

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RANDY THOMPSON,  
 SUSAN LUEBBE, and  
 SUSAN DUNAVAN,

Plaintiffs

VS.

DAVE HEINEMAN, in his official capacity  
 as Governor of the State of Nebraska;  
 MICHAEL LINDER, in his official capacity  
 as Director of the Nebraska Department of  
 Environmental Quality; and  
 DON STENBERG, in his official capacity  
 as the State Treasurer of Nebraska,

Defendants.

CI12-2060

ORDER ON MOTION TO DISMISS  
 SECOND AMENDED COMPLAINT

LANCASTER COUNTY  
 CLERK OF THE  
 DISTRICT COURT  
 2013 JUN 11 PM 12 48

**INTRODUCTION**

This case is before the court on Defendants’ Motion to Dismiss Plaintiffs’ Second Amended Complaint (filing #3). The parties agreed to submit the motion for consideration on briefs and without need for further hearing. The parties’ briefing was completed May 3, 2013, and the court, having considered the arguments of the parties, now finds and orders as follows.

**PLAINTIFFS’ SECOND AMENDED COMPLAINT**

Like the Plaintiffs’ prior complaints, the Second Amended Complaint seeks a declaratory judgment<sup>1</sup> that LB 1161 is unconstitutional on its face, and seeks injunctive relief preventing its enforcement. The Second Amended Complaint reiterates the allegations of the original Complaint, and adds several new allegations challenging the validity of actions taken pursuant to LB 1161 after the original and amended complaints were filed, and adds a claim that LB 1161 is unconstitutional because it pledges the State’s credit in contravention of Nebraska Constitution Article XIII, § 3.

Specifically, the Second Amended Complaint challenges the validity of the Governor’s January 22, 2013 action approving the route for TransCanada’s Keystone XL Pipeline project, which in turn granted the power of eminent domain to the pipeline company under the procedure mandated by LB 1161. *See* Second Amended Complaint ¶¶10, 14, 15 and 19.3. As such, the

<sup>1</sup> Paragraph 5 of the Second Amended Complaint contains the same typographical error which was pointed out in the court’s prior order (*see* Order dated December 31, 2012, fn. 1), but it nevertheless is clear from other allegations and the parties’ briefing that Plaintiffs bring this declaratory judgment action pursuant to NEB. REV. STAT. § 25-21,149 *et seq.* (Reissue 2008).

Second Amended Complaint seeks not only a declaration that LB 1161 is unconstitutional on its face, but also seeks a declaration that actions taken by the Governor predicated on LB 1161 are unconstitutional, null and void. Additionally, the Second Amended Complaint seeks injunctive relief preventing not only enforcement of LB 1161, but also preventing further action pursuant to the Governor's January 22, 2013 letter approving the pipeline route.

The Second Amended Complaint also adds an allegation that LB 1161 (which requires pipeline carriers to "reimburse the department for the cost of the evaluation or review within sixty days after notification from the department of the cost") is an unconstitutional pledge of State credit in violation of Nebraska Constitution Article XIII, § 3.

### **DEFENDANTS' MOTION TO DISMISS**

Defendants seek dismissal of the Second Amended Complaint in its entirety claiming this court lacks subject matter jurisdiction over the claims asserted therein, and claiming the Second Amended Complaint fails to state a claim upon which relief can be granted. To the extent Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint seeks to re-argue issues considered and ruled upon in the Defendants' first motion to dismiss, this court overrules Defendants' motion and stands on the analysis and holdings articulated in the prior order entered December 31, 2012, and declines to reconsider the issues on a subsequent motion to dismiss.

Turning to the new or amended allegations in Plaintiffs' Second Amended Complaint, Defendants seek dismissal of the following claims for the following reasons:

- Regarding claims challenging the validity of the Governor's action in approving the route for TransCanada's Keystone XL Pipeline project, Defendants seek dismissal on grounds the claims are moot.
- Regarding claims LB 1161 is an unconstitutional pledge of State credit, Defendants seek dismissal on grounds the allegations fail to state a claim upon which relief can be granted.
- Regarding claims LB 1161 violates Plaintiffs' equal protection rights, Defendants seek dismissal on grounds the allegations fail to state a claim upon which relief can be granted.

### **Mootness Analysis**

In their first motion to dismiss, Defendants took the position that Plaintiffs' claims were not yet "ripe" for judicial review because the Governor had neither approved nor denied a particular pipeline route under LB 1161. In seeking dismissal of the original Complaint, Defendants argued that until the review process required by LB 1161 played out and the final decisions of the NDEQ and the Governor were clear, the court "should avoid a premature adjudication based on Plaintiffs' alleged hypothetical future event." (Defendants' Brief in Support of Motion to Dismiss Complaint, p. 11).

Now that the Governor has approved the proposed pipeline route, Defendants argue Plaintiffs claims for declaratory and injunctive relief should be dismissed as “moot” because there is no justiciable controversy left to be determined. Specifically, Defendants suggest Plaintiffs claims for declaratory and injunctive relief were rendered moot because “the Governor’s January 22, 2013 action marked the conclusion of the state action necessary for implementation of LB 1161 to this particular project.” (Defendants’ Brief In Support of Motion to Dismiss Second Amended Complaint, p. 6). In arguing the claims are moot, Defendants concede that Plaintiffs have—since the beginning of the litigation—requested injunctive relief preventing enforcement of LB 1161, but Defendants argue that since Plaintiffs did not seek a preliminary injunction before the Governor took action predicated on LB 1161, it now is too late for the law to provide any meaningful relief. (Defendants’ Brief in Support of Motion to Dismiss Second Amended Complaint, p. 7). The court finds this argument unpersuasive given the nature of the claims asserted and relief requested.

Mootness is a justiciability doctrine that can prevent courts from exercising jurisdiction. *Blakely v. Lancaster County*, 284 Neb. 659, 670 (2012). “Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.” *Id.* at 671 (citing *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200 (2011)). A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—in other words, a case in which the issues presented are no longer alive. *Blakely*, 284 Neb. at 671. The central question when analyzing mootness is “whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.” *Id.* at 671 (citing *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137 (2009)). “A case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party’s grievances.” *Blakely* at 671.

Applying the mootness analysis set forth above to the present case, this court concludes Plaintiffs’ claims for declaratory and injunctive relief were not rendered moot by the fact that, during the pendency of this litigation, the NDEQ and the Governor took action predicated on the statutory scheme which Plaintiffs allege is unconstitutional and void. Plaintiffs challenge the constitutionality of LB 1161 on its face, and as such their constitutional claims remain unaffected by the Governor’s ultimate approval, or disapproval, of any particular pipeline route. The Governor’s action approving the route for TransCanada’s Keystone XL Pipeline project did not foreclose the possibility of meaningful declaratory or injunctive relief in the event Plaintiffs are able to prevail on any of the constitutional claims they assert. While the precise nature and scope of any declaratory and/or injunctive relief available would depend on a myriad of factors this court cannot, and need not, predict at this phase of the litigation, the facial constitutional challenges raised by Plaintiffs remain alive, and the doctrine of mootness does not require dismissal of Plaintiffs’ claims for declaratory or injunctive relief.

#### **§6-1112(b)(6) Analysis**

Defendants seek dismissal of certain claims on grounds they fail to state a claim upon which relief can be granted under NEB. CT. R. PLDG. § 6-1112(b)(6). Specifically, Defendants claim Plaintiffs have failed to state a claim that LB 1161 constitutes an unconstitutional pledge of State credit, and have failed to state a claim that LB 1161 violates equal protection.



When reviewing a motion to dismiss for failure to state a claim, this court is required to accept as true all facts which are well pled and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *Central Neb. Pub. Power and Irrigation Dist. v. Jeffrey Lake Dev., Inc.*, 282 Neb. 762, 764-65 (2011); *Zawaideh v. Nebraska Dep't of Health and Human Servs. Reg. and Licensure*, 280 Neb. 997, 1004 (2011). To survive a motion to dismiss for failure to state a claim, the Complaint must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face. *Doe v. Board of Regents*, 280 Neb. 492, 506 (2010). In cases where a plaintiff does not or cannot allege specific facts showing a necessary element, "the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim." *Id.* A motion to dismiss for failure to state a claim is designed to test only the legal sufficiency of the Complaint, not the substantive merits of the claims. *Britton v. City of Crawford*, 282 Neb. 374, 379 (2011). "Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.*

### ***1. Claim that LB 1161 is an unconstitutional pledge of State credit***

Nebraska's Constitution prohibits the State from giving or loaning its credit to private parties, and provides in relevant part:

The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . .

Nebraska Constitution Article XIII, § 3. Plaintiffs allege LB 1161 violates this constitutional provision by "pledg[ing] funds and credit of the State for at least 60 days to a pipeline applicant who is to repay the funds later." (Plaintiffs' Second Amended Complaint ¶13.6). Defendants argue these allegations fail to state a legally cognizable claim that LB 1161 constitutes an unlawful pledge of the State's credit.

"Article XIII, § 3, of the Nebraska Constitution prevents the state or any of its governmental subdivisions from extending the state's credit to private enterprise. It is designed to prohibit the state from acting as a surety or guarantor of the debt of another." *Japp v. Papio-Missouri River Nat. Res. Dist.*, 273 Neb. 779, 787 (2007)(citing *Haman v. Marsh*, 237 Neb. 699 (1991) and *Callan v. Balka*, 248 Neb. 469 (1995)(footnotes omitted)). In explaining the purpose behind Article XIII, § 3, the Nebraska Supreme Court noted that similar constitutional provisions appear in most state's constitutions, and represent:

the reaction of public opinion to the . . . extravagant dissipation of public funds . . . in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business.

*Haman v. Marsh*, 237 Neb. 699, 719 (1991). In sum, Article XIII, § 3 "seeks to prevent the state from loaning its credit to an individual, association, or corporation with the concomitant possibility that the state might ultimately pay that entity's obligations." *Japp, supra* at 788.

Those claiming a violation of Article XIII, § 3 must prove three elements: “(1) The credit of the State (2) was given or loaned (3) in aid of any individual, association or corporation.” *Japp, supra*, at 787. Regarding the first element, “credit of the State,” the Nebraska Supreme Court has explained:

The state’s credit is inherently the power to levy taxes and involves the obligation of its general fund. . . . There is a distinction between the loaning of state funds and the loaning of the state’s credit. When a state loans its funds it is in the position of creditor, whereas the state is in the position of debtor upon the loan of credit.

*Japp, supra* at 788 (footnote omitted)(finding the state did not extend its credit to private developers by agreeing to pay for the construction of dams, because the state did not use its credit to secure capital for a private project or agree to act as a guarantor for a private company).

In their briefing, the parties vigorously debate whether the provisions of LB 1161 result in a “pledge of state credit” which is prohibited by Article XIII, § 3, or whether instead the provisions result in a loan of state funds that does not involve an unconstitutional pledge of credit. Their arguments in this regard are based in large part on facts outside the pleadings and evidence not yet before the court. A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint—not the substantive merits of the claims. Accepting the factual allegations as true and affording Plaintiffs all reasonable inferences therefrom, the court concludes the Second Amended Complaint alleges sufficient facts to state a plausible claim that LB 1161 represents an unconstitutional pledge of the State’s credit to a private enterprise, and Defendants’ Motion to Dismiss should be denied as to such claim.

## **2. *Claim that LB 1161 violates equal protection***

In its earlier order of December 31, 2012, this court concluded Plaintiff’s Complaint failed to state a plausible claim that LB 1161 violated Plaintiffs’ equal protection rights. The court noted no facts were plead in support of such a claim and the Complaint’s threadbare conclusions that LB 1161 violated equal protection were insufficient. *See Central Neb. Pub. Power & Irrig. Dist. V. North Platte Nat. Res. Dist.*, 280 Neb. 533 (2010)(threadbare recitals and conclusory statements do not suffice to state a claim; court is not obliged to accept as true a legal conclusion couched as a factual assertion). The Motion to Dismiss was sustained as to the equal protection claim, and Plaintiffs were given leave to amend.

The allegations of Plaintiffs’ Second Amended Complaint, as regards the equal protection claim, are not appreciably different from those found legally insufficient in the original Complaint. Despite the opportunity to amend, Plaintiffs still have plead no facts in support of their legal conclusion that LB 1161 violates Plaintiffs’ equal protection rights, and the existence of such facts cannot reasonably be inferred from allegations elsewhere in the Second Amended Complaint. Under the circumstances, Defendants’ Motion to Dismiss should, again, be sustained as to the equal protection claim.

Concerning the question of whether Plaintiffs should be given further leave to amend their complaint as regards the equal protection claim, the court notes Plaintiffs make no effort to

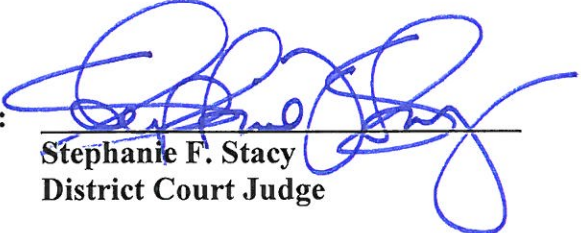
refute Defendants' contention that the Second Amended Complaint fails again to state an equal protection claim. While Plaintiffs' brief responds specifically to the other arguments raised by Defendants on this Motion to Dismiss, Plaintiffs' brief is silent as to the challenged insufficiency of their equal protection allegations. Because Plaintiffs were given adequate opportunity to cure the defects by amendment and have been unable to do so, the court concludes further leave to amend the equal protection claim will not be granted as a matter of course. If Plaintiffs want to request another opportunity to amend their complaint in an effort to state a cognizable claim that LB 1161 violates Plaintiffs' equal protection rights, they may file a Motion for Leave to Amend accompanied by a proposed Third-Amended Complaint, and set the matter for further hearing.

**IT THEREFORE HEREBY IS ORDERED:**

1. Defendants' Motion to Dismiss Second Amended Complaint is sustained as to any claim that LB 1161 violates equal protection;
2. Defendants' Motion to Dismiss Second Amended Complaint is overruled in all other respects, and Defendants are given 10 days from today to Answer the Second Amended Complaint;
3. A progression hearing is set for JULY 19, 2013 at 3:00p.m. to set this matter for trial.

Dated this 11<sup>th</sup> day of June, 2013.

BY THE COURT:

  
Stephanie F. Stacy  
District Court Judge