

Neb. Gov. Can't Shake Landowners' Keystone Law Challenge

By Sean McLernon

Law360, New York (January 02, 2013, 1:27 PM ET) -- A Nebraska state judge on Monday refused to toss a challenge to a law giving the state's governor the power to approve a new route for the Keystone XL pipeline, finding that three landowners have standing because public funds are being used to carry out the law's provisions.

Lancaster County District Judge Stephanie F. Stacy said that the Nebraska Department of Environmental Quality has spent some of the \$2 million appropriated by the law and concluded that the property owners whose land covers a portion of the pipeline's proposed route can move ahead with their suit against Republican Gov. Dave Heineman and other state officials.

Following concerns that the pipeline as originally planned would have crossed environmentally sensitive parts of the state, Canadian energy giant TransCanada Corp. worked with the state to propose new paths for the pipeline through Nebraska. The law, L.B. 1161, gives the governor the authority to bestow the final approval of a new route.

"Public funds and time already are being expended by the NDEQ in implementing L.B. 1161," the judge said. "The plaintiffs' complaint challenges the lawfulness of those expenditures and the constitutionality of the process and procedure by which a pipeline route is approved and eminent domain authority is granted under L.B. 1161. These issues are neither hypothetical nor contingent on future decisions of the NDEQ or the governor and are fit for judicial review at this time."

By handing over the power to the governor, L.B. 1161 violates a clause of the state's constitution that says matters involving common carriers — including crude oil companies — must be handled by the Nebraska Public Service Commission, the landowners allege.

Not only can the governor sign off on the route, but he can also dictate the state's use of eminent domain by allowing pipeline companies to take private land for their pipelines, the landowners say.

In addition to improperly delegating power to the governor and the DEQ, the statute, passed by the state Legislature in April, constitutes special legislation for an unlawful, closed class of people and fails to provide notice to affected parties, depriving them due process of law, they contend.

The plaintiffs want the law overturned and are seeking an injunction barring its enforcement.

Attorney [Brian E. Jorde](#) of [Domina Law Group PC LLO](#), who represents the landowners, told Law360 that the ruling is a signal to the Legislature that the law should be changed.

"It's so important that the Legislature gives matters such as this serious attention and does not allow itself to be

rushed by the powers of special interests," Jorde said.

A representative from the governor's office declined to comment on the ruling.

President Barack Obama rejected TransCanada's application to build the 1,700-mile pipeline from Alberta, Canada, to the Gulf Coast at the beginning of 2012. He attributed the decision to a congressionally imposed deadline that didn't give his administration enough time to conduct its environmental review.

Nebraska officials and other stakeholders also balked at the pipeline's path through the state, and the state government instructed the company to prepare a more thorough environmental analysis.

TransCanada filed a report with the Nebraska Department of Environmental Quality in April identifying alternative routes for the \$7 billion pipeline that circumvent the Sand Hills area that was deemed unsuitable. The Ogallala Aquifer, a water table that provides much of the state's irrigation and drinking water, sits just below the Sand Hills' surface.

The DEQ issued a draft report in October which doesn't make any recommendations or approve any construction, but says the new pipeline route avoids environmentally sensitive areas and drinking water sources previously in its path.

The governor is expected to receive the DEQ's final report sometime this month, after which he will have 30 days to make a decision on TransCanada's proposed route.

The landowners are represented by [David A. Domina](#), [Brian E. Jorde](#) and Brandon B. Hanson of [Domina Law Group PC LLO](#).

The case is Randy Thompson et al. v. Dave Heineman et al., case number CI12-2060, in the District Court of Lancaster County, Nebraska.

--Additional reporting by Derek Hawkins and Keith Goldberg. Editing by Katherine Rautenberg.