

Nebraska Supreme Court

Randy Thompson,
Susan Luebbe, and
Susan Dunavan,

Plaintiffs,

v.

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

Defendants.

Original Action
No. _____

Plaintiffs'
Verified Petition

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NEBRASKA SUPREME COURT
COURT OF APPEALS

Plaintiffs allege, for their verified Petition, pursuant to *Neb Ct R* § 24-204,
and *Neb Const* Art 5, § 2:

Separate Jurisdiction Statement

1. A separate Jurisdictional Statement accompanies this verified
Petition. Leave is sought by the Plaintiff to file this original action with this Court for
reasons stated in the Jurisdictional Statement; they impact this Court's discretion..

Case Overview

2. *LB 1161 (Laws of Nebraska 102nd Leg 2d Sess)* is challenged on
the grounds that it, or parts of it, are unconstitutional. Declaratory judgment is sought
declaring *LB 1161* unconstitutional and void.

3. Plaintiffs are real parties in interest with standing. Defendants are
the officials of Nebraska's state government, sued in their official capacities, with the
duty to execute *LB 1161*, which became effective when approved by Defendant
Heineman on April 17, 2012. Defendants are officials who have enforced, and threaten
to enforce, the unconstitutional law.

4. *LB 1161* is unconstitutional in one or more of these ways. It:

4.1 Unlawfully delegates to the Governor, powers over a common carrier contrary to *Neb Const Art IV, § 20*.¹

4.2 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*.²

4.3 Constitutes special legislation contrary to *Neb Const Art III, § 18*³, and denies equal protection of the law contrary to *Neb Const Art I, § 3*.⁴

4.4 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*⁵ et seq. and by failing to provide for notice to affected parties, thereby depriving them of due process of law, contrary to *Neb Const Art I, § 3*.

¹ *Neb Const Art IV, § 20* provides:

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

² *Neb Const Art II, § 1* provides:

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

³ *Neb Const Art III, § 18*

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

⁴ *Neb Const Art I, § 3*

No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws.

⁵ *Neb Const Art V, § 1* provides:

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

5. *LB 1161* 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.”⁶ It is the supreme will of the people of Nebraska, as expressed in their State Constitution, that (A) matters involving public common carriers, including crude oil pipelines, be committed to the Public Service Commission, not to the Governor, as the Legislature directs; (B) the Public Service Commission, and the governor, are both constitutionally-created components of Nebraska State Government of equal constitutional stature. (C) The Office of Governor is not superior to the Public Service Commission. Instead, each must perform separate constitutionally assigned and authorized duties, functions and responsibilities. The Legislature may not override the supreme will of the people as expressed in their Constitution.

Jurisdiction and Parties

6. This Court has discretionary original subject matter jurisdiction pursuant to *Neb Const* Art V § 2. Constitutional jurisdiction is implemented by *Neb Rev Stat* § 24-204 and by *Neb Ct R App P* § 2-115.

7. A declaratory judgment is sought as authorized by *Neb Rev Stat* § 25-24, 129 *et seq.* An actual case and controversy exists and arises. The controversy concerns, and calls into question, the constitutional validity of *LB 1161* (*Laws of Nebraska 102nd Legis, 2d Sess 2012*), a statute relating to crude oil pipelines and the power of eminent domain.

7.1 The statute is of great public interest. This interest extends across, and transcends, Nebraska.

7.2 The subject of routes for crude oil pipelines resulted in a Special Session of the Nebraska Legislature in November 2011, in which

⁶ *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).

legislation was enacted. The regular session of the Nebraska Legislature in 2012 enacted additional legislation, including *LB 1161*, which largely eviscerated the action of the Legislature's Special Session in 2011.

7.3 Questions of Nebraska State constitutional law are enacted. At issue are matters of significant public importance.

7.4 A proposed crude oil pipeline across Nebraska has commanded the attention of the United States Congress, which included the subject in legislation it addressed and enacted during 2011, the United States Department of State, and the Secretary of State, as the pipeline that is proposed to cross Nebraska would also cross the US-Canada international border, an act requiring consideration by the State Department.

7.5 The proposed pipeline crossing Nebraska requires a permit from the President of the United States to authorize a border crossing of the US-Canada border. Accordingly, the pipeline has commanded the attention of the President of the United States, and it has been, and continues to be, a matter of considerable public debate and substantial public attention across the United States, and particularly in Nebraska.

8. The Plaintiffs are:

Randy Thompson	Mr. Thompson is a citizen, resident, taxpayer, and elector, of Lancaster County, Nebraska. Mr. Thompson pays required state and federal taxes, owns real estate, and is interested in the disbursements of funds from the state treasury, and the adoption and execution of law in accord with constitutional mandates.
Susan Luebbe	Ms. Luebbe is a citizen, resident, taxpayer, and elector, of Holt County, Nebraska. Mrs. Luebbe pays required state and federal taxes, is beneficiary of a trust holding Nebraska real estate, and is interested in the disbursements of funds from the state treasury, and the adoption and execution of law in accord with constitutional mandates.
Susan Dunavan	Ms. Dunavan, a citizen, resident, taxpayer, and elector, of York County, Nebraska. Mrs. Dunavan pays required

	state and federal taxes, owns real estate, and is interested in the disbursements of funds from the state treasury, and the adoption and execution of law in accord with constitutional mandates.
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9. The Defendants are:

Name	Position; Role
Heineman, Dave	Mr. Heineman is the current Governor, Chief Executive of the State with a duty to “take care that the laws be faithfully executed.” ⁷
Linder, Michael	Mr. Linder is the current Director, Nebraska Department of Environmental Quality ⁸ with the powers and duties imposed upon him and his Department. ⁹
Stenberg, Don	Mr. Stenberg is the current State Treasurer. He is responsible to: ¹⁰ (1) To receive and keep all money of the state not expressly required to be received and kept by some other person; (2) To disburse the public money upon warrants drawn upon the state treasury according to law and not otherwise; and, (3) collect, hold, invest, and disburse Nebraska’s tax revenues, including those to be disbursed under <i>LB 1161</i> .

10. Plaintiffs assert the unconstitutionality of *LB 1161* with full awareness that the statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. Plaintiffs understand that 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.¹¹ Plaintiffs contend *LB 1161*’s unconstitutionality is clearly established by its terms and provisions, and its repugnancy to the Constitution’s requirements.

⁷ *Neb Const* Art IV, § 6.

⁸ Created by *Neb Rev Stat* § 81-1502(6) & (7).

⁹ *Neb Rev Stat* § 84-1504 et seq. and provisions of *LB 1161* challenged in this case

¹⁰ *Neb Rev Stat* § 84-602.

¹¹ *Sarpy County Farm Bureau v Learning Community of Douglas & Sarpy Cos.*, 283 Neb 212, 808 NW2d 598

11. *LB 1161* provides for the expenditure of funds for its implementation. The expenditure is for an unlawful purpose, i.e., to fund the operations of *LB 1161*. Plaintiffs, as taxpayers, have standing to challenge *LB 1161* and this expenditure.¹²

LB 1161, Laws (2012)

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

13. *LB 1161 (Laws of Nebraska 102nd Leg 2d Sess)* purports to amend *LB 1*. It does so unconstitutionally. *LB 1161* 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, 102nd Legislature First Special Session 2011*. Summarized for general background, but not to serve as a substitute for *LB 1161*’s terms, these are the provisions of the challenged statute:

LB 1161 §§	Summary
§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>

(2012); *Kiplinger v Nebraska Dept of Nat Resources*, 282 Neb 237, 803 NW2d 28 (2011)

¹² *Project Extra Mile v Nebraska Liq Control Comm’n*, 283 Neb 379, 810 NW2d 149 (2012)

LB 1161 §§	Summary
	Condemnation must commence within two (2) years of approval by the Governor for the PSC.
§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 <i>LB 1161</i> , but there is a reference in § 8 to the Nebraska Department of Environmental Quality.
§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.

LB 1161 §§	Summary
§10	Repealer clause for inconsistent provisions.
§ 11	Emergency Clause. ¹³

Unconstitutionality

14. *LB 1161* is unconstitutional and void. It suffers from individual and distinct constitutional infirmities each of which alone, and all of which collectively, require an adjudication that the Bill, and its pertinent provisions as described below or so much thereof as offends any constitutional guarantee, be declared null and void. The constitutional infirmities of *LB 1161* are:

14.1 **Unlawful Delegation of Authority.** *LB 1161* 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 *LB 1161* §§ 1-7 purport to do so, they are unconstitutional and void.

14.2 **Separation of Powers; Due Process.** *LB 1161* 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

¹³ The slip law copy of *LB1161* may be read at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB1161.pdf>

Governor to approve or to disapprove, or to decline to act upon applications for authority to acquire property and erect crude oil pipelines across Nebraska. Statutes that permit quasi-judicial functions to be exercised by boards but fail to provide for notice of hearing or judicial review are unconstitutional and void.¹⁴ This infirmity is also present for the separate, distinct reason that *LB 1161* fails to provide for judicial review of action of the Public Service Commission.

14.3 Unlawful Delegation of Authority. *LB 1161* constitutes an unlawful delegation of the Legislature's plenary authority over the power of eminent domain.¹⁵ 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.¹⁶ For these reasons, *LB 1161* 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.

14.4 Special Legislation. *LB 1161*, in view of its restrictive provisions and the circumstances under which it was enacted, constitutes special legislation for the benefit of an unconstitutional, substantially closed class of persons contrary to *Neb Const* Art III § 18 and the equal protection guarantee and special legislation prohibitions of the Nebraska Constitution including *Neb Const* Art I § 3. The class closed, and arbitrary classifications made by *LB 1161* substantially closed class membership to crude oil pipelines having sought to

¹⁴ *First Fed Sav & Loan Ass'n v Department of Banking*, 187 Neb 562, 568, 192 NW2d 736, 740 (1971)

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

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

establish trans-Nebraska pipeline routes prior to November 2011, involving activity of the US Department of State, and therefore constituting pipelines that will cross a national border of the United States with a foreign nation. As a matter of fact, there was, and is, only one such organization or company, i.e. TransCanada Pipeline Company which proposes its Keystone XL Pipeline project to pump bitumen, also known as crude oil, extracted through environmentally damaging processes from sandy, tar laden geologic structures commonly referred as “tar sands.”

14.5 Unlawful Expenditure. *LB 1161* 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 *LB 1161*’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 *LB 1161* 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.

14.6 No Standards. *LB 1161* 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 contrary¹⁷ to *Neb Const* Art II, § 1, Art V, § 1, and standards prescribed by the Nebraska Supreme Court. It also fails to require notice prior to action by the Governor or Public Service Commission.¹⁸

¹⁷ *Lincoln Dairy Co. v. Finigan*, 170 Neb 777, 780, 104 NW2d 227, 230 (1960).

¹⁸ *Id.*

15. Plaintiffs have well-established rights not to be damaged and burdened by the execution of an unconstitutional tax statute.¹⁹ There is no adequate remedy at law except for declaratory judgment. Requiring Plaintiffs to institute a legal action for damages imposes undue burdens and results in a net loss to the Plaintiffs in time and expense. It would be unjust to require Plaintiffs to pursue damages rather than to seek a declaration of *LB 1161*'s unconstitutionality to prevent the executive officials of the State of Nebraska from acting upon *LB 1161* which is unconstitutional on its face, and as applied.

16. Permanent injunctive relief against the defendants is sought pursuant to *Neb Rev Stat* § 25-1062 *et seq.*, but no temporary injunction is sought. Permanent injunctive relief is also sought pursuant to 42 *USC* § 1983, a serviceable remedy in state court.²⁰ 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.²¹

17. There is a high probability that Plaintiffs will prevail on the merits. The issues presented are legal issues and their presence is apparent on the face of *LB 1161*. Plaintiffs and the public will be harmed if the statute is permitted to operate while its constitutional infirmities are litigated. This probability of harm is great because a non-Nebraska company purporting to plan to build a transnational pipeline across the United States and Nebraska threatens to invoke *LB 1161* forthwith. It has made a public announcement of a route and dispatched representatives to meet with members of the public who are potentially affected landowners in Keya Paha, Boyd, Holt, Antelope, Boone, Nance, Merrick, York and other Counties in Nebraska.

¹⁹ *Jaksha v State*, 241 Neb 106, 486 NW2d 858 (1992).

²⁰ The state courts have jurisdiction to grant relief under 42 *USC* § 1983. *Bauers v City of Lincoln*, 255 Neb 572, 586 NW2d 452 (1998). The federal courts, however, cannot assume jurisdiction of suits like this one to grant such relief because the Tax Anti-Injunction Act prevents them from doing so. 28 *USC* § 1341; *Fair Assessment in Real Estate Ass'n, Inc., v McNary*, 454 U S 100 (1981).

²¹ "[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).

18. The threat of harm is great and irreparable. If eminent domain is used and land is taken, it is committed to pipeline use and potential remedial cost will be great. Lands with common ownership will be severed by the easements sought; uses and rights to use land will be diminished. The land will be adversely affected on a long-term basis. On the other hand, the harm to Defendants is not great and delay assures that only lawfully enacted statutes are enforced. Defendant Heineman has publicly declared his support for the proposed pipeline even before the company threatening to apply has made any filings in Nebraska.²² He threatens to act to approve a pipeline and allow use of eminent domain if not enjoined.²³ This Court's doctrinal pronouncement concerning the validity or invalidity of *LB 1161* is necessary to deal with the issues raised in this verified Petition. This Court is well positioned to do so with due deliberation and reasonable responsiveness. This Court's action in an original proceeding will avoid the necessity of action at the district court level, which regardless of the outcome, is highly likely to result in an appeal of the district court's decision to this Court for a doctrinal pronouncement.

Attorney's Fees

19. Upon successful resolution of this case, declaring *LB 1161* unconstitutional, Plaintiffs assert that they are entitled to recover, and do request, a reasonable compensation for the services of their lawyers. They invoke *Neb Rev Stat* § 24-204.01 and 42 USC §§ 1983 & 1988, and authorities related thereto, for this purpose. They also respectfully contend the right fees as prevailing parties under the uniform course of practice of law in Nebraska.²⁴ This Court has awarded fees in cases involving the unconstitutionality of statutes.²⁵

²² Official Statement of Governor, http://www.governor.nebraska.gov/news/2012/01/18_pipeline.html

²³ Official Statement of Governor, http://www.governor.nebraska.gov/news/2012/04/17_pipeline.html

²⁴ A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees. *Eikmeier v. City of Omaha*, 280 Neb 173, 783 NW2d 795 (2010).

²⁵ *Hamann v Marsh*, 237 Neb 699, 467 NW2d 836 (1991); *Neb Rev Stat* § 24-204.01.

Requests for Relief

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

20.1 A Declaratory Judgment be rendered that *LB 1161* is unconstitutional and is null and void, and an Injunction be rendered preventing its enforcement.

20.2 A Declaratory Judgment be rendered that *LB 1161* violates *Neb Const* Art I, § 3, Art II §1, Art III § 18, Art IV § 20, Art V § 1, and *US Const* amend XIV, and is unconstitutional and void.


20.3 A permanent injunction preventing enforcement of *LB 1161*.

20.4 Court costs and attorney's fees pursuant to Nebraska's uniform practices, and state law, and provisions of federal law.

20.5 Additional relief the Court finds just, equitable, and proper.

Randy Thompson, Susan Luebbe, and
Susan Dunavan, Plaintiffs

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