

Special session poses legal challenge



The Clerk of the Legislature's office made sure the voting system was working on Monday, Oct. 31, 2011, before the start of the Nov. 1 special session. Index clerk Carol Koranda (left) and journal clerk Vicki Buck checked each senator's light. (ROBERT BECKER/Lincoln Journal Star)

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By **KEVIN O'HANLON / Lincoln Journal Star** | Posted: Monday, October 31, 2011 3:05 pm

State lawmakers face a legally precarious challenge when they convene in special session Tuesday to consider giving Nebraska authority to say where TransCanada's proposed Keystone XL oil pipeline goes through the state.

If they end up passing legislation that delays or ultimately results in the pipeline not being built, Nebraska could face legal action from TransCanada or from other states on the pipeline route, who stand to reap tax revenues from the project.

"I'm not interested in just passing something that takes us into a legal minefield," said Sen. Chris Langemeier, chairman of the Natural Resources Committee, which likely will oversee the pipeline legislation.

"Because at the end of the day ... either you have the pipeline and a lot of litigation costs and maybe a judgment or just a lot of legal costs and a judgment," Langemeier said during a conference call with reporters. "And I don't think that is good for Nebraska."

He said Nebraska could find itself on the losing end of a major judgment, such as it did when it was ordered 10 years ago to pay \$151 million in damages by a federal judge who found that former Gov. Ben Nelson orchestrated efforts to undermine building a radioactive warehouse in northeast Nebraska.

TransCanada wants to build a 36-inch pipeline from the oil sands of Alberta to refineries along the U.S. Gulf Coast. It has been working on the route for several years and wants it to go through Nebraska's Sandhills region and over the massive Ogallala Aquifer, a source of irrigation and drinking water for a large swath of the central United States.

The \$7 billion, 1,700-mile project has been met by fierce resistance from Sandhills landowners and from advocacy groups worried about the potential effects of an oil spill over the aquifer - the nation's largest.

Attorney Alan Peterson of Lincoln, working on behalf of the Sierra Club, recently issued an opinion that said lawmakers could pass siting legislation without fear of legal challenges that would allege violation of the Commerce Clause of the U.S. Constitution - which regulates commerce between states. He also said such a law could be written so it could not be challenged as so-called "special legislation" aimed specifically at the pipeline.

Attorneys [David Domina](#) and [Brian Jorde](#) of Omaha, working through the anti-pipeline group Bold Nebraska, also said Nebraska lawmakers have the power to act.

"After careful study, we conclude Nebraska can regulate its own land use," [Domina](#) and [Jorde](#) wrote in a 32-page "Green Paper."

"Federal safety regulations pre-empt how the pipeline must be built, but Nebraska has the right to control, reasonably and responsibly, where it must be built. Pipeline safety is federally pre-empted, but oil pipeline siting is not."

Two legal memos prepared for TransCanada by the international law firm of Sidley Austin LLP and the firm of McGrath North Mullin & Kratz of Omaha and released Monday, took an opposite view. Among the findings:

Any pipeline siting act enacted in the special session would be targeted exclusively at stopping or re-routing Keystone XL. This would constitute unconstitutional discrimination against interstate commerce.

Federal pipeline safety regulation already specifically protects areas that are unusually sensitive to environmental damage if there is a pipeline accident, such as areas like the Ogallala aquifer. Based on the federal Pipeline Safety Act and the federal government's comprehensive regulation, state legislation that intrudes into this area is unconstitutional.

Under the U.S. Constitution and controlling federal law, it is the role of federal agencies - not individual states - to determine whether the route and construction of an interstate pipeline raise a risk of environmental damage and to weigh any risk against the economic and other benefits of the proposed pipeline.

Alex Pourbaix, TransCanada's president for energy and oil pipelines, said the company felt "it was important for Nebraskans to hear from all sides in this debate.

"We are hopeful that this information will provide some balance and insights related to proposed draft legislation to alter the Keystone XL route," he said, noting that Speaker Mike Flood of Norfolk "recently identified concerns with pipeline siting legislation following his own legal analysis."

Although Gov. Dave Heineman called the special session, he did not offer legislation to help guide lawmakers, as is customary.

Heineman has said he supports the pipeline but wants it moved away from the aquifer.

There also is the specter that Heineman could veto any bill if he believes it will delay or kill the pipeline project.

If that happens, it would take support of 30 of the Legislature's 49 lawmakers to override the veto.

Langemeier said if a bill is passed that would delay or kill the pipeline, Heineman will have to "make a tough decision" whether to bow to constituent pressure against the pipeline or to national interests in producing more oil.

Langemeier said he was "confident ... that you are going to have a pipeline built through Nebraska."

Sen. Annette Dubas of Fullerton has been working with several senators and attorneys on a siting bill.

The bill is focused on an oil pipeline permit process that would be overseen by the Nebraska Public Service Commission.

Lawmakers are in a race because the U.S. State Department has set a deadline of the end of the year for acting on a presidential permit for the Keystone XL.

If they want to pass a bill that would take effect immediately, instead of the customary three calendar months, it would take 33 votes.

"That's a pretty high hurdle," Langemeier said.

Langemeier noted that lawmakers have been discussing pipeline legislation for two years, but no bills had enough support to get out of his committee and to the full Legislature for debate.

"If we continue to have the gridlock in committee ... we could easily be there until sometime after Thanksgiving," he said.