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Jurisdiction and the Special Session

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Yesterday began a special session called to address the Keystone XL pipeline. If that seems broad and vague, that's because it is - and so was the Governor's call for the session which did not include a clear policy objective. Since the State Department process for Keystone XL has been underway for more than three years, it also begs the question as to why the Nebraska agencies that have participated in the approval process didn't raise concerns earlier - a move that could have saved taxpayers the unnecessary expense of a special session with unspecified outcomes.

The question on the minds of anyone interested in the issue is "what will come from the special session?" But the question that should be asked is what jurisdiction does the Nebraska Unicameral have at this point?

THE CONSTITUTION AND THE COMMERCE CLAUSE

Under the United States Constitution's Commerce Clause it is the role of the federal government, versus individual states, to determine whether the route and construction of an international and interstate pipeline raises significant environmental risks and to determine if the project is in the national interest. If these decisions were left up to the states, each state would base their decisions on their limited individual state interests rather than the broader national interest. The Commerce Clause of the Constitution was adopted specifically to prevent this situation.

A pipeline siting act enacted in the Special Session in this political environment would clearly apply specifically and exclusively to the Keystone XL pipeline, with intent to stop or reroute it. Many legal experts believe this would constitute unconstitutional discrimination against interstate commerce. In addition, a pipeline-siting act intended to stop or delay the Keystone XL Pipeline could very well conflict with the President's foreign affairs power to approve important international energy infrastructure projects.

SO WHAT ABOUT SAFETY?

Congress clearly delegates the issue of safety regulation exclusively to the federal government and not to individual states, a fact pointed out by the legal analysis put out by Speaker of the Legislature Mike Flood two weeks ago. Nebraska cannot avoid that

restriction simply by taking the word "safety" out of pipeline-siting legislation for this special session. Whether or not a bill is designed to address safety is determined by the impact of the law, not just its wording. The political dialogue that has taken place concerning this issue has been, however devoid of facts and science, largely focused on safety concerns.

Any bill passed in this session to retroactively reroute the pipeline to avoid the Ogallala Aquifer, which covers almost the entire state, would clearly be passed on the issue of safety - and therefore, is outside of the state's jurisdiction.

The State Department has already conducted an exhaustive review of the proposed route and issued its Final Environmental Impact Statement (FEIS); and federal pipeline safety regulations already specifically protect environmentally sensitive areas, such as the Sandhills and the entire Ogallala Aquifer. Based on the federal Pipeline Safety Act and the federal government's comprehensive regulation, state legislation that wades into this area is constitutionally preempted.

The Clinton State Department's independent studies have certified the route safety again and again. And TransCanada has gone beyond the required federal safety regulations, agreeing to [fifty-seven project specific safety precautions](#).

COSTLY LITIGATION

In addition to the \$7,500-\$10,000 a day it will cost taxpayers for legislators to convene for the special session, any legislation that results is likely to cost the state potentially billions of dollars in damages and attorney's fees. Since the case would most likely be a constitutional claim, the State of Nebraska could be forced to pick up both its own attorney's fees and the attorney's fees for whatever party successfully challenges the legislation. These attorney's fees alone may run into the tens of millions of dollars. With the State Department certification of safety, which included participation by Nebraska State agencies, and the federal government exclusively allowed to deal with safety issues - any pending legislation is likely to be unconstitutional and costly to taxpayers. Courts have also routinely held that statements of legislators are compelling evidence of an unconstitutional purpose. Here, the statements of legislative critics of the pipeline would be fodder for attorneys challenging any legislation passed during the special session.[\[1\]](#)

The best taxpayers can hope for is that instead of joining in the political game playing, Nebraska's State Senators pass legislation that gives them some siting authority for future pipelines, like South Dakota, rather than trying to make it retroactive and costing taxpayers much more than the money wasted on this special session.

Two law firms, McGrath North Mullin & Kratz, PC LLO, and Sidney Austin, LLP have both weighed in on the subject and given their legal opinions. Their findings may be found, at <http://www.transcanada.com/reports/mcgrath-north-legal-analysis-nebraska-siting-legislation.pdf> and <http://www.transcanada.com/reports/sidley-legal-analysis->

[nebrasks-siting-legislation.pdf](#), respectively.

[1] The case of *Smithfield Foods, Inc. v. Miller*, 241 F.Supp.2d 978 (S.D. Iowa, 2003), found that a law controlling pork production in the state of Iowa was a violation of interstate commerce. In addition to violating the Commerce Clause, the District Court Judge J. Pratt found that the law had a discriminatory purpose based on intent of the legislators. Such a precedent could potentially be applied to any siting law put forth concerning the Keystone XL.



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