

# Dakota Counsel

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Organizing • Research • Advocacy • Education

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## PUBLIC SPEAKS OUT AGAINST SOUTH HEART MINE

### Commissioners Cramer and Kalk Asked to Step Down

Nearly 100 people showed up for the opening session of the informal conference on the proposed lignite mine near South Heart June 28 in Dickinson.

About 40 spoke against the mine. No members of the public spoke in favor.

None of the three state Public Service Commissioners attended.

“We’ll stand and fight every step of the way until we hear they go back to Texas,” Mary Hodell, Dickinson, of Neighbors United said of Great Northern Project Development (GNPD), which is promoting the mine.

GNPD admitted at the hearing they have no current market for the electricity they plan to produce with the coal, something DRC, Neighbors United and the Sierra Club have been suggesting for some time.

The company maintained it wants to build an experimental plant that will capture carbon dioxide, the most important contributor to global warming, but noted that the absence of federal regulation of the gas makes the plant cost-prohibitive.

GNPD said that without such regulation it would not build the plant or mine coal near South Heart.

GNPD also continued to claim it has no connection with GTL Energy, which built a coal drying facility adjacent to the proposed mine site.

However, DRC and its allies remain convinced the two projects are connected—and concerned that the goal of the project may be to ship the lignite out to distant markets for use in power plants.

The allies presented testimony on water and soil degradation, and the need for reform of state mine bonding practices.

DRC Board member Steve Merrill, a soil scientist, said the mine would destroy alluvial valley floors in Heart River tributaries and disturb subsurface water supplies.

“It’s a terrible sacrifice,” he told the *Bismarck Tribune*.

DRC’s testimony focused on the poor record of reclamation and bond release in the state and noted that North Dakota’s bond calculation practice effectively grants bond release without an opportunity for public hearing in violation of federal law.

The conference ran until about midnight and was processed rather than adjourned, since the company has nearly

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## HAVE YOU HEARD THE NEWS ?

We keep hearing talk about the “new and improved” annual meeting this year in Bismarck. We’ve heard about a trivia contest with an authentic “booty prize.” We also heard that the noon luncheon is going to feature a soup and bread contest like no other that has ever tempted your palate. And not only that, we’ve heard there’s going to be some awesome silent auction items up for grabs. And then to top it off,

we hear that there’s a roast and toast for our retiring staff director, Mark Trechock. Pretty sure you won’t want to miss out on that! But you know it’s always more fun and productive (since we do have to tend to some business) if every available DRC member can join in for the day, take care of business and give Mark the send off he deserves. We’ve even heard there might be cake!

And you can eat it too! Hope you all mark October 22 on your calendar now.



The Dakota Counsel is published six times a year by Dakota Resource Council, a nonprofit, grassroots activist organization. The mission of Dakota Resource Council is to form enduring, democratic local groups that empower people to influence decision-making processes that affect their lives. DRC is committed to preserving sustainable agriculture and natural resources.

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## **HIDDEN COSTS, SILENT HAZARDS**

**By DRC Board Chair Marie Hoff**

The United States is finally taking note of North Dakota, not only because of the flooding, but because of a much larger issue: oil.

In late June Bismarck hosted the Interstate Oil and Gas Compact Commission's mid-year meeting, convening nearly every governor in the nation. Let's hope that with all the fresh eyes, the oil patch receives the scrutiny it deserves.

The IOGCC brings industry executives together with governors and other public officials. There is not transparency, nor any place for citizens to voice input.

The IOGCC has a well-known reputation for cultivating pro-extraction governors, crafting pro-extraction policies and promoting information inclined toward extraction industries.

This mid-year meeting marks a significant time in the oil and gas industry, as development is booming but lacks any real oversight or public accountability, particularly in North Dakota.

Companies have shown they cut corners, and the Department of Mineral Resources (DMR) is still under-equipped for the magnitude of activity.

North Dakotans have quickly seen our prairie change from agricultural land to industrial zones.

The burdens of extraction are externalized by companies and deeply felt by North Dakota communities. The hidden costs and silenced hazards of the oil boom include perpetual leases, waste pit mismanagement, insufficient bonding, land segmentation, and intimidation—not to mention countless spills on croplands and pastures this year.

It's commendable to hear the DMR call for closed-loop systems for oilfield waste disposal, something that's been advocated by landowner groups for a long time. This is a significant step in the right direction.

It's also important that companies are moving to multi-well pads, an important factor in reducing impacts.

These are common sense measures.

It's the responsibility of our state agencies and elected officials to protect North Dakota first. It's their job to scrutinize the benefits and detriments of oil and gas extraction in North Dakota, not to act as a placeholder simply to validate it.

North Dakota needs agencies it can trust and depend on—officials who will be judicious with leasing and firm on safety enforcement.

We'll soon have a prairie of nearly infinite rigs, and no one wants officials that are soft on companies that spill oil.

In light of the IOGCC meeting in North Dakota—on the front porch of the booming Bakken—we call on our public officials to act independently and prudently. We want responsible development, accountability and transparent relations between corporations and government.

We want to see our land and water safeguarded, and the people most directly affected by fossil fuel extraction protected.

**P.S. SAVE THE DATE OF OCTOBER 22nd!** I am very much looking forward to seeing you at our Annual Meeting as we bid a fond farewell to our Staff Director, Mark Trechock.



# CONGRESS MAY SCUTTLE LIVESTOCK REFORM

Livestock market reform hangs in the balance after the U.S. House of Representatives voted to zero out appropriations for draft rules to improve competition.

The issue now moves to the Senate, which may take up the bill shortly after the August recess.

Senator John Hoeven has not yet indicated whether he supports allowing the rules to move forward.

“North Dakota ranchers need Hoeven to step up to the plate and go to bat for them by voting against efforts to strip funding for these rules on livestock competition,” said Link Reinhiller, Hazen, chair of DRC’s Trade and Livestock Task Force.

The competition rules, now being drafted by the federal Grain Inspection, Packers and Stockyards Administration

(GIPSA), come in response to 2008 farm bill legislation, which required the agency to clarify aspects of the 1921 Packers and Stockyards Act.

GIPSA and the U.S. Department of Justice held a “listening session” to gather input on livestock competition last year in Fort Collins, which Reinhiller attended.

Reinhiller will also travel to the nation’s capitol in September with the Western Organization of Resource Councils to urge Senators to keep the rules alive.

“Right now competition and transparency are lacking,” said Reinhiller. “A handful of huge packing companies largely control the price through insider trading on the futures market and forward contracts with no base price prior to delivery.

DRC and WORC identified these problems more than 20 years ago and presented a petition for rulemaking to then Secretary of Agriculture Dan Glickman in 1996 to adopt rules requiring a fixed base price on forward livestock transactions.

Bills have been introduced again this year in both the U.S. Senate and House of Representatives to make that proposed rulemaking law. The main sponsors are Sen. Mike Enzi (R-WY) and Rep. Cynthia Loomis (R-WY).

“It’s not a partisan issue,” said Reinhiller. It’s an issue of fairness for the cattle producers who are so important to North Dakota’s economy.”

Reinhiller urged DRC members to call Senator Hoeven at 202-224-2551, and ask him to vote for funds to let the GIPSA study continue.



## FARM AMENDMENT COULD SPELL PROBLEMS

DRC doesn’t like the looks of a proposed state Constitutional amendment being initiated by the North Dakota Farm Bureau.

The amendment would guarantee “forever” the “right of farmers and ranchers to engage in modern farming and ranching practices” and forbid any state law which “abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.”

A joint call of DRC’s Trade and Livestock, Food Safety and Factory Farm Task Forces this month resulted in a resolution to oppose the measure.

Those on the call said the measure looked like an attempt to knock away the last vestiges of local control over siting of factory hog facilities. They

noted that Farm Bureau had been behind several such facilities in northeastern North Dakota.

A Farm Bureau lawsuit also overturned Ramsey County zoning regulations for concentrated animal feeding operations a few years ago.

Others on the call said they thought the measure would call into question implementation of federal laws in the state, and could force state courts to issue opinions on what modern agricultural practices are.

The measure also raised questions about what is modern. For example, is identity-preserved marketing modern?

In 2001 Stutsman County farmer and DRC member Tom Wiley lost an identity-preserved soybean contract because of contamination from

genetically-modified (GM) soybeans. The incident got statewide publicity related to the legislative debate over GM wheat regulation that year.

The *Grand Forks Herald* editorialized against the proposed amendment because of its vagueness.

“There’s plenty of evidence that agriculture does have an impact beyond the farm...and that the rights of farmers often conflict with the rights of others, often other farmers,” wrote publisher Mike Jacobs.

“That’s happened with hog farms and dairy barns,” Jacobs added. “Should these impacts be overlooked?”

The Farm Bureau must gather nearly 27,000 petition signatures to put the measure on the ballot, either in the 2012 primary or general election.

# OILFIELD SPILLS AND CHILLS LOG

**June 19.** “Reserve pits are an environmental catastrophe waiting to happen,” Fred Ryckman of the state Game and Fish Department told press. Ryckman cited a spill earlier in the year where an oil well pad and reserve pit were built over a wetland.

**June 23.** The U.S. Environmental Protection Agency confirmed that two sites in Dunn County will be part of a national study of hydraulic fracturing. One site is a well drilled through the Killdeer Aquifer. It was the site of a major spill last fall.

**July 2.** A fracking accident north of Killdeer dumped 22 barrels of oil and other liquids around a well.

**July 7.** A blowout at a Denbury Onshore oil well near Alexander spewed oil, saltwater and natural gas 40 feet into the air for 15 hours after a heavy equipment operator hit it, snapping off the head.

**July 11.** DRC met with about 30 White Earth area residents concerned about a proposed nearby oil waste facility. Many acknowledged that off-site disposal of waste was a better alternative than the proliferation of reserve pits, but said the location is poor because of threats to ground water.

A hearing before the state Oil and Gas Division for the on-site treatment plan is scheduled for August 30. However, Mountrail County has yet to take up the required county waste disposal permit.

**July 14.** The Three Affiliated Tribes put into effect an interim resolution to regulate oilfield waste spills and impose fines of up to \$1 million for multiple willful violations.

Failure to pay fines may result in suspension or revocation of a company’s license to do business on the reservation.

**July 20.** The state Health Department announced it was working on a consent agreement to address volatile organic compounds air quality violations in the Bakken oil production area.

Nominal \$1,000 per well fines for release of the compounds at approximately 1,500 wells may result.

State rules went into effect June 1 requiring that the compounds must be burned off or captured rather than emitted

directly to the air. Bakken wells that produce more than 20 barrels per day must retrofit sites by December 1.

**July 22.** The Industrial Commission announced it was proposing nearly \$600,000 in fines for improper cleanup of a reserve pit overflow near Dickinson in April. About 150 barrels of crude oil and drilling mud spilled into a drainage area near the Heart River. Enviro Shield began conducting the cleanup but stopped when the oil company, Halek Operating, failed to pay for their services.

**July 24.** An explosion at an oil rig near Beach sent three workers to a regional burn center.

Drill pipe was being laid at the time of the explosion, and fracking of the well had not yet commenced.

**July 25.** A saltwater spill that flooded about 40 acres of cropland and wetlands near Mohall was reported.

Petro Harvester Operating, which owns the saltwater pipeline whose rupture caused the leak, estimated the spill at 300 barrels.

However, no one really knows how much saltwater was spilled, since the state Oil and Gas Division still does not require input and output monitors on saltwater pipelines, which could provide early warning.

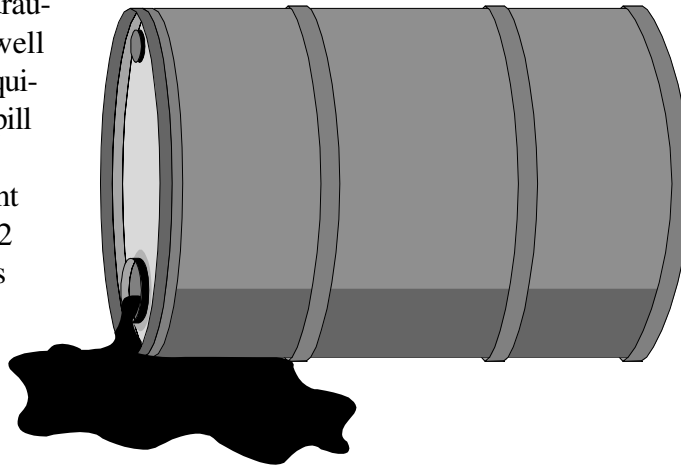
Darwin Peterson, who farms the land, said he first noticed excess water seeping into the field July 14.

Galen Peterson, the local emergency contact, said the soil is basically dead and the land may never be used for agriculture again, noting that soil in the area contaminated by saltwater 50 years ago still cannot support farming.

**July 27.** About six barrels of crude oil spilled into a creek near Mandaree due to a pump failure.

**August 2.** An estimated 12,000 to 15,000 barrels of saltwater spilled at a well site, also near Mandaree, contaminating grassland. The apparent cause was a ruptured saltwater tank line.

Cliff Whitman, director of emergency services and homeland security for the Three Affiliated Tribes, told press he estimated that one or two spills per week occur on the reservation, but many have gone unreported, something he hopes the tribe’s new waste law will address.



# STATE COURT JEOPARDIZES OIL BONUS PAYMENTS

## Get the Check at Signing

Watch out for the latest deceptive oil and gas leasing practice—offering bonuses and failing to pay them.

It seems like a breach of contract, but the state Supreme Court gave the green light to this practice in a controversial February 8 opinion, *Irish Oil and Gas, Inc., v. Riemer*.

The case involved mineral owners who negotiated a lease agreement, including a per-acre bonus payment.

The owners did not receive the bonus payment at the signing, and the company failed to respond to numerous requests for payment.

Finally, the mineral owners wrote the company, saying they considered the non-payment to have made the lease null and void. They subsequently signed a lease with another company.

The first company, however, sued the mineral owners for breach of contract for signing the second lease.

A state district court agreed with the mineral owners, but the state Supreme Court overturned its decision.

The court’s reasoning was that the company’s failure to pay was not a complete “failure of consideration,” since the mineral owners retained their right to the lease’s specified percentage of production.

In a spirited minority opinion, Chief Justice Gerald W. VandeWalle said the opinion opened the door to allowing “speculators to secure a lease with a promise to pay a bonus, attempt to sell the lease to an operator, and if that doesn’t succeed...simply refuse to pay...”

If a dry hole is drilled, VandeWalle noted, the mineral owner may be left “to pursue the statutory remedies while holding a property proven to be worthless...”

VandeWalle noted that “recent success of oil exploration” may have “dimmed the memory of those years when the number of dry holes drilled significantly outpaces the number of successful wells.”

Reports from southwestern North Dakota indicated that some companies may be taking advantage of this ruling by offering large bonuses but failing to pay.

State legislators may want to address this problem in 2013.

In the meantime, the moral would seem to be: Get the check at signing.

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## USING HB 1241

### How Landowners and Mineral Owners Can Benefit

Landmark legislation protecting North Dakota surface and mineral owners went into effect this month, but its benefits are not automatic.

The law (HB 1241) opens the possibility for annual production loss payments to surface owners that could save tens of thousands of dollars over the life of a well sited on their land.

But the law does not prevent oil companies from offering the traditional one-time payment.

Landowners should calculate average production revenue from the typical four to six acres of land per well taken up by oil activities to determine fair annual compensation.

They may also want to determine exactly how much land will be out of

production. DRC has received reports of companies low-balling the acreage.

The law’s required seven-day direct notice prior to staking could also help landowners identify problem areas with proposed siting, such as shelter belts and calving grounds, and negotiate modifications in advance.

Of course, those who own the minerals are still at an advantage. They should be able to negotiate drilling restrictions to protect their land, livestock and homes in the mineral lease itself.

Mineral owners may also benefit from the law’s provision that the 18% penalty for late royalty payments must be paid in all cases.

Testimony at legislative hearings on HB 1241 indicated that some compa-

nies have routinely failed to pay the penalty unless it was directly requested by the mineral owner.

One possible disadvantage of the new law is that the penalty now takes effect 150 days from marketing rather than production of oil and gas. This may delay payments for oil that is produced but not marketed.

Becoming familiar with the statements that accompany royalty checks is also something mineral owners may want to undertake. DRC has received some reports of irregularities in these statements.

These statements are often complicated and confusing, and review by a trusted attorney may be worth the expense.

# RECLAMATION AND BOND RELEASE: GRADE F

North Dakota’s surface mining bond release practices violate federal law and must be corrected before any new mines are permitted, DRC said in its testimony at the Public Service Commission’s informal hearing on the proposed South Heart mine.

One result is that the state’s second-largest mine, Falkirk, has yet to achieve final bond release for post-mining agricultural use on a single acre of land, yet has had its bond reduced many times without public input, despite federal law guaranteeing that right.

The problem is “Policy Memorandum No. 18 to Mine Operators,” issued by the PSC in 1987.

That memorandum allows “a single performance bond to cover more than one permit area at a mine” and establishes bond calculation on the basis of “a worst-case reclamation cost determination.”

The PSC has fleshed out this memorandum in its “Reclamation Cost Estimating Guidelines,” last updated in July, 2006.

The cost guidelines focus on tasks like earth-moving, revegetation and demolition of mining structures that might fall to the public if bond was forfeited “at the time when the reclamation liabilities are the greatest.”

One flaw in this approach is that no bonds are retained to cover the costs of potential failure to meet federal re-

quirements for replacement of water sources or the state standard of 100% of pre-mining agricultural productivity on all lands permitted for mining and designated for post-mining agricultural use.

The implication is that the public will have to absorb all costs should these key requirements not be met.

The losses to farmers and rural communities could be very significant.

Over 100,000 acres remain under mining permits in North Dakota.

If only half of that amount were designated for cropland, at a conservative rate of 30 bushels of wheat per acre at \$7.00 per bushel, these lands could be expected to generate \$10,500,000 per year in farm revenues.

If these reclaimed lands achieve an average of 90% of pre-mining productivity, farm revenues in mining areas would decrease by over \$1 million per year.

The other flaw is that the PSC’s “worst-case scenario” for calculating performance bonds gives mine credit for work performed with no opportunity for public review.

These guidelines discourage mine operators from making formal applications for either partial or final bond release. The number of disturbed acres designated for post-mining agricultural use and fully released from bond on currently active mines is only 1,456.



## SOUTH HEART (from p. 1)

400 technical “deficiencies” to overcome before the PSC can rule on the mining permit.

Resolving these deficiencies is expected to take months.

### Kalk and Cramer Should Step Down

This month DRC, Neighbors United and the Sierra Club asked the federal Office of Surface Mining (OSM) to remove Public Service Commissioners Kevin Cramer and Brian Kalk from deliberations on the South Heart Coal mining permit because they accepted campaign contributions from company officials.

“We deserve Commissioners who evaluate the pros and cons of this mining permit on its merits,” said Linda Weiss, Belfield, DRC Assistant Treasurer.

“Instead we have two Commissioners whose election campaigns were bankrolled by the company they’re supposed to regulate,” said Weiss.

OSM enforces the Surface Mining Control and Reclamation Act and federal rules on surface mining. These rules prohibit gifts from regulated industries to members of state commission members who “perform any function of duty under the Act, if they perform decision making functions for the State Regulatory Authority under the authority of State law or regulations.”

Kalk and Cramer received at least \$16,500 in campaign contributions from August 2008 through October 2010. from Corbin Robertson, owner of Great Northern Power Development, which owns South Heart Coal.

About one-third of the contributions came prior to the mining permit being filed on October 15, 2008, but public meetings on the project were held as early as 2003 outlining the mining project and the need for PSC approval.

“The Commissioners should step down voluntarily,” said Mary Hodell, Dickinson, Neighbors United. “Those of us affected by the proposed mine deserve having our concerns addressed fairly and impartially.”

# CLEAN AIR NEEDED

By Terrence Kardong

Federal regulations on Regional Haze have been on the books a long time. The state and the industry have been dragging their feet on establishing plans to come into compliance.

So despite the recent frantic arm-waving of the North Dakota coal industry about an EPA takeover, they really have no basis to complain, this is just a case of the federal government doing the job Congress expected of it when it wrote the Clean Air Act.

The pollution caused by regional haze is real, as anyone who drives through "coal country" can see with his or her own eyes.

So are the health hazards. Sulfur dioxide (SO2), nitrogen oxides (NOX), mercury and carbon dioxide are among the most dangerous emissions North Dakota's coal plants spew.

SO2 and NOX are major contributors to respiratory illnesses. Mercury emissions enter the food chain and never break down, thereby increasing the risks of eating fish from North Dakota's lakes and rivers.

Carbon dioxide is the most infamous of global warming pollutants, contributing to climate change, which experts believe will result in weather extremes—increased drought in parts of the world and flooding in others.

Industry executives brag about meeting the National Ambient Air Quality Standards, but they fail to note that North Dakota's power plants remain some of the dirtiest in the nation.

Why? Most of these plants were built before Clean Air Act amendments and are "grandfathered" at higher emissions rates than would be permissible today.

The North Dakota lignite industry

has a long history of special pleading and regulatory maneuvering to avoid cleaning up—especially related to federal standards for Prevention of Significant Deterioration (PSD), which limits new pollution in areas that are otherwise meeting ambient air quality standards, such as Theodore Roosevelt National Park.

The state Health Department discovered PSD SO2 violations in 1998. Rather than respond by moving to clean up plants, the department worked with industry to introduce unauthorized measurement techniques that made the violations artificially disappear.

What North Dakota's coal-fired electricity industry would like is to continue functioning as an island by being allowed to ignore national standards. Business as usual—pollution and all.

Utility executives like to brag about their investment in clean, renewable energy sources, especially wind. While that investment is commendable, the reality is that without states like Colorado and Minnesota setting renewable energy requirements for these utilities, much of that investment would have gone elsewhere, leaving North Dakota's best energy resource for the future blowing in the wind.

In terms of those farmers and ranchers the utility executives sentimentally write about in their ads and opinion pieces, they could benefit from royalty payments by having wind turbines on their land—or better yet have the opportunity to invest in locally-owned wind farms.

Exempting our dirtiest coal plants from the law of the land to keep them polluting at full steam would stifle those opportunities.

*(Terrence Kardong, Richardton, is DRC's Secretary of the Board of Directors.)*



**I'D LIKE TO SUPPORT DRC  
ENCLOSED PLEASE FIND:**

**General Membership**

- \_\_\_ \$500 • Watchdog of the Prairie
- \_\_\_ \$250 • Sustaining
- \_\_\_ \$100 • Century Club
- \_\_\_ \$ 55 • Household
- \_\_\_ \$ 35 • Individual
- \_\_\_ \$ 15 • Student/Low Income

**BARC/DRC Membership**

Household \$60\_\_\_ Individual \$40\_\_\_

**GFC3/DRC Membership**

Household \$60\_\_\_ Individual \$40\_\_\_

**MCETA/DRC Membership**

Household \$65\_\_\_ Individual \$ 45\_\_\_

**MVRC/DRC Membership**

Household \$60\_\_\_ Individual \$40\_\_\_

**SARC/DRC Membership**

Household \$75\_\_\_ Individual \$ 45\_\_\_

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# DRC SHARES KEYSTONE EXPERIENCE IN NEBRASKA

Cogswell area landowners Bob Banderet and Paul Mathews traveled to Nebraska August 4-6 to take part in a press conference and rally at the invitation of those seeking changes in the proposed route for the Keystone XL pipeline.

Bold Nebraska is the grassroots organization leading landowners and other concerned citizens in opposing the current route, which traverses large sections of the Ogallala Aquifer.

The aquifer provides 78 percent of the state's drinking water.

Banderet called in an eyewitness report to TransCanada of the May 7 spill but told press it took about five hours for the company to get a clean-up crew to the site.

"To me, that's not adequate," he said.

The Cogswell spill was estimated at 400 barrels.

Comments at the press conference by pipeline expert Anthony Swift of the Natural Resources Defense Council suggested the clean-up itself may have been inadequate as well as late.

Clean-up efforts at a Michigan pipeline found that heavy tar sands oil does not pool at the surface but sinks into water, making recovery more difficult.

At issue in Nebraska is who has authority to approve the pipeline route.

Bold Nebraska is asking Governor Dave Heineman to call a special legislative session to explore changes in the route. Heineman contends the state lacks authority to do so.

"The state makes the routing decisions," Nebraska Senator Ben Nelson told the press. "The governor needs to stop playing politics and decide where he wants the pipeline route to be."

Banderet and Mathews addressed several hundred people at an August 5 rally that started at the state capitol and then moved down the street to the governor's mansion.

The Keystone pipeline has had 12 spills during the first year of operation on the U.S. section of the pipeline, and more than that in Canada.

The U.S. State Department is considering the Keystone XL permit application.

**DRC TRIVIA**  
October 22, 2012  
What exciting, important event will take place  
A. Gathering of great minds & caring spirits  
B. A celebration of many years and bargains  
C. A time for fun, prizes, and bargains  
D. All of the above  
You win, it is D!

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