

## Lawyers: Legislature can move on pipeline

By KEVIN O'HANLON / Lincoln Journal Star JournalStar.com |

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(ERIC GREGORY/Lincoln Journal Star)

As state lawmakers prepare to meet in special session to consider giving Nebraska authority a say in where the proposed Keystone XL oil pipeline goes through the state, three prominent attorneys say the Legislature would be on legally solid ground in doing so.

Attorney Alan Peterson of Lincoln, working on behalf of the Sierra Club, issued an opinion that said lawmakers could pass siting legislation without fear of legal challenges that would allege violation of the Commerce Clause of the U.S. Constitution -- which regulates commerce between states. He also said such a law could be written so it could not be challenged as so-called "special legislation" aimed specifically at the pipeline.

Attorneys [David Domina](#) and [Brian Jorde](#) of Omaha, working through the anti-pipeline group Bold Nebraska, also said Nebraska lawmakers have the power to act.

"After careful study, we conclude Nebraska can regulate its own land use," [Domina](#) and [Jorde](#) wrote in a 32-page "Green Paper." "Federal safety regulations pre-empt how the pipeline must be built, but Nebraska has the right to control, reasonably and responsibly, where it must be built. Pipeline safety is federally pre-empted, but oil pipeline siting is not.

"Nebraska's authority must be exercised by its Legislature. The Legislature should act before commencement of State Department authorization for a Canadian border crossing or construction as eminent domain proceedings which will likely follow in Nebraska," they said.

TransCanada wants to build the 36-inch pipeline from the oil sands of Alberta to refineries along the U.S. Gulf Coast. It has been working on the route for several years and wants it to go through Nebraska's Sandhills region and over the massive Ogallala Aquifer, a source of irrigation and drinking water for a large swath of the central United States.

The \$7 billion, 1,700-mile project has been met by fierce resistance from Sandhills landowners and from advocacy groups worried about the potential effects of an oil spill over the aquifer -- the nation's largest.

Said Peterson: "If the Legislature decides to ... pass legitimate oil pipeline routing, location and siting legislation, such legislation would be legally defensible. Such legislation could be crafted so as not to create any obvious imbalance of the 'burdens' to each side under commerce clause doctrine -- namely the burdens to the pipeline company on the one side and to the people of this state on the other.

"My opinion is that the Nebraska Legislature has the ability and authority to pass a law that will withstand constitutional scrutiny, is not special legislation and is structured to protect the state's legitimate current and future economic interests," he said. "Any statute passed would not be special legislation so long as this project or company is not singled out as a "closed class" target, and so long as the legislation is careful as to classifications, definitions and scope so as not to be arbitrary."

Gov. Dave Heineman on Monday called for a Nov. 1 special session to deal with the siting issue. Sen. Annette Dubas of Fullerton has been working with several senators and attorneys on a siting bill. The bill is focused around an oil pipeline permit process by the Nebraska Public Service Commission. The revised version will answer the legal and constitutional questions, Dubas said.

Meanwhile, the State Department may miss its announced deadline of the end of the year for acting on a presidential permit for the Keystone XL.

A senior State Department official, who asked not to be identified, told The Associated Press, "While we are working towards a timely decision by the end of the year, our foremost commitment is to a thorough review and assessment of information and to make a decision based on the best available data and analysis."

After a meeting two weeks ago in Norfolk with several state senators, TransCanada offered no change in the route but did offer a six-point plan for easing concerns about it. The Calgary-based company proposed a \$100 million performance bond and an operations office in O'Neill as additional ways to cope with the possibility of an oil leak or spill.

[Domina](#) and [Jorde](#) noted TransCanada already has one pipeline, the Keystone, running through Nebraska and that it does not pass over the Ogallala Aquifer.

"The Legislature can require TransCanada to use its existing corridor again in eastern Nebraska by enacting a law generally requiring pipeline companies to consolidate their pipelines in reasonable corridors to maximize land utilization and minimize interference with land use by

others," they said. "But, to exercise this power, the Legislature must enact a statute and the governor must approve it ... by the end of 2011.

"Nebraska's siting authority may be more theoretical than real if it delays action," they said. "Once the United States State Department issues a permit authorizing construction of the pipeline and the route across Montana and South Dakota is finalized, it will be difficult to compel TransCanada to move its proposed pipeline eastward to its existing corridor."

Meanwhile, three environmental groups who sued earlier to stop the pipeline, have expanded their lawsuit.

The Center for Biological Diversity, the Western Nebraska Resources Council and Friends of the Earth Inc. asked for an injunction to halt plans for the pipeline, alleging that the U.S. Fish and Wildlife Service authorized the removal of endangered American burying beetles from the proposed Keystone XL route in Nebraska this past summer.

Capturing insects on the federal endangered list would have been done prior to the issuing of a presidential permit for the TransCanada project, and the issue of timing was a key.

The groups expanded their lawsuit this week, saying a spill from the pipeline could harm whooping cranes and other endangered species.

*Reach Kevin O'Hanlon at (402) 473-2682 or [kohanlon@journalstar.com](mailto:kohanlon@journalstar.com).*