

Nebraska trial could delay Keystone XL pipeline

By [Lenny Bernstein](#), Published: August 4

While environmentalists, energy executives and elected officials across North America await the State Department's critical decision on the [Keystone XL pipeline](#), a little-noticed trial scheduled for next month in Nebraska could spell problems for the \$5.3 billion project.

Despite [two attempts by Nebraska's attorney general to have the case thrown out](#), Lancaster County District Court Judge Stephanie Stacy has set a [Sept. 27 trial date](#) for arguments in a lawsuit that contends the state legislature unconstitutionally gave Gov. Dave Heineman (R) authority to approve the pipeline route.

A win for the plaintiffs — three Nebraska landowners who oppose the pipeline — would force TransCanada, the company that wants to build the 1,179-mile northern leg of the project, to go through the entire siting process again. Even supporters do not believe that would permanently block the project, but it could add years to the timeline. Appeals through the Nebraska court system could have a similar effect.

"I don't think [people] realize how Nebraska is a big monkey wrench in all this," said [Brian Jorde](#), attorney for the three landowners.

The State Department must sign off on the pipeline because it would cross a U.S. border, bringing as much as [830,000 barrels a day of diluted bitumen crude from oil sands in Alberta, Canada](#), to U.S. refineries in the Gulf of Mexico. A State Department official said the agency's review of the pipeline is continuing and would not be affected by the Nebraska litigation.

But route decisions are left to the states along the way, which gives Nebraska jurisdiction over nearly 200 miles of the proposed project. That might not have been a problem for TransCanada until the state legislature, acting in the final hours of its 2012 session, took authority over review and approval of the route away from the five elected members of the Public Service Commission and instead gave it to Heineman and the state's Department of Environmental Quality. The bill, LB 1161, passed by an overwhelming majority.

It also authorized the governor to give TransCanada the power of eminent domain over landholders, a valuable weapon as the company seeks easements from farmers and ranchers to run the pipeline through Nebraska.

"By all appearances, that bill was written by TransCanada. . . . I think at some point in time, ordinary citizens can't tolerate that kind of behavior," said Randy Thompson, a small farmer and one of the plaintiffs.

Shawn Howard, a spokesman for TransCanada, said in an e-mail that the company believes the Nebraska law "is constitutional and should be upheld." The company will continue to plan the pipeline and seek easements, even with the threat of a new route review looming, Howard said.

The plaintiffs argue that, under the Nebraska constitution, the legislature had no authority to transfer route-approval powers from the commission to the governor or to give him the ability to delegate the power of eminent domain to TransCanada. The law also does not provide for judicial review of the governor's decision, they contend, and is essentially "special legislation" designed to benefit the pipeline company only.

“The suit claims that the PSC has the exclusive jurisdiction” to review the pipeline and set its route, “and the legislature can’t take that power . . . and transfer the right to one person, a partisan person, the governor, to become the trigger for eminent domain,” Jorde said.

A spokeswoman for Attorney General Jon Bruning declined to comment on the case, but Deputy Attorney General Katherine J. Spohn argued in her brief that the legislature had acted lawfully. Spohn said lawmakers had the legal ability to give Heineman the power to delegate eminent domain authority to TransCanada.

Stacy, the district court judge, has scheduled an hour of arguments in her courtroom and subsequently could take months to rule on the issues, Jorde said. The losing side is expected to appeal as far as the state’s Supreme Court before the issue is finally decided, he said.

“When our legislature steps over the line,” Thompson said, “I think it’s important that ordinary citizens take them to task.”