



Insight

# The Fate of Keystone XL Rests with the Nebraska Supreme Court

CATRINA RORKE | SEPTEMBER 16, 2014

On Friday, September 19, the Keystone XL pipeline application turns six. This project, which will [create 42,000 jobs](#), [induce \\$7 billion in private infrastructure investment](#), and [reduce the environmental and health impacts of our oil trade](#), seems like a no-brainer. Unfortunately, its application is still sitting at the State Department, moving through a sluggish approval process.

Earlier this year, the State Department declared that it would put on hold consideration for the Keystone XL pipeline to allow Nebraska to resolve a pertinent legal dispute. That decision highlighted a protracted legal battle asking one question with broad consequence: was the pipeline route through the state decided according to a legal process?

In February, Nebraska's Lancaster County District Court voided a state law that gave the governor authority to approve the pipeline route and so rejected the route itself. The state appealed the ruling to the Nebraska Supreme Court, whose decision will determine how much longer we'll have to wait to find out the fate of Keystone XL.

## The case has covered three narrow issues:

### *DO THE LANDOWNERS WHO BROUGHT THE CASE HAVE STANDING?*

If the landowners don't have standing, the Nebraska Supreme Court will overturn the decision of the lower court and dismiss the case, allowing the route to stand. The lawyer for the plaintiffs argued that these landowners have both "direct standing," that is, they are directly affected by the route, and "taxpayer standing," since there is a modest state expenditure associated with the pipeline. The state argued that since many of the plaintiffs do not have land along the route, there are other parties that would be better suited to bring the suit.

### *IS KEYSTONE XL A "COMMON CARRIER"?*

A common carrier, per Nebraska code 75-501, is "any person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska intrastate commerce." The plaintiffs argue that any pipeline can switch between intra- and interstate commerce, so that Keystone XL, despite its design as an interstate pipeline, should be considered a common carrier. The state countered that a strict reading of state code would exclude this pipeline, with an international border that crosses seven states, from common carrier classification.

### *DID THE GOVERNOR HAVE THE AUTHORITY TO APPROVE THE PIPELINE ROUTE?*

In 2012, the Nebraska legislature passed LB 1161, which set up a pipeline siting process that gave the governor the final decision. This process was an alternative to the existing process, which gives consideration authority to the state's Public Service Commission (PSC) in cases of common carriers. The PSC must solicit input from

the public and its decisions can be challenged in court. The plaintiffs, in arguing that Keystone XL is a common carrier, contend that the PSC should have been the arbitrating body. Moreover, the plaintiffs contend that the judicial review made possible by the PSC procedures is a necessary protection for landowners. The state countered that Keystone XL is not a common carrier, separating the PSC from involvement in consideration.

## Possible Verdicts

The Nebraska Supreme Court's decision is expected to go one of three ways. First, it can find that the plaintiffs do not have standing, overturn the lower court's ruling, and dismiss the case. Second, the court can find that Keystone XL is not a common carrier and that LB 1161 is consistent with the state constitution, again overturning the lower court ruling. In both cases, the route as approved by the governor and currently under consideration at the federal level can continue through the State Department's approval process.

Alternatively, the Supreme Court can uphold the lower court finding that LB 1161 is unconstitutional. This would give authority for pipeline consideration to the PSC, which would open a seven to 12 month deliberative process and invite public input. Should this process result in approval for the established pipeline route, the State Department can continue its own deliberation.

We can expect a ruling from the court within three months, but there's no deadline for a decision. Once we know where Nebraska stands, the clock will restart at the federal level right where it left off in April, with [the State Department expecting comment from eight other federal agencies](#). That consideration process has no established timeline. If history is any guide, the White House will continue to slow walk their decision on Keystone XL, perhaps punting to the next administration.