Members of the Legislature  
State Capitol  
Lincoln NE 68509

INTER OFFICE MAIL

RE: Enactment of Pipeline Siting Legislation and Special Session

Dear Colleagues:

On October 5, 2011, I visited with the media in response to several inquiries regarding the possibility of a special session to address pipeline siting legislation following the release of Senator Dubas’s proposed bill. At that time, I pledged, in my work as Speaker of the Legislature, that I would ensure that the Legislature is both responsive and responsible as it relates to the issues presented by the proposed Keystone XL Pipeline. On that date, I advised that I was in the process of 1) information gathering; 2) listening to our constituents; 3) understanding the law; 4) facilitating a discussion between parties; 5) discussing proposed solutions; and finally, 6) action by the Legislature.

I want to report to each of you my personal progress as one member out of 49 working to find answers to the questions presented by the Keystone XL Pipeline project.

1. Information gathering. On October 8, 2011, Senator Langemeier and I met with Connie Weichman and Cindy Myers of Stuart, Nebraska. We spent several hours touring portions of southwestern Holt County in close proximity to the proposed Keystone XL route. We personally observed wet
meadows, a natural flowing well and the proposed site of a pumping station and high water table at said location.

On October 5, 2011, I sent a letter to U.S. Secretary of State Hillary Clinton requesting a meeting in Lincoln with Senators Langemeier, Dubas, Sullivan, and myself. On October 17, 2011, we met with Mr. Dan Clune, Principal Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, regarding questions relating to the relationship between the federal and state government and siting legislation. During the meeting, we verified that a change in the route by TransCanada would require a supplemental environmental impact statement under the National Environmental Policy Act ("NEPA") and that it would be speculative for the State Department to comment on the length of time such a review would take. We also learned that Nebraska state agencies raised certain local issues with the Department of State during their NEPA environmental review of the Keystone XL Project, including concerns regarding the American burying beetle, river crossings, and shallow groundwater areas, and we learned that the Department of State relied on this information.

2. Listening to our Constituents. Since October 5, 2011, I have heard from hundreds of Nebraskans by phone, email, and letters. I have also spoken to several dozen in and throughout the 19th Legislative District. Although opinions vary on whether or not the State should enact siting legislation in a special session, many of those whom I have visited with believe that the State does need to enact siting legislation to prevent this scenario in the future. I must say, I agree. In my opinion, the State of Nebraska should have enacted siting laws several years ago. As you might imagine, hindsight is always perfect. This being said, in my opinion, the Legislature must agree upon and enact siting legislation to prevent this scenario from ever happening again. However, it is also important to remember that siting
legislation in and of itself does not guarantee nor in most every case substantially alter the actual route. Its primary purpose, in my opinion, allows citizens a structured and appropriate process to voice concerns at the beginning of any proposed project.

3. Understanding the law. For several weeks, my legal counsel, Matt Boever, and I have researched and analyzed the relevant issues surrounding a bill like the Oil Pipeline Siting Act ("OPSA"). Mr. Boever's legal memorandum is attached for your review. And below is a summary of my thoughts on two critical issues on the legal landscape. These are my conclusions based on the legal information currently available to me at this time.

Preemption: If passed in its current form and then challenged in court, the OPSA would likely generate a preemption question. The purposes of the OPSA and the federal Pipeline Safety Act ("PSA") overlap significantly. The issue is whether the OPSA and the regulatory scheme it would establish are part of the domain of pipeline safety that is expressly and entirely preempted by the PSA. It is difficult to say whether the preemption argument would be ultimately successful, but there seems a possibility for either express preemption, based on an 8th Circuit federal court case, Kinley Corporation v. Iowa Utilities Board, or, alternatively, implied preemption, based on the rationale advanced by the pipeline operator in a recent federal court case in Maryland.

Dormant Commerce Clause: The court in reviewing a challenge to the OPSA would perform a "balancing" test as described in a Supreme Court case, Pike v. Bruce Church, Inc. The standard is that the statute will be upheld if it serves a legitimate local interest and the burden on interstate commerce is not clearly excessive in relation to the putative local benefits. The State's interest in groundwater and other natural resources is, I believe, clearly a legitimate local interest. Nevertheless, the court would scrutinize the OPSA
and any application to the Keystone XL project with heightened judicial scrutiny since it would implicate interstate and foreign commerce.

The court would first inquire as to whether the challenged law has a "disparate impact on interstate commerce." A statute burdens interstate commerce "when it inhibits the flow of goods interstate." The definition of "oil pipeline" in the OPSA suggests that the proposed statute will put an impermissible burden on interstate commerce, especially without specific findings or a rationale for the distinction between pipelines that are 25 inches in diameter and those that are larger. Considering that the Keystone XL project, in particular, is nearing the end of federal and state review processes, a (necessarily) lengthy new state process at this point, however good and worthy its goals, would significantly disrupt interstate and foreign commerce, thereby raising real questions concerning the Act’s constitutionality.

4. Facilitating a discussion between the parties. On October 11, 2011, Senators Langemeier, Dubas, Sullivan and I met in Norfolk with Alex Pourbaix and Robert Jones of TransCanada. Also in attendance at the meeting was Kent Warneke, editor of the Norfolk Daily News, as a media representative. We, as senators, spent several hours asking the representatives of TransCanada to change the proposed route. We made it very clear that thousands of our citizens do not approve of the current proposed route. The TransCanada executives stated on several occasions that, under their timeline, moving the route was an unacceptable solution because it would require an additional two to possibly three years preparing a supplemental environmental impact statement on any proposed new route. This delay in the project would render the TransCanada Keystone XL Pipeline useless due to the inability to provide crude oil to the refineries of Texas and Louisiana by 2014 as under their current contractual agreements.
After several hours asking TransCanada to change the proposed route, we reiterated our concerns that contamination of groundwater, response time by the company to any spill along the route in Nebraska, the financial capability of the company to remediate any oil spill, and the testing of water in and close proximity to the Keystone XL route were concerns driving our request that the route be changed. TransCanada executives requested that they be given several days to respond to those concerns and did respond by letter on October 18, 2011, a copy of which is hereto attached. TransCanada offered the following measures:

• Provide and maintain a performance bond of $100 million, to be made available to the State of Nebraska if TransCanada does not clean up a spill in the Sandhills;

• Construct a concrete containment structure surrounding the Keystone XL pump station #22 in Holt County;

• Locate oil spill response equipment and personnel in the Sandhills region to minimize initial spill site response time to less than 2 hours;

• Install concrete coating, rock jacket or other protective materials that will fully encircle the pipeline in the Sandhills where the water table is near or at the surface for significant distance;

• Conduct water well testing for all interested Landowners that have water wells within 300 feet from the centerline of the proposed pipeline in the Sandhills region; and

• Pay for a public liaison officer to facilitate the exchange of information between TransCanada’s contractors and employees, and landowners, local communities and residents.

5. Proposed solutions. I truly believe that each member of the Legislature is responsible for conducting his or her own analysis of what the most appropriate course of action is to deal with the current controversy relating to the Keystone XL Pipeline. In this letter, I speak for myself as the representative of District 19, but also as the Speaker of the Legislature. As much as I would personally like to see TransCanada change the current route of the Keystone XL Pipeline, I
cannot in good faith support, nor recommend that the Legislature, acting in special session, enact and establish a siting regulatory scheme to deal with the current proposed project. Certainly, Mr. Boever's legal analysis provides caution and pause, more than concerns related to federal preemption and special legislation. I am moved and persuaded that the establishment of a regulatory framework at this point, on this project, would take approximately sixteen months and would clearly create an impermissible barrier to interstate commerce under our federal Constitution. Had we had siting legislation on the books five years ago, had rules and regulations been promulgated and in effect, and had our process been designed to render a decision in a reasonable amount of time, I do not believe we would find ourselves in this same situation.

My reluctance to enact siting legislation in a special session will no doubt disappoint those wanting the state to take said action. In my opinion, much of that disappointment will come from very concerned Nebraskans who have been led to believe by certain interest groups and a few members of our Legislature that passing siting legislation in a special session will move the pipeline. Nothing could be further from the case. The states of Montana and South Dakota both have siting legislation and neither state modified the route in any way similar to what the opponents of the Keystone XL Pipeline proposed. In fact, Montana moved the route to help facilitate the addition of North Dakota's crude oil into the pipeline. We, as legislators, must make decisions grounded in reality and rooted in the law. Understandably, the short-term appreciation of thousands of our citizens for passing siting legislation in a special session would be very gratifying. We must, in my opinion, think long term about the ramifications of enacting such legislation. Years of litigation and potentially exposing the state of Nebraska to expensive liability. There is no question in my mind that the state should adopt siting legislation during the 2012 regular session. Such legislation would
not affect the current Keystone XL Pipeline, but would set up a process that would be used for the next pipeline project proposing to criss-cross our state.

In my opinion, any law should have a delayed effective date to ensure that rules and regulations are in full force and effect on the first day of the new law's effective date. As for the additional safety concessions from TransCanada in their October 18, 2011, letter, I believe these, at a minimum, should be expected from the company. On this date, I have sent Governor Heineman a letter, a copy of which is enclosed, encouraging him and his administration, at the very least, to ensure that these additional safety conditions be stipulated to by the state and TransCanada, where applicable. In the event the state is unable to require one or any of these additional conditions, a request should be made that in the event a federal permit is issued by the Department of State that these conditions be merged into any said authorization by the federal government.

For me, the bottom line is that additional steps need to be taken, given, in my opinion, the state's inability to effect the proposed Keystone XL project through legislation. I believe that the concrete insulated pipe through areas that have a high water table and the location of response teams in and close to the proposed pipeline route are important and should be expected of the company, should their permit be authorized by the Department of State. I, like many of you, share the concerns of our citizens as they relate to any potential spill. In the event the Keystone XL permit is granted, the pipeline project is constructed, and an oil spill occurs, it is my hope and expectation that our state, in cooperation with the federal government, will ensure that our citizens are made whole and all damage to the environment is remediated.

6. Action by the Legislature. As already stated, at this time, I am not in favor of a special session
for the purpose of enacting siting legislation that would apply to the proposed Keystone XL Pipeline project. I do support enacting siting legislation that would apply to future pipeline proposals during the 2012 regular session.

Yours very truly,

Michael J. Flood

MJP:jrt

Enclosures:
October 19, 2011, Memorandum from Matthew J. Boever
October 12, 2011, letter from Mike Hybl, Nebraska Public Service Commission
October 19, 2011, letter from Alex Pourbaix, TransCanada
October 19, 2001, letter to Governor Dave Heineman

cc: News Media