

## LB 1161: A Bad Idea, Poorly Executed



*The first of a two-part series on the lawsuit over LB 1161.*

By [Kietryn Zychal](#) <sup>[1]</sup>

Retired rancher Randy Thompson has become the face of the fight against TransCanada's Keystone XL pipeline. His image appears on banners and cardboard cutouts around the city of Lincoln. "Stand with Randy" is a popular slogan for the pipeline fighters. As one of three taxpayers suing the state of Nebraska over LB 1161, the 2012 bill that may—or may not—determine how pipelines are sited in Nebraska, Thompson stands to lose nothing personally if Keystone XL goes in the ground. The pipeline was rerouted away from his family's farm on an island in the middle of the Platte River in Merrick County. So, why is he suing the state?

"People should be outraged by what the legislature did. They threw us under the bus," he said during an interview at his home in Martell, southwest of Lincoln.

In the fall of 2007 Thompson received his first call from TransCanada. "We were totally unaware that there was any type of pipeline project," he said. He was also unaware that a 1963 Nebraska law, 57-1101, granted oil pipelines the power of eminent domain, even companies owned by foreign corporations. Thompson wrote a letter to Gov. Heineman and received a form letter in return that did not answer any of his questions. "It was just a brochure about the pipeline," he said. A subsequent letter to the attorney general complaining about his treatment by TransCanada did not receive a response.

TransCanada eventually sent Thompson a letter in 2010 with an easement agreement offering him a one-time payment of \$18,900 for a perpetual right of way across 80 acres of his land. They directed him to sign in 30 days or they would initiate condemnation proceedings in court, an option for those who have eminent domain powers. At the time, TransCanada did not even have a permit to build the pipeline.

### **‘Casual observers don’t have a clue what the legislature pulled off here.’**

Thompson watched as LB 1, the Major Oil Pipeline Siting Act (MOPSA), was approved during a special legislative session in November 2011. The bill gave authority over pipeline siting to the five elected officials of the statewide Public Service Commission (PSC). It laid out standards for evaluation of any pipeline routes. However, LB 1 would not apply to TransCanada because they had applied for a permit prior to its passage when different laws were in effect.

During the special session, TransCanada agreed to be bound by a new law, LB 4, which gave the governor and his appointees at the Department of Environmental Quality the power to evaluate and approve pipeline routes instead of the PSC. Two months later, when President Obama denied TransCanada’s permit, LB 4 became obsolete. TransCanada would now be subject to the requirements of LB 1, like any other company, when they resubmitted a new application. During the short 60-day legislative session of 2012, the legislature passed LB 1161 to exempt TransCanada from having to fall under the regulations of LB 1. The new bill was modeled after LB 4 and included a new benefit. TransCanada would receive the power of eminent domain immediately upon approval of a route by the governor.

“I am a Republican. But, not a very proud one. This has really changed my attitude about politics in general. I’ve lost faith in it, basically, is what’s happened,” Thompson said. “Casual observers don’t have a clue what the legislature pulled off here.”

He still holds out faith that the legal system will provide a check and balance to protect the constitution from politics, and to bolster citizen rights against the influence of powerful corporations.

### **You Can Be for Keystone XL But against LB 1161**

Brian Jorde of the Domina Law Firm in Omaha is stretched in two directions on Keystone XL. He and Dave Domina are the attorneys working with N.E.A.T., the Nebraska Easement Action Team, fighting for a better easement agreement for landowners. They also filed the lawsuit on behalf of Randy Thompson, Susan Luebbe and Susan Dunavan, challenging the constitutionality of LB 1161. “We could have had a hundred plaintiffs in this case—we only needed one. We had people begging to be plaintiffs, but for client reporting duties and case management purposes, we chose three,” he explained.

Jorde's role in the Keystone debate is not about stopping the pipeline, though he certainly sympathizes with his clients who have that goal. "At a threshold level, we have to have laws that are constitutional. If we encourage the practice of unconstitutional laws, that affects all of us," Jorde said.

Long before LB 1161 was approved, the legislators were warned of its unconstitutionality. Ken Winston is an attorney with the Sierra Club who lobbies on behalf of the environment in Nebraska. He testified at the hearing on LB 1161 that it appeared to be unconstitutional because it was special legislation, written for the benefit of a particular party. Winston recounts, "Then we followed up with an 11-page memo to the Natural Resources Committee from Alan Peterson, a well-respected attorney in Lincoln, on the constitutional prohibition against special legislation." The Peterson memo was written at a time when Amendment 1984 was under consideration. The memo states, "LB 1161 also provides, rather strangely and unlike LB 1 or LB 4, for a possible 'joint review' by Nebraska with 'a pipeline carrier.'" (AM 1984, p. 4, line 2.) This language was questioned at the committee hearing, but no real explanation was provided as to how it could be justified that the applicant itself would be a joint reviewer of its own application. The amendment was withdrawn, but the special legislation arguments raised by Peterson were never addressed by the legislature and the bill was passed by a vote of 44-5 and signed by the governor.

Jorde and Domina's petition challenging LB 1161 contains five main points:

1. Powers over a common carrier (such as a pipeline) are delegated to the PSC in Article 14, Section 20 of the Nebraska constitution and cannot be switched to the governor.
2. The power of eminent domain belongs to the legislative branch and cannot be exercised by the executive branch, except as permitted in the constitution. Article 2, Section 1.
3. The bill does not provide for judicial appeals or notice to affected parties, depriving them of due process of law. Article 1, Section 3.
4. Special legislation benefiting a particular party is prohibited in Article 3, Section 18. Special legislation is also a denial of equal protection of the law. Article 1, Section 3.
5. The bill allows for the Department of Environmental Quality to spend \$2 million to evaluate TransCanada's application, in effect, loaning the corporation taxpayer's money. This is prohibited by Article 13, Section 3.

"The responsibility of deciding what is an appropriate route for a 36-inch tar sands pipeline is exclusively the governor's, whether or not he or she has any expertise or ability to decide those things. It should be decided by the PSC, not a single official," Jorde said.

"Once his decision is made, there is no judicial review. It can't be questioned, challenged or investigated. There is no recourse for anyone who disagrees. Under

MOPSA [LB 1], there was an appeals process. At least there was a judicial review process,” Jorde continued.

“We also believe that the funds and credit of the state are being unlawfully allocated to TransCanada. We don’t believe the state can advance TransCanada funds, hoping they pay the state back.” (The DEQ actually spent nearly \$6 million on behalf of TransCanada.)

The PSC is preferred as a reviewer by those opposed to LB 1161. “One person in a highly partisan office, should one person be able to trigger eminent domain rights?” Jorde asked. “Five people from across the entire state, people elected on staggered terms, from any party, isn’t that better? Putting that kind of power in one person’s hands—not just Dave Heineman, whoever it is—that’s not wise,” Jorde said.

Should the plaintiffs prevail in the lawsuit, the acts of Governor Heineman would be void and the route would have to be evaluated by the PSC under the provisions of LB 1. Ken Winston is confident the PSC review would be vastly superior to the one done by the DEQ, and not a repeat of the same process. He explained in an email, “LB 1 requires consideration of whether another utility corridor exists (i.e. Keystone 1). LB 1161 requires nothing.

“LB 1 requires consideration of the views of the local governing bodies. Considering the fact that both Natural Resource Districts in that area, (Lower Niobrara and Upper Elkhorn) which have jurisdiction over groundwater have passed resolutions in opposition to the pipeline as well as Holt County, which arguably has the most vulnerable part of the aquifer, all have opposed the pipeline which is significant. LB 1161 requires nothing.”

Brian Jorde agrees that the process has been inadequate, especially in terms of protecting landowner rights. “No one analyzed the agreement that gives perpetual rights away. Not the legislature. Not the attorney general. In a 1,000-page document [the NDEQ environmental impact statement], there wasn’t one word about the easement agreement,” he said.



## Would You Sign This Easement?

The Fifth Amendment to the U.S. Constitution states in part: “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

What is just compensation for a perpetual easement transporting 830,000 barrels of tar sands per day? Is it the \$18,900 that TransCanada offered Randy Thompson? According to Thompson, a wind farm would pay more in one year.

“I have a friend here in Nebraska who has four or five wind towers on his property. Over 20 years, he gets \$6,000 per year per tower. It’s not going to ruin his water supply. He gives up a little bit of ground, but he can still farm around it. They have to remove the towers from his land in the future. Why is an oil company any different?” Thompson asked.

Jorde is appalled at the easement TransCanada has been offering to landowners for additional reasons—first and foremost liability. “The easement is with a limited partnership. We don’t know who the limited partners are. Who are we entering into a contract with? Who actually holds the assets to back up potential liability?”

“Why is a landowner signing over perpetual rights for a pipeline that has a finite life? TransCanada has admitted that the life of the pipeline is 40 to 50 years. So, why would we allow them to control 1,700 miles of ground from Canada to Texas forever for something that is a 40- to 50-year project?”

“The easement is assignable on the day it is signed. It could be assigned to any person, company or country. It is something we want the landowner to be wary of,” Jorde said. In other words, China or Saudi Arabia could one day own the Keystone pipelines.

“They want to be able to abandon the pipeline in place after its useful life, once the tar sands are gone. We would request that they remove it and mitigate and restore the land to its original condition.” The easement does not require this.

“The negligence question is huge and overshadows anything having to do with money. Liability for negligence in terms of what happens to the pipeline should be exclusively on TransCanada, and the only acts that the landowner should be liable for are intentional acts that interfere with the easement.”

There is also concern over why TransCanada insists on burying the pipeline in the aquifer instead of putting it next to Keystone 1. TransCanada retains the right to convert the pipeline from tar sands to something else. Do they anticipate using water from the aquifer in the future?

“I don’t think it’s conspiracy theory. I think it’s curious when they talk about repurposing or converting the pipeline to another use. Why isn’t that setting off alarm bells? Why won’t they move it away from the aquifer? In the future they say water will be more valuable than oil—maybe in our lifetime. There is an incredible amount of water they need in Canada for fracking. If the product transported changes, those landowners should be paid a second time.

“I believe the state of Nebraska was asleep on this. They tried during the special session. But where is the long-term planning in this state that would require people to think about the significance of ‘forever’? I don’t know who is thinking in about our future,” Jorde said.

Next month: a visit with Susan Luebbe and Susan Dunavan, who is the only plaintiff who stands to have the Keystone XL buried on her organic farm.

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Public Policy <sup>[3]</sup>

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