

The Saga of the Keystone Pipelines in Nebraska: Unconstitutional Regulation, and Lessons on How to Acquire Property and How Not to Acquire Property

Members of Owner's Counsel of America, who regularly represent property owners in condemnation situations, tend to be naturally very protective of private property rights. We enjoy events that shed light on this dark corner of the law, especially when they help to shape public opinion in favor of property rights. A recent Keystone XL decision by a Lincoln Nebraska trial judge is being cast in that mold, but in the process, the decision is being greatly and widely misunderstood, and the practical lessons for lawyers are being ignored.¹ It is not an eminent domain case and it is not a property rights case. Eminent domain is only a side effect, and really not much of a side effect. The driving issue in the case has always been how to regulate pipelines to protect the environment. Is the XL pipeline going to be dependably safe enough to let it go through the fragile Nebraska Sandhills and over the Ogallala Aquifer? Of course, the coalition of XL opponents includes those who are opposed to any pipeline anywhere that carries any petroleum product, as well as those who oppose allowing any private entity to use the power of eminent domain, particularly a foreign entity. The latter is likely the reason for the widespread misunderstanding of the litigation.

The original Keystone pipeline was constructed through eastern Nebraska in 2008, following a relatively short period of informational meetings and negotiations. There was little time for opposition to the Keystone project to organize and the opposition was quickly crushed when a representative of the Department of State announced at an informational meeting that the President wanted the Keystone pipeline built. The pipeline was an international project, so the permitting process ran through the State Department.² There was no oversight of the routing of such pipelines in Nebraska, and the Nebraska statutes at the time simply stated that any person or company organized for the purpose of conveying petroleum products through the state of Nebraska could acquire right of way for a pipeline by use of eminent domain.³

The Keystone project resulted in very little actual use of eminent domain, but of course the threat was always present. TransCanada commenced negotiations with property owners by asking for signatures on an easement document that should have been summarily rejected by every property owner. Hopefully, those owners who signed quickly in order to receive TransCanada's generous compensation and crop damage payments will not someday be sorry for their cooperation. The initial document included the right to construct undisclosed above ground appurtenances and an unspecified number of additional pipelines. TransCanada would be responsible for the 'commercially reasonable' costs of cleanup following a leak and the location of the pipeline(s) on a property could be moved without additional compensation. The contractor would have an unlimited right of access across the property.

Many owners wisely recognized that the terms of the easement were even more important than the dollars. By joining forces and negotiating as a group, they were able to settle on an easement agreement that could work for both sides. TransCanada was receptive to property owners' concerns and was quick to make accommodations to meet those concerns. TransCanada did not quibble over crop damage or cost to cure, and didn't look for sales that could justify low land values. A few negotiators for TransCanada resorted to somewhat unethical tactics and false statements, but those negotiators were quickly pulled from the project.

The Keystone pipeline route was through eastern Nebraska, missing the Sandhills region. Before the Keystone trench was opened, TransCanada announced the Keystone XL and its proposed

route through the Nebraska Sandhills. The Sandhills region is a rich and beautiful grassland of 20,000 square miles, a perfect but fragile habitat for cattle and an abundance of wildlife. It is an almost endless sea of rolling hills with few or no trees and enchanting river valleys. The sandy hills, up to four hundred feet in height, sit on the heart of the vast Ogallala aquifer, which contains one billion acre feet of water, and runs through the Great Plains from South Dakota to Texas.



Nebraskans started asking for regulation and say in the routing process. The cry for state oversight was greatly enhanced when TransCanada began issuing letters threatening property owners with condemnation if they did not sign an easement within thirty days. Of course, at the time, TransCanada did not have approval from the Department of State, and Nebraska law requires a Petition to Condemn filed in county court to state that all required approvals have been obtained.⁴ When confronted with this requirement, TransCanada asserted that it did not apply, but no plausible explanation was given. TransCanada merely backed away from its threat, only to reissue it a few months later and to then back away again. The threat achieved the opposite of what TransCanada hoped for. The Nebraska farmers and ranchers who inhabit the area are not easily intimidated. Opposition solidified and received help from the Nebraska Legislature.

The issue our legislature (the Unicameral) dealt with was whether to regulate the routing of pipelines through our state, and if so, how should it be done. There was some discussion of whether a foreign pipeline should have eminent domain authority, but that issue gained little traction with the Nebraska lawmakers. Interstate commerce and Federal supremacy quickly posed a problem. The Unicameral passed the Major Oil Pipeline Siting Act in 2011⁵, requiring major pipelines to apply for approval to the Nebraska Public Service Commission, a five member elected body with authority to regulate common carriers. The Commission's authority

is granted in the Nebraska Constitution.⁶ Right of way could not be acquired by eminent domain unless the Commission granted approval of the pipeline. The Act specifically did not relate to safety, but only routing. The Act also did not apply to any pipeline for which an application had already been submitted to the Department of State, which meant that it did not apply to the catalyst XL pipeline.

When the President announced the route through the Sandhills was rejected,⁷ rerouting and the regulatory process immediately became the hot topic of the day. No longer was there a pending application exempting the XL from the regulatory process, and a new application would need to be filed for a new route, subjecting TransCanada to the Public Service Commission process. TransCanada had lost a battle but was far from defeated. New routes were already considered and the two sides undertook massive advertising campaigns. Every politician was either for energy independence and an increased tax base, or for protecting the environment.

Another new regulatory process was quickly added by the Unicameral in 2012, ordering major pipeline routes to be studied by the Nebraska Department of Environmental Quality, with authority to approve or reject the route given to the Governor.⁸ If the Governor rejected the proposed route, then the pipeline company could apply to the Public Service Commission. Again, eliminating eminent domain authority was briefly discussed, but it was never a serious issue.

When the reroute around the eastern edge of the Sandhills was approved by the Governor, several affected landowners filed suit to have the new regulatory process declared to violate the Nebraska Constitution and to therefore be unlawful.⁹ Pipeline opponents continued to cry for an end to the seizure of American land by foreign corporations and called for a profit-sharing measure of just compensation when the condemning authority is a private corporation, these issues were not involved in the litigation. The controlling issue in the litigation has been whether TransCanada will build the XL pipeline as a ‘common carrier’. If so, any state regulatory effort regarding the route (not whether it can be built) through the State of Nebraska must be either directly by the Unicameral or by our Public Service Commission.¹⁰ It is not clear whether a pipeline that just goes through Nebraska and does not pick up or deliver any product in Nebraska is a “common carrier”, and it was not clear at the outset whether the XL would pick up any petroleum product in Nebraska. The opinion by the trial judge was a carefully written effort (50 pages and almost 250 footnotes) to simply say that the XL pipeline will be a common carrier under the meaning of the Nebraska Constitution.

The appeal to the Nebraska Court of Appeals was filed immediately and was almost immediately moved to the Nebraska Supreme Court’s advanced docket.¹¹ In the meantime, there is another set of statutes allowing the matter to go to the Public Service Commission,¹² but there has been no evidence of an effort in that direction. The offending statutes do not give TransCanada the power to condemn, and the alternative regulatory scheme does not grant that power. It has been there all along. The final effect of the ruling in the litigation could be that the process will now have to go through the Public Service Commission under the original 2011 Act, but that is only one possibility. All foreseeable outcomes of the litigation will leave the power of eminent domain in place.¹³

This author has handled the negotiations with TransCanada on behalf of over fifty clients for the two Keystone projects, and the concerns of the owners have always been primarily routing, safety, permanent property damage, temporary inconvenience, and money, usually in that order.

At the time of this article, easements have been signed and the money paid for far more than a majority of the route through Nebraska, and TransCanada is still actively negotiating for the remainder of the route.¹⁴ This is after the Company has already lost millions on one route that it was required to abandon.

The recent litigation might have some small effect on public awareness and opinion regarding the questions of who should have the power of eminent domain, and when the entity is a profit centered corporation, should 'just compensation' be measured by something other than fair market value, but the issues in that litigation will likely remain focused on the regulatory process regarding siting. The advertising campaigns will no doubt continue full throttle and the politicians will continue to support either the economy or the environment. TransCanada will likely continue to attempt to obtain one-sided, almost unconscionable easements and will seem a little bewildered when confronted by well informed property owners and organized opposition.

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Endnotes

¹ See Order dated February 19, 2014, *Thompson v Heineman*, District Court of Lancaster County, Nebraska, No. 12-2060 (2012).

² See Executive Order 13337, 65 Fed. Reg. 25299 (Ap. 30, 2004).

³ Neb. Rev. Stat. §57-1101 (Reissue, 2010).

⁴ Neb. Rev. Stat. §76-704.01 (Reissue, 2009).

⁵ L.B. 1, 102nd Legislature, 1st Special Session (Neb. 2011).

⁶ Nebraska Constitution, Art. IV §20.

⁷ White House Press Release, January 18, 2012.

⁸ L.B. 1161, 102nd Legislature, 2nd Session (Neb. 2012), codified at Neb. Rev. Stat. §57-1501, et. seq. (2012 Cum. Supp.).

⁹ See, *Thompson v Heineman*, Lancaster County, Nebraska District Court, Case No. 12-2060 (2012).

¹⁰ Nebraska Constitution, Art. IV §20.

¹¹ *Thompson v. Heineman*, Appeal No. 14-158, Nebraska Supreme Court.

¹² Neb. Rev. Stat. §57-1401, et. seq. (2012 Cum. Supp.), as adopted by L.B. 1, 102nd Legislature, 1st Special Session (Neb. 2011).

¹³ Neb. Rev. Stat. §57-1101 (Reissue 2010).

¹⁴ Verified by the author on February 27, 2014 in conversation with one of TransCanada's right-of-way agents.