



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
TIERONE FAX (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

KATHERINE J. SPOHN
SPECIAL COUNSEL TO THE
ATTORNEY GENERAL

August 15, 2012

Lancaster County District Court
Judge Stephanie F. Stacy
c/o Kim Folsom, Bailiff
575 S 10th St, 3rd Floor
Lincoln, Nebraska 68508

ECOPY

RE: *Randy Thompson, et al. v. Dave Heineman, et al.*
Case No. CI 12-2060

Dear Ms. Folsom:

Enclosed is the following document for filing in the above referenced case.

1. Brief in Support of Defendants' Motion to Dismiss

Please contact the undersigned if you have any questions regarding this matter. Thank you.

Sincerely,

JON BRUNING
Attorney General

Katherine J. Spohn
Special Counsel to the Attorney General

Enclosure
cc: David Domina

This is a COPY
Original filed by the
DISTRICT COURT CLERK
of Lancaster County, NE
on 08/15/12

TABLE OF CONTENTS

BACKGROUND 1

STANDARD OF REVIEW 6

ARGUMENT 6

I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE FOR REVIEW 7

A. PLAINTIFFS FAIL TO ESTABLISH STANDING AS TAXPAYERS ... 7

B. PLAINTIFFS’ CLAIMS ARE NOT RIPE FOR REVIEW 9

II. PLAINTIFFS’ COMPLAINT FAILS TO STATE A CLAIM FOR WHICH THIS COURT CAN GRANT RELIEF 12

A. LB1161 DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF AUTHORITY 13

1. The Public Service Commission’s Jurisdiction Over Common Carriers Is Subject to Legislative Demarcation 13

2. Pipeline Carriers Subject to LB 1161 Are Not Intrastate Common Carriers 15

3. LB 1161 Does not Wrongfully Assign the Duty to Delegate the Power of Eminent Domain..... 17

4. LB 1161 Properly Authorizes the Governor to Carry Out the Complete Operation of the Law 18

B. LB 1161 DOES NOT GIVE RISE TO DUE PROCESS CONCERNS .20

1. Nebraska Law Provides Notice to Affected Parties 21

2. Actions Taken by the Governor or PSC Pursuant to LB 1161 Do Not Result in a Deprivation of Property 21

C. LB 1161 DOES NOT GIVE RISE TO SEPARATION OF POWERS CONCERNS 24

D. LB 1161 DOES NOT CREATE A PERMANENTLY CLOSED CLASS IN VIOLATION OF THE NEBRASKA CONSTITUTION .26

**E. LB1161 DOES NOT VIOLATE THE EQUAL PROTECTION
CLAUSE27**

CONCLUSION28

TABLE OF AUTHORITIES

Cases

<i>Abbott Labs v. Gardner</i> , 387 U.S. 136, 87 S.Ct. 1507 (1967).....	10
<i>Anderson v. Wells Fargo Financial Acceptance Pennsylvania, Inc.</i> , 269 Neb. 595, N.W.2d 625, (2005).....	6, 27
<i>Ashcroft v. Iqbal</i> , 129 S.Ct. 1937 (2009).....	6, 27
<i>Bamford v. Upper Republican Nat. Resources Dist.</i> , 245 Neb. 299, N.W.2d 642 (1994).....	19
<i>Burger v. City of Beatrice</i> , 181 Neb. 213, N.W.2d 784 (1967).....	23
<i>Burlington Northern Santa Fe Ry. Co. v. Chaulk</i> , 262 Neb. 235, N.W.2d 131 (2001).....	17, 22
<i>Burnett v. Central Nebraska Public Power & Irrigation Dist.</i> , 147 Neb. 458, 23 N.W.2d 661 (1946).....	17, 22
<i>Califano v. Sander</i> , 430 U.S. 99, 97 S.Ct. 980 (1977).....	10
<i>Chambers v. Lautenbaugh</i> , 263 Neb. 920, N.W.2d 540 (2002).....	7
<i>Chicago & N. W. Ry. Co. v. County Board of Dodge County</i> , 148 Neb. 648, 28 N.W.2d 396, (1947).....	14
<i>Citizens Opposing Indus. Livestock v. Jefferson Cty.</i> , 274 Neb. 386, N.W. 2d 362 (2007).....	7
<i>City of Omaha v. City of Elkhorn</i> , 276 Neb. 70, 752 N.W.2d 137 (2008).....	9
<i>Daniels v. Williams</i> , 474 U.S. 327, 106 S. Ct. 662 (1986).....	22

<i>Gourley v. Neb. Methodist Health Sys.,</i> 265 Neb. 918, 663 N.W.2d 43 (2003).....	26
<i>Gramercy Hill Enterprises v. State,</i> 255 Neb. 717, 587 N.W.2d 378 (1998).....	27
<i>Hall v. Cox Cable of Omaha, Inc.,</i> 212 Neb. 887, 327 N.W.2d 595 (1982).....	8
<i>Haman v. Marsh,</i> 237 Neb. 699, 467 N.W.2d 836 (1991).....	26
<i>In re Petition of Nebraska Community Corrections Council,</i> 274 Neb. 225, 738 N.W.2d 850 (2007).....	23
<i>Keating v. Neb. Public Power Dist.,</i> 562 F.3d 923 (8th Cir. 2009).....	21-22
<i>Parratt v. Taylor,</i> 451 U.S. 527, 101 S. Ct. 1908 (1981).....	22
<i>Klinger v. Department of Corrections,</i> 31 F.3d 727 (8th Cir.1994)	28
<i>Klinger v. Department of Corrections,</i> 513 U.S. 1185, 115 S.Ct. 1177 (1995).....	28
<i>Krambeck v. City of Gretna,</i> 198 Neb. 608, 254 N.W.2d 691 (1977).....	23
<i>Lincoln Dairy Co. v. Finigan,</i> 170 Neb. 777, 104 N.W.2d 227 (1960).....	19
<i>Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration,</i> 113 U.S. 33, 5 S. Ct. 352 (1885).....	12
<i>Mississippi & Rum River Boom Co. v. Patterson,</i> 98 U.S. 403 (1878).....	18
<i>Myers v. Neb. Inv. Council,</i> 272 Neb. 669, 724 N.W.2d 776 (2006).....	8

<i>Nebraska PSC v. Nebraska Pub. Power Dist.</i> , 256 Neb. 479, 590 N.W.2d 840 (1999).....	17
<i>Nebraska Pub. Power Dist. v. MidAmerican Energy Co.</i> , 234 F.3d 1032 (8th Cir. 2000).....	10
<i>O'Shea v. Littleton</i> , 414 U.S. 488, 94 S.Ct. 669 (1974).....	11
<i>Ohio Forestry Ass'n v. Sierra Club</i> , 523 U.S. 726, 118 S.Ct. 1665 (1998).....	11
<i>Parkert v. Lindquist</i> , 269 Neb. 394, 693 N.W.2d 529 (2005).....	6
<i>Ponderosa Ridge LLC v. Banner County</i> , 250 Neb. 944, 554 N.W.2d 151 (1996).....	18
<i>Power Oil Co. v. Cochran</i> , 138 Neb. 827, 295 N.W. 805 (1940).....	25
<i>Project Extra Mile v. Nebraska Liquor Control Comm'n</i> , 283 Neb. 379, 810 N.W. 2d 149 (2012).....	8
<i>Public Water Supply District No. 10 of Cass County, Missouri v. City of Peculiar, Missouri</i> , 345 F.3d 570 (8th Cir. 2003).....	10
<i>Reed v. State</i> , 278 Neb. 564, 773 N.W. 2d 349 (2009).....	8
<i>Scott v. State</i> , 196 Neb. 681, 244 N.W.2d 683 (1976).....	25
<i>Smith v. City of Papillion</i> , 270 Neb. 607, 705 N.W. 2d 584 (2005).....	7
<i>Spear T Ranch v. Knaub</i> , 269 Neb. 177, 691 N.W.2d 116 (2005).....	6
<i>State ex rel Douglas v. Nebraska Mortgage Finance Fund</i> , 204 Neb. 445, 283 N.W.2d 12 (1979).....	19

<i>State ex rel. Spire v. Northwestern Bell Tel. Co.</i> , 233 Neb. 262, 445 N.W.2d 284 (1989).....	14-15
<i>State of Ga. v. City of Chattanooga</i> , 264 U.S. 472, 44 S.Ct. 369 (1924).....	18
<i>State v. Atkins</i> , 250 Neb. 315, 549 N.W.2d 159 (1996).....	28
<i>Swanson v. State Dep't of Educ.</i> , 249 Neb. 466, 544 N.W.2d 333 (1996).....	26
<i>Texas v. United States</i> , 523 U.S. 296, 18 S.Ct. 1257 (1998).....	10
<i>Thomas v. Union Carbide Agricultural Products Co.</i> , 473 U.S. 568, 105 S.Ct. 3325 (1985).....	10
<i>United States v. Raines</i> , 362 U.S. 17, 80 S.Ct. 519 (1960).....	12
<i>United States v. Salerno</i> , 481 U.S. 739, 107 S. Ct. 2095 (1987).....	12
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442, 128 S.Ct. 1184 (2008).....	12

Statutes

Neb. Rev. Stat. §57-1101	17, 22-23
Neb. Rev. Stat. §57-1402	27
Neb. Rev. Stat. §57-1404	16, 26
Neb. Rev. Stat. §57-1405	21
Neb. Rev. Stat. §57-1407	14
Neb. Rev. Stat. §57-1409	25
Neb. Rev. Stat. §57-1501 <i>et al.</i>	17

Neb. Rev. Stat. § 57-1502	16, 26
Neb. Rev. Stat. §57-1503	9, 15-16, 19, 21-22
Neb. Rev. Stat. §75-501	15-16
Neb. Rev. Stat. §75-503	15
Neb. Rev. Stat. §76-704 to 76-724.....	23, 25
Neb. Rev. Stat. § 76-720	23
Other Authorities	
40 C.F.R. § 1506 <i>et al.</i>	21
LB 1, 102nd Leg., 1st Spec. Sess. (Neb. 2011)	1
LB 4, 102nd Leg., 1st Spec. Sess. (Neb. 2011)	4
LB 1161, 102 nd Leg., Second Session (Neb. 2012).....	1, 4-9, 11-28
Neb. Const. Art I.....	20, 23-24, 27
Neb. Const. Art II.....	18, 20
Neb. Const. Art. III	25-26
Neb. Const. Art. IV	13-14, 17
Neb. Const. Art V	18, 20
Neb. Ct. R. Pldg. § 6-1112.....	1, 6-7, 9, 12-13, 18, 20-21, 24, 27-28
TransCanada Keystone XL Pipeline Project, <i>Initial Report Identifying Alternative and Preferred Corridors for Nebraska Reroute</i> , https://ecmp.nebraska.gov/deq-seis/ (Submitted April 18, 2012)	11
<i>Overview of Design, Construction, and Operation of Interstate Liquid Petroleum Pipelines</i> , U.S. Department of Energy (Nov. 2007)	15

Plaintiffs Randy Thompson, Susan Luebbe, and Susan Dunavan (“Plaintiffs”) brought suit challenging the constitutionality of LB 1161, 102nd Leg., Second Session (Neb. 2012) (“LB 1161”). The Defendants named in this action: the Governor of the State of Nebraska, Director of the Nebraska Department of Environmental Quality, and the Treasurer for the State of Nebraska (collectively “the State”) are being sued in their official capacities. The State now files this Brief in Support of their Motion to Dismiss with the Court. For the reasons set forth herein, the Court should grant the State’s Motion to Dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112 because the Court lacks jurisdiction to hear Plaintiffs’ claims and Plaintiffs have failed to state a claim upon which relief can be granted.

BACKGROUND

In their Complaint, Plaintiffs challenge LB 1161, a bill which amends laws adopted on November 22, 2011 in a special legislative session called by the Governor to consider legislation relating to oil pipelines. To aid the Court in understanding the arguments put forth by Plaintiffs and the State, a brief summary of the laws adopted both in the Fall 2011 Special Session and LB 1161 is provided below.

LB 1, 102nd Leg., 1st Spec. Sess. (Neb. 2011)

The first bill adopted in the Fall 2011 special session was LB 1, 102nd Leg., 1st Spec. Sess. (Neb. 2011), entitled the Major Oil Pipeline Siting Act, (“MOPSA”), which regulates the proposed routing and construction of oil pipelines with diameters greater than six inches in Nebraska.

Under MOPSA, a pipeline carrier proposing to construct an oil pipeline or make a substantial change to the route of an existing oil pipeline must receive approval from the Nebraska Public Service Commission (“PSC”). LB 1 §6, 102nd Leg., 1st Spec. Sess. (Neb.

2011). The delegation of eminent domain authority to the pipeline carrier is dependent on application approval by the PSC. *Id.* at §1. MOPSA applies to oil pipelines larger than six inches in diameter, but does not include in-field and gathering lines. *Id.* at §5. The application must contain:

- (a) The name and address of the pipeline carrier;
- (b) A description of the nature and proposed route of the major oil pipeline and evidence of consideration of alternative routes;
- (c) A statement of the reasons for the selection of the proposed route of the major oil pipeline;
- (d) A list of the governing bodies of the counties and municipalities through which the proposed route of the major oil pipeline would be located;
- (e) A description of the product or material to be transported through the major oil pipeline;
- (f) The person who will own the major oil pipeline;
- (g) The person who will manage the major oil pipeline;
- (h) A plan to comply with the Oil Pipeline Reclamation Act; and
- (i) A list of planned methods to minimize or mitigate the potential impacts of the major oil pipeline to land areas and connected natural resources other than with respect to oil spills.

Id. at §6. Further, the applicant must publish notice of the application in at least one newspaper of general circulation in each county where the pipeline is to be constructed and serve notice to the governing bodies of those counties and municipalities. *Id.*

The Act provides that the PSC shall assess expenses attributable to the investigation and hearing regarding the application to the applicant and shall bill the pipeline carrier when the order is issued or from time to time during the application process. *Id.* at §7. The applicant must pay or object to that assessment within 15 days. *Id.*

After receipt of the application, the PSC must schedule a hearing and publish notice of the hearing. *Id.* at §8. In addition, the PSC may hold additional public meetings at locations near the proposed route. *Id.* The PSC shall also serve notice on the governing bodies of the counties and municipalities where the proposed route is located. *Id.* at §8. Prior to the hearing,

the following agencies shall file a report with the commission in their area of expertise: Department of Environmental Quality, Department of Natural Resources, Department of Revenue, Department of Roads, Game and Parks Commission, Nebraska Oil and Gas Conservation Commission, Nebraska State Historical Society, State Fire Marshal, and Board of Educational Lands and Funds. *Id.* at §8(3).

An application under MOPSA must be granted by the PSC if it determines the pipeline is in the public interest. *Id.* at §8(4). The pipeline carrier has the burden to establish the pipeline is in the public interest. *Id.* The PSC must evaluate:

- (a) Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances;
- (b) Evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources;
- (c) Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources;
- (d) Evidence regarding the economic and social impacts of the major oil pipeline;
- (e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline;
- (f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;
- (g) The reports of the agencies filed pursuant to subsection (3) of this section; and
- (h) The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.

Id.

Within seven (7) months, the PSC shall issue an order granting or denying the application and include the findings of the PSC. *Id.* at §9. The order approving the application shall state that the application is in the public interest and shall authorize the pipeline carrier to act under the eminent domain statute. *Id.* If the application is denied the pipeline carrier may reapply within sixty days. *Id.* at §9(4). Within sixty days after the receipt of the amended application the

PSC shall enter an order and make a new finding. *Id.* Any party aggrieved by the decision of the PSC on the application may appeal pursuant to the Administrative Procedure Act. *Id.* at §10.

LB 4, 102nd Leg., 1st Spec. Sess. (Neb. 2011)

During its 2011 Special Session, the Nebraska Legislature also adopted LB 4, 102nd Leg., 1st Spec. Sess. (Neb. 2011), which authorized the Nebraska Department of Environmental Quality (“NDEQ”) to collaborate with the federal government in the preparation of a supplemental environmental impact statement (“SEIS”) under the National Environmental Policy Act (“NEPA”) when reviewing proposed oil pipelines larger than eight inches in diameter, excluding in-field and gathering lines. LB 4 at §§2(2), 3(1). Prior to entering into such shared jurisdiction, NDEQ was required to enter into a memorandum of understanding with the federal agency that sets forth each agency’s responsibilities. *Id.* at §3(1). Finally, NDEQ was required to submit the completed evaluation to the Governor. *Id.* at §3(4). Within 30 days of receipt of the evaluation, the Governor was to indicate to the federal agency whether he or she approves of any of the routes reviewed by NDEQ. *Id.*

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

On April 17, 2012, the Nebraska Legislature adopted LB 1161, 102nd Leg., 2nd Sess. (Neb. 2012), which amended certain provisions of both LB 1 and LB 4. The amendments in LB 1161 were necessary

to clarify the law a pipeline carrier is to follow depending on the date an application is made for a Presidential Permit from the State Department... [and to provide] a process that would authorize the Department of Environmental Quality to conduct an environmental impact study of a pipeline route going through Nebraska to be used for a federal permit application when there is no federal permit application pending.

Committee Records on LB 1161, 102nd Neb. Leg., 2nd Sess. (February 16, 2012)(Committee Statement).

In particular, if a pipeline carrier proposes to construct or make a substantive change to the route of a major oil pipeline, LB 1161 authorizes NDEQ to study, in collaboration with a federal entity, the environmental impact of the pipeline route, and to conduct a study, similar to a NEPA review, of the environmental impact of the pipeline route even when no federal permit application is pending. *Id.* at §7. “Any such evaluation shall include at least one public hearing, provide opportunities for public review and comment, and include, but not be limited to, an analysis of the environmental, economic, social, and other impacts associated with the proposed route and route alternatives in Nebraska. . . .” *Id.* at §7. LB 1161 also revised the language of LB 4 by making permissive the previously mandatory requirement for NDEQ to enter into a memorandum of understanding with a federal entity for purposes of the study. *Id.* at §7(1).

After the study or SEIS is completed, NDEQ must submit it to the Governor. *Id.* at §7(4). The Governor has 30 days to indicate his approval of the route or to notify the pipeline carrier that he or she does not approve. *Id.* Upon approval of its route by the Governor, LB 1161 authorizes a pipeline carrier to utilize eminent domain without requiring an order from the PSC under MOPSA. *Id.* at §1. If a pipeline carrier’s route is not approved by the Governor, the pipeline carrier must file an application with the PSC, and receive approval under MOPSA, prior to commencing construction. *Id.* at §6.

Finally, Section 8 of LB 1161 appropriated \$2 million from the NDEQ Cash Fund for purposes of funding the studies contemplated under Section 7. *Id.* at §8. However, such appropriation is temporary as any expenditure by NDEQ for purposes of accomplishing the study or SEIS are reimbursed by the pipeline carrier. *Id.* at §7(1)(b).

STANDARD OF REVIEW

The State moves to dismiss this case in its entirety for lack of subject matter jurisdiction pursuant to Neb. Ct. R. Pldg. §6-1112(b)(1) and for failure to state a claim pursuant to Neb. Ct. R. Pldg. §6-1112(b)(6). When a motion to dismiss is brought under both Rules 12(b)(1) and (6) of the Nebraska Court Rules of Pleading in Civil Actions, “the court should consider the rule 12(b)(1) challenge first. If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider the Rule 12(b)(6) grounds. In the context under discussion, the court should consider the rule 12(b)(6) grounds only after it has determined that it has subject matter jurisdiction.” *Anderson v. Wells Fargo Financial Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 601, 694 N.W.2d 625, 630 (Neb. 2005).

When considering a motion to dismiss, “[c]omplaints should be liberally construed in the plaintiff’s favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief.” *Parkert v. Lindquist*, 269 Neb. 394, 396, 693 N.W.2d 529, 531 (2005); *Spear T Ranch v. Knaub*, 269 Neb. 177, 182, 691 N.W.2d 116, 125 (2005). However, “complaints must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *Anderson v. Wells Fargo Financial Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 603, 694 N.W.2d 625, 632 (2005). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

ARGUMENT

Plaintiffs have brought a facial challenge to LB 1161 comprised of a litany of claims aimed at the lawfulness of LB 1161 including the constitutionality of the law on separation of

powers, due process, and equal protection grounds; and characterizing the law as “special legislation.” In each instance, Plaintiff’s claims fall short of meeting the jurisdictional prerequisites of this Court. For the reasons set forth below, the State asks that the Court recognize these infirmities and grant the State’s Motion to Dismiss.

I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE FOR REVIEW.

As an initial matter, the Court does not have jurisdiction to hear Plaintiffs claims because Plaintiffs have not successfully established standing as taxpayers to challenge LB 1161. Furthermore, Plaintiffs’ claims are not ripe for judicial review. Accordingly, the Court should dismiss Plaintiffs’ claims under to Neb. Ct. R. Pldg. §6-1112(b)(1).

A. PLAINTIFFS FAIL TO ESTABLISH STANDING AS TAXPAYERS.

As an initial matter, Plaintiffs fail to allege any specific injury to themselves personally, but instead seek to bring their claims as taxpayers. As articulated below, Plaintiffs’ claims should be dismissed pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) because Plaintiffs have failed to show that they have standing as taxpayers to bring a facial challenge to LB 1161.

“The defect of standing is a defect of subject matter jurisdiction.” *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W. 2d 362 (2007). Thus, Neb. Ct. R. Pldg. § 6-1112(b)(1) is the proper statutory provision under which the Court should assess Plaintiffs’ standing to challenge LB 1161. “Standing is fundamental to a court’s exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.” *Smith v. City of Papillion*, 270 Neb. 607, 612, 705 N.W. 2d 584, 590 (2005). Only a party who has standing may invoke the jurisdiction of a court. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). Stated otherwise, “one

must have some legal interest in the outcome of the litigation in order to maintain suit.” *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 898, 327 N.W.2d 595, 602 (1982).

Plaintiffs’ assert standing as resident taxpayers to prevent unlawful expenditures of State funds. Complaint at 2, 13.5. Specifically, Plaintiffs’ assert that LB 1161’s allocation of \$2 million to NDEQ for implementation purposes is unlawful. Complaint at 10. It is true that “[t]axpayer litigants have an equitable interest in public funds and can maintain an action to prevent their unauthorized appropriation.” *Myers v. Neb. Inv. Council*, 272 Neb. 669, 681, 724 N.W.2d 776, 791 (2006). “A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.” *Id.*

However, the Court should not recognize the taxpayer exception to common-law standing requirements as applicable to the case at hand because Plaintiffs’ allegations regarding the unlawfulness of LB 1161 are insufficient to show an illegal expenditure of public funds. See, *Reed v. State*, 278 Neb. 564, 773 N.W. 2d 349 (2009). “[A] taxpayer’s interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing obedience to the law.” *Project Extra Mile v. Nebraska Liquor Control Comm’n*, 283 Neb. 379, 390, 810 N.W. 2d 149, 160 (2012). Plaintiff’s allegations, which show that they have only a general interest common to all members of the public, are insufficient to establish standing to invoke this Court’s jurisdiction.

The State of Nebraska generally utilizes two different types of funds for appropriating and accounting for revenue sources: the General Fund and the Cash Fund. The General Fund is used to account for all receipts not directed by statute to be credited to another fund. Importantly, General Fund revenues are those derived from, among other sources, individual

income taxes. The Cash Fund is used to account for revenues and expenditures of dedicated fees and charges. The monies in a Cash Fund can only be used for the specific purpose for which the fund was created. Importantly, Cash Fund revenues are those derived from inspection, regulatory, and license fees and charges, not from taxes.

LB 1161 provides for the appropriation of monies from the NDEQ Cash Fund and therefore does not provide for the expenditure of general taxing revenues. LB 1161, §8. As Plaintiffs have not alleged how they, as taxpayers, have contributed to this Cash Fund, Plaintiffs lack taxpayer standing.

Furthermore, LB 1161's allocation of monies from this NDEQ Cash Fund is not an "expenditure" of public funds because the statute requires that the pipeline carrier "shall reimburse the department for the cost of the evaluation or review . . ." and any reimbursement shall be remitted to the Department of Environmental Quality Cash Fund. Neb. Rev. Stat. §57-1503(1)(b). Since the costs of the evaluation or review are paid with private dollars, LB 1161 does not affect a permanent expenditure of public funds. For the foregoing reasons, Plaintiffs lack standing to challenge LB 1161 and the Court should dismiss Plaintiffs' Complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1).

B. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW.

In the event that the Court determines that one or more of the Plaintiffs have established standing to facially challenge LB 1161, the Complaint should nevertheless be dismissed because Plaintiffs' claims are not ripe for review. The ripeness doctrine flows from both the limits of Article III of the United States Constitution and on discretionary reasons of policy. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 80, 752 N.W.2d 137, 145 (2008). "The 'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling

themselves in abstract disagreements” or from rendering advisory opinions. *Public Water Supply District No. 10 of Cass County, Missouri v. City of Peculiar, Missouri*, 345 F.3d 570, 573 (8th Cir. 2003) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507 (1967) (overruled on other grounds by *Califano v. Sander*, 430 U.S. 99, 105, 97 S.Ct. 980 (1977))).

“A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 1259 (1998)(quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-581, 105 S.Ct. 3325, 3333 (1985)). “The ripeness inquiry requires the examination of both the ‘fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *City of Elkhorn*, 276 Neb. at 80, 752 N.W.2d at 145 (quoting *Abbott Labs*, 387 U.S. at 149, 87 S.Ct. at 1515. In order to obtain judicial relief, the party bringing the suit must satisfy both prongs to at least a minimal degree. *City of Elkhorn*, 276 Neb. at 80, 752 N.W.2d at 146.

The “fitness for judicial decision” prong considers the ability of the courts to evaluate a particular issue and asks whether the decision of the case would benefit from additional development of the facts of the case. *Id.*, 752 N.W.2d at 145. This prong “safeguards against judicial review of hypothetical or speculative disagreement. . . .” *Id.* (quoting *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000)).

Plaintiffs’ Complaint fails to level claims against any particular pipeline project or action taken by the State impacting Plaintiffs’. Rather, Plaintiffs’ allegations are limited to references to “a non-Nebraska company *purporting* to plan to build a transnational pipeline across the United States and Nebraska.” Complaint at 16 (emphasis added).

Further, Plaintiffs' claims are contingent on future actions by the Governor, NDEQ, and the PSC and are therefore not fit for judicial decision. NDEQ has only just begun the supplemental environmental impact statement process on the sole pipeline project under consideration at this time in the state and has submitted no advisory opinion and report to the Governor for review. Until the process occurs as detailed in LB 1161, this Court should avoid a premature adjudication based on Plaintiffs' alleged hypothetical future event.

The second prong to the ripeness standard requires that the plaintiff sustain or be "immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675 (1974). Here, withholding or delaying judicial review would not result in any hardship for Plaintiffs because no pipeline route has been approved.

As to the sole pipeline project currently being considered under LB 1161, NDEQ is considering nine different "proposed corridors" as part of the SEIS. TransCanada Keystone XL Pipeline Project, *Initial Report Identifying Alternative and Preferred Corridors for Nebraska Reroute*, <https://ecmp.nebraska.gov/deq-seis/> (Submitted April 18, 2012). Until a route is approved, Plaintiffs are not in danger of sustaining any injury resulting from a pipeline project under LB 1161 and therefore fail to satisfy the "hardship" prong of ripeness to even a minimal degree. Once a pipeline route is finalized, if Plaintiffs' concerns are not addressed, Plaintiffs "will have ample opportunity to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734, 118 S.Ct. 1665, 1670 (1998). Accordingly, the State asks the Court to dismiss Plaintiffs' facial attack on LB 1161 because the challenge does not meet the requirements for an Article III "case or controversy" making it inappropriate for judicial review at this time.

II. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR WHICH THIS COURT CAN GRANT RELIEF.

Should the Court determine that subject matter jurisdiction lies to hear Plaintiffs' claims, Plaintiffs' Complaint should nonetheless be dismissed pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief may be granted.

As noted, Plaintiffs challenge to LB 1161 is a facial challenge to the constitutionality of the statute because the Plaintiff's do not challenge a particular application of the statute but rather the language and operation of the statute in and of itself.

In determining whether a law is facially invalid this Court must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. *See United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519 (1960). Facial challenges are disfavored for several reasons. "Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 1191 (2008). "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S. Ct. 352 (1885)). "Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*, at 451.

A party challenging the facial validity of a statute must demonstrate that no set of circumstances exists under which the statute would be valid. *United States v. Salerno*, 481 U.S.

739, 745, 107 S. Ct. 2095, 2100 (1987). Here, Plaintiffs cannot demonstrate that LB 1161 is facially unconstitutional.

A. LB 1161 DOES NOT CONSTITUTE AN UNLAWFUL DELEGATION OF AUTHORITY.

LB 1161 does not constitute an unlawful delegation of authority because the PSC's jurisdiction over common carriers is subject to legislative demarcation and pipeline carriers subject to LB 1161 are not intrastate common carriers. Each will be analyzed in turn.

1. The Public Service Commission's Jurisdiction Over Common Carriers Is Subject To Legislative Demarcation.

Plaintiffs' argue that LB 1161 constitutes an unlawful delegation of PSC authority over common carriers to the Governor. Complaint at 3.1. The Court should dismiss the Plaintiff's "unlawful delegation" claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) because nothing within the language of Neb. Const. Art. IV, §20 vests exclusive jurisdiction over common carriers with the PSC. The Nebraska Constitution provides in relevant part:

The powers and duties of [the PSC] 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.

Neb. Const. Art. IV, § 20 (emphasis added).

Plaintiffs misinterpret this provision as limiting the authority of the Legislature, when in fact, the opposite is true: the PSC has plenary jurisdiction over common carriers unless restricted by the Legislature through specific legislation. The Nebraska Legislature has given further meaning to this general grant of PSC authority through various statutory enactments including LB 1161. "Although the [PSC] is an independent regulatory body under the Nebraska Constitution, PSC jurisdiction to regulate common carriers may be restricted by the Legislature

through ‘specific legislation.’” *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 276, 445 N.W.2d 284, 293 (1989).

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

State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 275, 445 N.W.2d 284, 293 (1989)(quoting *Chicago & N. W. Ry. Co. v. County Board of Dodge County*, 148 Neb. 648, 653, 28 N.W.2d 396, 400 (1947)). While the Legislature “cannot totally divest the PSC of jurisdiction over a class of common carriers,” it can “specifically and preemptively exclude the PSC from some control over a class of common carriers’ . . .” *Id.* at 277, 445 N.W.2d at 294 (emphasis added).

Assuming *arguendo* that pipeline carriers subject to LB 1161 are a class of common carriers, LB 1161 does not totally divest the PSC of its constitutionally-granted jurisdiction over these common carriers. Rather, LB 1161 specifically and preemptively excludes the PSC from some control over interstate pipelines carriers, namely the NDEQ evaluation and siting determinations made based on the NDEQ evaluation. Further, LB 1161’s NDEQ evaluation falls outside of the PSC’s constitutional authority to regulate “rates, service and general control of common carriers. . .” Neb. Const. Art. IV, § 20. The Legislature, through specific legislation, has excluded this environmental evaluation of pipeline carriers from PSC control, but has not totally divested the PSC of its jurisdiction.

Under LB 1161, after receiving an application under MOPSA, the PSC continues to have the authority to review the application, conduct an investigation and hearing, and make a determination of whether or not the pipeline is in the public interest. Neb. Rev. Stat. §57-1407.

Additionally, the changes to Neb. Rev. Stat. §57-1503 by LB 1161 allow NDEQ to collaborate with the PSC on the supplemental environmental impact statement process. The PSC also retains jurisdiction under LB 1161, to review routes not approved by the Governor following the review process in Neb. Rev. Stat. §57-1503.

Further, nothing in LB 1161 precludes the PSC from regulating intrastate common carrier pipelines. Neb. Rev. Stat. §75-501 to §75-503 (Reissue 2009). Thus, LB 1161 has not totally divested the PSC of jurisdiction over a class of common carriers, but instead constitutes specific legislation “prescribing the method and manner in which the PSC will exercise its regulatory activities” concerning the route of interstate oil pipelines. *Spire*, 233 Neb. at 279, 445 N.W.2d at 295.

2. Pipeline Carriers Subject to LB 1161 Are Not Intrastate Common Carriers.

Plaintiffs’ unlawful delegation claim further fails because pipeline carriers under LB 1161 are not intrastate common carriers. Regarding pipelines subject to PSC jurisdiction, the Legislature has defined common carriers as “[a]ny person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska *intrastate* commerce . . .” Neb. Rev. Stat. §75-501 (Reissue 2009) (emphasis added). The operative term in this definition being intrastate.

The pipelines subject to regulation under LB 1161 are not pipelines that operate in intrastate commerce. The network of crude oil pipelines in the U.S. can generally be divided into three categories: (1) transmission lines (usually 25 inches in diameter and larger), (2) trunk lines (usually 8 to 24 inches in diameter) that connect regional markets, and (3) gathering lines (usually 2 to 6 inches in diameter) that gather the oil from the wells. *Overview of Design, Construction, and Operation of Interstate Liquid Petroleum Pipelines*, U.S. Department of Energy (Nov. 2007).

The provisions of LB 1161 establish processes for route application and review of oil pipelines larger than eight inches in diameter but do not include “in-field and gathering lines.” Neb. Rev. Stat. §§57-1404 and 57-1502. Pipelines that are larger than eight inches in diameter and thus subject to regulation under LB 1161 are generally categorized as trunk lines that connect regional markets, i.e. those that operate in *interstate* commerce. Thus, these pipelines fall outside the Legislature’s definition of common carrier pipelines subject to PSC jurisdiction.

That pipelines regulated by LB 1161 are not intrastate common carriers, is further supported by the Legislature’s delineation of three different types of pipeline carriers in Neb. Rev. Stat. §75-502: (1) pipeline carriers which are declared common carriers under section 75-501; (2) pipeline carriers approved under MOPSA; and (3) pipeline carriers for which the Governor approves a route under Neb. Rev. Stat. § 57-1503. Because the Legislature distinguished common carrier pipelines from those approved under MOPSA and by the Governor, it can be presumed that MOPSA- and Governor-approved pipelines are not intrastate common carriers.

This does not mean that that Legislature cannot subject pipeline carriers that are not intrastate common carriers to PSC regulation, but simply that the PSC’s authority is not constitutionally mandated. Because pipeline carriers subject to LB 1161 are not operating in intrastate commerce, and therefore not intrastate common carriers, the authority of the PSC in the instant case must spring from legislative enactment, and nothing else. LB 1161 precisely delineates the powers of the Governor, NDEQ, and the PSC with regard to pipeline regulation. LB 1161 does not grant general, unfettered authority over pipelines to any particular governmental entity; rather, LB 1161 specifies the regulatory duties and obligations possessed by each entity. “When the Legislature grants the PSC jurisdiction over non-common carriers, the

PSC must exercise such authority completely within the statutory scheme.” *Nebraska PSC v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 491, 590 N.W.2d 840, 848 (1999). Since pipeline carriers under LB 1161 are not intrastate common carriers, there has been no unlawful delegation of authority over pipeline carriers contrary to Neb. Const. Art IV, §20.

3. LB 1161 Does Not Wrongfully Assign the Duty to Delegate the Power of Eminent Domain.

Plaintiffs allege the Legislature has wrongfully assigned the duty to delegate the power of eminent domain by “empowering the Governor to decide what company shall be approved to build a pipeline and use the power of eminent domain to acquire real property rights for a pipeline route in and across Nebraska”. Complaint at 13.3. For the reasons set forth below, LB 1161 lawfully assigns the authority to delegate the power of eminent domain. Thus, Plaintiffs’ claims must fail.

“The Legislature has the right to delegate [the power of eminent domain] and to restrict or limit the extent of its use.” *Burnett v. Central Nebraska Public Power & Irrigation Dist.*, 147 Neb. 458, 460, 23 N.W.2d 661, 666 (1946). See also, *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). The Legislature has granted the power of eminent domain to any pipeline carrier for the purpose of acquiring property reasonably necessary for the laying, relaying, operation, and maintenance of any pipeline. See, Neb. Rev. Stat. §57-1101. However, the Legislature has conditioned the availability of the power of eminent domain by requiring that major oil pipelines first comply with either MOPSA or §57-1501 *et al.* before such power is vested. *Id.*

The Legislature’s power to attach such conditions to a pipeline carrier’s eminent domain authority is rooted in the state’s inherent power as a sovereign to exercise the right of eminent domain in the first place. “The right of eminent domain, that is, the right to take private property

for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.” *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). “[P]roperty may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.” *Id.* Indeed, the power of a state to exercise or delegate the right of eminent domain is absolute within the state’s jurisdiction; it is superior to all rights in property and extends to all property within a state. *State of Ga. v. City of Chattanooga*, 264 U.S. 472, 480, 44 S.Ct. 369, 370 (1924).

Just as the Legislature has the power to grant the right of eminent domain to a private corporation – here, a pipeline carrier – so may it take away that right or place restrictions on its use. Thus, LB 1161’s conditioning of eminent domain rights on the conferral of a PSC order or Governor approval is consistent with the Legislature’s power to regulate eminent domain. For these reasons, LB 1161 does not violate the doctrine of separation of powers, or the unlawful delegation of authority provisions in Neb. Const. Art II, §1 and Art V, §1.

4. LB 1161 Properly Authorizes the Governor to Carry Out the Complete Operation of the Law.

Plaintiffs’ assert that LB 1161 constitutes an unlawful delegation of authority for its failure to prescribe standards by which the law is to be implemented. Complaint at 13.6. LB 1161 provides the Governor with reasonable limitations and standards by which the law is to be executed. Therefore, the Court should dismiss the Plaintiffs’ claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6).

“The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations.” *Ponderosa Ridge LLC v.*

Banner County, 250 Neb. 944, 951, 554 N.W.2d 151, 157 (1996) (quoting *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 780-81, 104 N.W.2d 227, 230-31 (1960)). “The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act.” *Id.* Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority. See, *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994).

In *State ex rel Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 464-65, 283 N.W.2d 12, 24 (1979), the Nebraska Supreme Court wrote:

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

.....

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.

Under LB 1161, the Legislature has provided reasonable limitations and standards for carrying out the delegated duties. LB 1161 provides that the evaluation conducted by NDEQ and to be submitted in a federal agency’s NEPA review process shall “include, but not be limited to, an analysis of the environmental, economic, social, and other impacts associated with the proposed route and route alternatives in Nebraska.” Neb. Rev. Stat. §57-1503(1)(a)(i). The evaluation based on these standards is to be submitted to the Governor for his review prior to his making a recommendation to the federal agency or agencies responsible for the NEPA review. Neb. Rev. Stat. §57-1503(4). If the Governor finds that the proposed route evaluation is

unacceptable, the pipeline carrier is obligated to submit an application to the PSC pursuant to MOPSA. *Id.*

These directions and limitations on the relevant executive and administrative agencies demonstrate more than adequate effort by the Legislature to define the various obligations of the Governor, NDEQ and the PSC in implementing LB 1161. Indeed, the Governor's review of NDEQ's Supplemental Environmental Impact Statement does not constitute final action on the proposed route but rather either is a submission in support of the state-level review as part of the more comprehensive federal NEPA analysis or directs the pipeline carrier to take the additional steps of submitting an application with the PSC pursuant to state law. Given its limited, gatekeeping function, LB 1161's definition of the Governor's role is certainly adequate. Thus, LB 1161 does not constitute an unlawful delegation of authority contrary to Neb. Const. Art II, § 1, or Art V, §1 and the Court should dismiss Plaintiffs claims pursuant to Neb. Ct. R. Pldg. 6-1112(b)(6) for failure to state a claim.

B. LB 1161 DOES NOT GIVE RISE TO DUE PROCESS CONCERNS.

Plaintiffs' Complaint initially alleges that as a result of its failure "to provide for notice to affected parties," LB 1161 violates the due process clause found in Neb. Const. Art. I, § 3. Complaint at 3.4. In the latter portion of the Complaint, Plaintiffs argue that LB 1161 is unconstitutional for its failure to provide "for judicial review of decisions of the Governor to approve or disapprove, or to decline to act upon applications for authority to acquire property and erect crude oil pipelines across Nebraska." Complaint at 13.2. Plaintiff's assert that LB 1161 is similarly unconstitutional for failure "to provide for judicial review of action of the [PSC]." Complaint at 13.2. According to Plaintiffs, due process is required because LB 1161 permits the Governor and PSC to exercise a "quasi-judicial function" without further review. *Id.*

Plaintiffs claim that LB 1161 fails to provide for notice to affected parties is simply inaccurate. Further, regardless of whether LB 1161 authorizes the Governor or PSC quasi-judicial authority, the exercise of such authority does not deprive Plaintiffs of their property. Thus, the Court should dismiss the Plaintiffs due process claims pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6).

1. Nebraska Law Provides Notice to Affected Parties.

LB 1161 provides that as part of the evaluation done by NDEQ, there shall be “at least one public hearing,” and “provide opportunities for public review and comment . . .” Neb. Rev. Stat. §57-1503. NDEQ’s evaluation, as a part of the NEPA review process, would also be subject to notice and comment. 40 C.F.R. § 1506 *et al.*

In addition, if an applicant pursues approval of its route through MOPSA, “[t]he applicant shall publish notice of the application [with the PSC] in at least one newspaper of general circulation in each county in which the major oil pipeline is to be constructed and forward a copy of such notice to the commission. The applicant shall serve notice of the application upon the governing bodies of the counties and municipalities....” Neb. Rev. Stat. §57-1405. Clearly, LB 1161 provides ample notice to parties impacted by a proposed pipeline and Plaintiffs’ allegations to the contrary are incorrect.

2. Action Taken by the Governor or PSC Pursuant to LB 1161 Do Not Result in a Deprivation of Property.

The Court should also dismiss Plaintiffs’ due process claims pursuant to Neb. Ct. R. Pldg. 6-1112(b)(6) because there has not been a showing that the actions of the Governor or the PSC will result in a deprivation of property. “In order to establish a procedural due process violation, a plaintiff must prove that he or she was deprived of ‘an opportunity...granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case.’” *Keating*

v. Neb. Public Power Dist., 562 F.3d 923, 928 (8th Cir. 2009) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 786 (1971)). “Generally, where ‘deprivations of property [are] authorized by an established state procedure...due process [is] held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur.’” *Keating*, 562 F.3d at 928 (quoting *Parratt v. Taylor*, 451 U.S. 527, 538, 101 S. Ct. 1908, 1914 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S. Ct. 662, 667-68 (1986)).

As noted above, Plaintiffs allege a constitutional infirmity in LB 1161 due to the absence of a provision for judicial review of the actions of the Governor and PSC. LB 1161 bestows upon the Governor the duty to review the evaluation conducted by NDEQ pursuant to Neb. Rev. Stat. § 57-1503(1)(a)(i). If the Governor approves of the evaluation, the pipeline carrier is then granted authority to exercise the power of eminent domain. See, Neb. Rev. Stat. § 57-1101. Alternatively, or if the Governor disapproves of NDEQ’s evaluation, the pipeline carrier may submit an application to the PSC under MOPSA. *Id.* Use of eminent domain authority is then conditioned on the PSC issuing an order approving the pipeline carrier’s application. *Id.*

Actions taken by the Governor or PSC pursuant to LB 1161 clearly do not affect a deprivation of property thus evoking the protections of due process under the Nebraska Constitution. The decision by either entity only authorizes the *future* use of eminent domain authority by a pipeline carrier; it does not in and of itself deprive Plaintiffs’ of their property.

As previously explained, “[t]he Legislature has the right to delegate [the power of eminent domain] and to restrict or limit the extent of its use.” *Burnett v. Central Nebraska Public Power & Irrigation Dist.*, 147 Neb. 458, 460, 23 N.W.2d 661, 666 (1946). See also, *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). The

Legislature has afforded pipeline carriers the authority to use eminent domain necessary for the laying of a pipeline. Neb. Rev. Stat. §57-1101. The fact that the Legislature has conditioned the availability of the power of eminent domain upon approval by the Governor or the Public Service Commission does not thereby result in a decision entitled to due process. This is particularly true given that the Legislature clearly required in LB 1161, “[t]he procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.”

Assuming *arguendo* that Plaintiffs’ Complaint intended to assert a due process challenge to the pipeline carrier’s prospective use of eminent domain authority, such a claim must fail. Every Nebraskan has the constitutional right to acquire, own, possess, and enjoy property. Neb. Const. Art. I, § 25. A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain. *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967). Eminent domain is defined generally as the power of the nation or a state, or authorized public agency, to take or to authorize the taking of private property for a public use without the owner's consent, conditioned upon the payment of just compensation. Neb. Const. Art. I, § 21; *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977).

Here, the Legislature has authorized the taking of private property for a public purpose once certain conditions are met. Once condemnation proceedings commence, landowners subject to the condemnation proceedings can appeal the “public purpose” determination to the district court. Neb. Rev. Stat. § 76-720 (Reissue 2009). If a pipeline carrier uses eminent domain along an approved route, and Plaintiffs’ land is subject to condemnation proceedings, Plaintiffs have the opportunity to be heard in a meaningful time and a meaningful manner by challenging the public purpose determination in the district court. This judicial review provided to Plaintiffs in the district court is more appropriate to the nature of Plaintiffs property interest

than providing review to Plaintiffs as an outsider to a NDEQ evaluation or review as Plaintiffs ask. Finally, if their property is taken for a public purpose, Plaintiffs are entitled to the payment of just compensation. Neb. Const. Art. I, § 21. Therefore, the requisite protections are in place to protect Plaintiffs' right to due process and Plaintiffs have failed to state a claim upon which relief may be granted under Neb. Ct. R. Pldg. §6-1112(b)(6).

C. LB 1161 DOES NOT GIVE RISE TO SEPARATION OF POWERS CONCERNS.

Plaintiffs' initially allege that LB 1161 violates the separation of powers clause of the Nebraska Constitution by "permitting action to occur without judicial review." Complaint at 3.4. In the latter part of the Complaint, Plaintiffs further claim that LB 1161 "violates Nebraska's requirement that state government be divided into executive, legislative, and judicial departments...because it contains no provision for judicial review of decisions of the Governor...[or] the [PSC]." Complaint at 13.2. Finally, Plaintiffs assert that the Legislature's assignation of the duty to delegate eminent domain authority to the Governor and PSC gives rise to separation of powers concerns. Complaint at 13.3.

The general principles underlying the separation of powers doctrine in Nebraska have been set forth by the Nebraska Supreme Court as follows:

Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch. It also prohibits a branch from improperly delegating its own duties and prerogatives—except as the constitution directs or permits. . . .Deciding whether the Nebraska Constitution has committed a matter to another governmental branch, or whether the branch has exceeded its authority, is a delicate exercise in constitutional interpretation....[T]he line between what is a legislative function and what is a judicial one has not been drawn with precision.... In defining that line, we look at the function's purpose—not merely its statutory origin—to decide whether a governmental function is legislative or judicial.

As imprecise as the line between the branches may sometimes be, logic and case law dictate that it is the Legislature's function through the enactment of statutes to declare the law and public policy . . .

In re Petition of Nebraska Community Corrections Council, 274 Neb. 225, 229-30, 738 N.W.2d 850, 853-54 (2007) (footnotes omitted) (emphasis added).

Here, the Legislature has simply declared that under Nebraska law, the Governor or the PSC must decide whether a particular pipeline carrier is qualified to exercise eminent domain. Neb. Const. Art. III, § 1. “The legislature, subject only to the initiative and referendum, and constitutional inhibitions, and provided that legislation is for a public purpose, has an unlimited field within which to legislate.” *Power Oil Co. v. Cochran*, 138 Neb. 827, 839, 295 N.W. 805, 812 (1940). Public policy regarding the application and evaluation of pipeline carrier routes is a “legislative function which that branch of government ordinarily carries out through administrative agencies created by it.” *Scott v. State*, 196 Neb. 681, 687-88, 244 N.W.2d 683, 688 (1976).

In addition, Plaintiffs’ allegations do not give rise to a separation of powers violation because Plaintiffs’ allegations are inaccurate under the plain language of the law. Pursuant to Neb. Rev. Stat. §57-1409, “[a]ny party aggrieved by a final order of the commission regarding an application or assessment under the Major Oil Pipeline Siting Act, including, but not limited to, a decision relating to the public interest, may appeal. The appeal shall be in accordance with the Administrative Procedure Act.” *Id.* Likewise, LB 1161, requires pipeline companies to follow “[t]he procedure to condemn property . . . in the manner set forth in sections 76-704 to 76-724.” Such provisions include appeal procedures should a landowner dispute the amount of compensation awarded in an eminent domain proceeding. Therefore, Plaintiffs’ claims are without merit and Defendants are entitled to their Motion to Dismiss.

D. LB 1161 DOES NOT CREATE A PERMANENTLY CLOSED CLASS IN VIOLATION OF THE NEBRASKA CONSTITUTION.

Plaintiffs further contend LB 1161 violates the prohibition against special legislation in Neb. Const. Art III, § 18. Complaint at 3.3, 13.4. “A legislative act can violate article III, § 18, in one of two ways: by creating a totally arbitrary and unreasonable method of classification, or by creating a permanently closed class.” *Swanson v. State Dep't of Educ.*, 249 Neb. 466, 479, 544 N.W.2d 333, 342 (1996) (citing *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991)). LB 1161 is not special legislation because the method of classification is not arbitrary and unreasonable and nothing prevents any future oil pipeline from entering the class.

For purposes of LB 1161, the Legislature defined “oil pipelines” as pipelines larger than eight inches in diameter constructed in Nebraska for carrying oil, but excluded in-field and gathering lines. Neb. Rev. Stat. § 57-1502. This classification is not arbitrary and unreasonable given the vast majority of pipelines regulated by LB 1161 encompass interstate transmission lines and trunk lines, the largest pipelines, whose routes are most likely to have environmental, economic, and social impacts. “If the Legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances...” *Gourley v. Neb. Methodist Health Sys.*, 265 Neb. 918, 943, 663 N.W.2d 43, 68 (2003).

Plaintiffs argue that LB 1161 is unconstitutional because it creates “substantially closed class memberships to crude oil pipelines having sought to 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.” Complaint at 13.4. Plaintiffs’ summary of LB 1161 is inaccurate. LB 1161 applies to *any* oil pipeline, as defined in Neb. Rev. Stat. §§57-1404 and 57-1502, placed in operation after the

effective date of the act. Under this classification, the class is still open to any future oil pipeline that fits within those broad definitions.

In fact, LB 1161 specifically eliminated what may have been a closed class under subsection (3) of Neb. Rev. Stat. §57-1402, which exempted from MOPSA any major oil pipeline that had already submitted an application to the United States Department of State. Plaintiffs even agree in their complaint that this subsection has been removed. Complaint at 12.

LB 1161 does nothing to prevent any future oil pipeline from entering this class. LB 1161 does not use an arbitrary and unreasonable method of classification and does not create a permanently closed class. Therefore, the Court should dismiss Plaintiffs' special legislation claims pursuant to Neb. Ct. R. Pldg. §6-1112(b)(6).

E. LB 1161 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Finally, Plaintiffs make a bare allegation that LB 1161 "denies equal protection of the law contrary to Neb. Const. Art 1, §3." Complaint at 3.3, 19.2. As noted above, "complaints must set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *Anderson v. Wells Fargo Financial Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 603, 694 N.W.2d 625, 632 (2005). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Plaintiffs fail to provide any supporting factual analysis to support their equal protection claim. There is no allegation of discrimination or any other declarations which would enable this court to analyze an equal protection clause claim.

For purposes of an equal protection analysis, the initial inquiry "focuses on whether one has demonstrated that one was treated differently than others similarly situated. Absent this threshold showing, one lacks a viable equal protection claim." *Gramercy Hill Enterprises v.*

State, 255 Neb. 717, 724-725, 587 N.W.2d 378, 383 (1998); quoting *State v. Atkins*, 250 Neb. 315, 320-21, 549 N.W.2d 159, 163 (1996); *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir.1994), *cert. denied* 513 U.S. 1185, 115 S.Ct. 1177, 130 L.Ed.2d 1130 (1995).

As noted, Plaintiffs' Complaint provided no factual demonstration that they were treated differently than others similarly situated. Accordingly, the Court should dismiss the Plaintiffs' equal protection claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief can be granted.

CONCLUSION

The State requests that the Court dismiss the Plaintiffs' claims in the first instance pursuant to Neb. Ct. R. Pldg. § 6-112(b)(1) for lack of proper subject matter jurisdiction due to the Plaintiffs' failure to establish standing to challenge LB 1161. In the event the Court determines that subject matter jurisdiction properly lies, the State requests that the Court dismiss the Plaintiffs' claims pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a proper claim upon which relief can be granted.

Respectfully submitted this 15th day of August, 2012.

BY: JON BRUNING, #20351
Attorney General


BY: 
Katherine J. Spohn, #22979
Special Counsel to the Attorney General
Ryan S. Post, #24714
Assistant Attorney General
2115 State Capitol
Lincoln NE 68509-8920
Tel: (402) 471-2834
Katie.Spohn@nebraska.gov
Ryan.Post@nebraska.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of August, 2012 a copy of the foregoing Defendant's Motion to Dismiss Plaintiffs' Complaint and Notice of Hearing has been served on the Plaintiffs by mailing a copy to their attorney of record as follows:

David A. Domina
Domina Law Group p c llo
2425 S 144th St.
Omaha, NE 19144-3267

BY: 
Katherine J. Spohn, #22979
Special Counsel to the Attorney General