

Keystone Route Ruling Should Be Overturned, Nebraska Says

By Andrew Harris April 22, 2014



A warning sign stands at a TransCanada Keystone XL pipeline valve station in Direct, Texas. Photographer: Max Faulkner/Fort Worth Star-Telegram/MCT via Getty Images

A court challenge holding up TransCanada Corp. ([TRP:US](#))'s Keystone XL pipeline should be dismissed, Nebraska's governor said, urging his state's high court to allow the project to move forward.

The case's outcome is delaying the Obama administration's review of the project, the U.S. State Department said April 18. Nebraska's Republican Governor Dave Heineman yesterday asked the state's supreme court to throw out a judge's ruling that the pipeline route was approved without proper authority.

The court may not hear the case until at least September, and probably won't rule until after mid-term congressional elections in November, taking a divisive issue off the table.

TransCanada is awaiting a U.S. permit to build the northern leg of Keystone XL, which would supply U.S. Gulf Coast refineries with crude from Alberta's oil sands. Because it crosses an international boundary, the proposal requires State Department approval.

Based in Calgary, TransCanada is seeking to build the 830,000 barrel-a-day, 1,179-mile (1,897-kilometer) conduit running from Hardisty, Alberta, to Steele City, Nebraska, where it would connect to an existing network.

Backers of the project contend it will create jobs. Opponents have countered it will contribute to global warming. If the Nebraska Supreme Court upholds the lower court, Keystone will need to apply to the state's Public Service Commission for approval. Under law, the commission has seven months to review such applications.

Judge's Ruling

Judge Stephanie Stacy in Lincoln ruled Feb. 19 that legislation enabling Heineman and TransCanada to bypass the commission when planning the pipeline route violated the state's constitution.

Stacy erred in allowing a challenge by three property owners to move forward because they hadn't shown they had been injured as taxpayers by the state's plan, Heineman, a Republican, said in a filing yesterday.

State Attorney General Jon Bruning, a Republican running to succeed Heineman as governor, argued that the trial judge set too low a threshold for taxpayers to bring court challenges to state legislation.

Bruning also argued the not all crude oil pipelines qualified as “common carriers” falling under the exclusive jurisdiction of the Public Service Commission.

1885 Law

At issue in the litigation is a 2012 legislative change to Nebraska’s Major Oil Pipeline Siting Act, itself adopted by the state in 2011.

Created with the intention of protecting the state’s natural resources, the act spelled out a formal process for evaluating and approving pipeline routes through the state, placing ultimate authority with the state’s Public Service Commission, according to the lower court ruling.

Originally established in 1885 to regulate railroads, and enshrined in a 1906 amendment to the state’s constitution, the PSC’s mandate includes regulation of telecommunications carriers, household moving companies, natural gas utilities and major oil pipelines.

Under the 2011 version of the law, any proposal to build a major pipeline or change the route of an existing conduit, and the eminent domain authority needed to do so, was contingent upon PSC approval.

On Nov. 23, 2011, the same day it adopted the siting act, Nebraska’s one-house legislature added a related measure requiring joint state-federal environmental impact assessments of any plan to build an oil pipeline with an inside diameter of more than eight inches.

Just five months later, Nebraska lawmakers amended those measures, defining a major oil pipeline as any with an inside diameter of greater than six inches, and vested in the governor the power to approve the proposed path in lieu of the PSC, after a self-funded assessment by the Nebraska Department of Environmental Quality.

Those changes took effect on April 18, 2012. The landowners filed their constitutional challenge one month later.

U.S. Senate

David Domina, a lawyer for the landowners, is seeking the Democratic nomination to run for U.S. Senate in the state, where he would follow Republican Mike Johanns, who is retiring after a single term.

“Their argument is nothing new. It is what we already beat them on,” said Brian Jorde, an attorney in Domina’s law firm, adding that the landowners’ brief was due in 30 days.

Domina argued in the lower court that the legislation, which took effect in 2012, improperly divested the constitutionally-created Public Service Commission of jurisdiction over pipeline routing, placing it with the governor and the Nebraska Department of Environmental Quality.

Stacy agreed, rejecting the state’s contention that pipeline routing was outside the PSC’s purview. In her Feb. 19 decision, Stacy sided with the landowners that the shift in authority effected by the legislation was improper.

“The court finds there is no set of circumstances under which such provisions could be constitutional,” she said.

Stacy, appointed by Heineman, rejected Nebraska’s argument that the landowners didn’t have the right to sue as taxpayers because TransCanada reimbursed the state more than \$5.15 million, meaning the people hadn’t been harmed.

“While private reimbursement of public expenditures may be good fiscal policy, it should not be used as a legislative tool to insulate allegedly unconstitutional laws from taxpayer challenge,” she said.

The case is Thompson v. Heineman, S-14-000158, Nebraska Supreme Court (Lincoln).

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