

Keystone XL pipeline is issue of property rights for some ranchers



By Steven Mufson, Published: July 27, 2012

WINNER, S.D. — John Harter stood on his ranch in the flat sun, a stiff breeze muffling the sound of his voice. Small sandy mounds rose behind him. In front, lay pasture and grazing cattle. At an old well, he stopped to point to water just five or six feet below the surface. Now he looked back at the row of tall cottonwood trees where his pickup truck was parked.

The Keystone XL pipeline would come through right here, he said.

He doesn't want it to, and he's even fought to stop it. It's not a question of how much TransCanada pays him. He just doesn't want strangers and heavy equipment tearing a 110-foot-wide gash through his land, cutting down trees and burrowing under the sand hills and pasture.

He worries that it could take years for the land to recover. And the pipeline, buried four or five feet deep, will be sitting in water, the same water that is part of the vast Ogallala aquifer and which lies so close to the surface that his pasture does not need to be irrigated. He worries that a spill or leak will spread because the soil is so porous.



Laris Karklis/The Washington Post

“I worry about what they will do to the tall cottonwoods and what they will do to this view,” he said, “and the beauty of it is irreplaceable.”

But Harter, like thousands of other landowners, doesn’t have much choice. Two days earlier, Harter had been in court trying to stop TransCanada, which had asked a judge to let it exercise eminent domain and force Harter to give it access to his land.

Harter lost.

The Keystone XL pipeline has reignited the emotional issue of eminent domain — the taking of private property for public use — all along its proposed route. The vast majority of landowners

have signed agreements with TransCanada, the pipeline owner. But where necessary, the Calgary, Alberta-based company is busy going to state courts to exercise eminent domain and lining up rights to cross properties throughout the Great Plains — even though the State Department and Obama administration still are weighing whether to give TransCanada’s Keystone XL pipeline a permit to cross the U.S.-Canadian border.

The reason: The company has warehoused nearly \$2 billion worth of steel pipe and other supplies. If the Obama administration gives it the nod, TransCanada wants to get to work quickly. Now Harter has a warehouse’s worth of anger and despondency.

“I found out that they have more rights to my property than I do,” he said. “It makes me very angry when I paid for it, paid the mortgage on it and take care of it.”

Fight over rights

People across the United States have been forced to make way for power lines, sidewalks, telephone poles, pipelines and other projects. In a 2005 case, the Supreme Court in a 5-to-4 ruling said that local governments could even force property owners to sell out to make way for private economic developments if officials felt that it would benefit the public.

The case, *Kelo v. City of New London*, became a rallying point for conservatives and others who said the ruling violated the Fifth Amendment prohibition against the taking of property except for “public use.” In a dissenting opinion, then-Justice Sandra Day O’Connor wrote the ruling meant that the “specter of condemnation hangs over all property.”

Ironically, many conservative critics of that case, including Deb Fischer, Nebraska’s Republican candidate for U.S. Senate, support the Keystone XL pipeline. They say that it will serve the public good by increasing U.S. oil supplies and easing national security concerns.

In its court filings, TransCanada says that the pipeline is a common carrier whose permanent easements are “in the public interest.”

Opponents of the line — including Harter’s lawyer Matt McGovern, a candidate for South Dakota’s public utilities commission — argue that TransCanada is a private firm seeking access for Canadian oil sands crude to Texas refineries along the Gulf of Mexico. If prices are better abroad, those refineries will ship the oil products overseas, they say, possibly raising gasoline prices in the central part of the United States.

Harter does not see how this will help him in South Dakota. “This is a pipeline of greed, not need,” he said.

He is weighing an offer from a wind-farm developer, who would pay an initial fee and annual royalties. TransCanada pays an initial fee that covers only temporary damage and inconvenience. Harter thinks three turbines would have less impact on his land, but he isn’t sure.

“There will always be a few vocal opponents,” said Russ Girling, TransCanada’s chief executive. “As a last resort we have the right of eminent domain, but we hardly ever use it. In 60,000 [landowners], you’re going to find a few who don’t like us.”

“The claim that we have a right to expropriate property is not correct,” Girling said. “The landowners own their property. We pay them for inconvenience. . . . Eighteen months after we’re gone on farmland, you won’t know the pipeline is there.”

David Domina, an Omaha lawyer, said if the State Department and President Obama approve the pipeline, then landowners will not have much of a case. Even without that okay, TransCanada has qualified for eminent domain under state laws by winning approval from state utility commissions, according to experts in pipeline law.

But Domina says TransCanada's easement terms are onerous and he has signed up more than 100 ranchers and farmers in Nebraska to negotiate collectively. TransCanada's initial terms offer modest payments to cover any risk of leaks, rupture or interruptions of service as well as damage to crops, Domina said.

"I don't know what it is they claim they still have liability for, but it wouldn't be much," Domina said. Landowners, by contrast, would be liable for any damage done to the pipeline, willful or not.

Recently, TransCanada has sweetened offers to landowners, especially those along the new Nebraska route, to try to ease access problems.

But Harter says the mere threat of eminent domain has persuaded many landowners to come to terms with the company without going to court — or running up legal fees.

"Negotiating with TransCanada having right of eminent domain is like having somebody trying to rob you at gunpoint and arguing for your billfold when there's nothing in it," Harter said. When a company representative threatened to use eminent domain, he recalled, "I said, 'I will not be bullied into signing.' "

A willing rancher

As Girling said, not every landowner is fighting TransCanada. Marshall Treadwell — whose peripatetic career has included stints as a car salesman, recreation superintendent for a Florida county, and a math and science teacher in a Texas elementary school — was happy to sign an agreement with TransCanada over the 800-acre Texas farm his father worked from 1948 until before his death in 1995.

Treadwell and his siblings didn't want to farm the land, so they planted pine trees for harvesting. Unlike cows, Treadwell said, pine trees don't jump fences, or need feeding, or require immunization or help giving birth. There's still upkeep, but it isn't a full-time job and he lives in Tyler, about 40 minutes drive from the farm. There are two wells drilled about five years ago when oil prices soared; they produce about six or seven barrels a day.

Three pipelines already run across Treadwell's property and have been there "since I can remember," he said. The routes, one of which dates to the 1930s or 1940s, are clearly visible, cut through the tall grass and trees. TransCanada proposed clearing a 50- to 110-foot corridor through the trees, parallel to one of the other lines, to lay down the Keystone XL pipeline.

“If we’re going to have a leak or spill,” Treadwell said, “those old ones are more prone than a new one would be.”

Usually TransCanada pays a one-time fee plus compensation for the time before the land is restored. While that would be fine for cattle pasture, Treadwell told TransCanada, the pine trees couldn’t be replanted on top of the pipeline and years of investment in existing trees would be lost, too. So the company sharply increased the price, paying almost as much as it would cost to buy the land, Treadwell said.

Deal done, and TransCanada already has cleared the trees to get ready for installing the line. Treadwell said he sold the trees and pocketed another \$8,000.

“I’m sure there are some bad experiences with people, but I never experienced that,” he said. “All the negotiations we had were very amenable.”

Galvanizing support

As the Keystone XL has grown into a major political battle, foes of the pipeline have held up examples of grass-roots support. The Sierra Club has moved to organize Texas ranchers to oppose the pipeline, and it has given out Harter’s name and numbers to reporters.

In early June, Friends of the Earth had a conference call that included the oft-profiled David Daniels, a Texas rancher north of Tyler, who said he signed a contract after being threatened with an eminent domain court case. Earlier, Kim Huynh, who has the title “Federal Dirty Fuels Campaigner” at Friends of the Earth, sent journalists an e-mail saying the group had launched a “Stand with David” photo petition site and that actresses Daryl Hannah and Sheryl Lee, had added photos.

TransCanada has its own rival list of happy landowners. It took out a full-page ad in some Texas newspapers featuring a couple named the Romeros. Wesley, the husband, is wearing a cowboy hat and they are posing with what appears to be dead chickens hanging in the background. “I was never pressured. I was never intimidated . . . they treated me right,” the Sour Lake, Tex., landowner is quoted as saying.

The company also contacted Treadwell after he wrote a letter to a local newspaper, the Tyler Morning Telegraph, defending the pipeline project. TransCanada suggested him to The Washington Post. He said that he has not been written about before.

One popular example of opponents to the pipeline is that of Julia Trigg Crawford, a 6-foot-tall former college basketball player and former executive recruiter who has taken

over management of the 650-acre farm her grandfather bought in 1948. It has corn, soybeans and a few cattle. It lies northwest of Paris, Tex., bounded by a country road on one side and the Red River, the border between Oklahoma and Texas, on the other.

Near the river, there are two mounds where Native American artifacts have been discovered, and Crawford has tried, unsuccessfully, to block the pipeline on that basis. She doesn't have the same type of relationship to the land as Harter has, but Crawford is just as passionate.

"We are a Texas family standing up to a foreign company who wants to take our land for what appears to be a profit-making endeavor," she said, at a table overlooking her fields through picture windows. Two deer heads were mounted on walls of the two-story living room.

"We don't have a problem with eminent domain," she said. "But is it really for the public good?"

Crawford says, however, that she is the only one of 12 farmers and ranchers in her county who has not signed an agreement with TransCanada. In Lamar County court earlier this year, James A. Freeman, a TransCanada lawyer, let his frustration show: "We are not going to have one landowner hold up a multibillion-dollar project that is going to be for the benefit of the public."

Crawford said that the burden in court is on TransCanada to prove it is entitled to build across her property and that it does not have an alternative route. She has a pretrial hearing Aug. 10.

"This is a David and Goliath story," she said. "We're not going to fold our tents because this is hard."

Crawford's case has admirers. "Admire your guts," a retired Texas lawyer wrote to her after reading her story in a newspaper.

Environmental groups have held her out as an example. She connected with them last year when she went to Washington to protest the pipeline. She was arrested with 170 other activists, including Sierra Club people. She shook the hand of Bill McKibben, the Middlebury College professor who has led much of the fight against the pipeline and was also arrested in front of the White House. She still carries her citation in her wallet next to her driver's license.

Driving a rugged golf cart across her land, she points out soybeans, corn and the bend in

the river where the pipeline would cross. It doesn't help, Crawford says, that the easement proposal from TransCanada says that it can bury or burn debris.

However, she says, "From our perspective, this is not an environmental issue. This is a property rights issue. Does a foreign company have the right to take a Texan's land if they don't want to give it up?"

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