

Judge hears challenge to pipeline siting law



SEPTEMBER 28, 2013 6:40 AM • BY LORI PILGER / LINCOLN JOURNAL STAR

Nebraska landowners fighting TransCanada's Keystone XL pipeline and a crowd of their supporters packed a Lincoln courtroom Friday as their attorney took jabs at the state law that handed the power of approval for its path through the state to the governor.

"The statute ought not survive," attorney [David Domina](#) argued at a bench trial that took only about half an hour because the case essentially boiled down to two issues:

- * Whether plaintiffs Randy Thompson, Susan Luebbe and Susan Dunavan have standing to bring the suit against the state.
- * Whether [LB1161](#), passed by Nebraska lawmakers during a special session in 2011, is unconstitutional, as the plaintiffs allege.

Assistant Nebraska Attorney General Kate Spohn argued they had failed on both fronts.

Lancaster County District Judge Stephanie Stacy, who heard the case, already has refused to throw it out because the landowners have alleged public funds were spent illegally.

But Spohn said under the plain language of the statute "there has been no expenditure of public funds."

While the law appropriated \$2 million from the Nebraska Department of Environmental Quality's cash fund to pay for an evaluation of any proposed pipeline, the pipeline carrier ultimately pays that, she said.

Without naming TransCanada, Spohn said, evidence showed that in the one case where the law was used the state has been reimbursed.

But Domina said it was the 11th time the attorney general's office had taken the position in lawsuits against it that those filing didn't have standing.

"It failed in those previous 10 cases, and it should fail here, too," he said.

Domina said his clients were in court as Nebraska residents and taxpayers, and that gave them standing.

Spohn also argued they have failed to prove the law was unconstitutional on its face because it deprived a right to life, liberty or the use of their property without due process. She said the law allowed the pipeline carrier to use eminent domain, and landowners can challenge that in court.

On the other side, Domina ticked off a laundry list of reasons the law is unconstitutional.

Among them:

- * It took jurisdiction to regulate oil pipelines from the Public Service Commission, an independent regulatory body, and gave it to the governor.
- * It gave the governor authority to decide which private, proposed pipeline company would be given the power to condemn Nebraska land, which he called a particularly egregious violation.
- * It provides for no judicial review.
- * It provides no clearly defined standards for how the governor is to make the decision.
- * It was passed "for a single, nonresident of the state."
- * It requires the state to pay for siting evaluations with no guarantee of being repaid.

Domina called the law ill-conceived legislation that was rushed through.

Spohn said the plaintiffs were attempting to rewrite history. If the PSC had authority to approve pipeline sitings, she asked rhetorically, why did the governor need to call a special legislative session?

Even if it did have the authority, she said, it is clear the Legislature can pass a law to limit the PSC's jurisdiction.

"And that is precisely what has happened on LB1161," Spohn said.

In the end, Stacy took the case under advisement. Whatever she decides, the case is expected to end up in front of the Nebraska Supreme Court.

Before the hearing, more than [50 people gathered](#) on the courthouse steps to protest the law and the proposed pipeline.

"It's one of many battles we've fought against this pipeline," Jason Miller of Omaha said of the lawsuit. "It's a good example to set for my son, too."

Miller and his 4-year-old son, Jack, were among six people who stood near the street holding signs while other rally participants filed inside the building.

After the hearing, dozens of challengers filled a public lounge, and the plaintiffs took turns stepping in front of TV cameras.

"I think it's a rare opportunity when ordinary citizens have the opportunity to stand up against major oil companies," said Randy Thompson, one of the three landowners suing.

He said he was grateful to have the opportunity.

Live video, updates

Watch live video of the Keystone XL pipeline hearing at netNebraska.org/news. Stay tuned with JournalStar.com for coverage.