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# Eminent Domain Fight Has a Canadian Twist

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A Canadian company has been threatening to confiscate private land from South Dakota to the Gulf of Mexico, and is already suing many who have refused to allow the Keystone XL pipeline on their property even though the controversial project has yet to receive federal approval.

Randy Thompson, a cattle buyer in Nebraska, was informed that if he did not grant pipeline access to 80 of the 400 acres left to him by his mother along the Platte River, “Keystone will use eminent domain to acquire the easement.” Sue Kelso and her large extended family in Oklahoma were sued in the local district court by TransCanada, the pipeline company, after she and her siblings refused to allow the pipeline to cross their pasture.

“Their land agent told us the very first day she met with us, you either take the money or they’re going to condemn the land,” Mrs. Kelso said. By its own count, the company currently has 34 eminent domain actions against landowners in Texas and an additional 22 in South Dakota.

In addition to enraging those along the proposed pipeline’s 1,700-mile path, the tactics have many people questioning whether a foreign company can pressure landowners without a permit from the State Department — the agency charged with determining whether the project is in the “national interest.” A decision is expected by year’s end on the pipeline, which would carry crude oil from Alberta to American refineries.

A government official with knowledge of the permitting process who would address the issue only on condition of anonymity said, “It is presumptuous for the company to take on eminent domain cases before there is any decision made.”

Landowners have begun joining forces and challenging the company’s assumption that it can legally seize land.

“With so many unanswered questions about the safety of this project, perhaps it’s time for the U.S. to hit the brake pedal,” Mr. Thompson wrote in testimony for a House Energy and Commerce Committee hearing in May. “And perhaps it’s time that our government starts placing the concerns of American citizens over and above those of a foreign corporation.”

Mr. Thompson said he intends to fight to keep the pipeline, 36 inches in diameter, off his land. Eminent domain laws generally allow for the confiscation of private property if taking it is judged to serve a larger public good. These kinds of laws differ slightly from state to state as do the processes by which pipelines are approved and licensed. As a result, there is both debate and

confusion over whether TransCanada has the right to use the courts to demand easements from property owners in advance of final approval for the project.

A TransCanada spokesman, Shawn Howard, says the company does not have to wait for a license from the State Department to begin securing land. He said the company has tried to obtain voluntary agreements, but when that fails the company has the right to force lease agreements upon landowners in all six states the pipeline would pass through. All of TransCanada's permit applications, he said, have been made through its subsidiary in Omaha, Keystone Pipeline.

"We have been given the legal advice that we can do this in parallel to the process going on in Washington," Mr. Howard said. "If we didn't think we had the authority or ability to do this, we wouldn't be doing it."

A senior State Department official, who asked not to be identified because the permit process is continuing, said TransCanada had not sought federal approval to invoke eminent domain. He said the department had no authority on the issue and that it was up to state law and the courts to determine appropriate use of eminent domain laws.

Landowners and their lawyers are pushing local courts to do just that. While it is impossible to say how many cases are working their way through the legal system, in addition to the 56 Texas and South Dakota cases, TransCanada acknowledges it has sent "Dear Owner" letters to dozens of families in Nebraska.

Timothy Sandefur, a lawyer with the Pacific Legal Foundation, a nonprofit advocate for property rights issues, said that if the project is approved, the company will be on firmer ground. As unfair as the laws might seem, he said, the right of way of pipelines and railroads as public goods has been well established, regardless of whether they are foreign-owned. "Property owners almost never win these suits," he said.

But lawyers for the landowners, particularly in Nebraska, Oklahoma and Texas, argue that TransCanada has not met the requirements to invoke eminent domain under those states' laws. In South Dakota, however, a judge has already ruled that TransCanada could use eminent domain to secure land for a previous pipeline project.

**David A. Domina**, a Nebraska lawyer whose firm represents 45 landowners, said there was "no way" that TransCanada has eminent domain powers under Nebraska law, and that the company was "acting in bad faith."

In East Texas, where residents are used to having cordial dealings with oil companies, landowners said they had never seen a company behave as aggressively as has TransCanada.

Norman Ladd, a lawyer in Tyler, Tex., whose firm represents more than a dozen landowners, said the company has low-balled on prices and threatened to use eminent domain "instead of coming down here and saying we can work with you."

TransCanada has taken reticent landowners before special county boards in Texas, one of the first steps in that state's condemnation process. The boards determine only how much landowners should be compensated, not whether eminent domain laws apply.

With drilling and pipeline building expected to expand into more shale fields and the news over the weekend that Kinder Morgan was buying the El Paso Corporation to expand its pipeline network, these types of land use challenges may well increase in coming years.

Supporters of Keystone XL argue it will help bolster domestic energy security and spur job growth. But many politicians, particularly in Nebraska, oppose much of the pipeline's route because they say it poses a danger to the Ogallala Aquifer, which provides more than a quarter of the water for the country's agricultural crops.

Environmental groups argue that extracting and burning the heavy crude drawn from Alberta's oil sands will increase greenhouse gas emissions. They also warn that if there is a spill or a leak, it would cause severe environmental damage and be extremely hard to clean up.

In what has been interpreted as a virtual green light for the project, a State Department report in August concluded that the pipeline would have minimum environmental impact if operated under federal regulations.

Mr. Howard said the company has already secured legal agreements with 90 percent of the landowners it needs in Nebraska, and that he does not expect a few unhappy landowners to slow the process or force changes to the intended route. But TransCanada backed off and dropped its lawsuit against Sue Kelso's family, when it was clear that the family was not going to acquiesce. Mr. Howard said the company decided it would be better to reroute the pipeline around the Kelso property for "various reasons" based on convenience.

An East Texas landowner, Eleanor Fairchild, said that a TransCanada representative arrived at her house a few days before her husband died of Alzheimer's in 2009. At first, she considered the \$42,000 offer — later raised by \$18,000 — for a 50-foot easement on her 425 acres. But she said that the more she learned about the pipeline, the less she wanted it on her land.

"It was a hard decision whether I wanted to fight and spend all this money even though I could lose the thing," Ms. Fairchild said in a weary drawl. "But somebody needs to fight them. I decided it would be me."

TransCanada's condemnation suit against her is pending.