

Legal Issues Update

Budd-Falen Law Offices, LLC
Cheyenne, Wyoming

This newsletter is intended to provide interested landowners in Montana, South Dakota, and Nebraska an update on the legal issues surrounding the TransCanada Keystone XL Pipeline project.

What It Means To Be a “Common Carrier”

What is a common carrier?

Generally, a common carrier is someone who holds himself out to the general public as engaged in the business of transporting people or goods for hire. Mainly, a common carrier is one who transports private goods publically, whereas a private carrier—also known as a contract carrier—will transport private goods without any

public involvement. It is important that one who claims to be a common carrier actually acts as a common carrier. It is not enough to merely claim that you are a common carrier. Pipeline companies are typically considered common carriers as long as they meet several important requirements.

First, a common carrier must hold themselves out to the general public. For

example, a pipeline company could publically advertise its transportation of oil. This includes advertisements in newspapers, telephone directories, and even the internet. In addition, the fact that a pipeline is supplying oil to the general public at large is enough to meet this first requirement.

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The Condemnation Process: Why It Matters to You

The ability of the government to condemn your land is a long standing and constitutionally backed practice called eminent domain. Eminent domain is the inherent power of the government to take privately owned land and convert it to public use, so long as the government pays “just compensation” to the landowner for the taking. Thus, the government can take your land for any public use so long as they pay you just compensation in return.

A public use is defined broadly to include any use that is rationally related to the public health, safety,

or welfare. It can include the use of the community, state, or even the general public of the United States. Thus, carrying crude oil through a pipeline that will ultimately be refined and used by the American people may likely be considered a “public use.”

Just compensation is generally the fair market value of the property taken by the government. Just compensation is typically the difference in the value of the land before and after the pipeline is installed on the property. Typically, just compensation reimburses the landowner only for the

value of the affected land. But sometimes the value of the entire parcel of land may be taken into consideration—based on the overall impact of the pipeline on the value of the land. However, this overall impact can be difficult and expensive to calculate.

Taking for the “public good”

Unfortunately for landowners, the state statutory law may grant private entities—like public utility and pipeline companies—the power of eminent domain.

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How You Can Get Involved

Comment on the Federal EIS

Because the Keystone XL Pipeline is an action that will significantly affect the human environment and will require federal, state, and local permits, an environmental impact statement, or EIS, shall be required. An EIS requires the government to take a “hard look” at the environmental, social and economic impacts of the pipeline, all feasible and prudent alternatives to the pipeline (including alternative routes or whether a pipeline is necessary at all), and possible modifications to the proposed project in order to reduce potential adverse impacts. The U.S. Department of State, along with the Bureau of Land Management, have begun to prepare a draft EIS for the Keystone XL Pipeline. This draft EIS is due out to the public for review and comment by mid-November 2009. Interested members of the public may comment on the draft EIS, in order to express any issues or concerns they have with the Keystone XL Pipeline project. The agency must take these comments into consideration and respond to them in a meaningful way, sometimes even changing the proposed action altogether. Therefore, it is critical that landowners comment on the draft EIS when it is available. Landowners may even request formal hearings if necessary to voice your concerns about the Pipeline.



Get Involved in State and Local Permit Processes

Your participation and involvement in the state processes is just as important as your participation and involvement in the preparation of the federal EIS. Currently, in addition to the federal EIS, the Montana Department of Environmental Quality is preparing an EIS for its Montana Major Facility Siting Act permit. Also, the South Dakota Public Utilities Commission (SDPUC) may require an EIS for its Energy Conversion and Transmission Facilities Act permit. While it may be too late to formally intervene in the SDPUC hearings, you still have time to send the Commission comments and/or request public hearings to voice your concerns.



In addition, TransCanada is required to obtain numerous permits from local and state agencies for its Keystone XL Pipeline. Landowners should keep abreast of the status of these permits and intervene when necessary, through public comments, attending public hearings, and even litigation if necessary. The Budd-Falen Law Offices will be tracking these permits, and deciding if and when you may be able to intervene.

Finally, county and town boards have the power over land use issues, including building permits, zoning and site-plan developments. Through this land use authority these governments may have the power to mitigate the impact of the Keystone XL Pipeline, including potentially limiting landowner liability in the future. Contact your local government to see how you can help change local regulations to limit the negative effects of the Keystone XL Pipeline.

Contact Your Local and State Representatives

One final alternative regarding the Keystone XL Pipeline is to contact your local and state representatives. A group of interested landowners who are organized and prepared may have a better opportunity at influencing the location of the pipeline than a few sporadic landowners. This is a good way to voice your opinion and hopefully have it heard.



What It Means To Be a “Common Carrier”

Secondly, a common carrier is one who operates its services for the general public. A good example of a common carrier that transports people for hire is a taxi service. While it may be privately owned, a taxi company hires itself out to the general public in exchange for fees. A pipeline may also be hired out to the general public if it accepts, or is willing to accept, oil from members of the public generally, not just through individual private contracts.

Finally, the pipeline carrier must not discriminate against any person willing to hire them. For instance, being a “non-discriminatory” common carrier means that a pipeline may not selectively advertise its services, and must accept all oil from members of public that apply for transportation.

Differences between the states.

Montana, South Dakota, and Nebraska treat common carriers—and sometimes pipelines themselves—very differently from one another.

Montana law provides that a pipeline company that “transports crude petroleum to or for the public for hire” is considered a common carrier. Once a pipeline agrees to accept the provisions of the state law regulating common carriers, the pipeline then has the

power of eminent domain. Eminent domain allows for private property to be taken in return for just compensation. (For more on condemnation and eminent domain, see the next article.)

South Dakota law states that all pipeline companies “holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline” are common carriers. As with Montana, any pipeline determined to be a common carrier will have the power to exercise the right of eminent domain.

Yet in Nebraska, a pipeline company does not have to be a common carrier in order to avail itself of the power of eminent domain. Rather, Nebraska law gives the power of eminent domain to “any person engaged in the transportation of crude oil across the State.” Before it will be allowed to condemn the private land, however, the pipeline company must first try to obtain such property through an agreement with the private land owner first.

Why it matters...

Being labeled a common carrier can carry with it important privileges. Most importantly, pipelines that are labeled common carriers will have the power to condemn private land. Consequently, one of the most important reasons *to you* whether or not TransCanada is a common

carrier is that being a common carrier will give TransCanada the legal right to take your land for purposes of installing, maintaining, and removing a pipeline for the transportation of crude oil.

For example, TransCanada has already alleged that it is a common carrier in pending litigation before a South Dakota State Circuit Court. If TransCanada is held to be a common carrier in South Dakota, then it will have the power of eminent domain in that state.

However, if TransCanada is held not to be a common carrier, then it may be unable to condemn your land. While the states have different requirements for what makes a pipeline company a “common carrier,” if TransCanada is not a common carrier in one state, there is some possibility that this will affect its ability to claim common carrier status in other states as well.

The Condemnation Process

Yet, because the “taking”—as it’s known—must be for public use, these private companies are required to show that they are acting for the public good. As far as pipelines are concerned, some state laws automatically give the power of eminent domain to pipeline companies. Others require there to be some additional showing of the public nature of the company, such as being a “common carrier.” Hence, this is why the status of common carrier is critical. (See above for more on common carriers.)

Montana law allows any common carrier to exercise the power of eminent domain. Pipelines that meet the statutory definition of a common carrier have the right to “enter upon and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or authorization of the company’s common carrier pipeline.”

Similarly, South Dakota law states that any pipeline that is held to be a common carrier under state law shall have the power of eminent domain in acquiring a right-of-way.

On the other hand, Nebraska state law gives pipelines the authority to condemn property without regard to common carrier status.

However, because private property cannot be taken for private use, in order to be granted the power of eminent domain, the pipeline company must still make a formal statement as to the public use of their pipeline.

How condemnation will affect you.

If TransCanada Keystone XL is granted the power of eminent domain, they will be able to condemn any portion of your land for their pipeline. You will have no right to refuse or decline to participate; you will only have the right to receive just compensation in exchange for the land they take.

Also, there is much debate as to how much power pipeline companies are given under eminent domain. Some state laws expressly include the right to survey land in the power of eminent domain, but some state laws are not so clear. In a pending case in South Dakota, landowners are challenging TransCanada’s ability to enter land to survey for the pipeline *before* condemnation authority is granted to the company.

Thus, if TransCanada is given condemnation authority under state law, it may also be able to come onto your land with trucks and crews and survey the property for the pipeline route. It is unlikely that there will be any compensation

required for this entry onto your private land.

Bottom line: if TransCanada can prove that it is a common carrier and/or that the pipeline is for the public use, TransCanada will be able to take your land for the Keystone XL pipeline route in exchange for the fair market value of such land.

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About Our Firm...

Budd-Falen Law Offices, LLC provides legal representation regarding endangered species, clean water, private property ownership and use, federal lands, and local government involvement, local zoning and property rights, in proceedings before courts of the United States of America, and in proceedings in the various state courts where its attorneys are individually licensed to appear, including Wyoming, Colorado and New Mexico. We are not licensed to practice in Montana, South Dakota, or Nebraska.

Budd-Falen Law Offices, LLC can trace its roots back five generations in Wyoming, to the family ranch started by Karen Budd-Falen's forefathers. Frank Falen is a third generation rancher in the Oregon, Idaho, and Nevada corner. This tradition of federal land use and private property ownership continues today as Budd-Falen Law Offices, LLC seeks to protect rural traditions and ways of life, while still preserving natural resources in a manner consistent with multiple and wise use of the land.

Franklin J. Falen, co-owner and senior partner, is the lead attorney on the TransCanada Keystone XL Pipeline project. Mr. Falen is licensed to appear in the courts of the State of Wyoming, and is also licensed to appear before the United States Supreme Court, the United States Court of Appeals for the Ninth and Tenth Circuits, the United States Court of Federal Claims, and the United States District Court for the Districts of Colorado and Wyoming. Mr. Falen may be contacted at (307) 632-5105 or frank@buddfalen.com.

About The Organizations...

Landowners for Fairness, Protect South Dakota Resources, and Eastern Mountain Landowners Group collectively make up a three-state landowner group which represents landowners' interests against the TransCanada Keystone XL Pipeline in Montana, South Dakota, and Nebraska. The primary focus of this group is to protect the interests of individual landowners; main issues include obtaining adequate compensation for any pipeline right-of-way across private land, securing long-term limitations on landowner liability, and requiring successful reclamation and decommissioning of the pipeline. By banding together, landowners in Montana, South Dakota and Nebraska are able to pull together their resources, have a stronger voice and better bargaining power, and obtain more affordable representation against the large, international pipeline company.

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