

Keystone XL: Nebraska Landowners Sue Governor, but Case May Not Get Heard

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By [Lisa Song](#), [Inside Climate News](#) | Report

Nebraska landowners who helped doom TransCanada's plan to build its Keystone XL pipeline through the Sandhills say their state is trying to rubber-stamp the project by using a law that loosens environmental and eminent domain protections.

So they're taking legal action.

Randy Thompson, Susan Luebbe and Susan Dunavan challenged Nebraska's controversial "pipeline siting" law [in a lawsuit](#), claiming that it violates the state Constitution. The suit, filed in May, is against Nebraska Gov. Dave Heineman, the state treasurer and the director of the [Department of Environmental Quality](#) (DEQ).

Although the State Department has final say on whether to approve the Keystone XL's northern leg because it crosses a national border, Nebraska regulators are largely responsible for determining whether the pipeline's route through the state is safe to people and the environment. TransCanada's [revised path avoids the fragile Sandhills, but it still crosses the Ogallala aquifer](#), a crucial water source for Nebraskans.

The pipeline siting law, which took effect in April, allows [TransCanada](#) and other companies to skirt a rigorous environmental assessment by going through the DEQ, and not through the state's [stricter Public Service Commission](#).

The law also gives Heineman—who supports the pipeline—ultimate authority to approve or reject the Nebraska route. And it lets TransCanada confiscate private land for Keystone XL construction before it's federally approved. The landowners want the law declared unconstitutional and void for giving the governor "unlawful" authority over pipelines and their private property.

But it's still unclear if the case will be allowed to proceed.

[During a hearing on Sept. 14](#), lawyers from the Nebraska Attorney General's office argued that the suit should be thrown out. They said landowners have no right to challenge the \$2 million pipeline review process because it isn't being funded by taxpayers.

A judge from Lancaster County District Court is expected to rule on the state's motion to dismiss within the next few weeks.

The offices of the governor, the treasurer and the DEQ all directed questions about the lawsuit to the Nebraska Attorney General's office, which did not respond to requests for information.

Brian Jorde, one of the lawyers representing the landowners, told InsideClimate News he was "hopeful" his clients would get their day in court. The landowners "are essentially speaking on behalf of all Nebraskans," he said. "And if people who are taxpayers—who are landowners—can't [file] a suit to challenge constitutionality, then who can?"

Thompson, Luebbe and Dunavan are three of the most vocal opponents of the Keystone XL, which is designed to carry up to 830,000 barrels a day [of dilbit, or diluted bitumen](#), from Canada to oil refineries in the Gulf Coast. They've played leading roles at hearings and protests and helped fuel the opposition that forced Pres. Obama to reject TransCanada's original path through Nebraska's Sandhills. Obama's move forced the State Department to start its environmental review from scratch, which postponed a final decision on the project to well beyond the presidential election.

All three once lived along the path of the pipeline, and although the current route no longer crosses Thompson's or Luebbe's land, they've stayed in the fight to help other landowners.

Inside LB 1161: Why Landowners Are Concerned

The landowners' lawsuit revolves around the contentious LB 1161. The law allows pipeline companies to submit proposed projects to either the DEQ or to the Public Service Commission, which have very different review processes.

The DEQ process requires the agency to hold at least one public hearing but doesn't specify how they will evaluate proposed pipeline routes. Pipelines reviewed by the DEQ are handed to the governor for approval or rejection, and the DEQ cannot overrule the governor's decision. The Public Service Commission adheres to a more rigorous process, requiring pipeline companies to submit detailed information about the environmental impacts of the pipeline route. It does not involve the governor.

TransCanada submitted its plan to DEQ when LB 1161 was passed in April. For now, the Keystone XL is the only pipeline affected by the law.

Jane Kleeb, director of the anti-Keystone XL group Bold Nebraska, said the current law creates a "choose your own adventure" scenario. She fears that companies will always select the easiest course. "[O]bviously they'll go through the DEQ process because they don't have to disclose much of anything, and the governor gets to easily sign off on the route."

Jorde, the landowners' lawyer, said the problem lies not in the DEQ, but in the lack of safety regulations.

"It's very possible the DEQ will do an outstanding job" evaluating the Keystone XL, he said. "But the law as it's drafted doesn't require a good job. It doesn't have standards or criteria in place."

Randy Thompson said he feels "pretty good" about how the DEQ has reviewed the pipeline route so far. The agency has held multiple public meetings and requested information from TransCanada about the pipeline's impacts on soil and groundwater.

But Thompson said the DEQ's hands are tied, because the ultimate decision lies with the governor. "There's only so much that they [DEQ] can do."

Susan Dunavan is particularly concerned about how the law affects property rights. The law allows pipeline companies to use eminent domain as soon as the governor approves the route—even if the company hasn't secured federal permits required for construction. (The State Department's decision is expected in the first quarter of 2013.)

"I'm afraid if this [lawsuit] is thrown out, and we get nothing that's positive for the citizens of Nebraska, what's to prevent any other company in the world from coming in to start condemning people's property?"

In an email to InsideClimate News, TransCanada spokesman Grady Semmens said the company "cannot comment directly on this lawsuit because it is between private landowners and the State of Nebraska."

Semmens added that the company "continues to work collaboratively" with the DEQ on finalizing a route that "minimizes potential impact on Nebraska's land and water resources."

Bill 'Absolutely Gutted' Public Service Commission Oversight

If LB 1161 wasn't passed, the environmental impacts of Keystone XL would have been evaluated by the Public Service Commission.

The commission's authority over proposed oil pipelines was established last fall, when Nebraska lawmakers met in a special session to discuss rerouting Keystone XL around the Sandhills. At that time the legislature passed two bills. One bill directed the DEQ to evaluate TransCanada's reroute. The other bill authorized the commission to create regulations for reviewing future pipelines, other than the Keystone XL.

When the Obama administration rejected the presidential permit on Jan. 18, the DEQ was forced to halt its review due to a legal technicality. The following day a lawmaker introduced LB 1161.

The bill allowed the DEQ to continue its review, but that wasn't all. One of the many amendments made to the legislation allowed TransCanada to use eminent domain once the governor approves the route. A separate 10-page amendment, introduced just 30 minutes before lawmakers voted to adopt it, made the bill applicable to all future oil pipelines.

Thompson said LB 1161 "absolutely gutted" the Public Service Commission bill passed during the special session last fall. "They've thrown all the landowners in Nebraska under the bus, with the new eminent domain thing. How ridiculous is that idea? The governor could give them eminent domain power, and they could start condemning property in Nebraska when they don't have [the presidential] permit."

Records from the Nebraska Accountability and Disclosure Commission show that TransCanada spent at least \$47,499 between [January](#) and [June](#) lobbying in support of the bill.

Bold Nebraska and other pipeline opponents [lobbied against the bill](#), but it's difficult to tell how much they spent because their funds were spread out over dozens of bills, most of which were unrelated to the Keystone XL. Kleeb estimates they used a total of \$10,000 on LB 1161.

Why the Public Service Commission Is Preferred

The landowners said they prefer the Public Service Commission process because it's more transparent. "I feel like the PSC really kind of listens to what people have to say," Thompson said.

Susan Luebbe said the agency has revised its rules to include specific recommendations from landowners. For instance, the current Public Service Commission regulations require pipeline companies to provide information on the chemical composition of their crude oil—something that landowners have urged for years. This is especially important for dilbit pipelines because the oil is more difficult to clean up when it spills in water.

Two other suggestions—a requirement for a depth-to-groundwater survey and a study of soil permeability along pipeline routes—were also included at the request of concerned citizens.

Funding is another point of contention, and it could play an important role in the court's ruling on whether to dismiss the case.

LB 1161 authorizes the DEQ to spend up to \$2 million for its review, which would be reimbursed by TransCanada once DEQ completes its evaluation. This is why the state's lawyers argued that landowners have no standing as taxpayers in this case.

Jorde disagreed. "There are public funds being expended given on loan to TransCanada," he said. "And hopefully TransCanada would agree sometime in the future to pay that back."

"But what if the governor were to reject the route?" Jorde asked. "How eager will they be [to pay the money back]? How do we enforce that?"

Unlike the DEQ, the Public Service Commission can send pipeline companies periodic invoices and charge interest for late payments. "PSC has [a] process for appealing billings," Jorde said in an email. "DEQ [has] no such option. Money is ultimately from tax revenues."

Laura Demman, director of the Public Service Commission's natural gas department, told InsideClimate News the agency is unaffected by the landowners' lawsuit. The commission released the latest version of its draft rules in August and is now collecting public comments. The final regulations could be released as early as November.

Demman said the commission could begin reviewing a pipeline proposal today using its draft rules—if it was asked to do so.

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