

Neb. High Court Rebuffs Suit Over Gov.'s Keystone Power

By Keith Goldberg

Law360, New York (May 31, 2012, 2:35 PM ET) -- Nebraska's Supreme Court on Wednesday refused to hear a direct constitutional challenge to a law giving the state's governor the power to approve a new route for the Keystone XL pipeline, leaving the case to work its way through the lower courts first.

[Dave Domina](#), an attorney for the three Nebraska landowners who brought the May 23 suit against three state officials, told Law360 on Thursday that the high court's decision not to hear the case on an expedited basis isn't surprising, especially considering the landowners had simultaneously launched a parallel suit at the state court level.

"We knew the likelihood that the Supreme Court was not going to hear it was high," Domina said. "Original jurisdiction in the Supreme Court is sparingly used — it's used in matters of great public interest or emergencies. We thought the court might consider it because there was so much public interest."

The state court suit, filed against Gov. Dave Heineman, Nebraska Department of Environmental Quality Director Michael J. Linder and State Treasurer Don Stenberg, remains active. Given the case's controversial nature, Domina believes it may end up before the state Supreme Court eventually.

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

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 last month, 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.

Last month, TransCanada filed a report with the DEQ 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 new routes proposed by TransCanada are subject to a series of public meetings in Nebraska. The DEQ will then pass along feedback on the routes to TransCanada and the company will finalize its preferred path.

That route will then be subject to a DEQ review that accounts for National Environmental Policy Act requirements. After another period of public review, the agency will send a final report to the governor.

The Obama administration supports the pipeline's southern leg, which will run from the Cushing, Okla., market hub to Texas refineries. TransCanada said it had spent \$800 million on the southern portion of the pipeline as of March 31, and it plans to complete the southern leg by mid-to-late 2013.

A spokeswoman for Gov. Heineman declined to comment Thursday.

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

The Supreme Court case is Randy Thompson et al. v. Dave Heineman et al., case number S-33-120005, in the Supreme Court of Nebraska.

The district court case is Randy Thompson et al. v. Dave Heineman et al., case number CI12-0002060, in the District Court of the State of Nebraska, Lancaster County

--Additional reporting by Maria Chutchian, Derek Hawkins and Greg Ryan. Editing by John Quinn.