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Green Paper

- 1) Nebraska's Regulatory Authority Over Oil Pipelines.**
- 2) Nebraska's Non-Preempted Right To Regulate Land Use.**
- 3) Legal Authority for Action By Nebraska.**

Prepared for

BOLD NEBRASKA

And

Public Interest

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**Green Paper
Nebraska Governmental Authority & Oil Pipelines**

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Note: This Green Paper is prepared for Educational Reasons. Its function is to inform readers, encourage additional inquiry, and prompt appropriate action by government officials. It is not legal advice upon which the reader should, or may, rely to make individual decisions involving specific instances. It is a Paper addressing structural legal, and policy, issues.

Executive Summary

1. TransCanada, a foreign company engaged in the business of oil transportation by pipeline holds itself out as a leader in the development and operation of North American energy infrastructure. The company proposes a Keystone pipeline which, when built, will be a 1,833 mile long pipeline what transports crude oil from Hardisty, Alberta, across Montana, South Dakota, Nebraska, including a portion of the Nebraska Sandhills and Ogallala Aquifer, Kansas, Missouri, and Oklahoma with a terminus at Cushing, Oklahoma. There the transported oil will connect with another pipeline system and move to Port Arthur, Texas, to be processed and sold on the international oil market.

2. The pipeline will pass through an area of Nebraska not now punctuated by oil pipeline structures. The area to be crossed includes the pristine Ogallala aquifer and the fragile Nebraska Sandhills. A map of the project borrowed from the US Department of State website¹ appears below. The Ogallala aquifer is depicted below, too.



US State Dept Map¹

¹ <http://keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/map.jpg?OpenFileResource>



The Ogallala Aquifer²

3. Legal questions have arisen concerning Nebraska's role and authority as a State government. This green paper analyzes legal concerns in three areas:

- 3.1 Where oil pipelines are concerned, what can Nebraska regulate?
- 3.2 Does Nebraska have authority to regulate its land use by limiting pipeline routes?
- 3.3 If Nebraska has the authority to act, how and when must it do so?

4. After careful study, we conclude Nebraska can regulate its own land use. Federal safety regulations preempt *how* the pipeline must be built, but Nebraska has the right to control, reasonably and responsibly, *where* it must be built. Pipeline *safety* is federally preempted but oil pipeline *siting* is not.

5. Nebraska's authority must be exercised by its Legislature. The Legislature should act before commencement of State Department authorization for a Canadian border crossing, or construction as eminent domain proceedings which will likely follow in Nebraska.

6. Unlike the federal government's control of pipeline safety, the United States lacks authority to regulate, prescribe, or proscribe sites or routes for proposed pipelines, even

² Source: <http://web.mit.edu/>

if they are interstate lines. This deficit concerning oil pipelines contrasts with national authority over natural gas pipelines. Federal control over such pipelines is found in the *Natural Gas Act*, 15 USC §§ 717 *et seq.* While certificates of public convenience and necessity are required to operate gas pipelines, no similar requirement mandates oil pipeline owners or operators must obtain certification from the Federal Energy Regulatory Commission (FERC) or any other federal agency.

7. The federal government has not preempted the States enacting pipeline siting issues within a State. Where the federal government has not acted, the States may. Federal law preempts pipeline safety issues so Nebraska has no significant role in pipeline design or construction criteria which is wholly separate from route siting.

8. Though Nebraska has the power to regulate locations at which pipelines will be placed, it has not exercised this power. Nebraska is without a statute designing how a proposed route submitted for approval is to be handled. Simply, Nebraska has no statute pertaining to any permitting requirements that apply specifically to construction or operation of oil pipelines.

9. Nebraska has the legal power to regulate its land use and thereby control the routes for oil pipelines across the State. TransCanada has one oil pipeline across Nebraska; its location was acquired without controversy about three years ago. This pipeline lies in an easement large enough to accommodate TransCanada's second pipeline across the State. The Legislature can require TransCanada to use its existing corridor again in eastern Nebraska by enacting a law generally requiring pipeline companies to consolidate their pipelines in reasonable corridors to maximize land utilization and minimize interference with land use by others.

10. But, to exercise this power, the Legislature must enact a statute and the Governor must approve it. This should occur and be accomplished by the end of 2011. Presently, Nebraska has no pipeline siting statute. It does have an eminent domain statute that permits pipelines to exercise the power of eminent domain. *Neb Rev Stat* § 57-1101. If Nebraska's Legislature enacts a thoughtful statute governing pipeline siting, it is likely the statute will be valid and enforceable against TransCanada and all other oil pipeline companies. At ¶¶ 86 *et seq.* possible course of action are collected and listed. The list is not exhaustive.

11. Nebraska's siting authority may be more theoretical than real if it delays action. Once the United States State Department issues a permit authorizing construction of the pipeline and the route across Montana and South Dakota is finalized, it will be difficult to compel TransCanada to move its proposed pipeline eastward to its existing corridor.

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Analysis

I. What Is Nebraska's Regulatory Interest Over Oil Pipelines?

12. Oil pipelines consume land, interfere with its use, limit alternatives for its economic development and create barriers for owners and the public. They must be accepted when planning, accommodated when building, and avoided when digging. As structures pipelines can force rerouting, or halt development of water and sewer mains, electrical and telecommunications lines, and constrain economic growth. Accordingly, pipelines must be dealt with in land use terms. They cannot be permitted to be placed willy-nilly everywhere. Oil pipeline placement is, therefore, a matter of undeniable State interest.³

13. In recent publications by TransCanada and its lawyers, arguments have been made suggesting that Nebraska's regulatory authority over pipelines has been preempted by the federal government. But, this is not correct. Federal regulatory preemption governing oil pipelines has occurred only in the area of pipeline design and construction safety. Regulation of land use within States, i.e., defining the route or site at which a pipeline can be constructed, has not been preempted by federal law.

14. Indeed, State oil pipeline approval is required in numerous areas of regulatory activity. This is readily displayed in the permits, approvals, and regulatory requirements section of the US Environmental Protection Agency's Environmental Impact Study of the proposed TransCanada Keystone pipeline.⁴ It names numerous State and local governmental approvals, collaborations and reviews necessarily completed before oil pipeline construction can occur.

15. Certainly, federal authority is present in connection with TransCanada's need for government approval for its proposed pipeline project. The US President's Executive Order 1337 commits to the Department of State oversight and review in

³ Zoning laws are the classic example, see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition of brickyard operations); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

⁴ See USEPA EIS, Keystone XL Pipeline Projection, Table 1.8-1, Permits, Licenses, Approvals, and Consultation Requirements, identifying state and municipal approval authorities in Montana, South Dakota, Nebraska (historical preservation, Department of Environmental Quality, Division of Air Quality, Department of Natural Resources, Game & Parks Commission, Department of Transportation, County Roads Departments, and county and local authorities), Kansas, Oklahoma, and Texas.

connection with applications for Presidential permits for pipeline border crossings. A series of additional executive orders ensure compliance in other areas.⁵

16. The TransCanada Keystone pipeline, as proposed, illustrates the massive, long term impact of a pipeline on land use in the State. In Nebraska, the TransCanada Keystone pipeline proposes to encompass these land requirements:

16.1 A 110-foot wide construction right of right-of-way easement across the width of the State consisting of a:

16.1.1 60-foot temporary workspace easement generally across the State; and

16.1.2 50-foot permanent easement for construction and service.

17. Greater than 3,400 acres of Nebraska land will be affected directly during construction, and 1,560 acres of Nebraska land will be effectively taken on a permanent basis. Millions of cubic yards of borrow material are expected to be required for temporary storage during construction, and to stabilize land and permanent facilities and to pad pipelines. Seven contractor yards, from Holt County in the north to Gage County in the south of Nebraska, are expected to be used, covering a combined 191 acres. Three railroad siding facilities in Merrick, York, and Jefferson Counties, utilizing 60 acres, will be committed to the project. Nine pump storage sites in eight Nebraska counties will use 274 combined acres. Four of those counties, Keya Paha, Holt, Wheeler, and Greeley, include stretches of the Nebraska Sandhills. At least six of them, Keya Paha, Holt, Wheeler, Greeley, Nance and Hamilton also include reaches of the Ogallala Aquifer.

18. The EPA's Environmental Impact Statement discloses the pipeline will cross under or through these Nebraska rivers⁶:

| | |
|--------------|-----------------|
| Keya Paha | Niobrara |
| Cedar | Loup |
| Platte | Blue, West Fork |
| Beaver Creek | |

19. The EPA's EIS also identifies the fact that 160 additional water body crossings are expected to occur in Nebraska. Both rainwater basin wetlands and

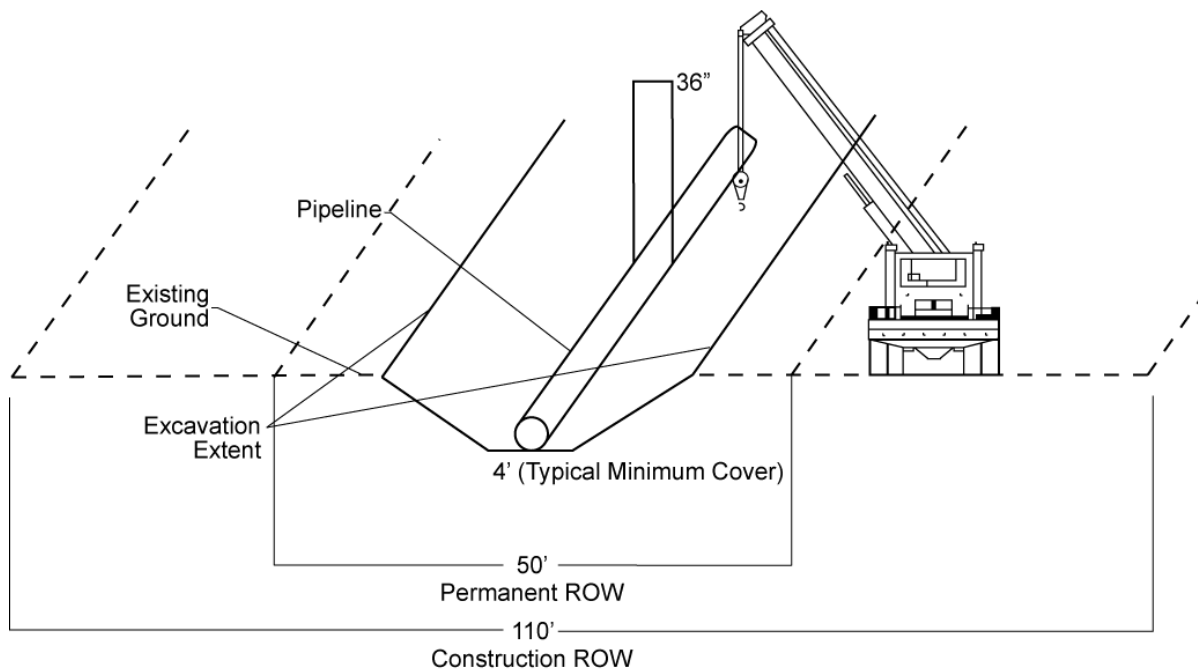
⁵ EO11988, Flood Plain Management; EO11990, Protection of Wetlands; EO12114, Environment Effects; EO12898, Environmental Justice, Minority, and Low Income Populations; EO13007, American Indian Sacred Sites; EO13112, Endangered Species; EO13175, Consultation and Coordination With Tribal Governments; EO13186, Responsibility to Protect Migratory Birds; & EO13212, Expedition of Energy-Related Projects.

⁶ US EPA Environmental Impact Statement Table 3.3 *et seq.* Aug 26, 2011.

Sandhills wetlands would be crossed within the State. As planned, the project proposes open cut crossings, including streambed disturbances.⁷

20. At least three endangered species of wildlife within the State will be affected. So will endangered aquatic, plant, and insect species.⁸

21. As proposed, the TransCanada pipeline will cross 254.1 miles of privately-owned Nebraska land, and includes 15% of the length of the project. 115.3 miles of this land is used for crop production. 124.7 miles is used as range land. The remainder is developed, open water, wetland, or wooded land.⁹ Its permanent right of way, and construction furrow will look like this¹⁰:



22. The pipeline, as proposed, will pass within two miles of seven Nebraska communities, ranging from Ericson in Wheeler County to Steele City in Jefferson County.¹¹ Under Nebraska law, TransCanada may be required to comply with municipal regulations.¹² The pipeline will constitute a 36" diameter¹³ barrier to be dealt with on hundreds of east-west roads, dozens of railroads, and bridges, and will impact

⁷ Environmental Impact Statement § 3.7. Aug 26, 2011.

⁸ *Id.*

⁹ US EPA Environmental Impact Statement Aug 26, 2011.

¹⁰ *Id at ES-6*

¹¹ *Id.*

¹² *City of Alma v. Furnas County Farms*, 266 Neb 558, 667 NW2d 512 (2003).

¹³ Pipeline specifications are for an outside diameter of 36" and operating pressure of 1,308 psig. EPA Environmental Statement ES-3, Aug 26, 2011.

infrastructure development and repair in the State, driving up costs for Nebraska and its political subdivisions for the foreseeable future. Nebraska does not permit private road construction, or other common carrier infrastructure to be built without State attention to land use interests. Even a single storage tank for oil is regulated.¹⁴ The smallest phone company, serving the smallest village, must obtain State permission for most actions, and certainly to operate.¹⁵ Yet, under current State law, oil pipeline siting is not regulated.

23. TransCanada has a pipeline through the State now. It was acquired recently with no controversy. Alternate routes for the Keystone pipeline have been discussed. Some are exemplified in Appendix 1.¹⁶ But this Green Paper's purpose is not to focus on a single pipeline, or route. It is to study and provide information concerning the legal authority Nebraska possesses and the alternatives available to the State to control use of its land and resources. After consideration, the conclusion emerges that State authority to regulate exists in federal and state law. But it can also be found within the brief history of the TransCanada Keystone pipeline. To this extent, the Keystone pipeline provides some useful information that informs one to the answer of the legal question under scrutiny.

24. The EPA found that TransCanada must comply with State air quality and noise restrictions, noting that Montana's requirements are more stringent than those imposed by federal law.¹⁷ This point does not appear to be contested by TransCanada. This is an overt concession to the power of State governments to regulate the pipeline in areas not preempted by federal law. The concession is well placed since federal preemption of siting has not occurred.

Areas of Federal Regulation

25. The United States, as a federal government, embarked on preemptive regulation in the area of pipeline safety in 1992, by enacting the *Pipeline Safety Act*, 49 USC §§ 60101 *et seq.*¹⁸

26. Pipeline safety is preempted by federal law, and regulations issued under the Act are given effect to assure pipeline design and construction safety.¹⁹ Even drug testing regulations for workers have been upheld under the Act.²⁰ The regulations under

¹⁴ 267 *Neb Admin Code* § 3-024, and other rules of the Nebraska Oil & Gas Conservation Comm'n.

¹⁵ 291 *Neb Admin Code* § 5-001.

¹⁶ Appendix 1, Fig 1. is an illustration of the authors based on data from TransCanada's publications. App 1, Fig 2 is taken from EPA Environment Impact Statement, ES 13 Aug 26, 2011.

¹⁷ EPA Environment Impact Statement, § 3.12, Aug 26, 2011.

¹⁸ This Act combined and recodified two previous safety statutes, the *Hazardous Liquid Pipeline Safety Act* of 1979 and the *Natural Gas Pipeline Safety Act* of 1968.

¹⁹ *Skinner v. Mid America Pipeline Co.*, 490 US 212 (1989)

²⁰ *International Broth of Elec Workers Local 1245 v. Skinner*, 912 F2d 1454 (9th Cir 1990).

the Act depend on a definition of “pipeline.” The term is defined by federal regulations as but not by Nebraska law. Under federal regulations:

Pipeline or pipeline system means all parts of a pipeline facility through which a hazardous liquid or carbon dioxide moves in transportation, including, but not limited to, the pipe, valves, and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping units, metering, and delivery stations, and fabricated assemblies therein, and break-out tanks.... Pipeline facility means new and existing pipe, rights-of-way, and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide.²¹

Crude oil pipelines and natural gas pipelines must both comply with federal safety criteria. Natural gas pipelines, which transport a hazardous ultimately usable product must comply with federal siting criteria. There are no such federal siting criteria for crude oil pipelines like the proposed TransCanada Keystone line.

27. A number of judicial decisions have dealt with what is preempted by the *Pipeline Safety Act* and its regulations. Generally, States are permitted to impose fees on pipeline operators to delay costs of conducting inspections where required to be permitted by States.²² State law, governing land use and requiring a pipeline company to deepen its lines to accommodate drainage improvements, was not preempted.²³ In the Eighth Circuit, control of pipeline crossings under county roads does not appear to be wholly preempted.²⁴

28. The United States Court of Appeals for the Eighth Circuit has held that State laws purporting to regulate the safety aspects of pipeline design or construction are preempted by federal law.²⁵ In *Kinley*, the court cited the U S Supreme Court’s Supremacy Clause²⁶ and noted that federal law may supersede State law in multiple ways, but that congressional intention to supersede, or refrain from doing so, is critical to determining whether supersession occurs. The court noted that the *Pipeline Safety Act* of 1992, amended numerous statutes and imposed new duties on the US Secretary of Transportation.²⁷

²¹ 49 *CFR* § 195.2. Definitions.

²² *Tenneco Inc., v. Public Service Commission of West Virginia*, 489 F2d 334 (4th Cir 1993).

²³ *Panhandle Eastern Pipeline Co., v. Madison County Drainage Board*, 898 FSupp 1302 (SD Ind 1995).

²⁴ *Williams Pipeline Co., v. City of Mounds View, Minn*, 704 FSupp 914 (D Minn 1989).

²⁵ *Kinley v. Iowa Utilities Board*, 999 F2d 354 (8th Cir 1993) (interstate hazardous liquid pipeline extending 13 miles from terminal near Council Bluffs to Offutt Air Force Base, Bellevue Nebraska, four inches in diameter to transport aviation jet fuel).

²⁶ *US Const Art VI CL 2*.

²⁷ 49 *USC* § 2002(a), (b), confirming the court’s view that safety standards were preempted by the Act.

29. But *Kinley* does not address questions concerning State authority to regulate land use. It is well settled that “the historic police powers of the States [are] not to be superseded by [a] federal act unless that [is] the clear and manifest purpose of congress.”²⁸ One must “look first to the language of a statute to determine congress’ intent.”²⁹ Further, “[t]here is a presumption against preemption in areas of traditional State regulation,”³⁰ which “is overcome if it was the ‘clear and manifest purpose of [the agency]’ to supersede State authority.”³¹

30. The States historically controls land use issues. Land use and zoning issues have “ ‘always been an intensely local area of the law.’ ”³² More specifically, it has been established for quite some time that zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of States and municipalities.³³ In 2009, the Tenth Circuit Court of Appeals held:

“Land use policy such as zoning customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.” *Mount Olivet*, 164 F3d at 487. In such circumstances, we are particularly averse to find preemption. See *Ramsey Winch Inc. v. Henry*, 555 F3d 1199, 1204 (10th Cir 2009) (holding that the presumption against preemption “applies with greater force when the alleged conflict is in an area traditionally occupied by the States”).³⁴

31. In the area of natural gas, the Federal Energy Regulatory Commission has been given “exclusive authority to approve or deny an application for the siting... of natural gas pipelines and terminals.”³⁵ But, there is no such statute governing the construction of oil pipelines. No federal agency has been given regulatory control over oil pipeline siting. The Eighth Circuit recognized this dilemma, noting that natural gas

²⁸ *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516 (1992); *AES Sparrow Point Lng LLC v. Smith*, 527 F3d 120, 125 (4th Cir 2008).

²⁹ *Sprintsna v. Mercury Marine*, 537 US 51, 62 (2002).

³⁰ *Wuebker v. Wilbur-Ellis Co.*, 418 F3d 883, 887 (8th Cir 2005) (citing *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151, 121 S Ct 1322, 149 L.Ed.2d 264 (2001)).

³¹ *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F3d 781, 794 (8th Cir 2010).

³² *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 67 (4th Cir 1992) (quoting Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev 837, 839 (1983)) (tracing the history of land-use and zoning regulations in the United States); see also *River Park, Inc. v. City of Highland Park*, 23 F3d 164, 165, 167 (7th Cir 1994); *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir 1986).

³³ See *St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274, 39 S Ct 274, 63 L.Ed. 599 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-31, 37 S Ct 190, 61 L.Ed. 472 (1917).

³⁴ *Deane v. United States*, 329 F App'x 809, 814 (10th Cir 2009).

³⁵ 15 USC § 717(b).

pipelines are a scheme of federal laws preempting the States,³⁶ but also noting there is no such express regulation affecting oil pipelines.³⁷

32. In short, the federal government has regulated in the area of oil pipeline safety, but not siting. The States are left with the right to decide where, within their jurisdictions, pipelines can be sited so long as they exercise the power in a manner that does not so obstruct commerce as to interfere unreasonably with its conduct.

Federal Constitutional Considerations

33. The Supremacy Clause and Commerce Clause of the *U S Constitution* are two prominent federal constitutional considerations that impact State regulation of oil pipelines. As noted above, the Supremacy Clause, which serves as the foundation for the doctrine of federal preemption, does not prevent Nebraska from regulating land use by requiring that pipelines be located reasonably within the State so as to protect the State's land use plan and prevent undue interference with others. There is no federal statutory or regulatory scheme preempting Nebraska's regulation of land use in connection with oil pipelines. Congress's intention to leave this to the State is manifest in its decision to give siting authority over gas pipelines to a federal agency.³⁸ The Congressional Research Office so informed Nebraska Congressman Lee Terry in a September 20, 2010 Memorandum.³⁹

34. The Commerce Clause prevents Nebraska from enacting laws or regulations that unduly impede commerce between or among the States. Nebraska cannot grant undue preferences to its own citizens in matters affecting interstate commerce. It cannot engage in favoritism. But, the State can regulate land use evenhandedly so its regulations apply, with equal force and clarity to Nebraskans and non-Nebraskans, without running afoul of the dormant Commerce Clause. Discussion appears below.

35. Some concern has been expressed that the Commerce Clause of the *U S Constitution* preempts action by Nebraska. The U.S. Constitution, gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."⁴⁰ This "Commerce Clause" is sometimes said to have an implicit,

³⁶ *Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F3d 817 (8th Cir 2004).

³⁷ *Kinley, supra*, fn 23.

³⁸ Many authorities support this statement. One interesting one is, *Briefing Paper #1: Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at <http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

³⁹ The Memorandum, by Paul Parfomak, Specialist in Energy & Infrastructure Policy, 7-0030 is entitled "Information on Federal Law Related to Siting and Safety of Oil Pipelines. See, the paper at <http://boldnebraska.org/uploaded/pipeline/CongressionalResearchServicereport.pdf>

⁴⁰ *U S Const* Art I, Sec 8, Cl 3.

or “dormant” component that empowers the federal government to trump states when federal interests outweigh those of the States, individually.⁴¹ State regulations are not inherently, or even preferentially, preempted by the dormant Commerce Clause:

“Where the [State] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁴²

Under the *Pike* standard, the burden is on the party challenging a State law to prove that it imposes a burden on interstate commerce that is too great to bear.

36. The Commerce Clause must be considered in connection with the federal Supremacy Clause⁴³ providing for the superiority of federal law in areas where the federal government legislates or regulates. Preemption may be express or implied. As noted above, there is no express federal preemption of oil pipeline siting. Implied preemption can occur in two ways, i.e., a field can be preempted, or conflicts between State and federal laws can have the effect of preempting.⁴⁴ Field preemption exists when congress’ intent to supersede State law altogether is found in a scheme of federal regulation “so pervasive as to make reasonable the inference that congress left no room to supplement it.”⁴⁵ “Conflict preemption” occurs when compliance “with both federal and State regulations is a physical impossibility.”⁴⁶ Conflict preemption also occurs where State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.”⁴⁷

37. Nebraska has no known land use regulation that expressly conflicts with the federal government. The federal government has no law or regulation suggesting that oil pipelines can be built willy-nilly across States in criss-cross fashion, or a few hundred feet apart. There is nothing to suggest that States cannot require reasonable corridors for pipeline construction to protect and preserve populations, land structures and formations, wilderness areas, or to otherwise preserve and regulate land quality and land use, or to protect natural resources within a State.

38. Nothing expressed in any federal statute suggests that Congress intended to leave no room for States to supplement the control of pipelines by defining where they may be built. To the contrary, there is authority that where regulations do not

⁴¹ The balancing of interest process was overtly announced in *Pike v Bruce Church, Inc.*, 397 US 137 (1970).

⁴² *Id.*

⁴³ *US Const* Art VI Cl 2.

⁴⁴ *Gade v. Nat’l Solid Wastes Management Ass’n*, 505 US 88, 98 (1992).

⁴⁵ *Pacific Gas & Electric Co v. State Energy Res Cons & Dev Commission*, 461 US 190, 203 (1983).

⁴⁶ *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 US 132, 142 (1963)

⁴⁷ *Hines v. Davidowitz*, 312 US 52, 67 (1941).

impermissibly discriminate against interstate commerce, State and local taxes, permit requirements and construction location requirements will be held valid. For example, a franchise fee of \$59,000 per mile for an oil pipeline across Santa Monica, California, was valid.⁴⁸ The dormant Commerce Clause was rejected in a case holding that States can regulate the manner in which contracts involving pipelines are negotiated.⁴⁹

39. Public safety measures concerning construction or operation of a pipeline are preempted by federal law.⁵⁰ But, there is no indication that land use requirements, if reasonable and not unduly restrictive of commerce, will be enforced.

40. The Commerce Clause forbids only the promotion of local economic interest over out-of-state interests. It does not forbid restrictions that even-handedly apply to both interstate and intrastate companies.⁵¹ Nebraska is not precluded by the dormant Commerce Clause from adopting a statute that would apply equally to State and local oil pipeline companies, and to those from outside the State, or outside the United States.

41. This is the analysis applied to determine whether the dormant Commerce Clause requires that a State or local law be stricken as unduly burdensome to interstate commerce:

To determine whether a law violates this so-called “dormant” aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433, 125 S Ct 2419, 162 L Ed 2d 407 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359, 112 S Ct 2019, 119 L Ed 2d 139 (1992). In this context, “ ‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S Ct 1345, 128 L Ed 2d 13 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988). Discriminatory laws motivated by “simple economic protectionism” are subject to a “virtually *per se* rule of invalidity,” *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S Ct 2531, 57 L Ed 2d 475 (1978), which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose, *Maine v. Taylor*, 477 U.S. 131, 138, 106 S Ct 2440, 91 L Ed 2d 110 (1986).⁵²

⁴⁸ *Shell Oil Company v. City of Santa Monica*, 830 F2d 1052 (9th Cir 1987).

⁴⁹ *Central Valley Chrysler Valley Jeep Inc., v. Witherspoon*, 2006 WL1883363 (Ed CA) (application of California Health & Safety Code, and Regulations governing air quality to pipeline).

⁵⁰ *Olympic Pipe Line Co., v. City of Seattle*, 437 F3d 872 (9th 2006).

⁵¹ *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U S 93, 99 (1994).

⁵² *United Haulers Ass'n v Oneida-Herkimer Solid Waste Mgmt Auth*, 550 US 330, 338-89 (2007).

42. Nebraska's adoption of pipeline siting regulations, expressed in a statute applying universally to a class of pipelines, and not discriminating on its face against interstate commerce, does not constitute "simply economic protectionism." Indeed, if the statute simply requires that all pipeline companies, or all pipeline companies with actual or proposed pipelines similarly situated, must act similarly as they seek a route through the State, is not discriminatory but advances legitimate State purposes. Nebraska has an interest in controlling the number of interstate structures carrying hazardous liquids across the State.⁵³ It has an interest in confining the geographic location of those structures to maximize land use, as well as other efficiencies. And it has an interest in protecting the land.⁵⁴ These interests can be advanced by adopting legislation that takes one of several forms, including these two forms generally:

42.1 The legislation can define a set of circumstances applying to all pipelines whose circumstances fall within the definitions. For example, if a pipeline company has an existing oil pipeline route through the State and desires to build a second and if the pipeline can be built within the location of the original pipeline's easement, or adjacent to it, without undue or unreasonable restraint on interstate commerce, then the State can require that the company place its pipelines in the same easement area.

42.2 Second, the State could require that pipeline companies apply for corridor permits to build their presently-proposed and future pipelines across the State, and that existing pipelines will be grandfathered in, provided their routes shall constitute the corridor for their owners, or the affiliates of their owners and their owners' successors, across Nebraska. This approach, too, would assure that legitimate State interests in land utilization and preservation are advanced by consolidating geographic areas where pipelines pass, and thereby limiting the impositions on land use and infrastructure that can come from the lack of foresight, coordination, and creation of utility corridors for oil pipelines.

43. In TransCanada's case, the company has an existing pipeline route extending from near Yankton, South Dakota, southward to Steele City, Nebraska. It now proposes a pipeline entering the State approximately 100 miles west of Yankton, and angling vertically across the Ogallala Aquifer, and a stretch of the Sandhills, southward eventually to Steele City but forming a triangle in the northern two-thirds of the State. This triangulated line can be eliminated by a statute requiring consolidation of pipelines

⁵³ See, e.g., Sorenson et al, *New Mexican Nationalism and the Evolution of Energy Policy in New Mexico*, 17 Nat Res J 283 (1977) for a discussion of state interests.

⁵⁴ See commentary of University of Nebraska water scientists report at <http://watercenter.unl.edu/Archives/2011WaterScientistsWarn.asp>

into a corridor, or utilization of an existing pipeline easement for a second line to be owned by the company already transacting oil pipeline business within the State.

II. Is Nebraska's Legal Authority To Regulate Land Use Preempted?

44. Nebraska's legal authority to regulate land use with respect to oil pipelines crossing the State has not been preempted by federal law. The State's authority to require that oil pipelines be placed in approved sites, or sites that meet reasonable legislature criteria, is intact.

45. In fact, Nebraska's law clearly does regulate certain pipelines. Its laws will control the process of acquiring land for the pipeline from Nebraskans, and the State's law, including its eminent domain law, is a sovereign power held exclusively by the State. The State can regulate oil pipeline siting by constricting the use of the power of eminent domain to circumstances in which legislative criteria, reasonably established, are satisfied.

46. Nebraska has a well established eminent domain procedure and a history of legislative protection, and extension, of the sovereign authority to delegees. Delegation has occurred to departments of State government, local government, and utilities.⁵⁵ It has consciously delegated or withheld the power of eminent domain as a matter of legislative prerogative.

‘The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired, whether an easement or the fee or some estate intermediate these two, such as a base, conditional, or determinable fee.’⁵⁶

47. The Nebraska Legislature's oil pipeline legislative authority is substantial; the Body is not obligated to delegate sovereign powers, including eminent domain, to a private company.

State Pipeline Regulations

48. Nebraska has adopted, administratively sections of the federal regulations⁵⁷ enacted pursuant Natural Gas Pipeline Safety Act.⁵⁸ Nebraska does not appear to have

⁵⁵ Natural Resource Districts, *Neb Rev Stat* § 2-3234; Aeronautics, *Neb Rev Stat* § 3-144; Roads, *Neb Rev Stat* § 39-1320; Cities, e.g., *Neb Rev Stat* § 14-2003; etc.; counties, *Neb Rev Stat* § 39-1710; power and irrigation districts, *Neb Rev Stat* § 70-760. These are examples.

⁵⁶ *Burnett v. Central. Neb Pub Power & Irr. Dist.*, 147 Neb 458, 466, 23 NW2d 661, 666 (1946).

⁵⁷ Nebraska's regulations are at 155 *Neb Admin Code* 001 *et seq.* The federal regulations adopted by incorporation into state law are at 49 CFR Pts 191, 192, 193 & 199.

⁵⁸ 49 USC § 6101 *et seq.*

adopted any federal regulations related, in any way, to oil pipeline safety. There are no federal oil pipeline siting regulations. The State's pipeline regulations are negligible.

Control of Eminent Domain

49. No one doubts that Nebraska law controls the eminent domain process applicable to right of way condemnation by utilities, and pipelines.

50. Eminent domain authority emanates from one federal, and one State, constitutional sources. First the Fifth Amendment to the U S Constitution provides, among its guaranteed rights:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁵⁹

51. The Nebraska Constitution's eminent domain clause is notably broader than the federal provision:

The property of no person shall be taken or damaged for public use without just compensation therefor.⁶⁰

52. Eminent domain was explained in 2010 by the Nebraska Court of Appeals as follows:

We first summarize the nature of eminent domain. 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. *Krambeck v. City of Gretna*, 198 Neb 608, 254 NW2d 691 (1977). The power of eminent domain is a sovereign power which exists independent of the Constitution of Nebraska. *Burger v. City of Beatrice*, 181 Neb 213, 147 NW2d 784 (1967). The Legislature may delegate the power of eminent domain. See *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb 235, 631 NW2d 131 (2001). The Constitution of Nebraska and legislative enactments pursuant thereto are in no sense a grant of power, but are and should be treated as a limitation of the power of eminent domain.⁶¹

⁵⁹ *US Const Amend V*, C1 5.

⁶⁰ *Neb Const Art I*, § 21.

⁶¹ *City of Omaha v. Tract No. 1*, 18 Neb App 247, 251, 778 NW2d 122, 127 (2010).

The important teaching of these holdings is that the Legislature has broad authority to grant or withhold delegation of the power of condemnation.

53. State legislatures have some, but not absolute, authority to delegate legal power to private companies. This includes the power to delegate the sovereign power of eminent domain. One common instance of delegation involves common carriers. A common carrier is a business that transports people or services to the general public under a license or authority provided by a regulatory body.⁶² The common carrier approach means that the private service provider is subject to special duties to ensure fair terms of access and reasonable rates. Whether a pipeline is a common carrier of a State may depend on State law, and case law.

54. The common carrier approach originated with the railroads – a common carrier which transports people and goods, instead of oil via pipeline. As in the railroad industry, monopoly power was a concern in the oil industry at the turn of the 19th century, but the concern was dissipated with the breakup of the Standard Oil Trust in 1911.⁶³ In fact, antitrust policy developed largely as the result of mergers, pricing, and access behavior during the early oil pipeline development period.⁶⁴ As a result of abuses by the Standard Oil company, Congress enacted the 1906 Hepburn Amendment to the Interstate Commerce Act, which gave the Interstate Commerce Commission (ICC) (which later became the Surface Transportation Board (STB)) federal regulatory responsibility over interstate oil pipelines. Under the Act, most interstate oil pipelines were granted common carrier status, shipment rates were required to be “just and reasonable,” and shipments were required to be allocated on a nondiscriminatory basis.⁶⁵

55. Under a common carrier approach, anyone who wishes to transport oil through a pipeline may do so on payment of the appropriate fee.⁶⁶ Common carriage systems fall into two categories: voluntary and compulsory. Under a voluntary common carriage, a pipeline company is free to elect to provide a common carriage service or not.⁶⁷ If it provides transportation services to any customer, it must stand ready to provide

⁶² Common Carrier, Encyclopedia Britannica Online, at <http://www.britannica.com/EBchecked/topic/128177/common-carrier>.

⁶³ M.A. de Figueredo, H.J. Herzog, P.L. Joskow, K.A. Oye & D.M. Reiner, *Regulating CO2 Capture and Storage*, 2 (Center for Energy and Environmental Policy Research, Working paper, April 2007), available at <http://web.mit.edu/ceepr/www/publications/workingpapers.html>.

⁶⁴ *Id.* See also, *Briefing Paper #1: Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at <http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

⁶⁵ *Id.*

⁶⁶ J Bernhardt, *Is Natural Gas Pipeline Regulation Worth the Fuss?*, 40 *Stan L Rev* 753, 756 (1988).

⁶⁷ *Id.* See also, *Briefing Paper #1: Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at <http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

transportation services to all customers at nondiscriminatory rates.⁶⁸ Under compulsory common carriage, a pipeline has no option; it must provide transportation services to anyone who wants them.⁶⁹

56. State Legislatures may, but are not required to, delegate the power of eminent domain. The Nebraska Supreme Court explained the process in a comprehensive 1946 decision:

Eminent domain is the power to take private property for public use. 1 Bouv.Law Dict., 588. It is the power which remains in the government to resume the possession of property upon making just compensation therefor, whenever the public interest requires it. This right of resumption may be exercised, when required for the public good, in the construction of a railroad, public road, canal, or other like work. The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen, and transfer it to another even for full compensation. *Beekman v. Saratoga, etc., R. Co.*, 3 Paige, N.Y., [45], 73, [22 Am.Dec. 679]. In other words, the right of eminent domain gives to the legislature the control of private property for public uses, and for public uses only. 2 Kent, Comm., 339, and cases cited. This being the rule, the property must be used for the purpose which justified its taking, otherwise it would be a fraud on the owner and an abuse of power, and the authority being in derogation of private right, is to be strictly construed.’

The right to exercise the power of eminent domain rests in the Legislature. This is stated in *McInnis v. Brown County Water Improvement District No. 1*, Tex.Civ.App., 41 S.W.2d 741, 744, as follows: ‘Eminent domain, or the power to take private property for public use, is an inherent and inalienable attribute of sovereignty. Its delegation to the Legislature is implied from the general grant of legislative power; requires no express authority; and constitutional provisions touching it are generally regarded as limitations upon the legislative authority. See 20 C.J. p. 513, § 1; 10 R.C.L., p. 11, § 9; *Lewis on Eminent Domain* (3d Ed.) vol. 1, pp. 20, 21, §§ 9 and 10.’

The Legislature has the right to delegate this power and to restrict or limit the extent of its use. As stated in 18 Am.Jur., *Eminent Domain*, § 114, p. 740: ‘The legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the quantum of interest or estate which may be acquired, whether an easement or the fee or some estate intermediate these two, such as a base, conditional, or determinable fee. The interest taken depends always on the

⁶⁸ *Id.*

⁶⁹ *Id.*

construction of the statute authorizing the taking. Generally, the rule of construction applied to determine the extent of the grant of the power of eminent domain is that its exercise is limited to the express terms or clear implication of the statute in which the grant is contained. So, if a statute expressly or by necessary implication declares that a fee shall be taken, the condemner will acquire the fee specified.

Whether the granting of such an estate is good public policy, there being no constitutional restriction, is a legislative, not a judicial, question. But where the language of the statute will bear that construction, courts, as a general rule, seem disposed to leave the fee in the landowner.⁷⁰

57. The Nebraska Legislature has made delegations of the power of eminent domain; it includes pipeline companies. One Nebraska statute mentions pipeline companies as delegees of Legislative authority to exercise the power of eminent domain in Nebraska. It provides:

Any person engaged in, and any company, corporation, or association formed or created for the purpose of transporting or conveying crude oil, petroleum, gases, or other products thereof in interstate commerce through, or across the State of Nebraska, or intrastate within the State of Nebraska, and desiring or requiring a right-of-way or other interest in real estate, and being unable to agree with the owner or lessee of any land, lot, right-of-way or other property for the amount of compensation for the use and occupancy of so much of any lot, land, real estate, right-of-way or other property as may be reasonably necessary for the laying, relaying, operation and maintenance of any such pipeline or the location of any plant or equipment necessary to operate such pipeline, shall have the right to acquire the same for such purpose through the exercise of the power of eminent domain. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.⁷¹

58. Delegees of the power of eminent domain must abide by the rules laid down by the Legislature:

The power of eminent domain may be delegated by the Legislature. *Van Patten v. City of Omaha*, 167 Neb 741, 94 NW2d 664 (1959). Although railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain. See NebRevStat § 74-308 (Reissue 1996). See, also, *Gustin v. Scheele*, 250 Neb 269, 549 NW2d 135 (1996). We have stated that “[p]roceedings to subject the property of another for public use under the doctrine of eminent domain must be

⁷⁰ *Burnett v. Cent. Neb Pub. Power & Irr. Dist.*, 147 Neb 458, 465-66, 23 NW2d 661, 666-67 (1946).

⁷¹ *Neb Rev Stat* § 57-1101.

conducted in the manner prescribed by the statute delegating the power.” *Spencer v. Village of Wallace*, 153 Neb 536, 544, 45 NW2d 473, 477 (1951). See, *SID No. 1 v. Nebraska Pub. Power Dist.*, *supra*; *Engelhaupt v. Village of Butte*, 248 Neb 827, 539 NW2d 430 (1995). Pursuant to § 74-308, railroads are required to exercise their eminent domain power in accordance with Nebraska's general eminent domain statutes. See § 76-701 et seq.⁷²

59. Nebraska’s Constitution, statutes, regulations, and ultimately its courts, have clear, present, and well defined roles in the legal processes involving in the movement of a pipeline through the State by an interstate carrier. The eminent domain process is one of the areas in which State law controls over federal rules.

60. The power of eminent domain could be withdrawn from pipelines, or oil pipelines, by the Legislature. Instead of the current grant of this power, the Legislature could reasonably constrain the eminent domain authority to oil pipelines so it could be used only where takings are to occur in locations, and on terms, consistent with the State’s reasonable siting criteria.

61. For example, the Legislature could find that the Ogallala’s Aquifer’s value to the State and nation are transcendent, and that oil which, as the Nebraska Constitution recognizes, is a natural want,⁷³ requires oil pipelines be placed in locations where they do not intersect the aquifer, or where the intersection over the aquifer is controlled.

62. Similarly, the power of eminent domain could be constrained to limit the geography in which oil pipelines built for interstate transmission, or primarily interstate transmission of oil, may be located. Existing corridors could be required to be used unless the pipeline company can demonstrate, by clear and convincing evidence, that it cannot use the existing pipeline for reasons associated with a need for compliance with the federal oil pipeline safety laws.

63. The Legislature could withhold the power of eminent domain from an oil pipeline company seeking a route solely because its proposed site for an interstate oil transmission line is economically beneficial to the company, or it would simply be cheaper to route the line across a convenient route, rather than build it across one consistent with Nebraska’s land use policy.

64. These general approaches to effectively constraining the use of eminent domain, or otherwise regulating oil pipeline siting, are consistent with the State’s manifest interest in regulating its land use and do not burden interstate commerce. They

⁷² *Burlington N. & Santa Fe Ry. Co. v. Chaulk*, 262 Neb 235, 241-42, 631 NW2d 131, 137 (2001).

⁷³ *Neb Const Art XV § 4*; *Neb Rev Stat § 46-201*.

permit an interstate oil pipeline company to build a pipeline, indeed several, across Nebraska, but they prevent the pipeline from crossing the State in multiple locations at diverse points, instead of reasonably consolidating pipeline construction into a localized corridor.

Nebraska's Control of Pipeline *Siting* is Not Inconsistent With Federal Control of Pipeline *Safety*

65. State regulation of oil pipeline siting within Nebraska can be achieved on terms entirely consistent with federal regulation of oil pipeline safety. Safety criteria promulgated by the federal government include specifications for pipe steel, strength, structure integrity, valve quality, couplers and coupler quality, and joint supports, among many other things. These criteria apply regardless of the pipeline's site. The flanges necessary to connect two pipes and be compliant with federal law, are the same whether the pipeline enters Nebraska in Keya Paha County or Cedar County. There is no federal distinction in the safety regulations based on where within Nebraska, or any other State, an oil pipeline is located.

66. Nebraska can, therefore, regulate oil pipeline siting without interfering, or legislating on terms inconsistent with, federal pipeline safety standards. This point can be readily understood by inspecting a recent federal Order compelling TransCanada to take corrective action to prevent and halt oil spills from its existing interstate pipeline across Nebraska. The US Department of Transportation Pipeline & Hazardous Materials Safety Administration ("PHMSA"), the federal agency responsible for pipeline safety, monitoring, and regulatory enforcement, dealt with TransCanada recently.

67. TransCanada experienced a series of spills or leaks from its existing pipeline across Nebraska, principally outside of the State prior to June 2011. As a result, mandatory information submissions were made to PHMSA. It issued a corrective Order as a result. PHMSA found, in its Order issued against TransCanada on June 3, 2011 that its authority under 49 USC § 60112 was invoked. This statute "provides for the issuance of a corrective Order without prior opportunity for notice and hearing upon a finding that failure to issue the Order expeditiously will result in likely serious harm to life, property, or the environment." In the Order issued against TransCanada this specific safety-related finding was made by US DOT PHMSA:

...I find that the continued operation of the pipeline without corrective measures would be hazardous to life, property and the environment. Additionally, after considering the circumstances surrounding the May 7 and May 29, 2011 failures, the proximity of the pipeline to populated areas, water bodies, public roadways and high consequence areas, the

hazardous nature of the product the pipeline transports, the ongoing investigation to determine the cause of the failures, and the potential for the conditions causing the failures to be present elsewhere on the pipeline, I find that a failure to issue this Order expeditiously to require immediate corrective action would result in likely serious harm to life, property and the environment. Accordingly, this Corrective Action Order mandating immediate corrective action is issued without prior notice and opportunity for hearing.

68. The PHMSA official who signed the June 3 Order made its terms effective immediately.⁷⁴ Analysis of the terms discloses both the nature, and scope of federal oil pipeline safety regulation, and helps to distinguish pipeline *safety* from pipeline *siting* concerns. When sited in locations approved by the State as appropriate to the State's overall land use and growth plan, the pipeline must be built and operated safely. Safety and siting are different concerns. The PHMSA safety-related Order issued to TransCanada in 2011 due to spills from its existing line clearly applied without concern about the pipeline's site, or location. The Order required⁷⁵:

68.1 TransCanada to submit a written re-start plan or approval before re-energizing the line.

68.2 The re-start plan had to include at least these steps and provide adequate staffing, monitoring and patrolling during restart to ensure no leaks or failures at any pumping station.

68.3 Prior to re-start, TransCanada had to complete mechanical and metallurgical testing and failure analysis of failed pipe components is required. Within sixty (60) days after issuance of the Order, a review of Keystone facilities is required. It must contain this extensive data:

68.3.1 It was required to compile all available data on previous failures of similar small diameter piping and components.

68.3.2 It was ordered to compare a list by location that includes all sizes of pipes, sizes of components, etc.

⁷⁴ Order, June 3, 2011, PHMSA, available at <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Keystone%20CAO%20and%20Restart%20Approval.pdf>

⁷⁵ *Id.*

68.4 Within forty-five (45) days of the Order, an automated tracking system called Issues and Incident Tracker, was required to disclose by location previous difficulties.

68.5 The company was ordered to compile all media data or other documents to support its version of what went wrong.

69. Obviously, the PHMSA Order was not dependent on the whereabouts of TransCanada's pipeline. The Order was about the pipeline's structural integrity, construction, and maintenance. The corrective Order could have been issued if the pipeline was located in central Nebraska, or eastern Nebraska, when it entered the State, and whether it exited, in its southbound route, in Jefferson County or Richardson County.

70. State regulation dealing with where the pipeline should go does not interfere with federal regulation of pipeline safety. Further, while some Nebraskans might be vitally interested in protecting against pipeline spills that could taint the aquifer or damage the Sandhills, these are land use issues, not pipeline safety issues like those regulated by PHMSA and the Department of Transportation. Protective land use regulations are not at variance with the regulatory scheme of the DOT and its PHMSA.

Pipeline *Safety* Is Preempted by Federal Law, but *Siting* Is Not Preempted

71. Oil pipeline siting is not federally preempted. Oil pipeline safety is preempted. Virtually everyone except TransCanada's lawyers hired to write papers for the company's public relations use in Nebraska have so concluded. Those reaching this conclusion include State agencies,⁷⁶ scholars,⁷⁷ scholarly think-tanks,⁷⁸ and federal agency researchers.⁷⁹

72. Congressional researchers have reached the same conclusion.⁸⁰ In view of the uniform results of studies conducted for the US Congress, this conclusion is inescapable about oil pipelines because it is accurate:

⁷⁶ Briefing Paper #1: *Regulatory Aspects of CO2 Pipeline Infrastructure Development*, Colorado Dept of Natural Resources, available at

<http://dnr.state.co.us/SiteCollectionDocuments/CCS%20DOCS/CO2PipelineInfrastructure.pdf>

⁷⁷ J Bernhardt, *Is Natural Gas Pipeline Regulation Worth the Fuss?*, 40 *Stan L Rev* 753, 756 (1988).

⁷⁸ M.A. de Figueriredo, H.J. Herzog, P.L. Joskow, K.A. Oye & D.M. Reiner, *Regulating CO2 Capture and Storage*, 2 (Center for Energy and Environmental Policy Research, Working paper, April 2007), available at <http://web.mit.edu/ceepr/www/publications/workingpapers.html>.

⁷⁹ National Commission on Energy Policy, *Siting Critical Energy Infrastructure: An Overview of Needs and Challenges*. (Washington, DC: June 2006): 9.

⁸⁰ Congressional Research Service, *Carbon Dioxide (CO2) Pipelines for Carbon Sequestration: Emerging Policy Issues* (Updated 1-17-08).

Siting Authority. A company seeking to construct a CO2 pipeline must secure siting approval from the relevant regulatory authorities and must subsequently secure rights of way from landowners along the pipeline right by purchasing easements or by eminent domain. However, since federal agencies claim no regulatory authority with respect to CO2 pipeline construction, potential builders of new CO2 pipelines do not require, and could not obtain, federal approval to construct new pipelines. Likewise, federal regulators claim no eminent domain authority for pipeline construction, and so cannot ensure that pipeline companies can secure rights of way to construct new pipelines. By contrast, companies seeking to build interstate *natural gas* pipelines must first obtain certificates of public convenience and necessity from FERC under the Natural Gas Act (15 USC §§ 717, et seq.). Such certification may include safety and security provisions with respect to pipeline routing, safety standards and other factors.³⁶ A certificate of public convenience and necessity granted by FERC (15 USC § 717f(h)) confers eminent domain authority.⁸¹

73. Nebraska's State government is empowered to act in the area of oil pipeline siting, or routing, through the State. It cannot regulate safety, but can regulate land use within the State. State interests must be expressed reasonably and be weighed responsibly against competing interests impacting interstate commerce.

Nebraska State Interests Weighed

74. As is demonstrated above, Nebraska's interests in regulating land use is substantial. This area of government is one in which the principal of federalism is generally aggressive observed and deference to the State interest in controlling its land is given unless overt federal preemption is present. As is demonstrated above, the federal interest in oil pipeline safety and federal interests in interstate commerce can be accommodated by reasonable State land use regulations. They can include either (a) a construction permit system that compels pipelines to build in defined corridors and not in irregular patchwork across the State, or (b) limits a pipeline company's authority to use the power of eminent domain to compel pipelines to consolidate their routes into reasonable corridors, and prevents them from building in multiple spots at odd angles or in otherwise irregular, redundant, unreasonable, or obstructive locations.

75. Nebraska's vital interests in its land use are especially pronounced where its most pristine natural resources must be protected. The Sandhills and the Ogallala Aquifer, as well as the State's scenic and economically important rivers and lakes, all require and justify land use protection.

⁸¹ *Id.* at CRS-10. Available at http://assets.opencrs.com/rpts/RL33971_20080117.pdf

76. First the Sandhills are unique... so much so that it has been the subject of presidential investigations.⁸² What they hold as answers to questions residing deep within the minds of people is a matter of ongoing revelation.⁸³

77. Second, the Ogallala Aquifer is one of the world's largest aquifers, it covers an area of approximately 174,000 miles.⁸⁴ It supplies 70% of all water used in the State of Kansas.⁸⁵ This is only a small fraction of total dependence on the Ogallala aquifer, which serves as a prime water source for the States of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Colorado, New Mexico, and Wyoming.⁸⁶

78. Third, scientists now know that ground and surface water should be treated as a single hydrological system because that is the way they behave in nature.⁸⁷ Nebraska possesses the most valuable portion of the eight-state High Plains Aquifer—by far, the deepest, cleanest and largest share, a nearly unbelievable two-thirds of the whole.⁸⁸ Above most of this water is a sea of sandy soils, the Sandhills, where in many places the water table outcrops into wetlands, rivers or is not far below. Above most of this water is a sea of sandy soils, the Sandhills, where in many places the water table outcrops into wetlands, rivers or is not far below.⁸⁹

79. The TransCanada company wants to install a large-diameter high-pressure crude oil pipeline—the XL—through 110 miles of this sensitive, water-rich area, where

⁸² See, Axel Rydberg, *Flora of the Sandhills of Nebraska*, (Harvard Press 1893) and III US National Herbarium No. 3 (1895). See also, Mangan et al, *Response of Nebraska Sandhills*, 63 *Climate Change* Nos 1-2, 49-90 US Dept of Interior (2004).

⁸³ See, Sullivan, Janet. 1994. Nebraska Sandhills Prairie. In: Fire Effects Information System, [Online]. U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Fire Sciences Laboratory (Producer). <http://www.fs.fed.us/database/feis/> [2011, May 30].

⁸⁴ Dennehy, K.F. (2000). "High Plains regional ground-water study: U.S. Geological Survey Fact Sheet FS-091-00". USGS Retrieved 2008-05-07.

⁸⁵ Kansas Geological Survey Public Information Circular No 18, <http://www.kgs.ku.edu/Publications/pic18/index.html>

⁸⁶ Gutendag, Geohydrology of the High Plains Aquifer in parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming, USGS Numbered Paper 13454.

⁸⁷ "Traditionally, management of water resources has focused on surface water or ground water as if they were separate entities. As development of land and water resources increases, it is apparent that development of either of these resources affects the quantity and quality of the other. Nearly all surface-water features (streams, lakes, reservoirs, wetlands, and estuaries) interact with ground water...Thus, effective land and water management requires a clear understanding of the linkages between ground water and surface water as it applies to any given hydrologic setting." —Robert M. Hirsch, chief hydrologist, USGS, pubs.usgs.gov/circ/circ1139/#pdf.

⁸⁸ "In the entire High Plains aquifer, the place where the water is deepest is beneath the Sandhills. The key to that water volume...is that sand is highly permeable; water flows through it easily..." U.S. Water News Online, December 1996, "Nebraska's Sandhills Conceal Massive Aquifer," www.uswaternews.com/archives/arcsupply/6nebsan.html.

⁸⁹ L. Kent Wolgamott, "Future Control of Water Resources," published in "Flat Water: A History of Nebraska and Its Water," Resource Report No. 12, Conservation and Survey Division, Institute of Agriculture and Natural Resources, UNL, March 1993, p. 251.

(because of the soils' porosity and the close proximity of the water table) both ground and surface water are particularly vulnerable to widespread, rather than localized, contamination. It is also an area easily harmed by "clean-up" activities, where "natural remediation" of toxins over the course of many decades is likely to produce a dramatic detrimental impact on the environment. University of Nebraska Water Center Professor, Dr. John Gates testified under oath at a hearing on the TransCanada pipeline crossing the Sandhills, in the Nebraska Legislature, "It is known that surface waters in the Sandhills region, including rivers, wetlands, and lakes, are extensively fed by groundwater.[T]he time scale of flow from shallow groundwater to surface water can be very short in the Sandhills. Under these conditions, an oil release to groundwater that is near to a surface water body would be difficult to remediate before it is transmitted to surface.

80. The case for land use regulation of oil pipelines by the State is clear. The methods available are equally clear. A permit system can be enacted or, perhaps more simply, the power of eminent domain can be restricted, to assure that oil pipelines respect Nebraska's land use priorities, build their assets in controlled corridors, and comply with reasonable land use criteria, just like other industrial users of Nebraska's land must. No special burden will be imposed upon oil pipelines from any such legislation. Pipeline commerce and interstate benefits will be preserved. No intrastate preference for local pipelines will be created, and wise land use will be achieved.

81. Importantly, Nebraska's land use priorities can be achieved while accommodating interstate commerce reasonably. A pipeline company seeking passage through the State must expect to accommodate the law of each jurisdiction through which it works, including those laws that impact land use, taxes, permit requirements, notifications, disclosures, or siting. Matters of local importance must be respected and protected. This may require adjustments to routes, changes in plans and even some adjustments to schedules. But, so long as they accommodate interstate interests reasonably, the State laws will be enforced and command respect.

III. What Authority Authorizes Immediate Action By Executive & Legislative Branches of Nebraska's State Government?

How May Nebraska Act?

82. Nebraska's right to regulate land use is derived from the reservation of State powers in the U S Constitution. Simply,

The powers not delegated to the United States by the Constitution,
nor prohibited by it to the States, are reserved to the States respectively,

or to the people.⁹⁰

The 10th Amendment does to empower States not nullify federal laws or regulations or federal judicial decisions.⁹¹

83. Nebraska's power to act is implemented in the State's Constitution conferring lawmaking authority on the Legislature,⁹² and the separation of powers including duties to execute laws passed by the Legislature.⁹³ Executive departments must not exceed delegated powers or encroach upon legislative mandates in the implementation of statutes.⁹⁴ And, the power to make laws may not be delegated by the Legislature to the Executive Branch.⁹⁵ In fact, the Legislature cannot delegate its law making authority to the United States either.⁹⁶

84. Rule making authority can be delegated with adequate legislative standards.⁹⁷ The policy purposes for the delegation of authority and the boundaries for action must be established by the Legislature with the Executive agency's power being confined to implementation.⁹⁸

85. These background rules and the discussion of federal preemption and State authority above, provide legal background for the alternatives available to the Nebraska legislature as it deals with pipeline regulatory issues. These options are discussed throughout this Green Paper, but collected, below.

IV. What are Nebraska's Options for Action?

86. Nebraska's land use regulatory authority appears to authorize action to regulate oil pipelines in these categories or of these general types:

86.1 State law can, and should define what constitutes a *pipeline*. The federal definition quoted above at ¶ 26 is suggested.⁹⁹

⁹⁰ *U S Const* Amend 10.

⁹¹ *Cooper v Aaron*, 358 US 1 (1958).

⁹² *Neb Const* Art III Sec 1.

⁹³ *Neb Const* Art II Sec 1

⁹⁴ *Mann v. Wayne County Board of Equalization*, 186 Neb 752, 186 NW2d 729 (1971).

⁹⁵ *In re Petition of Nebraska Community Corr. Council*, 274 Neb 225, 738 NW2d 850 (2007).

⁹⁶ *Anderson v. Tiemann*, 182 Neb 393, 155 NW2d 322 (1967); *Smithberger v. Banning*, 129 Neb 651, 262 NW 492 (1935).

⁹⁷ *School Dist. No. 39 of Washington County v. Decker*, 159 Neb 693, 68 NW2d 354 (1955).

⁹⁸ A statute regulating the size of loaf of bread, authorizing Secretary of Agriculture to fix reasonable excess tolerances, is not invalid as a delegation of legislative power. *Petersen Baking Co. v. Bryan*, 124 Neb 464, 247 NW 39 (1933), affirmed, 290 U S 570 (1934).

⁹⁹ The federal definition is found at 49 *CFR* § 195.2. Definitions.

86.2 State law can define a “pipeline *company*” and should do so to include affiliates, related parties, commonly owned entities, joint ventures, etc.

86.3 State law can prohibit exercise of the power of eminent domain, or the ownership or operation of a pipeline in Nebraska by a company or organization with interests inimical to the United States as identified by the U S Department of State or the U S Department of Defense or any other agency authorized by the President of the United States to publish a list of nation states or organizations with interests inimical to those of the United States.

86.4 State law can be amended to limit or even eliminate the delegation of the power of eminent domain to oil pipeline companies, though tempering the use of the power is preferable to its elimination.

86.5 State law can require that pipeline companies build within defined corridors through the State, which corridors are defined on terms consistent with legislatively expressed state land use criteria.

86.6 State law can require that pipeline companies build in existing easements or right-of-way held by the company proposing construction, or in alternative compatible rights of way.

86.7 State law can require that pipeline companies build additional pipelines in easements or rights of way held by the company and can limit the power of eminent domain to expansion of existing easements only, if necessary.

86.8 State law can limit the power of eminent domain to construction in pre-approved corridors or existing easements or rights of way.

86.9 State law can require application and an approval process for a pipeline construction and / or operating permit as a condition precedent to exercise of the power of eminent domain.

86.10 State law can require that just compensation include severance damages where easements or rights of way, or partial takings, affect remainder interests or properties of nearby landowners.

86.11 State law can commit pipeline siting issues to either an administrative agency, in which case rule making would be required and lobbying and political influence could be wielded, or to the judiciary for adjudication of actual cases and controversies where such influence is minimized.

86.12 State law can regulate the ownership of pipelines by requiring prior approval before transfer to a successor as it does with State chartered banks, and privately owned utilities, and common carriers.

86.13 State law can criminalize fraudulent efforts to secure title to land or easements through false representations of the right to use the power of eminent domain.

86.14 State law can criminalize intentional or willful operations of a pipeline under unsafe conditions in violation of federal pipeline safety standards. It can provide for the right of the State to take over operations of a pipeline declared unsafe and to remediate the unsafe conditions at the expense of the power, and provide civil penalties assessed daily and payable to the State.

86.15 State can provide both compensatory and punitive damages, with funds for the latter to be paid to a designated State fund, where an offending pipeline violates the law of Nebraska, constitutes a public or private nuisance, or proximately causes losses to persons or property through operations that violate federal safety standards.

86.16 State law can require a remediation plan be filed and approved as a condition precedent to an operating permit, and it can require periodic (perhaps decennial) updates for the remediation plan as a condition precedent to permit renewal at periodic intervals.

86.17 State law can include a pipeline tax imposed as an ad valorem tax based on a formula that may include, among other possible factors, length, diameter, quantity and type of product transmitted, and other proper factors.

86.18 State law can be amended to repeal existing pipeline condemnation authority and replace that authority with an appropriate new methodology.

87. This list of options is not exclusive. It is illustrative.

When Does Nebraska Lose the Right to Act?

88. Once a pipeline company acquires property rights under an easement, right of way, condemnation or deed, it owns interests in real estate. Those interests are property of the pipeline company; it is entitled to just compensation if the government takes the property from it, just as in any other American citizen or any company with interests here. Property of foreign nations may be taken only for just compensation and

public purposes permitted by the Fifth Amendment.¹⁰⁰ Such takings for non-public purposes or without just compensation violate federal¹⁰¹ and international law.¹⁰²

89. The State must act before land is acquired by a pipeline company or it is likely to lose the right to exercise its sovereign powers. This means the deadline for State action is before the pipeline route is acquired from Nebraskans.

Is Nebraska Vulnerable to Suit If it Exercises Its Sovereignty?

90. Fear of efforts at reprisal by large companies against the State exist. Oil pipeline owners are often among the largest companies in the world, with resources and personnel greater than those of Nebraska and most States. But, Nebraska has an important protection that should not be dismissed lightly or overlooked. As a sovereign, Nebraska is immune from suit except where it waives its immunity.

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁰³

91. The Supreme Court has explained the Eleventh Amendments immunity recently:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,” *id.*, at 13, 10 S.Ct., at 506 (emphasis deleted), quoting *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). See also *Puerto Rico Aqueduct and Sewer Authority, supra*, at 146 (“The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity”). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States “was not contemplated by the

¹⁰⁰ *Crist v Republic of Turkey*, 995 F Supp 5 (D DC 1998).

¹⁰¹ 28 USC 1605(a). *Siderman de Blake v Republic of Argentina*, 965 F2d 699 (9th Cir 2003).

¹⁰² *Restatement (Third) of Foreign Relations Law of the US* § 712 (ALI 1987).

¹⁰³ *U S Const* Amend XI

Constitution when establishing the judicial power of the United States.” *Hans, supra*, at 15, 10 S.Ct., at 507.¹⁰⁴

92. Nebraska officials can be enjoined from enforcing an unconstitutional law,¹⁰⁵ but the State is not liable for damages unless it assents to be sued.¹⁰⁶

Conclusion

93. Nebraska’s government is empowered to protect the State’s vital land use interests and natural resources. Available options are plentiful and reasonable. A long range view of solutions for all foreseeable pipeline issues, and not a simplistic answer to a single pressing problem, is respectfully urged.

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¹⁰⁴ *Seminole Tribe of Florida v. Florida*, 517 U S 44, 54 (1996).

¹⁰⁵ *Bernbeck v Gale*, 2011 WL 3841602 (D Neb 2011) (enjoined enforcement of initiative & referendum laws).

¹⁰⁶ *Dover Elevator Co v Arkansas State Univ*, 64 F3d 442, 447 (8th Cir 1995); *Andrews v Nebraska*, 2011 WL 50337187.

Appendix I. Alternate Route Maps

Fig 1.

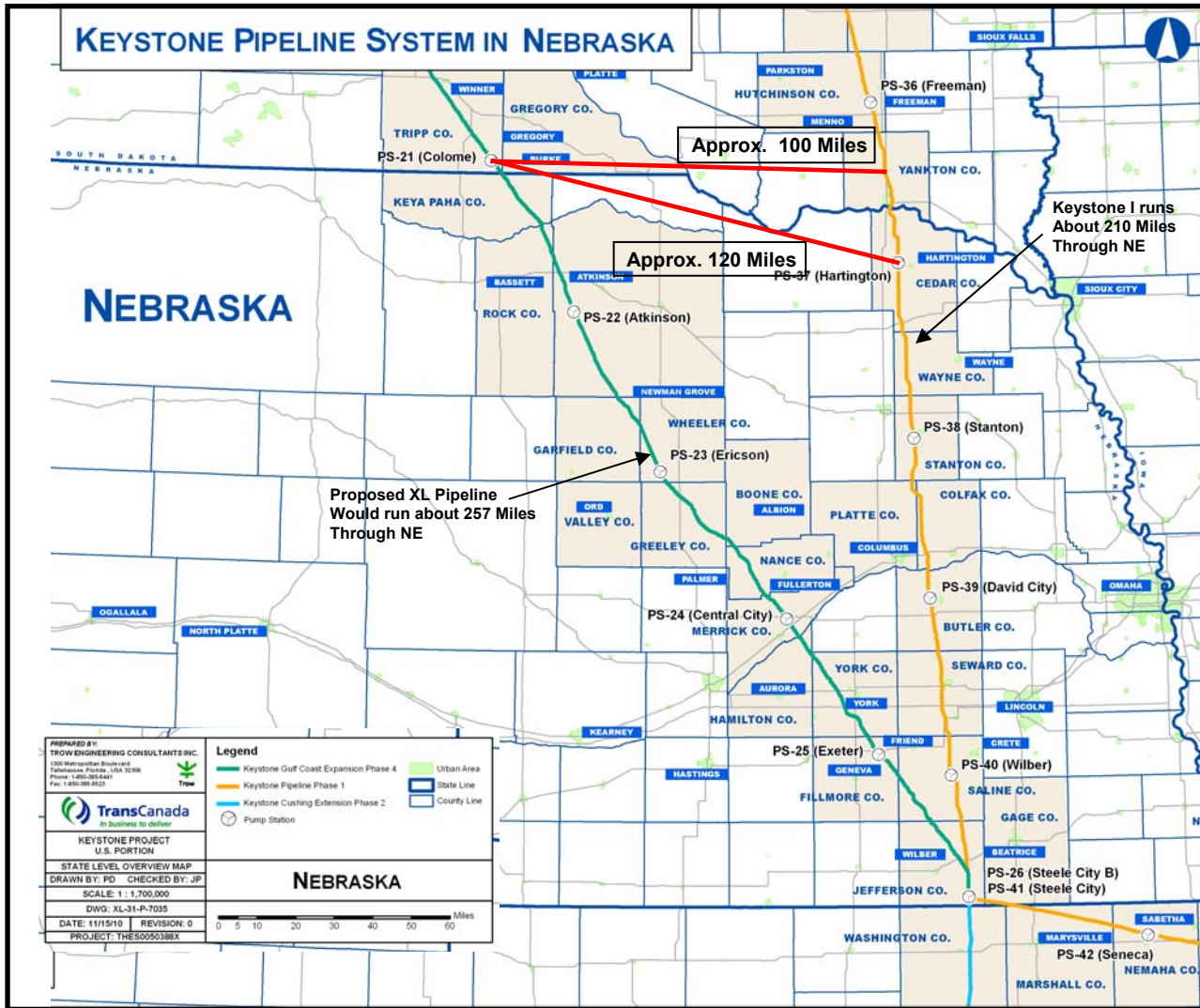


Fig. 2

