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Pipeline session looks to Montana

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"States have the ability to influence a decision on the routing. We do have the ability to look out for our natural resources," says State Sen. Annette Dubas of Fullerton.

LINCOLN — Up in Montana three years ago, state regulators ordered a major rerouting of a \$260 million, high-voltage electrical transmission line so farmers wouldn't have to dodge power poles as they cultivated their crops.

The state-ordered detours for the proposed Alberta-Montana Tie Line have caused at least a one-year delay in the project and added 10 miles to the line and \$10 million in costs.

While detractors say the decision has simply created a whole new set of unhappy landowners, supporters say Montana's law gives the state a voice in multimillion-dollar projects that cross the state and can result in major alterations to their location.

A lot of eyes in Nebraska are on Montana and its Major Facilities Siting Act right now.

Nebraska legislators will begin a special session Tuesday in search of a legal and constitutional way to reroute the \$7 billion Keystone XL pipeline around the state's ecologically sensitive Sand Hills.

The Montana law has been used as a model for a siting bill that Nebraska legislators will be asked to adopt.

State Sen. Annette Dubas of Fullerton said she has "cherry-picked" from Montana, as well as other states, in drafting her siting bill.

Such legislation, she said, "allows states to say, 'These are our concerns, and this is what we'd like to see addressed,' and allowed them to make changes. States have the ability to influence a decision on the routing. We do have the ability to look out for our natural resources."

Dubas' bill would put the Nebraska Public Service Commission — a five-member, elected board — in charge of reviewing major crude-oil pipelines such as the Keystone XL.

Her legislation will be introduced later this week, during a special session that could take three weeks.

There's a good chance senators could introduce bills on several subjects, not just routing issues. Liability for spills and issues involving eminent domain, for example, also are said to be among the issues addressed in the half-dozen bills being drafted for consideration.

This special session has been portrayed as one of the most unusual in Nebraska history — and one that might have only a 50-50 chance of resulting in a pipeline law.

It's unusual because there isn't a general consensus on the problem to be addressed or a solution to it and because citizen outcry led to the session.

A special session was unlikely, in fact, until Gov. Dave Heineman reversed course last week and called lawmakers back to Lincoln for the broadly worded purpose of "enacting legislation related to oil pipelines."

Veteran Lincoln lobbyist Walt Radcliffe, who was hired by pipeline developer Trans-Canada Inc., said that "on a good day," only 13 to 18 state senators were supportive of meeting on the pipeline issue. That would be far short of the 33 senators needed to force a session, had Heineman not made his surprising decision.

Before last week, the governor had emphatically insisted it was a waste of money to hold a special session without a consensus about what exactly to do. Last week, he said a "better understanding" of the state's power and citizens' expectations prompted him to call the session.

The governor said, however, he would not introduce a bill of his own — another unusual aspect to this special session — but would provide input.

One key lawmaker, Sen. Chris Langemeier of Schuyler, said Heineman, a fellow Republican, should put forward a proposal.

"I think if you want us to come into special session, you should propose an idea," said Langemeier, who heads the committee that will review any pipeline routing legislation.

Omaha Sen. Heath Mello, a Democrat, charged that the absence of a governor's bill showed a "lack of leadership."

"The governor is willing to send the people a bill (for the cost) for the special session, but not one to debate?" Mello asked. "Wow."

Langemeier said he remains unconvinced that the state can affect the routing of the 1,700-mile Keystone XL now, after the project has already undergone a three-year federal review and when it is only a couple of months away from a final federal decision.

"If we come up with a bill, it will be threading a needle," Langemeier said. "But with that, I still remain open-minded. We'll see what comes in."

Legal opinions last week from two prominent lawyers — Alan Peterson and [David Domina](#) — have provided some momentum for those who say Nebraska has the power to act now.

Montana's 28-year-old siting law is being touted as a way a state can review and affect pipeline routes.

The law requires companies to submit three different routing "corridors" for large-scale pipeline and electric transmission line projects.

The Montana Department of Environmental Quality reviews each project and the routing alternatives, with the goal of protecting the state's environmental resources, ensuring "consideration of socioeconomic impacts" and allowing for citizen input.

The review is done in conjunction with any federal reviews, which, in the case of the Keystone XL pipeline, means those conducted by the U.S. State Department.

The Montana review typically results in changes in a project, and sometimes the changes are major, said Tom Ring of the Montana Department of Environmental Quality.

"Better routing has resulted," Ring said. "Sometimes it's major changes, a lot of times minor changes, and there's been quite a few mitigation measures that have been required."

In the case of the Keystone XL pipeline, Montana issued 235 pages of guidance as part of the federal environmental impact statement. It included directives on how to avoid disturbance of greater sage grouse mating grounds and how to preserve topsoil. It also spelled out state bonding and liability requirements.

Montana's law also requires that eminent domain cannot be used until a project gets a state permit.

TransCanada has threatened to use eminent domain to obtain easements in Nebraska, but there is a legal question of whether that power could be exerted before the developer obtained a permit. In Montana, it's much clearer.

Montana's siting law also puts a priority on using public lands for pipeline and transmission routes, which is designed to avoid disruption of private property.

An official with the Montana-Alberta Tie Line said the project was willing to accept the routing changes ordered by the State of Montana, but he charged that the state has "waffled" in helping the project move forward using the new alignment.

Darryl James, who handles regulatory affairs for the project, said it has been a struggle to obtain right of way agreements because the state is telling the newly affected landowners the project should voluntarily consider another new route.

"It's been utterly frustrating," James said. "That's not the kind of 'clarity' you want in a regulatory process."

TransCanada officials told The World-Herald last week they had worked successfully with routing laws in states such as Montana. In the case of the Keystone XL, the Montana review resulted in a few, minor route changes to address landowner and environmental concerns.

But, company officials said, if Nebraska wanted authority over pipeline routes, it should have acted years ago. The company submitted its route for the Keystone XL three years ago.

Adopting a law now, they said, would be like changing the rules of a football game when a team is five yards from a touchdown.

"Anything that enhances safety and liability concerns, we're all over that," said company CEO Russ Girling. "But we would not be in favor of a rerouting of the pipeline."

That, TransCanada officials said, would likely require a three-year delay in the project for an entirely new environmental review. They said their refinery customers, who signed contracts to get oil from the pipeline in 2014, probably would seek alternative shipping methods if they thought the project was being indefinitely stalled.

Dubas said her bill addresses the timing concerns by calling for a decision by the state no longer than eight months after a federal licensing decision.

She said she initially became involved in the pipeline issue because of landowner complaints about eminent domain "threats" by TransCanada.

Nebraska had no government agency to take landowners' complaints and no agency looking over the shoulder of such projects, Dubas said.

Senators, she said, were initially led to believe that states had no power to influence pipeline routing. But now it's clear that's not the case, Dubas said, even if all senators aren't convinced of that yet.

"We are having a public discussion about this, with all of the senators together in one room," Dubas said. "That is what our citizens have expected from us."

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