue is proper in York County, Nebraska where Plaintiffs reside, the real estate to be taken is located, Defendants’ threats were made, and these claims arose.

8. Plaintiffs are:

<b>Susan Dunavan</b>	<p>Mrs. Dunavan is a citizen, resident, taxpayer, and elector, of York County, Nebraska. Mrs. Dunavan owns real estate on the proposed TransCanada KXL pipeline route as evidenced by TransCanada’s documents. Ms. Dunavan’s standing to sue was recognized by the majority and controlling opinion of the Nebraska Supreme Court in a January 9, 2015, decision related to issues raised in this case.<sup>8</sup></p> <p>Defendants gave Plaintiff written notice on or about December 15, 2014, of their intention to commence condemnation proceedings against Plaintiff’s property in January 2015. TransCanada threatens to condemn unless it is granted an Easement and property ownership rights without condemnation. Plaintiff declines and refuses to voluntarily convey ownership rights to TransCanada.</p> <p>The real estate owned by Plaintiff and identified by Defendants as property to be taken or partially taken by it is:</p> <p>A tract of land containing 80 acres, more or less, situated in the County of York, in the State of Nebraska, being further described as two tracts of land situated in the W1/2 of the SE1/4 of Section 6, T9N, R2W of the 6th P.M., as recorded in Book 169, Page 137 and Book 167, Page 342 in the Deed Records of York County, Nebraska; less and except any conveyances heretofore made.</p>
<b>William Dunavan</b>	<p>Mr. Dunavan is a citizen, resident, taxpayer, and elector, of York County, Nebraska. Mr. Dunavan owns real estate on the proposed TransCanada KXL pipeline route as evidenced by TransCanada’s documents.</p> <p>Defendants gave Plaintiff written notice on or about December 15, 2014, of their intention to commence condemnation proceedings</p>

<sup>7</sup> *Neb Rev Stat* § 25-21,150

<sup>8</sup> *See fn* 1.

	<p>against Plaintiff's property in January 2015. TransCanada threatens to condemn unless it is granted an Easement and property ownership rights without condemnation. Plaintiff declines and refuses to voluntarily convey ownership rights to TransCanada.</p> <p>The real estate owned by Plaintiff and identified by Defendants as property to be taken or partially taken by it is:</p> <p>A tract of land containing 80 acres, more or less, situated in the County of York, in the State of Nebraska, being further described as two tracts of land situated in the W1/2 of the SE1/4 of Section 6, T9N, R2W of the 6th P.M., as recorded in Book 169, Page 137 and Book 167, Page 342 in the Deed Records of York County, Nebraska; less and except any conveyances heretofore made.</p>
<p><b>Terri Harrington</b></p>	<p>Ms. Harrington is a real estate owner of property in York County, Nebraska. Mrs. Harrington owns real estate on the proposed KXL route as evidenced by TransCanada's documents.</p> <p>Defendants gave Plaintiff written notice on December 15, 2014, of their intention to commence condemnation proceedings against Plaintiff's property in January 2015. TransCanada threatens to condemn unless it is granted an Easement and property ownership rights without condemnation. Plaintiff declines and refuses to voluntarily convey ownership rights to Defendants.</p> <p>The real estate owned by Plaintiff and identified by Defendants as property to be taken or partially taken by it is:</p> <p>A tract of land containing 163.57 acres, more or less, situated in the County of York, in the State of Nebraska, being further described as the SE1/4 of Section 14, T12N, R4W, of the 6th P.M., as recorded in Book 189, Page 190, in the Deed Records of York County, Nebraska; less and except any conveyances heretofore made.</p>
<p><b>James "Jim" Tarnick</b></p>	<p>Mr. Tarnick is a citizen, resident, taxpayer, and elector, of Nance County, Nebraska. Mr. Tarnick owns Nebraska real estate TransCanada previously under threat of condemnation for the proposed TransCanada KXL pipeline as evidenced by TransCanada's documents.</p> <p>The real estate owned by Plaintiff and identified by Defendants as property to be taken or partially taken by it is:</p> <p>The E/2 SW/4 of Section 21, T-16-N, R-5-W, Nance County.</p>

9. Defendants are:

9.1 TransCanada Keystone Pipeline, LP, a limited partnership organized under Delaware law, and registered to do business in Nebraska. Defendant TransCanada has its principal place of business at 13710 FNB Parkway, Suite 300, Omaha, NE 68154. Its agent to receive service of process is CT Corporation System, 5601 South 59<sup>th</sup> St, Lincoln NE 68516. It also conducts business at 1106 Benjamin Avenue Suite 600, Norfolk, NE 68701.

9.2 Andrew Craig, Land Manager – Keystone Projects, is a resident of Nebraska who executed threats to Plaintiffs and other landowners that he will take actions for TransCanada to condemn Plaintiffs' land with and for TransCanada. Craig signed correspondence making demands, sent by certified mail to Plaintiffs. Craig is sued in his capacity with TransCanada. Craig resides or is otherwise domiciled in Douglas County NE.

10. Plaintiffs assert the unconstitutionality of LB1161. They know that the burden of establishing the unconstitutionality of a statute is on the one attacking its validity. Plaintiffs understand they bear this burden, and contend their claims meet and exceed it. The unconstitutionality of a statute must be clearly established before it will be declared void.<sup>9</sup> The Nebraska Supreme Court's four member majority, including all Justices who expressed opinions on constitutionality, concluded that LB 1161 is unconstitutional and void.<sup>10</sup> Three Justices of the Court have not yet expressed opinions on this subject. The District Court of Lancaster County, Nebraska concluded that the statute is unconstitutional, too.<sup>11</sup> No Nebraska judge who has been called upon to consider the constitutionality of LB 1161 and has expressed a judicial opinion or conclusion on the subject, is concluded that LB 1161 is constitutional. Plaintiffs contend LB1161's unconstitutionality is clearly disclosed by its terms, and its repugnancy to the Constitution's requirements. Judicial notice of the Nebraska Supreme Court and Lancaster

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<sup>9</sup> *Sarpy County Farm Bureau v Learning Community of Douglas & Sarpy Cos.*, 283 Neb 212, 808 NW2d 598 (2012); *Kiplinger v Nebraska Dept of Nat Resources*, 282 Neb 237, 803 NW2d 28 (2011).

<sup>10</sup> *Thompson v Heineman*, 289 Neb 798 (2015).

<sup>11</sup> *Thompson v Heineman, Dist Ct, Lancaster Co NE CI12-02060* (decided Feb 19, 2014).

County District Court decisions is respectfully requested.<sup>12</sup> Only state law questions are presented in this Complaint.

11. LB1161 provides for the expenditure of funds for its implementation. The expenditure is for an unlawful purpose, i.e., to fund the operations of LB1161. Plaintiffs, as taxpayers, have standing to challenge LB1161 and this expenditure.<sup>13</sup>

12. The Governor of Nebraska purports to have acted pursuant to LB 1161 to a) grant a permit to TransCanada authorizing it to locate and construct a pipeline across Nebraska in a location that crosses Plaintiffs' real estate, b) authorize TransCanada to commence the use of eminent domain to acquire right-of-way for its pipeline across Nebraska and c) have reported in his letter to President Barack Obama and Secretary of State Hillary R. Clinton, the Governor's decision to approve a route for TransCanada's Keystone XL Pipeline project through Nebraska under the authority of LB1161. Plaintiffs contend, and seek a declaration, that both the statute and this action by the Governor are null and void. As a result TransCanada has no approved pipeline route across Nebraska, and no authority to exercise powers of eminent domain. Plaintiffs seek an injunction to enjoin and prevent TransCanada and Craig from proceeding under the unconstitutional law, and unconstitutional gubernatorial action to take property from Plaintiffs or others for the purpose of constructing a pipeline upon, across, under, or connecting with, Plaintiffs' real estate.

#### **LB1161, Laws (2012)**

13. The genesis for LB1161 precedes the 102<sup>nd</sup> Legislature, 2nd Session, and requires examination of actions that occurred in the 102<sup>nd</sup> Legislature, 1st Special Session, held in November 2011. *LB 1 (Laws of Nebraska 102<sup>nd</sup> Leg 1st Sess)* enacted a framework and structure that committed to the Nebraska Public Service Commission ("PSC") responsibility for certain actions involving the applications of major crude oil pipeline companies for establishment of a route and construction of a crude oil pipeline within, or across, Nebraska.

14. LB1161 (*Laws of Nebraska 102<sup>nd</sup> Leg 2d Sess*) purports to amend *LB 1*. It

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<sup>12</sup> *Neb Rev Stat* § 27-201.

<sup>13</sup> *Project Extra Mile v Nebraska Liq Control Comm'n*, 283 Neb 379, 810 NW2d 149 (2012).

does so unconstitutionally. LB1161 was approved by the Governor and became the law of Nebraska, with the emergency clause, on April 17, 2012. The Bill’s title recites that it changes provisions of *LB 1*, 102<sup>nd</sup> Legislature First Special Session 2011. Summarized for general background, but not to serve as a substitute for LB1161’s terms, these are the provisions of the challenged statute:

<b>LB1161 §§</b>	<b>Summary</b>
§1	<p><i>Neb Rev Stat</i> § 57-1101 is amended to provide that the procedure is for oil pipeline companies to, as conditions precedent to exercising the power of eminent domain in Nebraska, secure route approval from either:</p> <p style="text-align: center;">the Governor, or</p> <p style="text-align: center;">the Public Service Commission under the Major Oil Pipeline Oil Siting Act if the Governor does not approve.</p> <p>Condemnation must commence within two (2) years of approval by the Governor for the PSC.</p>
§2	Technical provision. No explanation required.
§3	Provides that public documents will not be withheld unless withholding is authorized by § 84-712.05 of the Public Records Act or federal law
§4	Eliminates a provision of <i>LB 1</i> that provided: “The Major Oil Pipeline Siting Act shall not apply to any major oil pipeline that has submitted an application to the United States Department of State pursuant to Executive Order 13337 prior to the effective date of this Act.”
§5	Defines Commission as the Public Service Commission. Note the term “department” is not defined in LB1161, but there is a reference in § 8 to the Nebraska Department of Environmental Quality.



<b>LB1161 §§</b>	<b>Summary</b>
§6	Provides that “[i]f a pipeline carrier proposes to construct a major oil pipeline to be placed in operation across Nebraska after the effective date of this Act and the pipeline carrier has submitted a route for an oil pipeline within, through, or across Nebraska but the route is not approved by the Governor . . . the pipeline carrier shall file an application with the commission . . . .” If a carrier proposes a substantive change to a route submitted but not approved by the Governor, the carrier must file an application with the commission and receive approval pursuant to § 9 of the Act.
§7	Empowers the department (presumably the Department of Environmental Quality) to conduct an evaluation of the pipeline, including a supplemental environmental impact study of the proposed route and alternate routes, and make a report to the Governor. Section 7 amends <i>LB 1</i> § 3, part 4 to require that the Governor must act on the submission within thirty (30) days or, if he does not approve any of the routes, notify the pipeline carrier that it must receive approval from the public service commission.
§8	\$2 million appropriated to the DEQ.
§9	Severability clause.
§10	Repealer clause for inconsistent provisions.
§ 11	Emergency Clause. <sup>14</sup>

### **Unconstitutionality**

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

<sup>14</sup> The slip law copy of *LB1161* may be read at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB1161.pdf>

constitutional infirmities of LB1161 *are*:

15.1 **Unlawful Delegation of Authority.** LB1161 constitutes an unlawful delegation of authority over a common carrier to the Governor of Nebraska contrary to *Neb Const* Art IV, § 20. *Neb Const* Art IV, § 20 commits exclusively to the Public Service Commission the authority over common carriers and the regulation of common carriers when regulation is necessary. The Legislature is empowered to prescribe circumstances under which the PSC may regulate, or leave all regulatory control to the PSC, but the Legislature is powerless to delegate authority, dominion, or state sovereign control over common carriers to the Governor, or any organization or department of state government other than the PSC. Because LB1161 §§ 1-7 purport to do so, they are unconstitutional and void.

15.2 **Unlawful Delegation of Authority.** LB1161 constitutes an unlawful delegation of the Legislature's plenary authority over the power of eminent domain.<sup>15</sup> It does so by empowering the Governor to decide what company shall be approved to build a pipeline and use the power of eminent domain to acquire real property rights for a pipeline route in and across Nebraska. Only the Legislature has authority to delegate the power of eminent domain to individuals; it cannot lawfully assign this delegation responsibility or empowerment authority to the Governor or any other department of Nebraska state government.<sup>16</sup> For these reasons, LB1161 also violates the unlawful delegation of authority provisions of *Neb Const* Art II, § 1, and Art V, § 1, and the doctrine of separation of powers. It also thereby violates *Neb Const* Art I, § 3 by failing to require notice before action by the Governor or by PSC, as due process of law requires.

15.3 **Separation of Powers; Due Process.** LB1161 is unconstitutional and void because it violates Nebraska's requirement that state government be divided into executive, legislative, and judicial departments. It does so because it contains no provision for judicial review of decisions of the Governor to approve or to disapprove, or to decline to act upon applications for authority to acquire property

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<sup>15</sup> *Burnett v. Central. Neb Pub Power & Irr. Dist.*, 147 Neb 458, 466, 23 NW2d 661, 666 (1946).

<sup>16</sup> *Lincoln Dairy Co. v. Finigan*, 170 Neb 777, 780, 104 NW2d 227, 230 (1960).

and erect crude oil pipelines across Nebraska. Statutes that permit quasi-judicial functions to be exercised by boards but fail to provide for notice of hearing or judicial review are unconstitutional and void.<sup>17</sup> This infirmity is also present for the separate, distinct reason that LB1161 fails to provide for judicial review of action of the Public Service Commission.

15.4 **Unlawful Expenditure.** LB1161 unlawfully allocates to the Department of Environmental Quality the sum of \$2.0 million to implement the unconstitutional provisions outlined above. This constitutes an unlawful expenditure of taxpayer funds for all the reasons asserted for LB1161's unconstitutionality. In addition, the Bill constitutes special legislation for the benefit of an unconstitutional class of persons contrary to *Neb Const* Art I, § 3, *Neb Const* Art IV, § 8, and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution. Plaintiffs have standing to challenge LB1161 and this expenditure. Only citizens of the State with interests in its environmental quality and the lawful expenditure of State funds are proper parties to challenge the Bill. The NDEQ has advanced more than \$5 million dollars of public funds under LB1161. Although *Neb. Rev. Stat.* § 57-1503(1)(b) requires reimbursement from the applicant carrier within sixty days after notification from the department of the cost, there are no mechanisms for collection and no guarantee of repayment.

15.5 **Pledge of State Credit.** LB1161 § 8 pledges funds and credit of the State for at least 60 days to a pipeline applicant who is to repay the funds later. *Neb Const* Art XIII, §3<sup>18</sup> prohibits the State from pledging its credit or loaning funds in these circumstances. LB1161 violates this constitutional mandate. Contrary to *Neb Const* Art XIII, § 3, the extension of credit and sixty (60) day reimbursement period

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<sup>17</sup> *First Fed Sav & Loan Ass'n v Department of Banking*, 187 Neb 562, 568, 192 NW2d 736, 740 (1971).

<sup>18</sup> *Neb Const* Art XIII, § 3 provides:

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

in Section 7 of LB1161 unconstitutionally directs the State to lend funds to “borrower” pipeline carriers that have submitted a route for application or review:

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

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

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

15.6 **No Standards.** LB1161 constitutes an unlawful delegation of legislative authority to the Governor because it fails to describe or prescribe standards, conditions, circumstances, or procedures which are constitutionally mandatory for the action it purports to delegate. By doing so, it constitutes an unlawful delegation of legislative authority contrary<sup>19</sup> to *Neb Const* Art II, § 1, Art V, § 1, and standards prescribed by the Nebraska Supreme Court. It fails to require notice prior to action by the Governor or Public Service Commission.<sup>20</sup>

### **Injunction**

16. Plaintiffs have well-established rights not to be damaged by unconstitutional and unlawful condemnation proceedings under an invalid Nebraska statute.<sup>21</sup> There is no adequate remedy at law except for declaratory judgment and injunctive relief.

16.1 Unless injunctive relief is granted, Plaintiffs’ real estate will be taken by a private company without lawful authorization to exercise eminent domain in accord with the Nebraska Constitution. The threat that this will occur is grave as TransCanada has announced, unequivocally, its intention to initiate condemnation proceedings under the authority of LB 1161 and the Governor’s action in January 2015. Each Plaintiff has received this notification from TransCanada. Irreparable harm will occur from the taking of unique real estate interests, unless injunctive relief is granted.

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<sup>19</sup> *Lincoln Dairy Co. v. Finigan*, 170 Neb 777, 780, 104 NW2d 227, 230 (1960).

<sup>20</sup> *Id.*

<sup>21</sup> *U.S. Const* Amend V; *Neb Const* Art I, Sec 21. *Jaksha v State*, 241 Neb 106, 486 NW2d 858 (1992).

16.2 Plaintiffs are highly likely to succeed on the merits of their claim that LB 1161 and the gubernatorial action challenged are unconstitutional and, therefore, TransCanada is without condemnation authority. This is true because of the opinions and decisions of the Nebraska Supreme Court and the Lancaster County District Court.<sup>22</sup>

16.3 No harm will be incurred by TransCanada or Craig if injunctive relief is issued. LB 1161 applies only to applicants before authority to build pipelines across Nebraska who filed permits to construct those pipelines across the US Canadian border, or the border of the United States with another nation. Procurement of a Border Crossing Permit from the President of the United States is necessary before the pipeline can be built. The President of United States has not issued such a permit and has publicly stated that he will veto congressional legislation, if passed, that attempts to compel him to do so. TransCanada has no Border Crossing permit and cannot proceed with its project accordingly. In addition, TransCanada has no permit from the lawful authorities of South Dakota, and, perhaps Montana, to proceed with this project. Craig is a TransCanada employee or agent. Accordingly, injunctive relief in this case will cause no harm to TransCanada or Craig.

16.4 Injunctive relief will protect the Plaintiffs and the public and will not cause harm to the public. This is true for several reasons: A) there is no Border Crossing Permit issued by the President, so the project cannot be built by TransCanada; B) there are no authorizations from one or more other states so there is no risk of harm to the public from that the requested injunction; C) TransCanada has not constructed its line across South Dakota, so there is nothing to connect to the proposed Nebraska line; D) TransCanada has voluntarily elected against proceeding to the Nebraska Public Service Commission for proper authorizations in accord with the Nebraska Constitution. TransCanada has an alternative procedure under Nebraska law which it has chosen not to employ; E) the proposed project

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<sup>22</sup> *Thompson v Heineman*, 289 Neb 798 (2015). *Thompson v Heineman, Dist Ct, Lancaster Co NE C112-02060* (decided Feb 19, 2014).

provides no access, in Nebraska, for the use of Nebraska and transport, or benefit directly from the transport of tar sands or crude oil through the pipeline as proposed. Accordingly, the public purpose of the project requiring for a valid taking under *Neb Const Art I, § 21* has not been established following public hearing and due process procedures required by law. Depriving the public of these processes and procedures harms it. F) If eminent domain is used, land is taken, and the pipeline is built but must be removed because these things occurred unlawfully, remedial costs will be great. Finally, if unlawful takings occur, lands with common ownership will be severed by the easements and rights taken; uses and rights to use land will be diminished, and Nebraska land will be adversely affected on a long-term basis.

17. Permanent injunctive relief against Defendants is sought pursuant to *Neb Rev Stat § 25-1062 et seq.*, Temporary injunction is also sought at the time of filing of this Complaint. Though Nebraska has no statute authorizing injunctive relief to prevent enforcement of an unconstitutional statute, the judicial power of the courts inherently authorizes issuance of such injunctions.<sup>23</sup> Nebraska's courts also have authority to enjoin unconstitutional and unlawful actions purported to be taken under the authority of invalid laws. The decision of the Nebraska Supreme Court rendered January 9, 2015 makes it clear that this action is ripe when eminent domain proceedings are threatened or commenced.<sup>24</sup>

18. Plaintiffs request that TransCanada and Craig be enjoined from proceeding with steps to acquire property from them or others for its project until after a decision on the merits in this case has been rendered. When a decision on the merits is rendered, they request that the Court declare that LB 1161, and the gubernatorial action described above be declared unconstitutional, null and void, and that TransCanada has no approved pipeline route across Nebraska and has no legal authority to exercise the power of eminent domain for its keystone X pipeline project across this State. Plaintiff's further request that the decision on the merits declare that TransCanada and Craig have no authority to

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<sup>23</sup> “[T]he court’s power to enjoin unconstitutional acts... is inherent in the Constitution itself”, *Hubbard v EPA*, 809 F2d 1,11 n15 (DC Cir 1986). See also, *Hartman v Moore*, 547 US 250, 126 S Ct 1695, 1701 (2006). Accord, *Marbury v Madison*, 5 US 137 (1803); *Mitchum v Hurt*, 73 F3d 30 (3d Cir 1995).

<sup>24</sup> *Thompson v Heineman*, 289 Neb 798 (2015).

condemn, or acquire by eminent domain, all or any part of the real estate owned by plaintiffs and described above.

### **Requests for Relief**

19. On the foregoing basis, Plaintiffs request relief as follows:
  - 19.1 A Declaratory Judgment be rendered declaring LB1161 is unconstitutional and is null and void, and an Injunction be rendered preventing its enforcement.
  - 19.2 A Declaratory Judgment be rendered declaring that TransCanada and Craig have no approved construction route for its KXL pipeline project in Nebraska and has no lawful authority to acquire interests in property with the power of eminent domain;
  - 19.3 A Declaratory Judgment be rendered declaring LB1161, the actions of the Governor and the purported authority of TransCanada and Craig to take land with the power of eminent domain each and all violate one or more of *Neb Const* Art I, § 3, Art I, §21, Art II §1, Art IV § 20, Art V § 1, Art XIII, § 3, and is unconstitutional and void.
  - 19.4 A Temporary Injunction be issued to prevent TransCanada and Craig from taking any real estate from Plaintiffs or others under the purported authority of LB1161 or gubernatorial action thereunder, or for its KXL pipeline project.
  - 19.5 A Permanent Injunction be issued to prevent TransCanada and Craig from taking any real estate from Plaintiffs or others under the purported authority of LB1161 or gubernatorial action thereunder, or for its KXL pipeline project.
  - 19.6 Court costs and attorney's fees be awarded to Plaintiffs to the extent allowed by case law and customs and usages of the Courts and law of Nebraska.
  - 19.7 Additional relief be rendered as the Court finds just, equitable, and proper.

Susan Dunavan, et al, Plaintiffs



By \_\_\_\_\_

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**Notification to Attorney General**

To: Nebraska Attorney General Doug Peterson

Notice is respectfully given that the foregoing action has been filed in district court challenging the constitutional validity of the statutes and gubernatorial action identified above on the grounds specified above.

This notice is given to you at the mailing address which appears below

Attorney General Doug Peterson  
State Capitol  
2115 State Capitol  
Lincoln NE 68509-8920



\_\_\_\_\_  
David A. Domina