

CASE NO. S-14-000158

IN THE NEBRASKA SUPREME COURT

RANDY THOMPSON,
SUSAN LUEBBE, and
SUSAN DUNAVAN,

Plaintiffs-Appellees,

V.

DAVE HEINEMAN,
Governor of the State of Nebraska;
PATRICK W. RICE, Acting Director of
the Nebraska Department of Environmental
Quality; and DON STENBERG,
State Treasurer of Nebraska.

Defendants-Appellants.

FILED

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NEBRASKA SUPREME COURT
COURT OF APPEALS

APPEAL FROM THE DISTRICT COURT, LANCASTER COUNTY, NEBRASKA

THE HONORABLE STEPHANIE F. STACY

APPELLANT'S REPLY BRIEF AND ANSWER TO BRIEF ON CROSS-APPEAL

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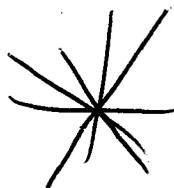


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REPLY BRIEF

Appellants hereby reply to Appellees brief responding to the initial assigned errors on appeal.

I. Argument

A. The District Court Erred In Determining Appellees Had Taxpayer Standing.

Appellees' challenge presents the Court with a case on the fringe of Nebraska's standing jurisprudence. Indeed, "[e]xceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule." *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 571, 773 N.W.2d 349, 355 (2009). While the District Court correctly found that Appellees failed to establish the traditional requirements for standing, it erred in concluding that Appellees could bring their challenge LB 1161 under the taxpayer standing exception. (T33-38).

In order to invoke the Court's jurisdiction as taxpayers challenging an unlawful expenditure of public funds, Appellees bear the initial burden of showing that LB 1161 would otherwise go unchallenged. See, *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb. 379, 390, 810 N.W.2d 149, 159 (2012). Indeed, Appellees acknowledge as much. See, Appellee Brief at 9 (citing *Field Club Home Owners League v. Zoning Bd. of App. of Omaha*, 283 Neb. 847, 852-3, 814 N.W.2d 102, 106 (2012)). Without requiring a showing that the action would otherwise go unchallenged, "the reason for permitting taxpayer actions challenging an unlawful expenditure of public funds [cannot] exist here." *Project Extra Mile*, 283 Neb. at 390, 810 N.W.2d at 160. Thus, the District Court erred in the first instance by finding Appellees were not obligated to show, if not for their lawsuit, LB 1161 would otherwise go unchallenged.

Despite an unsubstantiated contrary assertion, it has not been shown that LB 1161 would go unchallenged if not for Appellees lawsuit. See, Appellee Brief at 9. Rather, Appellees seek to shift the burden to Appellants to show that a party better suited to bring the challenge does exist. See, Appellee Brief at 9. With respect to divestment of the Public Service Commission's authority over common carriers under Article IV, §20, this Court has previously concluded that it is the Public Service Commission, and not a taxpayer, who has standing to challenge an alleged usurpation. *Ritums v. Howell*, 190 Neb. 503, 507, 209 N.W.2d 160, 164 (1973). In *Ritums*, this Court specifically dismissed a taxpayer challenge to a divestment of PSC authority:

That plaintiff pays a tax to support the Transit Authority does not give him the power to vindicate any rights which the Public Service Commission may have, nor to redress any supposed wrongs committed against it by the Legislature. If the Transit Authority sought to govern common carriers in the City of Omaha without the approval of the Commission, then it is for the Commission to act, and not a taxpayer.

Id.

To be sure, the *Ritums* opinion pre-dates some the Court's recent decisions regarding the standing analysis for taxpayers seeking to challenge an unlawful expenditure of public funds. However, the *Ritums* decision speaks directly to Appellees contention that LB 1161 might otherwise go unchallenged.

The District Court also erred in holding that Appellees were not obligated to prove that an actual expenditure would necessarily occur as a result of the operation of LB 1161 to have standing as taxpayers. (T37). While the taxpayer exception to the traditional standing analysis eliminates the need for a party to show an injury distinct from that common to all members of the public, it does not eliminate the need to show that injurious government action has occurred, i.e. an unlawful expenditure. See, *Project Extra Mile*, 283 Neb. at 388, 810 N.W.2d at 159. Appellees misconstrue the State's position concerning whether an actual "expenditure" occurs

pursuant to LB 1161. See, Appellees Brief at 11. Recognizing that Appellees have brought a “facial” challenge to LB 1161, the reimbursement required by the express terms of LB 1161 precludes Appellees from arguing there has been an “unlawful expenditure” giving rise to taxpayer standing. See, Appellant Opening Brief at 12-15. The “expenditure” aspect of the analysis does not require evidence of any specific instance of reimbursement; the Court need only examine the text of LB 1161. Appellees argue that the Legislature’s appropriation of \$2 million from the Nebraska Department of Environmental Quality’s (“NDEQ”) Cash Fund constitutes the “expenditure” that can be challenged under the taxpayer exception to standing. See, Appellees Brief at 10. Without more, however, a legislative appropriation, particularly when accompanied by a provision requiring reimbursement of all expenses by the applicant, is insufficient evidence to establish the sort of “unlawful expenditure” with which the Court’s taxpayer standing jurisprudence is concerned.

Providing litigants standing as taxpayers to bring facial challenges to a statute based solely on the attendant legislative appropriation and without showing that the law would otherwise go unchallenged allows the exception to swallow the rule. See, *State ex rel. Reed*, 278 Neb. at 571, 773 N.W.2d at 355. Accordingly, the Court should reverse the District Court’s determination that Appellees have standing as taxpayers to challenge LB 1161.

B. The District Court Erred In Determining LB 1161 Violates Nebraska Constitution Article IV, § 20.

Concluding that LB 1161 unlawfully divests the PSC of its constitutionally-granted authority requires the Court to find that under Nebraska law regulatory determinations made with regard to the routes of *all* pipeline carriers falls under the phrase “rates, service and general control of common carriers.” See, NEB. CONST. art. IV, § 20. But, as more fully argued in Appellants’ brief on the merits, LB 1161 is not an unconstitutional divestment of PSC

jurisdiction under Article IV, § 20 because LB 1161 can be interpreted to apply to pipeline carriers that are not common carriers.

The Court has a duty “to give a statute an interpretation which meets constitutional requirements if it can be reasonably done, and if a statute is subject to more than one construction, the court is required to adopt the construction which would make the act constitutional.” *Ritums*, 190 Neb. at 506, 209 N.W.2d 160. LB 1161 can be reasonably construed to apply to route of interstate pipelines, thereby operating within the bounds of constitutional requirements. Thus, the District Court erred in determining LB 1161 unlawfully divests the PSC of its authority over common carriers.

Notwithstanding the acknowledged “facial” nature of their challenge, Appellees present the Court with facts concerning the TransCanada Keystone XL pipeline in analyzing whether LB 1161 unconstitutionally divests the PSC of authority over common carriers. See, Appellees Brief at 16-17. Such argument and evidence is irrelevant. “A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face...can only succeed...by establishing that no set of circumstances exists under which the act would be valid, i.e. that the law is unconstitutional in all of its applications.” *State v. Harris*, 284 Neb. 214, 221, 817 N.W.2d 258, 268 (2012).

1. Eminent Domain Authority Does Not Equate To A Common Carrier Designation.

Appellees incorrectly equate the Legislature’s granting of eminent domain authority to pipeline carriers with common carrier status under Nebraska law. See, Appellee Brief at 14-15. None of the authorities cited by Appellees provide a basis for such a conclusion. In fact, the *Bayard* Court expressly found such argument to be meritless, noting that an entity’s status as a “common carrier” depends on the intrastate provision of services to the public for consideration

and specifically excluded interstate pipelines possessing eminent domain authority from the exclusive jurisdiction of the PSC. See, *City of Bayard v. North Central Gas Co.*, 164 Neb. 819, 829-30, 83 N.W.2d 861, 867 (1957).

2. Nebraska Law Recognizes A Long-Standing Distinction Between Carriers Providing Interstate and Intrastate Service.

There is a long-standing distinction between pipeline carriers providing services interstate and those operating intrastate. Appellees recognize the existence of the Legislature's definition of "common carriers" but conflate that definition with LB 1161's reach of interstate carriers. See, Appellee Brief at 20. Appellants do not dispute that LB 1161 applies to interstate carriers; but that applicability does not make an interstate carrier a common carrier under Nebraska law. Rather, the definition of common carrier is limited to those operating *intrastate*. See, NEB. REV. STAT. § 75-501; see also, Appellant Initial Brief at 17-18.

Furthermore, Appellees misconstrue the Court's opinion in *Chicago B&Q R. Co. v. Herman Bros., Inc.*, 164 Neb. 247, 82 N.W.2d 395 (1957) to hold that the PSC's jurisdiction extends to interstate carriers providing interstate services. See, Appellee Brief at 21. The *Herman Bros.* Court considered the Nebraska Railway Commission's regulation of "proposed rail rates governing the transportation of petroleum and petroleum products from points of origin in the State of Nebraska to points of destination in this state, when such traffic moves in intrastate commerce." 164 Neb. at 248. The Court held that although it may be difficult to establish clear demarcation between an interstate carrier's provision of interstate and intrastate services, the provision of interstate services should not necessarily preclude the state's ability to regulate the intrastate aspects of the service. *Id.* at 252. However, the authority over common carriers of which the PSC cannot be constitutionally divested remains limited to intrastate activity. Accordingly, Appellees' contention that the distinction between interstate and intrastate

pipeline carriers does not have a determinative effect on the PSC's jurisdiction over "common carriers" is meritless.

3. The "For Hire" Characteristic Necessary For Common Carrier Status Should Not Be Assumed To Exist In All Pipelines.

With respect to pipelines "[a]ny person who transports, transmits, conveys, or stores liquid or gas by pipeline *for hire* in Nebraska intrastate commerce shall be a common carrier subject to commission regulation." NEB. REV. STAT. § 75-501 (emphasis added). The Court has made clear that a common carrier is an entity that it holds "itself out to the public as offering its services to all persons similarly situated . . . for a consideration or hire." *Bayard*, 164 Neb. at 830, 83 N.W.2d at 867.

Appellees make conclusory assertions about "the fact that pipeline companies transport products for hire" without providing any evidence to support the striking LB 1161 as facially invalid. See, Appellees Brief at 16. Because Appellees cannot establish that *all* crude oil pipelines are "for hire", Appellees' facial challenge to unlawful divestment of PSC jurisdiction over common carriers must fail.

II. Conclusion

The State requests that the Court dismiss Appellees' claims based on the lack of standing. Alternatively, the State requests that the Court reverse the District Court's determination because LB 1161 can be interpreted to apply to those pipeline carriers that are not common carriers and therefore does not unconstitutionally divest the PSC of its exclusive authority under Nebraska Constitution Article IV, § 20.

ANSWER TO BRIEF ON CROSS-APPEAL

Appellants hereby respond to the errors assigned by Appellees on cross-appeal.

I. Scope of Review

The District Court did not reach a determination on the first and third errors assigned by Appellees' cross-appeal. (T68). In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. See, *Torres v. Aulick Leasing, Inc.*, 258 Neb. 859, 606 N.W.2d 98 (2000). However, in an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusions independent from the conclusions reached by the trial court. See, *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 469, 528 N.W.2d 297, 298 (1995). The parties stipulated to the facts necessary to decide all issues presented by Appellees' Complaint. (E44, vol. II). Thus, the Court's consideration of those issues can proceed without first remanding the matter to the District Court for an initial determination.

II. Propositions of Law

- A. An essential predicate to stating a violation of due process is establishing a deprivation of life, liberty, or property.

Hass v. Neth, 265 Neb. 321, 657 N.W.2d 11 (2003)

- B. 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, 23 N.W.2d 661 (1946)

- C. "There is a distinction between the loaning of state funds and the loaning of the state's credit."

Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

III. Argument

A. LB 1161 Does Not Violate Appellees' Right To Due Process Solely By Virtue Of The Absence Of A Provision For Judicial Review

The absence of a provision in LB 1161 addressing judicial review does not, in and of itself, constitute a violation of Appellees' due process rights. The Nebraska Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." NEB. CONST. art. I, § 3. Thus, an essential predicate to stating a violation of due process is establishing a deprivation of life, liberty, or property. See, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). Appellees do not provide any evidence that such a deprivation would necessarily occur as a result of the operation of LB 1161. See, *Harris*, 284 Neb. at 221, 817 N.W.2d at 268.

Rather than depriving Appellees of a fundamental right, LB 1161 limits certain pipeline carriers' ability to exercise eminent domain by requiring their proposed route be first evaluated and approved by NDEQ and the Governor. Once eminent domain authority is obtained, the law provides pipeline carriers with clear procedures to be used to condemn property. See, NEB. REV. STAT. § 57-1101 (referring to sections 76-704 to 76-724) (e.g., providing opportunity for condemnee to file a petition in county court and appeal judgment therefrom to the Court of Appeals).

Under Appellees proposed legal theory, every instance in which the Legislature grants eminent domain to any entity would, on its face, constitute a deprivation of a fundamental right thus giving rise to due process. Appellees have brought a facial challenge. To the extent anyone was subject to the condemnation of property by a pipeline carrier pursuant to NEB. REV. STAT. § 57-1101 (REISSUE 2010), the condemnee would be protected under the condemnation

proceeding established under NEB. REV. STAT. § 76-704. Accordingly, the Court should reject Appellees first assigned error on cross-appeal.

B. The District Court Correctly Determined That LB 1161 Does Not Abdicate The Legislature's Duty To Grant Eminent Domain Authority

The District Court correctly determined that LB 1161 does not unlawfully assign the authority to delegate the power of eminent domain to the Governor. (T55-57). Appellees mischaracterize the impact LB 1161 has on the universe of entities authorized to exercise eminent domain under Nebraska law. See, Appellee Cross-Appeal at 31. The authority for pipeline carriers to exercise eminent domain has existed since 1963. (T57); see, NEB. REV. STAT. § 57-1101. Certainly, 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). As such, the Legislature granted the power of eminent domain to any pipeline carrier for the purposes of acquiring property reasonably necessary for the laying, relaying, operation, and maintenance of any pipeline. See, NEB. REV. STAT. § 57-1101. According to Appellees proposed legal theory, the county judge overseeing condemnation proceedings would have "legislative decision making powers over who will and will not be granted eminent domain rights." See, Appellee Cross-Appeal at 31; see also, NEB. REV. STAT. § 76-704 (Reissue 2009) (establishing the right of to petition county court where property is located to initiate condemnation proceedings). As the District Court correctly found, "the amendments to the eminent domain provision ushered in by MOPSA, and then amended further by LB 1161, did not affect a change in the Legislature's prior delegation of eminent domain authority." (T57). "Pipeline carriers previously had, and continue to have, eminent domain authority after MOPSA and LB 1161." (T57). Therefore, the District

Court correctly determined that rather than expanding the universe of entities authorized to exercise eminent domain, LB 1161 merely “postponed the authorization to exercise eminent domain until a pipeline carrier first has its proposed route reviewed and approved...” (T57).

C. LB 1161 Is Not Unlawfully Devoid Of Standards

Appellees’ argument that LB 1161 is an unlawful delegation of legislative authority because it is devoid of standards to guide the implementation of its provisions is meritless. “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), this Court held:

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.

LB 1161 guides the NDEQ in the development of a thorough and detailed analysis to be conducted for any pipeline regulated by LB 1161. In particular, such analysis 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 Governor’s review is limited to the approval or disapproval of “the routes reviewed in the supplemental environmental impact statement or the evaluation conducted.” NEB. REV. STAT. § 57-1503. In conducting this review, the Governor is guided not only by the parameters set forth immediately above, but also the purposes of the Major Oil Pipeline Siting Act, which LB 1161 amended. (E1:1, vol. I) (setting forth the purposes of MOPSA including: ensuring the welfare of Nebraskans, protecting property rights, aesthetic values, and economic interests; protecting Nebraska’s natural resources in determining the location of routes of major oil pipelines; ensuring compliance with Nebraska law; and ensuring a coordinated and efficient approach to authorizing construction of major oil pipelines.) These directives to and limitations establish the standards required by the Legislature form the various obligations of the Governor, NDEQ, and PSC in the lawful implementation of LB 1161. Accordingly, the Court should reject Appellees third assigned error on cross-appeal.

D. The District Court Correctly Determined That LB 1161 Does Not Pledge The State’s Credit

The District Court correctly determined that LB 1161 does not require the State to unconstitutionally pledge its credit. LB 1161’s reimbursement provision puts the State in the position of a creditor upon a loan of funds, rather than a debtor upon a loan of credit; it is the later conduct that is prohibited by NEB. CONST. art. XIII, § 3. “There is a distinction between the

loaning of state funds and the loaning of the state's credit.” *Haman v. Marsh*, 237 Neb. 699, 719, 467 N.W.2d 836, 850 (1991). Appellees continue to confuse the loaning of funds, which is constitutionally permissible, with the extending of state’s credit, which is not. See, Appellee Cross-Appeal at 38-41 The District Court correctly concluded “LB 1161 does not require the State to guarantee payment of a pipeline carrier's debts to others. Rather, it creates the pipeline carrier's obligation to reimburse the State for the NDEQ evaluation.” (T43). The District Court was correct in recognizing this distinction. Accordingly, the Court should uphold the finding of the District Court with respect to Appellees fourth assigned error on cross-appeal.

V. Conclusion

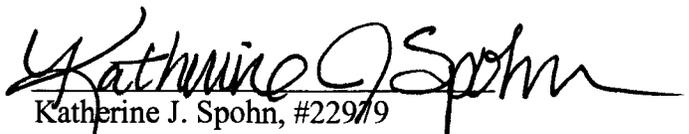
Although Appellees first and third assigned errors were not initially addressed by the District Court, those errors present questions of law upon which the Court is obligated to reach a conclusion independent of the trial court. Because the parties stipulated to the facts bearing on the claims set forth in Appellees complaint, there is no need to remand the matter to the District Court for an initial determination of these issues.

Appellees have failed to establish that LB 1161 will necessarily result in the deprivation of a fundamental right giving rise to due process concerns. Nor does LB 1161 alter the universe of entities authorized to exercise eminent domain, as the District Court correctly determined. LB 1161 establishes the necessary parameters for the development of a route evaluation and offers further guidance for implementation by setting forth the purposes of the statute. Finally, the District Court should be upheld in its determination that LB 1161 does not require an unlawfully pledge its credit, but rather places the State in the position of a creditor upon a loan of funds. Accordingly, the State requests that the Court reject Appellees’ four assigned errors on cross-appeal.

Respectfully submitted,

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STATE OF NEBRASKA)

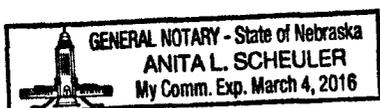
) ss.

COUNTY OF LANCASTER)

I, Katherine J. Spohn, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the Appellee by depositing said copies in the United States Mail, postage prepaid, addressed to David A. Domina, 2425 South 144th Street, Omaha, Nebraska 68144, on this 7th day of July, 2014.



Subscribed in my presence and sworn to before me this 7th day of July, 2014.



Notary Public