I. INTRODUCTION

A spill in the Nebraska Sandhills from the proposed Keystone XL Pipeline extension could release 7.9 million gallons of oil and eventually pollute up to 4.9 billion gallons of groundwater in the Ogallala
Aquifer.\(^1\) This contamination would pose serious health risks for Nebraskans using groundwater from the Ogallala Aquifer for drinking and irrigation.\(^2\) Approximately eighty percent of all water usage in Nebraska is derived from groundwater.\(^3\) Although pipeline operators are statutorily obligated to restore cropland productivity, farm workers will enjoy no protection against their loss of income before the crops are restored.\(^4\) In the event of a worst-case spill scenario, the lack of statutory protection for third parties would leave many Nebraskans to suffer a loss of income.\(^5\)

This Article proposes the Nebraska State Legislature enact legislation that allows the recovery of lost wages or diminution in profits without the burden to show physical injury or damage in the event of a pipeline spill.\(^6\) This Article will discuss the history behind the doctrine of pure economic loss, its rare exceptions, and the arguments surrounding the doctrine's effectiveness.\(^7\) Next, this Article will provide a broad historical overview of oil spills and subsequent federal legislation allowing for pure economic loss recovery.\(^8\) The Article will then analyze the federal liability framework and expose existing gaps covering groundwater.\(^9\) Finally, this Article will review Nebraska law disallowing the recovery of pure economic loss in contrast to several other states.\(^10\)

Nebraska farm workers are inadequately protected from risks posed by the Keystone XL Pipeline.\(^11\) Nebraska’s reliance on agriculture reinforces the need to implement pure economic loss recovery to address dangers from a potential Keystone XL pipeline oil spill.\(^12\) This Article proposes to close the gap in oil spill liability coverage for

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2. See id. at 2 (noting the quantities of benzene that would contaminate the groundwater would exceed safe drinking water levels).


4. See Neb. Rev. Stat. § 76-3304 (Supp. 2012) (declaring the intent of the legislature for enacting the Oil Pipeline Reclamation Act is to restore cropland productivity).

5. See infra notes 181-90 and accompanying text.

6. See infra notes 191-96 and accompanying text.

7. See infra notes 16-49 and accompanying text.

8. See infra notes 50-102 and accompanying text.

9. See infra notes 102-26 and accompanying text.

10. See infra notes 127-70 and accompanying text.

11. See infra notes 181-90 and accompanying text.

12. See infra notes 171-80 and accompanying text.
third parties in Nebraska. The Article identifies and rebuts objections to implementing recovery for pure economic losses. The Article will summarize the necessity and importance of this potent legal remedy.

II. BACKGROUND

A. Pure Economic Loss

Negligent infliction of economic loss, where the parties are connected solely by the accident, is a base theory for a claim of pure economic loss. Anthony v. Slaid is a seminal American case for the pure economic loss doctrine. Anthony, a man who financially supported the town indigents, brought an action for damages against Slaid. Anthony based his claim on extra expenses he incurred as a result of Slaid's wife assaulting an indigent Anthony supported. The Supreme Judicial Court of Massachusetts stated that the damage to Anthony was too indirect to recover losses. Since Anthony, American courts have persistently failed to recognize relational losses for recovery.

Robins Dry Dock & Repair Co. v. Flint developed the exclusionary rule barring recovery of pure economic loss under the theory of relational losses. The United States Supreme Court stated that damages caused by one man, to the person or property of another man, would not make the doer of the wrong liable to a third-party because the injured person was under a contract with that third-party unknown to the tortfeasor. In Robins Dry Dock, a party who had chartered a vessel brought suit against a dry dock company because the dry dock company damaged the vessel's propeller, thereby causing the chartered party to be delayed. The federal district court allowed

13. See infra notes 191-96 and accompanying text.
14. See infra notes 210-21 and accompanying text.
15. See infra notes 222-27 and accompanying text.
17. 52 Mass. (11 Met.) 290 (1846).
21. See id. (opining that the action could not be maintained).
22. Perry, supra note 18, at 10.
23. 275 U.S. 303 (1927).
24. Perry, supra note 18, at 10.
for recovery on the basis that the chartered party had a right in rem with the vessel. Robins Dry Dock & Repair Co. ("Robins Dry Dock") appealed to the United States Court of Appeals for the Second Circuit, which determined the chartered party was not a beneficiary of the contract between the vessel and the dry dock and therefore could not recover. The United States Supreme Court granted certiorari and stated the injury to the propeller created no wrong to the chartered party but did harm the owners of the propeller. The Court recognized the chartered party had no claim in contract or tort because they lacked a protected interest against unintended damages inflicted upon the vessel by the Robins Dry Dock. This decision has been interpreted to bar liability for future lost profits or additional costs suffered in actions other than contract, such as negligence, nuisance, or admiralty.

One argument against recovery for pure economic loss is that it creates liability to a broad unknown class of plaintiffs. Federal and state courts have generally accepted the bright line exclusionary rule barring recovery for pure economic losses. A few notorious exceptions of this rule exist. In People Express Airlines, Inc. v. Consolidated Rail Corp., the Supreme Court of New Jersey recognized that a duty of care to avoid economic damages is owed to a particularly foreseeable class of plaintiffs who can maintain predictable presence and can expect a certain type of economic disruption. In this case,

27. Id. at 308.
28. See id. at 307 (stating that the chartered party could not recover even under the most liberal rules).
29. Id. at 307-08.
30. Id. at 309.
32. See Anita Bernstein, Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss, 48 Am. L. Rev. 773, 774 (2006) (arguing that pure economic loss doctrine is rational to protect against liability for indeterminate losses); Perry, supra note 18, at 12 (noting that disallowing liability for pure economic losses hinges on the fear of open-endedness); Rhee, supra note 16, at 63 (noting the foreseeability issues of large and unpredictable liability).
33. See In re Taira Lynn Marine Ltd. No. 5, 444 F.3d 371, 377 (5th Cir. 2006) (noting the court's reaffirmation that one could not recover economic losses absent physical injury); Getty Ref. & Mtg. Co. v. MT Fadi B, 766 F.2d 829, 832-33 (3d Cir. 1985) (declaring the court would adhere to the rule described in Robins Dry Dock by Justice Holmes); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51-52 (1st Cir. 1985) (declaring the principles of Robins Dry Dock to be legally sound); Perry, supra note 18, at 11-12 (noting that federal courts have only allowed a few exceptions to allow for pure economic loss recovery and most state courts have acted likewise).
34. See Perry, supra note 18, at 11-12 (noting the Supreme Court of New Jersey as one of few courts that has allowed exceptions for the recovery for pure economic losses); Rhee, supra note 16, at 56-57 (discussing New Jersey as one state exception, as well as a general exception for fishermen recognized through English common law).
the operating terminal for People Express Airlines ("People Express") evacuated at Newark International Airport after a rail tanker owned by Union Tank Car Company, and leased to BASF Wyandotte Company, leaked ethylene oxide and ignited in the neighboring rail yard operated by Consolidated Rail Corporation.\textsuperscript{37} Although no physical damage occurred to property or personnel of People Express, the airline filed suit for business losses occurring as result of the evacuation.\textsuperscript{38} People Express asserted these losses were proximately caused by each of the other parties' negligent actions.\textsuperscript{39} The trial court granted defendants summary judgment on the assertion that, absent property damage personal injury or property damage, economic loss could not be recovered under tort.\textsuperscript{40} The appellate court overruled the trial court, holding that summary judgment was inappropriate because negligently caused economic losses are not barred automatically.\textsuperscript{41} The Supreme Court of New Jersey then granted certification.\textsuperscript{42}

The Supreme Court of New Jersey held that economic loss damages, when proximately caused, are recoverable, despite lack of physical damages, if suffered by individuals whom the defendant knows or has reason to know are likely to suffer.\textsuperscript{43} The court identified the historical background of American courts' denial of recovery for pure economic losses.\textsuperscript{44} The court described how barring tort claims based on the physical harm requirement may run contrary to the purpose of tort law.\textsuperscript{45} The court explained further, noting the overall purpose is to allow victims to recover for their losses, as well as, deterring future tortious conduct, vindicating reasonable conduct, and shifting the risk of loss to those best able to bear it.\textsuperscript{46}

Theoretical arguments of economic efficiency abound in defense of excluding pure economic losses.\textsuperscript{47} Meanwhile, scholastic discourse does not converge upon any common justification for allowing the re-

\textsuperscript{37} People Express Airlines, Inc., 495 A.2d at 116.
\textsuperscript{38} See id. at 108-09 (claiming damages including reservations, fixed operating expenses, and cancelled flights).
\textsuperscript{39} Id. at 109.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 116.
\textsuperscript{44} See id. at 109 (identifying the historical background of American courts).
\textsuperscript{45} See id. at 110-11 (noting that, in discarding the requirement for physical harm, public policy should override concerns such as limitless liability and fear of fraudulent claims).
\textsuperscript{46} Id. at 111.
\textsuperscript{47} See Perry, supra note 18, at 14-15 (identifying several economic reasons that relational losses have been excluded); Ronen Perry, The Economic Bias in Tort Law, 2008 U. Ill. L. Rev. 1575, 1588 (2008) (noting the expansion of liability creates over-deterrence, and over-deterrence is inefficient); see also Bernstein, supra note 32, at 774
covery of pure economic losses.\textsuperscript{48} This disagreement could possibly be a result of the complexity and sophistication required to sort the goals of efficiency, corrective justice, and insurance.\textsuperscript{49}

B. **HISTORICAL REVIEW OF THE PURPOSES AND PERFORMANCE OF OIL PIPELINES IN THE UNITED STATES**

The United States has a long history of oil pipelines serving national consumption needs, but pipelines have also created adverse financial and environmental consequences.\textsuperscript{50} In 2011, the United States House of Representatives Committee on Energy and Commerce recommended approval of the Keystone XL Pipeline and found the United States currently imports the majority of oil it consumes, frequently from countries hostile to the interests of the United States or with economic and political instability that compromises the security of oil supplies.\textsuperscript{51} While a substantial portion of imports are received from allies like Canada and Mexico, the United States remains vulnerable to significant supply disruptions created by geopolitical turmoil in major oil producing nations.\textsuperscript{52} In 1973, the same motivating factors influenced Congress to find the Trans-Alaska Pipeline to be within the national interest of the United States.\textsuperscript{53} In 2008, the Department of State noted it was within the national interest of the United States to supplement energy supplies through the construction of the original Keystone Pipeline in order to hedge adverse factors of other major suppliers for the United States and increasing demand.\textsuperscript{54}

In contrast to the national interests pipelines may serve, they can result in devastating oil spills that counteract any benefit they pro-

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\textsuperscript{48} See, e.g., Bernstein, supra note 32, at 776-77 (arguing that simplicity of allowing juries to decide whether one recovers for economic losses trumps other complex justifications or statutory allowances); Perry, supra note 18, at 6 (arguing that pure economic loss recovery is more defensible than allowing for punitive damages); Rhee, supra note 16, at 103 (arguing that pure economic loss should be imposed to protect factors of production).

\textsuperscript{49} See Bernstein, supra note 32, at 777 (describing torts scholars' inability to keep it simple)

\textsuperscript{50} See infra notes 51-81 and accompanying text.


\textsuperscript{52} Id.

\textsuperscript{53} Compare 43 U.S.C. § 1651(a) (2006) (citing a domestic shortage and insecure foreign sources as a need for the Trans-Alaska Pipeline), with H.R. Rep. No. 112-140, at 3-4 (citing unstable foreign sources and a reliance on oil imports as a need for the Keystone XL Pipeline).

vide. In 1968, the United States discovered enormous oil reserves at Prudhoe Bay in Alaska. Plans were developed two years later to transport the oil via pipeline. After Trans-Alaska Pipeline Authorization Act terminated lengthy environmental litigation, construction of the Trans-Alaska Pipeline System ("TAPS") began in 1974 as a joint venture between the Atlantic Pipe Line Company, Humble Pipe Line Company, and BP Oil Corporation. The TAPS is a forty-eight inch diameter crude oil pipeline that traverses 869 miles between Prudhoe Bay and the Port of Valdez on the Pacific Ocean. Transportation of oil through the pipeline has resulted in approximately 760 spills, leaking an estimated total of 280,738 barrels of oil. Those spills include pipeline operator spills, contractor spills and shipper vessel spills. The largest of the spills occurred when the Exxon Valdez ran aground on Bligh reef. The Exxon Valdez spilled approximately eleven million gallons into the Prince William Sound.

The focus of Holder v. Enbridge Energy, L.P. was events on July 25, 2010 when an oil pipeline running through Michigan ruptured and spilled oil into the Talmadge Creek and eventually into the Kalamazoo River. The spill released 840,000 gallons resulting in a thirty mile stretch of river to be closed. The pipeline carried tar sands oil that was more acidic, thick, and sulfurous than conventional crude. In Holder, the court refused to dismiss a class action count alleging Enbridge was strictly liable for the spill as an abnormally

55. See infra notes 56-69 and accompanying text.
57. Pipeline Cases, 436 U.S. at 633.
61. See ALYESKA PIPELINE SERV. CO., supra note 59, at 80-101 (specifying individual spills from 1977 to 2009).
62. Id.
63. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008); see also ALYESKA PIPELINE SERV. CO., supra note 59, at 80-101 (showing individual spill data by date, the Exxon Valdez being the largest).
64. Exxon Shipping Co., 554 U.S. at 478.
68. Id.
dangerous activity for sending a more corrosive fluid through an older pipeline which was not designed for such activity.\textsuperscript{69}

In light of this history of oil pipeline approval and subsequent oil spills, the Keystone Pipeline can begin to come into focus.\textsuperscript{70} On March 11, 2008, the State Department, acting under the authority of Executive Order 13,337,\textsuperscript{71} issued a Presidential Permit for the construction of the Keystone Pipeline.\textsuperscript{72} The Keystone Pipeline traverses 1,378 miles within the United States running between Hardisty, Alberta in Canada, entering the United States in North Dakota, to Patoka, Illinois, with an extension from Steele City, Nebraska to Cushing, Oklahoma.\textsuperscript{73} The Keystone Pipeline is expected to carry more corrosive tar sands oil rather than conventional crude.\textsuperscript{74} Within the first year of operation the Keystone Pipeline spilled twelve times, leaking a total of 23,403 gallons of oil.\textsuperscript{75}

The President directed the Department of State to deny a presidential permit for the Keystone XL Pipeline on February 3, 2012.\textsuperscript{76} The Keystone XL Pipeline is intended to transport tar sands oil extracted from Western Canada.\textsuperscript{77} The original proposed route of the Keystone XL Pipeline would enter the United States in Montana and operate over the Ogallala aquifer, to Steele City, Nebraska.\textsuperscript{78} The project also called for extending the original Keystone Pipeline from Cushing, Oklahoma to Port Arthur, Texas.\textsuperscript{79} Currently the Keystone XL Pipeline project is under reconsideration for a presidential per-

\begin{itemize}
  \item \textsuperscript{69} See infra notes 71-81 and accompanying text.
  \item \textsuperscript{70} See infra notes 71-81 and accompanying text.
  \item \textsuperscript{71} Exec. Order No. 13,337, 3 C.F.R. § 165 (2005).
  \item \textsuperscript{72} Notice of Availability of the Record of Decision and National Interest Determination and the Programmatic Agreement for the Proposed TransCanada Keystone Pipeline Project, 73 Fed. Reg. 11,456 (Mar. 3, 2008).
  \item \textsuperscript{73} U.S. DEP’T OF STATE, supra note 54, at 4-5.
  \item \textsuperscript{74} See NATURAL RES. DEF. COUNCIL ET AL., IRRATIONAL EXEMPTION: TAR SANDS PIPELINE SUBSIDIES AND WHY THEY MUST END 1 (2012), available at http://priceofoil.org/wp-content/uploads/2012/05/Irrational-exemption_FINAL_14May12.pdf (describing the purpose of the Keystone XL Pipeline is to transport tar sands oil); see also Holder, 2011 WL 3878876, at *1 (noting that tar sands oil is a thicker, stickier, and more acidic form of crude oil from Western Canada that must be heated or diluted to flow properly).
  \item \textsuperscript{76} In the Matter of the Keystone XL Pipeline, 77 Fed. Reg. 5,614 (Feb. 3, 2012).
  \item \textsuperscript{77} Holder, 2011 WL 3878876, at *1.
  \item \textsuperscript{79} Id.
\end{itemize}
mit. The Keystone XL Pipeline now faces heavy objections from landowners and environmentalists.

C. FEDERAL LIABILITY FOR OIL SPILLS

Until 1966, when the Oil Pollution Act of 1924 was amended, the federal government had no remedy to recover the cleanup costs of oil spills. Even after the 1966 amendment, the federal government was only allowed to recover cleanup damages. Subsequently, Congress passed the Water Quality Improvement Act of 1970 ("Improvement Act"), which specifically repealed the Oil Pollution Act. As a result of several publicized spills in the 1960s, Congress reinforced the Improvement Act with the Federal Water Pollution Control Act of 1972, which was later amended by the Clean Water Act of 1977 ("CWA"). The CWA created civil and administrative penalties, imposed strict liability for cleanup costs, and made hazardous waste and oil pollution specific crimes.

The laws relating to oil spill liability proved to be ineffective in the wake of the Exxon Valdez oil spill. Prior to the establishment of the Oil Pollution Act of 1990 ("OPA"), faults of the legal framework for oil spills were insufficient cleanup and damage relief, taxpayer subsidies for cleanup costs, and uncompensated third party damages. Many obstacles stood in the way of victim recovery, including

84. See id. (allowing recovery for the actual costs incurred for removal).
86. Force, supra note 83, at 890.
90. Id.
91. Id.
legal defenses, statutes of limitation, and unfavorable burdens of proof.94

Congress passed the OPA to amend the CWA in response to the Exxon Valdez accident.95 The OPA holds owners and operators of oil facilities and vessels liable for the costs of cleanup and damages, without the need to find fault, as a result of an oil discharge into a waterway, shoreline, or exclusive economic zone.96 The OPA also instituted a legislative override to the exclusion of pure economic loss recovery, superseding Robins Dry Dock & Repair Co. v. Flint97 and the pure economic loss rule.98 However, the OPA’s application is limited to the navigable waters of the United States as well as adjoining shorelines.99 The Comprehensive Environmental Response, Compensation, and Liability Act of 1980100 covers pollution of surface and ground waters but specifically excludes petroleum products.101 Defining the term navigable waters has been a central issue before many federal courts.102

1. Navigable Waters vs. Groundwater

Historically, the interpretation of navigable waters meant that they were to be navigable in fact.103 When Congress passed the Federal Water Pollution Control Act of 1972104, the Senate intended the term navigable waters to be interpreted as broadly as possible.105 The majority of courts now apply the “minimum nexus” approach to determine if a body of water is covered under the Oil Pollution Act of

94. Id.
95. See id. (noting the impact of the Exxon Valdez and other spills).
96. See 33 U.S.C. § 2702(a) (2006) (declaring that liability attaches when party is found responsible).
97. 275 U.S. 303 (1927).
98. See 33 U.S.C. § 2702(b)(2)(B) (allowing for the recovery of economic losses); Perry, supra note 18, at 10 (discussing the OPA abrogating the limit imposed by Robins Dry Dock).
103. See The Daniel Ball, 77 U.S. 557, 560 (1870) (noting that a navigable waterway is a waterway which acts as a highway of commerce upon which large vessels can navigate).
SHIFTING THE COSTS TO THOSE BEST ABLE

1990106 ("OPA") and the court’s jurisdiction.107 Satisfying the minimum nexus test occurs when a discharge of oil poses a substantial threat to navigable waters; the test does not require the discharge to actually occur on navigable waters.108 In Rapanos v. United States,109 Justice Kennedy partially endorsed the minimum nexus approach when he looked for a significant nexus between an oil discharge and a navigable-in-fact waterway in order to determine if the waterway was within the scope of regulation.110 The term navigable waters can hold different meanings under the Clean Water Act of 1977111 ("CWA") or the OPA, depending on whether courts look at congressional intent to determine the scope of the applicable law.112 Courts have interpreted navigable waters to apply to all waterways that the Commerce Clause113 covers.114 Alternatively, other courts adopted the historical, navigable-in-fact interpretation because the OPA was limited to protecting the nation’s shorelines.115 Federal courts have also concluded that groundwater is not covered under the CWA or OPA unless the polluted groundwater flowed directly into a form of navigable water.116

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110. See Rapanos v. United States, 547 U.S. 715, 759, 767 (2006) (Kennedy, J., concurring) (determining that a significant nexus was an appropriate test).
112. Angle et al., supra note 107, at 424.
113. U.S. CONST. art. I, § 8, cl. 3.
115. Angle et al., supra note 107, at 424.
116. Compare Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 964-65 (7th Cir. 1994) (stating that more than a hydrological connection is necessary to include groundwater under the CWA), and Wademan v. Concr., 13 F. Supp. 2d 295, 303 (N.D.N.Y. 1998) (recognizing that groundwater is excluded from the scope of the CWA), with Wash. Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994) (noting that pollution into navigable waters occurs when those pollutants enter through groundwater), and McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988) (requiring that plaintiffs must show that pollutants must have entered navigable waters in order to prevail), vacated on other grounds, 47 F.3d 325 (9th Cir. 1995).
2. A Financial Gap in Federal Liability

The Oil Pollution Act of 1990\textsuperscript{117} ("OPA") limits the liability of responsible parties by instituting a cap on recoverable damages.\textsuperscript{118} The OPA also created payment obligations to the Oil Spill Liability Trust Fund\textsuperscript{119} ("Trust"), which pays claims beyond the limit of the responsible party or when the responsible party cannot be identified.\textsuperscript{120} Various funds support the Trust including an eight-cents-per-barrel excise tax on crude oil, interest earnings, and penalties against responsible parties for OPA violations.\textsuperscript{121} As of 2012, the Trust holds an unobligated cash balance of $130 million, which is just 6.5% of its revenue goal.\textsuperscript{122} The funding gap exists, in part, due to recent large payouts and the exclusion of tar sands from the excise tax.\textsuperscript{123} Although the Trust is liable for covering tar sands spills, it is not allowed to collect revenue for tar sands transportation.\textsuperscript{124} The OPA does not pre-empt state law, therefore allowing states to further regulate oil discharges.\textsuperscript{125} Therefore, the Trust would be liable to pay for clean-up costs associated with the Keystone XL Pipeline in the event of a spill, even though TransCanada would contribute nothing to the Trust because the pipeline only transports tar sand oil.\textsuperscript{126}

\textsuperscript{118} 33 U.S.C. § 2704(d) (2006).
\textsuperscript{120} 26 U.S.C. § 9509(c); Force, Davies & Force, supra note 83, at 949.
\textsuperscript{121} See 26 U.S.C. § 9509(b) (identifying the amounts appropriated to the Trust).
\textsuperscript{124} See I.R.S. Tech. Adv. Mem. 201120019, at 2-3 (declaring that tar sands oil is not subject to the excise tax used to fund the Trust).
\textsuperscript{126} Compare 26 U.S.C. § 9509 (directing payments for oil cleanup as described under Federal Water Pollution Control Act), and 33 U.S.C. § 1321 (2006) (defining "oil" as oil of any kind, including tar sands oil), with I.R.S. Tech. Adv. Mem. 201120019, at 2-3 (declaring that tar sands oil is not subject to the excise tax used to fund the Trust), and STANSBURG, supra note 1, at 9 (noting the Keystone XL Pipeline is intended for tar sands transportation).
D. STATE LIABILITY FOR OIL SPILLS

Nebraska’s total gross domestic product in 2009 was $85 billion.127 Agricultural sales exceeded $15 billion and provided for 121,557 jobs.128 Nebraska agricultural irrigation accounts for 80% of groundwater use and totals approximately 7.3 billion gallons per day.129 As of 2007, 14,603 farms employed over 46,997 farm workers in Nebraska.130 The combined earnings of those farm workers totaled over $417 million.131 Agricultural jobs are reliant upon a thriving crop.132 Nebraska crops are reliant upon groundwater for the purpose of irrigation.133 In the event of a “worst-case” oil spill from the Keystone XL pipeline, billions of gallons of groundwater could be contaminated with oil particulates such as benzene.134 Benzene, a water soluble known carcinogen, has the potential of destroying crops or making the crop toxic.135 If groundwater becomes contaminated, the resulting crop damage will affect the jobs of farm workers.136 Therefore, a “worst-case” oil spill could result in crop damage and jeopardize the wages of 46,997 workers and a $416 million economy.137

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129. NEB. DEP’T OF NATURAL RES., supra note 3.
131. Id.
132. See, e.g., Conrad Collaco, Damage to Ontario’s Apple Crop Is Worse Than Expected, CBC News (June 6, 2012), http://www.cbc.ca/hamilton/news/story/2012/06/05/apple-crop-worse-than-estimated.html (noting a damaged apple crop will result in the loss of 600 jobs).
133. U.S. DEP’T OF AGRIC., supra note 130, at 317 (showing over 17,000 farms in Nebraska used irrigation).
134. STANSBURY, supra note 1, at 9.
136. Compare STANSBURY, supra note 1, at 9 (theorizing a plume of benzene contaminated water stretching fifteen miles long with a volume of approximately four billion gallons), with Collaco, supra note 132 (noting a damaged apple crop will result in the loss of 600 jobs).
137. Compare STANSBURY, supra note 1, at 9 (theorizing a plume of benzene contaminated water stretching 15 miles long with a volume of approximately 4 billion gallons), and U.S. DEP’T OF HEALTH & HUMAN SERVS., supra note 135, at 253, 259, 262 (finding that root uptake of contaminated water approximates 35% of the accumulation of benzene in crops and consumption of toxic foods is a source of human exposure), with U.S. DEP’T OF AGRIC., supra note 130, at 317 (noting 46,997 workers earn $416 million annually).
braska law imposes unlimited strict liability for cleanup of damaged croplands as a result of pipeline operations, but imposes no liability to compensate third parties that suffer economic losses because of a pipeline.138

In *Lesiak v. Central Valley Ag Cooperative Inc.*,139 the Supreme Court of Nebraska clarified previous rulings barring economic loss recovery in tort actions.140 Plaintiffs asserted theories of recovery based upon tort and implied warranty of contract.141 On summary judgment, the lower court found in favor of the defendant because the negligence claim was barred under the economic loss doctrine and plaintiffs failed to prove the amount of damages to prevail under the implied warranty of contract.142 The court determined that economic loss doctrine did not bar farmer’s claim for negligent misapplication of herbicide.143 Further, the court clarified that economic loss claims in Nebraska can only be brought under a duty issued by contract, not under a duty created by tort.144

Unlike Nebraska’s current laws, several other states have adopted statutes imposing strict liability and allowing recovery for pure economic losses.145 A common trait among states allowing recovery for economic loss is the natural resource of a coastal boundary.146 In Rhode Island, statutory law specifically allows for the recovery of lost wages or diminution in profits in the event of natural resource damage caused by water pollution or a negligent vessel.147 In *Ballard Shipping Co. v. Beach Shellfish*,148 an oil tanker dumped 300,000 gal-

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138. Compare Neb. Rev. Stat. § 76-3303 (Supp. 2012) (stating the purpose of the act is ensure pipeline carriers and owners are financially responsible for reclamation resulting from construction and operation of pipelines and that reclamation includes restoring croplands to their productive capacity), with Nat’l Crane Corp. v. Ohio Steel Tube Co., 332 N.W.2d 39, 44 (Neb. 1983) (disallowing economic losses under manufacturer liability without first showing physical harm to person or property).

139. 808 N.W.2d 67 (Neb. 2012).

140. See *Lesiak v. Cent. Valley Ag Cooper., Inc.*, 808 N.W.2d 67, 80 (Neb. 2012) (describing the current body of Nebraska law surrounding the economic loss doctrine as “an ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*”).

141. *Lesiak*, 808 N.W.2d at 72-73.

142. Id. at 73.

143. See id. at 84-85 (noting the pure economic loss doctrine is not a bar for recovery).

144. Id. at 81.


146. See, e.g., R.I. Gen. Laws § 46-12.3-4 (specifying vessels as well as specifically allowing commercial fisheries to recover).


148. 32 F.3d 623 (1st Cir. 1994).
ions of heating oil in Narragansett Bay after running aground. The appellant claimed the district court erred when it barred their Rhode Island section 46-12.3-4 claim for pure economic loss because the court relied on a theory of federal maritime preemption. The United States Court of Appeals for the First Circuit agreed with the appellant and reversed the lower court's ruling that barred the state claims. The First Circuit explained that adopting statutes to discourage and avoid pollution, as well as for providing redress for citizens, is undoubtedly within a state's interest. The First Circuit recognized Rhode Island's pure economic loss statute was a substantive law satisfying state interests that were not preempted by the Admiralty Clause of the Constitution.

The Supreme Court of Florida interpreted its state statute sections 376.30 to 376.313 to allow any person to recover for lost profits resulting from pollution discharge resulting in damages to property or natural resources without actually having ownership. Curd v. Mosaic Fertilizer, LLC involved polluted wastewater spilling into Tampa Bay after a dike ruptured. Local fishermen brought a claim alleging damage to the reputation of products and loss of marine life even though they did not claim ownership. The court addressed the question of whether the fisherman had a statutory or common law right to recover pure economic losses. The court held that fishermen had a cause of action based on statute and common law.

Alaska also allows for the recovery of pure economic losses through a statutory definition of damages to include lost profits and lost economic benefits. An example of the application of these statutes can be found in the case of In re Glacier Bay, where a tanker ran aground on a large submerged rock and created a major oil spill.
spill. Commercial fishermen brought claims against the tanker based solely upon lost economic benefit and the tanker operators sought dismissal on the theory that plaintiffs needed to show some form of physical injury to recover damages. The court denied the vessel operators request for dismissal based on the plain language of the statute's language preempting any other provision or rule of law, including those previously barring the recovery of damages under the doctrine of pure economic losses.

Alaska, Rhode Island, and Florida exemplify how a state can provide economic protection for those vulnerable from pollution by allowing for the recovery of pure economic losses through legislation.

III. ANALYSIS

A. IT IS UNCLEAR WHETHER AN OIL SPILL AFFECTING GROUNDWATER WOULD BE COVERED UNDER THE FEDERAL FRAMEWORK OF OIL SPILL LIABILITY

Applying the regulations and liabilities of the Clean Water Act of 1977 ("CWA") or the Oil Pollution Act of 1990 ("OPA") depends on an oil spill's size, location, and contamination of a navigable waterway. Even when the OPA or CWA are applicable, the Oil Spill Liability Trust Fund ("Trust") is inadequately funded to remedy damages from a catastrophic oil spill in pipeline-hosting states like Nebraska. The Trust currently maintains only 6.5% of its stated

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163. See In re Glacier Bay, 746 F. Supp. 1379, 1386-88 (D. Alaska 1990) (denying vessel operators motion to dismiss fisherman's claims of economic loss); see also In re Glacier Bay, 71 F.3d 1447, 1449 (9th Cir. 1995) (detailing the facts of the spill in a separate action).
165. Id. at 1387.
166. See Ballard Shipping Co., 32 F.3d at 626, 629 (noting that R.I. Gen. Laws § 46-12.3-4 provides a cause of action in state law and that a state has a heavy interest in protecting its economy and environment); In re Glacier Bay, 746 F. Supp. at 1386-87 (allowing recovery of pure economic losses for fishermen under Alaska Stat. 46.03.824; Curd, 39 So. 3d at 1218 (holding that Fla. Stat. §§ 376.30-376.317 provides a right to recover pure economic losses and the resulting pollution interfered with the fisherman's livelihood).
169. See Shields, supra note 102, at 617-19 (providing examples of when a waterway is considered a navigable waterway and, therefore, included or excluded from the jurisdiction of the CWA or OPA).
171. Compare NATURAL RES. DEF. COUNCIL et al., supra note 74, at 1-2 (highlighting the shortfall of funding for the Trust and the risks of a large oil pipeline spill), with Angle et al., supra note 107, at 424 (noting that the OPA and the CWA's applicability hinges on the definition of navigable waters).
goal and TransCanada’s tar sand operations would provide no revenue to fill this void. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") excludes petroleum and fractions thereof, including the toxic substance benzene. Therefore, several gaps exist in the federal framework of oil regulation and liability to adequately protect Nebraska’s economy in the wake of a catastrophic oil spill.

B. Nebraska’s Agricultural Economy Is Insufficiently Protected from a Worst-Case Scenario Oil Spill from the Keystone XL Pipeline Extension

Nebraska agriculture significantly contributes to the economy of the state. Nebraska’s agriculture represents a significant portion of its economy because agriculture contributes one-tenth of the available jobs in Nebraska and approximately one-sixth of its gross domestic product. Agriculture in Nebraska is largely dependent upon groundwater within the Ogallala Aquifer. A worst-case spill scena-

172. Compare I.R.S. Tech. Adv. Mem. 201120019, at 2-3 (Jan. 12, 2011) (declaring that tar sands oil is not subject to the excise tax used to fund the Trust), with Office of Mgmt. & Budget, supra note 122, at 16 (showing an unobligated cash balance of only $130 million of the desired $2 billion), and Natural Res. Def. Council et al., supra note 74, at 1-2 (noting a funding shortfall).


174. 42 U.S.C. § 9601(33) (2006); see also Knopf, supra note 101, at 14 (giving a historical overview of the EPA’s determination of petroleum exclusions).

175. Compare 42 U.S.C. § 9601(14) (excluding petroleum under CERCLA regulation), Wademan v. Conoco, 13 F. Supp. 2d 285, 303 (N.D.N.Y. 1996) (recognizing that groundwater is excluded from the scope of the CWA), Natural Res. Def. Council et al., supra note 74, at 1-2 (highlighting the shortfall of funding for the Trust and the risks of a large oil pipeline spill), and Batik, supra note 114, at 430 (noting that courts have interpreted the OPA to be more limited in scope than the CWA), with Neb. Dept of Natural Res., supra note 3 (showing that groundwater irrigation accounts for over 80% of all water use totaling 7.3 billion gallons a day), and Stansbury, supra note 1, at 17-18 (finding that a worst-case scenario spill could contaminate 4.9 billion gallons of water).

176. Compare Rural Dev., supra note 128 (highlighting agricultural employment contributes to 121,557 jobs and agricultural sales exceeded $15.5 billion), with Press Release, Bureau of Econ. Analysis, supra note 127 (listing revised 2009 GDP of Nebraska, anchored in current dollars, to more than $85 billion), and State Fact Sheets: Nebraska, U.S. Dept of Agric. Econ. Research Serv. (Dec. 19, 2012), http://www.ers.usda.gov/data-products/state-fact-sheets/state-data.aspx?StateFIPS=31&StateName=Nebraska (showing total number of Nebraska jobs in 2009 was 1,227,166).

177. Compare Rural Dev., supra note 128 (highlighting the fact that agricultural employment contributes to 121,557 jobs and agricultural sales exceeded $15.5 billion), with Press Release, Bureau of Econ. Analysis, supra note 127 (listing revised 2009 GDP of Nebraska, anchored in current dollars, to over $85 billion), and State Fact Sheets: Nebraska, supra note 176 (showing total number of Nebraska jobs in 2009 was 1,227,166).

178. See Neb. Dept of Natural Res., supra note 3 (showing that groundwater irrigation accounts for over 80% of all water use totaling 7.3 billion gallons per day).
rio from the proposed Keystone XL Pipeline within the Nebraska Sand Hills could contaminate 4.9 billion gallons of water and create a contaminated water plume 500 feet wide and forty feet thick, stretching fifteen miles long.\textsuperscript{179} If the Keystone XL Pipeline suffered a catastrophic spill, Nebraska agriculture would suffer severe economic damages.\textsuperscript{180}

Nebraska common and statutory law does not provide enough protection for those who may suffer economic losses as a result of a catastrophic oil spill from the proposed Keystone XL Pipeline.\textsuperscript{181} Federal laws allow recovery of pure economic losses, but those laws would not apply to a catastrophic oil spill that did not reach a navigable waterway despite permeating the sand hills to enter the groundwater of the Ogallala Aquifer.\textsuperscript{182} Furthermore, Nebraska law does not sufficiently protect the State's agricultural economy because the Supreme Court of Nebraska has disallowed recovery for pure economic losses.\textsuperscript{183} Recently amended Nebraska law imposes unlimited strict liability for cleanup as a result of pipeline operations, but imposes no liability that allows third parties to recover when suffering from economic losses due to pipeline failures.\textsuperscript{184} Therefore, agricultural employees are not able to recover wages from lost jobs due to crop destruction from a ruptured pipeline even though they may be a particularly foreseeable plaintiff who would not sustain physical injury.\textsuperscript{185} Therefore, if the Keystone XL Pipeline were constructed and

\begin{itemize}
\item \textsuperscript{179} See \textit{Stansbury}, supra note 1, at 9 (analyzing historical data in order to calculate expected spills over the course of the next 50 years).
\item \textsuperscript{180} Compare \textit{Neb. Dep't of Nat'l Res.}, supra note 3 (showing that groundwater irrigation accounts for over 80% of all water use totaling 7.3 billion gallons a day), and \textit{Rural Dev.}, supra note 128 (highlighting that agricultural employment contributes to 121,557 jobs and agricultural sales exceeded $15.5 billion), \textit{with Stansbury}, supra note 1, at 17-18 (finding that a worst-case scenario spill could contaminate 4.9 billion gallons of water).
\item \textsuperscript{181} See supra notes 127-70 and accompanying text.
\item \textsuperscript{182} See supra notes 82-126 and accompanying text.
\item \textsuperscript{183} Compare Lesiak v. Cent. Valley Ag Coop., Inc., 808 N.W.2d 67, 81 (Neb. 2012) (disallowing economic losses for tort but allowing them under contract), \textit{with Nat'l Crane Corp. v. Ohio Steel Tube Co.}, 332 N.W.2d 39, 44 (Neb. 1983) (disallowing economic losses under manufacturer liability without first showing physical harm to person or property).
\item \textsuperscript{184} Compare \textit{Neb. Rev. Stat.} \textsection 76-3303 (Supp. 2012) (stating the purpose of the Oil Pipeline Reclamation Act is ensure pipeline carriers and owners are financially responsible for reclamation resulting from construction and operation of pipelines and that reclamation includes restoring croplands to their productive capacity), \textit{with R.I. Gen. Laws} \textsection 46-12.3-4 (2007) (stating that a person is entitled to recover loss of income or diminution in profit without having to show physical injury to person or property resulting from a violation of water pollution laws).
\item \textsuperscript{185} \textit{Compare R.I. Gen. Laws} \textsection 46-12.3-4 (stating that a person is entitled to recover loss of income or diminution in profit without having to show physical injury to person or property resulting from a violation of water pollution laws), \textit{and People Express Airlines, Inc. v. Consol. Rail Corp.}, 495 A.2d 107, 116 (N.J. 1985) (holding that one owes a
a catastrophic oil spill from the pipeline contaminated the groundwater in the Nebraska Sandhills, federal and state laws would be inadequate to mitigate economic losses.\textsuperscript{186}

C. LEGISLATION IMPLEMENTING RECOVERY FOR PURE ECONOMIC LOSSES WOULD PROTECT NEBRASKA’S AGRICULTURAL ECONOMY IN THE EVENT OF GROUNDWATER CONTAMINATION

Similar to those in coastal states whose livelihood is protected as a result of oil spills from vessels or off-shore facilities, Nebraska should statutorily enable recovery of pure economic losses for those whose employment would be substantially impacted by an oil spill from the Keystone XL Pipeline.\textsuperscript{187} The Ogallala Aquifer supplies a significant source of irrigation for farmers.\textsuperscript{188} Direct and indirect employment from agriculture accounts for a substantial portion of Nebraska jobs.\textsuperscript{189} Further, particularly foreseeable plaintiffs occupy those jobs because of the dominance of agriculture in the rural portions of Nebraska.\textsuperscript{190} Similar to the Oil Pollution Act of 1990,\textsuperscript{191} any Nebraska statute enacted could include liability limitations in order to

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reasonable duty of care to particularly foreseeable plaintiffs the defendant should have reason to know will suffer damages without necessarily suffering physical injury, \textit{with Nat’l Crane Corp.}, 332 N.W.2d 39 at 81 (disallowing economic losses under manufacturer liability without first showing physical harm to person or property).

186. \textit{See supra} notes 182-85 and accompanying text.


188. \textit{See Neb. Dep’t of Natural Res.}, \textit{supra} note 3 (showing that groundwater irrigation accounts for over 80% of all water use totaling 7.3 billion gallons a day).

189. \textit{Compare} \textit{Rural Dev.}, \textit{supra} note 128 (highlighting the fact that agricultural employment contributes to 121,557 jobs and agricultural sales exceeded $15.5 billion), \textit{with Press Release, Bureau of Econ. Analysis, supra} note 127 (listing revised 2009 GDP of Nebraska, anchored in current dollars, to more than $85 billion), and \textit{State Fact Sheets: Nebraska}, \textit{supra} note 176 (showing total number of Nebraska jobs in 2009 was 1,227,166).

190. \textit{See State Fact Sheets: Nebraska}, \textit{supra} note 176 (showing that 93% of land is used in agricultural applications).

allow foreseeable damages paid by pipeline owners and operators to be based upon the average earned income in rural areas.  

D. **IS THE RISK OF A SPILL WORTHY OF LEGISLATION INCREASING THE SCOPE OF LIABILITY?**

There are two primary arguments against any legislative efforts to implement a scheme for pure economic loss recovery in Nebraska. First, there is an argument the unlikelihood of a catastrophic spill makes the scheme unworthy of legislative efforts. Second, there is an argument such recovery would create vast uncertainty to potential tortfeasors beyond the reasonable scope of contingency planning. As a result of this second argument, opponents would say allowing liability for pure economic recovery in the case of an oil spill would drastically increase administrative costs beyond their relative worth.

The data regarding the potential for a worst-case scenario spill is currently inconclusive. A Department of State Final Environmental Impact Statement noted that it is highly contested whether a spill could permeate surrounding layers of earth to reach groundwater. Even if oil is released into the groundwater, contamination may be managed and mitigated. That is, there are questions whether any contamination could pose a threat to humans. Several improve-

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193. See infra notes 195-96 and accompanying text.

194. See, e.g., H.R. Rep. No. 112-140, pt. 1 (2011) (finding that the Keystone XL permit should be expedited for approval because it has been under consideration for two years and will be safer than any existing pipeline).

195. See Bernstein, supra note 32, at 774-75 (noting economic losses can create incalculable losses); Perry, supra note 18, at 39-39 (noting that a ripple effect of liability would create uncertain potential liability).

196. See Perry, supra note 18, at 39-40 (citing a main objection to pure economic losses is the procedural and administrative demands).

197. Compare U.S. DEP’T OF STATE, FINAL ENVIRONMENTAL IMPACT STATEMENT 3.13-4 (2011), available at http://keystonepipeline-xl.state.gov/documents/organization/182068.pdf (stating the frequency of any size spill will be 2.2 spills every 10 years), with STANSBURY, supra note 1, at 9 (noting a frequency of 91 spills of any size during a 50 year lifetime).

198. Compare STANSBURY, supra note 1, at 17-18 (noting that a storm depositing an unusual amount of rain would allow benzene from tar sands to soak into the groundwater), with U.S. DEP’T OF STATE, supra note 197, at 3.13-4 (recognizing the argument that tar sands oil and accompanying toxins are not likely to permeate the groundwater).

199. Compare STANSBURY, supra note 1, at 17-18 (noting a dissolved plume of benzene in the groundwater could stretch 15 miles long and affect 4.9 billion gallons of water), with U.S. DEP’T OF STATE, supra note 197, at 3.13-88 (stating that groundwater plumes are likely to be less than several hundred feet long).

200. U.S. DEP’T OF STATE, supra note 197, at app. P.
ments to the pipeline design should mitigate a spill similar to the one in the Kalamazoo River.201

Additionally, enabling the recovery of pure economic losses may create an excessive burden to the actors who risk liability.202 Opponents of pure economic loss recovery assert that expanding liability creates an unnecessary level of deterrence.203 The federal statutory framework is already rife with complexity without the burdens of an added layer state law.204 By allowing recovery for pure economic losses at the state level, an actor would be burdened with assessing a higher potential for liability and managing those increased costs all while navigating the complexity of federal law.205

E. RISKS SHOULD BE BORN BY THOSE WHO ARE BEST ABLE TO BEAR THEM

The prospect of a major oil spill from the Keystone XL Pipeline occurring during its intended lifespan is significant and merits discussion of implementing recovery for pure economic losses.206 On one hand, to provide protection for workers by allowing damages under an economic loss theory, the state would bear a heavier administrative cost to allow the claims to be heard the courts, with potential frivolous results.207 On the other hand, farm workers would be left to bear the financial burden of job loss if the crops they tended and harvested were to be destroyed.208 The question boils down to whether a person prefers certainty over justice.209 However, choosing justice does not mean one would entirely abandon certainty.210

201. See STANSBURY, supra note 1, at 17-18 (acknowledging several improvements have been made to the pipeline).

202. See Angle et al., supra note 107, at 430 (identifying the increased costs and difficult assessments required of defendants in cases allowing for recovery of pure economic losses).

203. See Perry, supra note 47, at 1588 (noting that over-deterrence is avoided by excluding recovery for economic losses).

204. See Batik, supra note 114, at 446 (comparing the complexities of CWA and OPA and acknowledging the complex structure in federal maritime cases).

205. Compare Angle et al., supra note 107, at 430 (noting assessments of economic loss have historically been difficult and costly), with Batik, supra note 114, at 446 (analyzing complexities of federal law without consideration of state law).

206. STANSBURY, supra note 1, at 6 (estimating the frequency of a spills to be 1.82 times a year and a small leak could go undetected for 90 days ultimately releasing 7.9 million gallons of oil).

207. See Rheo, supra note 16, at 71 (noting that administrative costs of dispute resolution are a large hurdle to overcome allowing recovery for pure economic losses).

208. See Collaco, supra note 132 (noting a damaged apple crop will result in the loss of 600 jobs).

209. See Perry, supra note 18, at 20 (claiming that excluding recovery for pure economic loss creates certainty but asking whether that should trump justice).

By capping the amount of a claim based on a pure economic loss, or identifying a particular class of person who could recover for an economic loss, a potential injurer would have a framework in which to plan for contingencies.\textsuperscript{211} Similar to Rhode Island, Nebraska could stem the liability by limiting spills to specific sources under specific conditions.\textsuperscript{212} Under Rhode Island section 46-12.3-4, liability is eliminated by allowing recovery of pure economic losses for those natural resources damaged \textit{only} from pollution arising from vessels.\textsuperscript{213} Limiting liable parties exclusively to certain sources of pollution, or limiting the recovering parties, would prevent an overbroad application of pure economic losses.\textsuperscript{214}

Alternatively, a spill of a certain size could trigger liability similar to the Comprehensive Environmental Response, Compensation and Liability Act\textsuperscript{215} structure.\textsuperscript{216} In order to compensate for conflicting data regarding the potential frequency of a significant spill, a statute could incorporate a threshold where only large spills that carry a greater threat of contamination would trigger recovery of pure economic losses.\textsuperscript{217} Further, social costs would be better distributed by allowing corporations to pass costs to consumers rather than inflict them on a regional class.\textsuperscript{218}

IV. CONCLUSION

The current framework establishing liability and recovery for oil spills affecting groundwater are inadequate to protect third parties

\textsuperscript{211} Compare People Express Airlines, 495 A.2d at 110 (discussing why a limited class of plaintiffs is foreseeable), with Bernstein, supra note 32, at 774 (arguing that pure economic loss doctrine is a rationale to protect against liability for indeterminate losses).

\textsuperscript{212} See R.I. Gen. Laws § 46-12.3-4 (2007) (allowing for recovery only when spills are caused by vessels).

\textsuperscript{213} R.I. Gen. Laws § 46-12.3-4.

\textsuperscript{214} Compare R.I. Gen. Laws § 46-12.3-4 (limiting liable parties to vessels), with Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1221-22 (Fla. 2010) (noting that because Fla. Stat. §§ 376.30-376.317 states any person can bring a cause of action, liability is not limited to those suffering property damage).


\textsuperscript{216} See 42 U.S.C. § 9602 (2006) (mandating regulations be issued to state the specific quantity of various hazardous substances that, upon release, will trigger enforcement).

\textsuperscript{217} Compare 42 U.S.C. § 9601 (2006) (providing definitions that limit applicability of the statute to certain polluters and which discharges trigger liability), with Stanbury, supra note 1, at 9 (noting a frequency of a spill from a diameter larger than 10 inches of any size will occur 12.74 during a 50 year lifetime), and U.S. Dep't of State, supra note 197, at app. P (stating the frequency of a spill greater than 10,000 barrels to occur 0.5 times every 10 years).

\textsuperscript{218} See Rhee, supra note 16, at 64 (stating that diversifying social costs over marginally injured plaintiffs is less than just passing the costs to the consumers).
who would be affected in a worst case scenario oil spill.\textsuperscript{219} Agriculture employs 57,538 workers in Nebraska and indirectly contributes 121,557 jobs.\textsuperscript{220} Hired farm laborers earned over $466 million for the fiscal year 2010.\textsuperscript{221} If a pipeline spill were to contaminate the groundwater, it is unclear whether the framework of federal pollution laws and oil spill laws would provide protection for those whose livelihood depends on agriculture.\textsuperscript{222} Allowing for the recovery of pure economic losses would expose a pipeline operator to a much broader but more uncertain limit of liability.\textsuperscript{223} However, in comparing the parties in such an action of a farm worker attempting to recover lost income against a pipeline operator, a strong argument exists that the risk should be held by the party that is more able to bear it.\textsuperscript{224}

Comparing the sophistication and resources of an oil transportation company with that of an individual farm worker should inevitably lead to the conclusion that the risk should fall upon the pipeline operator. Rather than relying on uncertain results in litigation to provide protection for farm workers and those reliant upon the agriculture industry, the State of Nebraska should make it clear as to who should assume the risk in the event of an oil spill. In order to alleviate the risk of lost income brought upon farm workers by the construction of the Keystone XL Pipeline, the State of Nebraska should enact legislation that would allow third parties, who suffer a direct loss of income as a result of an oil spill, to recover under tort law without having to prove physical injury to themselves or their property. In a state like Nebraska, which is largely rural farmland, alternative employment opportunities outside of agriculture are scarce.

_Ryan Watson – ’14_

\textsuperscript{219} See supra notes 135-45 and accompanying text.
\textsuperscript{220} Rural Dev., supra note 128.
\textsuperscript{221} See State Fact Sheets: Nebraska, supra note 176 (citing employee compensation at over $466 million).
\textsuperscript{222} See supra notes 171-90 and accompanying text.
\textsuperscript{223} See supra notes 197-209 and accompanying text.
\textsuperscript{224} See supra notes 210-21 and accompanying text.