

# **Oil Pipeline Regulation: The Current Patchwork Model and an Improved National Solution**

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“Formula for success: rise early, work hard, strike oil.” – J. Paul Getty<sup>[1]</sup>

## **Introduction**

The United States of America’s reliance on foreign oil is shrinking.<sup>[2]</sup> This is due largely to technological advances allowing new sources of oil to be utilized, including shale-rock formations, oil sands, and those deep beneath the ocean floor.<sup>[3]</sup> With this surge in domestic oil production, increased infrastructure is needed to get oil from producer to consumer.<sup>[4]</sup> In 2013, 192,396 miles of pipeline transported crude oil, refined petroleum products, and natural gas liquids across the United States – a 9.3% increase from 2008.<sup>[5]</sup> This increase in pipelines coincides with an increase in the crude oil and petroleum products flowing through them – nearly 15,000,000 barrels last year, a 6.2% jump from 2012 to 2013.<sup>[6]</sup>

One pipeline looking to ride this trend of increased throughput and expansion is TransCanada’s Keystone XL Pipeline. This proposed 1,179-mile pipeline would transport crude oil from Hardisty, Alberta, Canada to Steele City, Nebraska, connecting with existing pipelines and allowing greater access to refining markets in the Midwest as well as along the Gulf Coast.<sup>[7]</sup> It has been over six years, however, since TransCanada first submitted its application, which is required for pipelines crossing international borders, to the U.S. State Department in September of 2008.<sup>[8]</sup> During that time, the State Department issued two Environmental Impact Statements (EIS)<sup>[9]</sup>, President Obama rejected the application, TransCanada resubmitted an application, and Congress issued several bills urging a final decision.<sup>[10]</sup> Currently, the State Department is delaying its national interest determination, citing a need to wait until the

Nebraska Supreme Court reaches a determination in a pending case<sup>[11]</sup> dealing with the siting of the pipeline through Nebraska.<sup>[12]</sup>

Even if ultimate approval is granted to the Keystone XL Pipeline, the matter of acquiring property rights on which to build the pipeline still stands in the way. If the pipeline company is unable to contract with landowners, it may be able to turn to the power of eminent domain.<sup>[13]</sup> Whether eminent domain authority is available, however, depends on the laws of each particular state through which the pipeline passes. This comment will address the current state-by-state nature of oil pipeline regulation, the implications for oil pipeline companies with interstate pipeline projects, and propose a possible improved national solution.

This comment consists of three parts. Part I provides background on oil pipeline regulation in the United States and how the current system came to exist. Part II surveys the expropriation laws and regulations in various states affected by pipeline projects through an examination of relevant statutes, analysis of recent court decisions reflecting tensions between landowners and pipeline companies, and examination of the national regulatory scheme of the related natural gas industry. Part III provides a suggested solution to the patchwork approach to oil pipeline regulation, seeking to provide a more unified, national system that combines aspects from both state statutes and the current Federal Energy Regulatory Commission's (FERC) natural gas regulatory scheme, in the hopes of developing a solution that bodes well for landowners, oil pipeline companies, and national interests alike.

## I. Background

National oil pipeline regulation has its origins with the Hepburn Act of 1906, which brought the regulation of oil pipelines under the Interstate Commerce Act (ICA) of 1887, an act that formerly applied only to railroads.<sup>[14]</sup> Falling under the ICA "common carrier"<sup>[15]</sup> designation oil pipelines were initially regulated by the Interstate Commerce Commission (ICC). However, subsequent to the passage of the Department of Energy Organization Act of 1977, regulatory authority was transferred to the newly created FERC.<sup>[16]</sup> Per the terms of the ICA, FERC has the authority to regulate the "transportation of oil."<sup>[17]</sup> The ICA delegates to FERC the power to regulate the rates assessed by interstate oil pipelines for

interstate movement of oil and terms and conditions of service, but not the construction and operation or termination and abandonment of pipelines.<sup>[18]</sup> This lack of a federal regulating authority over the entry into or exit from the marketplace by oil pipelines is filled by regulation on a state-by-state basis.<sup>[19]</sup>

As might be expected, coordinating the approval of each state implicated in an interstate oil pipeline project can be formidable. One major hurdle is when oil pipeline companies find themselves at odds with landowners. If an oil pipeline company is unable to negotiate a right-of-way easement, they must turn to the state to seek eminent domain authority. Different states approach the issue of eminent domain authority and pipelines in different ways – some grant eminent domain authority to all pipelines, some only to pipelines that are public utilities, some only to crude pipelines, and some grant no eminent domain authority at all.<sup>[20]</sup> If a pipeline company is unable to succeed either by negotiations with landowners or appeal to the state for a grant of eminent domain authority, then an expensive re-route may be the only option to avoid an objecting landowner.<sup>[21]</sup>

## II. Survey of the Issues

A number of states relevant to the success of the Keystone XL pipeline have legislation that grants eminent domain authority to pipelines. State courts are influential in the pipeline industry through their interpretation of power-granting statutory provisions. Legislation, judicial decisions, and the current regulatory scheme of the natural gas industry act as a patchwork of efforts to effectively manage the pipeline industry. The following section will look at all three.

### *A. Sample of Expropriation Laws/Regulations Across the Country*

Following is an overview of the current state of expropriation laws in various states and bordering countries relevant to interstate pipelines.

#### 1. Montana

Montana is a key state for the proposed Keystone XL pipeline, as it is contains the border where Keystone XL crosses into the United States from

Canada.<sup>[22]</sup> Montana confers the power of eminent domain on common carrier pipelines as follows:

Every person, firm, corporation, limited partnership, joint-stock association, or association of any kind mentioned in this chapter that has filed with the commission its acceptance of the provisions of this chapter has the power of eminent domain. In the exercise of the power of eminent domain, the entity may 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 entity's common carrier pipeline.<sup>[23]</sup>

Montana classifies an entity as a “common carrier” if it “engages in owning, operating, or managing any pipeline or any part of any pipeline within the state for the transportation of crude petroleum, coal, or [their products] or of carbon dioxide from a plant or facility that produces or captures carbon dioxide to or for the public for hire.”<sup>[24]</sup>

## 2. Nebraska

Nebraska is important in the field of interstate pipelines because of its central location, and thus its necessity as part of a route for the efficient transport of oil to both the Gulf of Mexico and East Coast. Eminent domain authority is granted to “[a]ny ... company ... transporting or conveying crude oil, petroleum, gases, or other products thereof in interstate commerce through or across the State of Nebraska or intrastate within the State of Nebraska” if the company is “unable to agree with the owner or lessee of any ... property for the amount of compensation for the use and occupancy of [such property] as may be reasonably necessary for the laying, relaying, operation, and maintenance of any such pipeline.”<sup>[25]</sup>

Regarding a pipeline’s status as a common carrier, Nebraska Revised Statutes Section 57-501 states that “[a]ny person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska intrastate commerce shall be a common carrier.”<sup>[26]</sup> Nebraska also differentiates between oil pipelines on the basis of size, defining a “major oil pipeline” to mean “a pipeline which is larger than six inches in inside diameter and which is constructed in Nebraska for the transportation of petroleum, or petroleum components, products, or wastes, including crude oil or any fraction of crude oil, within, through, or across

Nebraska”[\[27\]](#), and requiring major oil pipelines to follow additional procedures.[\[28\]](#) These additional procedures (allowing for approval of siting by the governor alone) are the substance of pending litigation in the Nebraska Supreme Court.[\[29\]](#)

### 3. Texas

With its rich history in the oil industry, as well as its size and location along the Gulf Coast, Texas is obviously one of the most important states when it comes to oil pipelines. Texas grants the power of eminent domain as follows:

Common carriers have the right and power of eminent domain. In the exercise of the power of eminent domain granted under the provisions of ... this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.[\[30\]](#)

In Texas, a “common carrier” includes one who “owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline.”[\[31\]](#) Interestingly, Texas limits common carrier status to pipelines transporting crude petroleum, coal, carbon dioxide and hydrogen.[\[32\]](#) This specificity has come up as an issue in state court cases.[\[33\]](#)

### 4. Kentucky

Though not a state involved in the Keystone XL Pipeline project, Kentucky still has implications when it comes to oil pipelines due to its location when connecting the Great Lakes and the Northeast with the Gulf Coast. Kentucky grants eminent domain authority to “[a]ny corporation ... engaged in ... constructing, maintaining, or operating oil or gas wells or pipelines for transporting or delivering oil or gas ... in public service.”[\[34\]](#) Said company may condemn land “necessary for constructing, maintaining, drilling, utilizing, and operating pipelines” if it is “unable to contract or agree with the owner after a good faith effort to do so.”[\[35\]](#) Kentucky has one of the more detailed condemnation statutes for pipelines in that it (1) incorporates a broad category of

products, (2) dictates that a pipeline company must make a good faith effort to contract with the landowner, and (3) details a wide array of uses relating to pipelines for which land may be condemned.<sup>[36]</sup> Companies “receiving, transporting or delivering a supply of oil or natural gas for public consumption” are declared to be common carriers.<sup>[37]</sup> Per statute, “every grant of authority ... to exercise the power of eminent domain shall be subject to the condition that the authority be exercised only to effectuate a public use of the condemned property.”<sup>[38]</sup> “Public use” is defined, somewhat circularly, as “the use of the property for the creation or operation of public utilities or common carriers.”<sup>[39]</sup> The seizure of private property under the power of eminent domain effectuating a mere indirect benefit to the general public (such as increasing the tax base, tax revenues, or employment, or promoting general economic health) is unauthorized.<sup>[40]</sup>

### B. “Not in My Backyard” – Court Decisions Reflecting Landowner/Pipeline Company Tensions

Following is a look at court decisions and pending litigation reflective of some of the tensions between citizens and pipeline companies in a few states relevant to interstate pipelines.

#### 1. Texas

Though not involving an oil pipeline, but rather a carbon dioxide pipeline, the 2011 Texas Supreme Court case *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*<sup>[41]</sup> started a chain reaction with important consequences for oil pipelines and eminent domain authority. In Texas, in order to obtain a common carrier pipeline permit, all that was previously required was the filling out of an Application for Permit to Operate a Pipeline in Texas (Form T-4) and simply checking the space marked “common carrier.”<sup>[42]</sup> In *Denbury*, the Texas Supreme Court held that the issuance of a common carrier permit was not conclusive when challenged by a landowner in a condemnation proceeding, stating that, “[h]ad the Legislature intended a T-4 permit to render a company's common-carrier status and eminent-domain power unchallengeable, it would have said so explicitly.”<sup>[43]</sup> Upon a challenge by the landowner, the pipeline company must prove it is qualified as a common carrier.<sup>[44]</sup> “While [statutory]

provisions plainly give private pipeline companies the power of eminent domain, that authority is subject to special scrutiny by the courts ... [I]n instances of doubt as to the scope of the power, the statute granting such power is ‘strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith.’”[\[45\]](#) The Texas Supreme Court also held that “a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.”[\[46\]](#) This has been deemed the “reasonable probability” test.[\[47\]](#)

By 2013, two Texas appellate courts had extended the requirement from *Denbury* that pipeline companies demonstrate their common carrier status upon a landowner challenge to include crude oil pipelines.[\[48\]](#) One appellate court went even farther in *In re Texas Rice Land Partners, Ltd.*,[\[49\]](#) a case involving the Keystone Pipeline, when it held that the trial court should have made a “preliminary finding” of TransCanada’s ability to wield “eminent domain authority.”[\[50\]](#) This ruling caused uproar in the pipeline industry because the statutes do not mention, let alone require, such a preliminary finding.[\[51\]](#) The Texas Supreme Court denied TransCanada’s appeal, and thus the state of oil pipeline eminent domain law remains in flux in Texas.[\[52\]](#)

## 2. Nebraska

TransCanada, the Canadian company behind the Keystone XL Pipeline project, is encountering obstacles in Nebraska. Many landowners continue to refuse offers from TransCanada, even when those offers continue to increase, in some cases by as much as 700%.[\[53\]](#) Litigation is also currently pending in the Nebraska Supreme Court[\[54\]](#) regarding a 2012 bill, LB 1161,[\[55\]](#) that delegated authority to approve oil pipeline siting to the governor and the Nebraska Department of Environmental Quality (NDEQ), but the real impetus behind LB 1161 was Keystone XL’s planned route through Nebraska.[\[56\]](#) The authority to site oil pipelines previously rested entirely with the Public Service Commission (PSC), but under the current scheme, pipeline companies may now choose whether to seek approval with the PSC or the governor and NDEQ.[\[57\]](#) The landowners argue that LB 1161 is an unlawful delegation of authority.[\[58\]](#) They assert that under Article IV, Section 20 of the Nebraska Constitution, the “Legislature is

empowered to prescribe circumstances under which the PSC may regulate, or leave all regulatory control to the PSC, but the Legislature is powerless to delegate authority, dominion, or state sovereign control over common carriers to the Governor, or any organization or department of state government other than the PSC.”[\[59\]](#) Article IV, Section 20 of the Nebraska Constitution provides in pertinent part that the “powers and duties of [the PSC] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.”[\[60\]](#) The district court found that “LB 1161 has the effect of either temporarily or permanently divesting the PSC of control over the routing decisions of oil pipelines,” and because LB 1161 vests this regulatory authority over common carriers “not in the Legislature but in NDEQ and the Governor, the evidence before this court clearly establishes LB 1161 violates Neb. Const., art. IV, § 20, and therefore is unconstitutional.”[\[61\]](#) As such, the trial court issued a permanent injunction, enjoining Governor Heineman and the NDEQ from enforcing LB 1161 and taking any further action regarding the approval of the Keystone XL Pipeline route.[\[62\]](#)

If the Nebraska Supreme Court sides with the landowners, the decision could have serious consequences for the future of the Keystone XL Pipeline project, as both the current Keystone Pipeline and the planned expansion runs straight through Nebraska on their path to the Gulf Coast.[\[63\]](#)

### 3. Kentucky

Kentucky is another state where individuals are pushing back against pipeline companies and eminent domain – and the court system is siding with the landowners. Instead of the Keystone XL Pipeline, the argument in Kentucky is over the Bluegrass Pipeline, which would transport natural gas liquids (NGLs) from the Northeast, through Kentucky, and to the Gulf Coast for sale.[\[64\]](#) In reaching its decision in *Kentuckians United to Restrain Eminent Domain, Inc. v. Bluegrass Pipeline Company, LLC*, the district court focused on the language of Kentucky Revised Statutes 278.502,[\[65\]](#) stating that “Kentucky’s General Assembly ... narrowed the scope of KRS 278.502 by shifting from a broader ‘public use’ standard to a more narrow ‘in public service’ standard,” and held the



“in public service” standard to be “a more restrictive standard than that which was addressed in *Kelo v. City of New London*.”<sup>[66]</sup>

Applying the narrower “in public service” standard to the present case, the court stated that “Bluegrass [Pipeline] is a private, for-profit, unregulated entity engaging in the interstate transportation of NGLs” and that such activity did not constitute acting “in public service,” therefore causing it to fall outside the scope of KRS Chapter 278.<sup>[67]</sup> The court went on to state that though “[t]he proposed pipeline transports NGLs *through* Kentucky, [it] does not have any impact on the energy needs of Kentuckians.” (Emphasis in original.)<sup>[68]</sup> Refuting Bluegrass Pipeline’s argument that the pipeline would be available to Kentucky producers, the court maintained that “the only stated purpose of the pipeline is to transport NGLs to the Gulf Coast to be processed and sold in Louisiana; not to provide natural gas to Kentuckians, but to have NGLs, a mixture of highly dangerous chemicals, running through Kentucky farmland and forests, and near rural communities.”<sup>[69]</sup>

The Bluegrass Pipeline project has been put on hold since the district court ruling, citing a “lack of customer commitments,” though the companies behind the pipeline project are still appealing the district court decision.<sup>[70]</sup> Bluegrass Pipeline’s argument going forward is that the district court misstated the “public use” and “in public service” requirements, stating that “[t]he availability of the Bluegrass Pipeline for use by end users and producers of NGLs is what matters, not the number of users or the frequency of their use.”<sup>[71]</sup> Bluegrass Pipeline would analogize the project to an interstate highway, in that “the Pipeline may be used to a greater or lesser extent depending on a variety of factors, and some segments of the public may have more cause to use it than others.”<sup>[72]</sup> They maintain that the “Bluegrass Pipeline is acting ‘in public service,’ and the Pipeline is a ‘public use’ regardless because the public has the right to use it.”<sup>[73]</sup>

### *C. Natural Gas Pipeline Regulatory Scheme*

The powers of the FERC are laid out in the Natural Gas Act, codified as 15 U.S.C.A. Section 717.<sup>[74]</sup> As with oil pipelines, FERC regulates the rates for services of natural gas pipelines.<sup>[75]</sup> But in the natural gas arena, FERC has more authority – it also regulates pipeline and storage facility construction and

abandonment.<sup>[76]</sup> The following provisions in the Natural Gas Act dealing with that subject matter would be useful in their application to oil pipelines as well.

Before a natural gas company can even enter the market, they must apply for a certificate of public convenience from FERC.<sup>[77]</sup> The Commission then sets the matter for public hearing, where it gives “such reasonable notice of the hearing thereon to all interested persons.”<sup>[78]</sup> A certificate of public convenience and necessity will be granted if it is found that “the applicant is able and willing properly to do the acts and to perform the service proposed ... to the extent ... required by the present or future public convenience and necessity.”<sup>[79]</sup> Once a certificate of public convenience and necessity is obtained, the holder has the power of eminent domain, which the natural gas company may use if it “cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a [natural gas] pipe line ... or other stations or equipment necessary to the proper operation of such pipe line.”<sup>[80]</sup> This action can be taken in either the United States District Court where the property is located, or in state court.<sup>[81]</sup>

FERC can also compel construction and extension of natural gas facilities if it finds that doing so would further the public interest.<sup>[82]</sup> In order to abandon a facility or cease to provide service, a natural gas company must obtain permission and approval from FERC after it has established through a hearing that “the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.”<sup>[83]</sup>

### III. Proposed Solution: Toward a More Unified National System

The current state-by-state system for the regulation of entry to and exit from the market of oil pipelines is in need of a national, unified fix. The current state-by-state patchwork approach makes interstate oil pipeline construction difficult and sometimes confusing for both pipeline companies and landowners. FERC is the appropriate federal agency to implement a national oil pipeline regulatory scheme for two reasons. First, FERC is already involved in the regulation of oil pipelines through its oversight of rates and practices of pipelines involved in interstate transportation as well as its establishment of equal service conditions for

transportation by pipelines. Second, FERC already regulates natural gas pipelines on a national level. A method of oil pipeline regulation that draws from the current structure of FERC's natural gas regulatory scheme, as well as select state statutes, presents a workable, and improved regulatory system.

#### *A. Aspects of the FERC Natural Gas Regulatory Scheme*

The major difference between FERC's regulation of oil pipelines as opposed to natural gas pipelines is the requirement that natural gas pipelines require FERC authorization before facilities can be constructed,<sup>[84]</sup> whereas an oil pipeline can be built without FERC even knowing about it. After construction, the oil pipeline company could approach FERC for rate-setting measures and potentially be met with an unsatisfactory determination. Progressing in this order creates uncertainty. The issuance of a certificate of public convenience and necessity on the front end, before an oil pipeline company takes any substantive steps, would help alleviate this uncertainty. The pipeline company would know what type of rates it could expect to be set by FERC before committing resources to a project. The pipeline company would also know at an early stage whether eminent domain authority would be available if the need arise. As with natural gas pipelines, the pipeline should bear the burden to prove that the "operation, sale, service, construction, extension, or acquisition" is required by "present or future public convenience or necessity."<sup>[85]</sup>

The issuance of this certificate should only come after all interested or concerned parties were afforded a chance to participate in notice and comment. This would allow FERC to hear from those parties with an opinion on the oil pipeline matter in question and gather information from the public. The review of public comments would help FERC to reach an appropriate determination as to the true public convenience and necessity of the oil pipeline under scrutiny.

Once in possession of a certificate of public convenience and necessity, an oil pipeline company would be able to acquire land required for the construction of a pipeline, or other essential facilities, through eminent domain if necessary. The federal exercise of eminent domain authority would preempt state action. However, this authority would still be contingent on the pipeline's classification as a common carrier under the ICA. Along with this designation comes the

requirement that all interested and qualified shippers be entitled to some reasonable percentage of pipeline use. Because of this fact, there is no firm capacity. While this could act to dissuade some potential oil-producing investors, such is the nature of something “in public service.”

### *B. Aspects of State Statutes*

Kentucky Revised Statutes Section 278.502 makes it clear that eminent domain may only be used once a good faith effort to acquire the necessary land by contracting with the landowner is unsuccessful.[\[86\]](#) Kentucky Revised Statutes Section 278.502 clearly expresses that acquisition through eminent domain is to be utilized as a last resort. This reflects the view that landownership is a fundamental right and should not be interfered with except in cases of true public necessity. Something that should be avoided from the Kentucky statutory scheme, however, is the mixed use of terminology.

The use by Kentucky of both “in public service” and “public use” confuses the standard to which pipeline operations are to be held. One phrase should be used consistently throughout the regulatory framework to ensure consistent application. The narrower “in public service” language would be the prudent choice, as it reflects the opposition of the majority of the country against eminent domain being exercised in private enterprise. “In public service” seems to stand for the proposition that whatever the end for which eminent domain is being applied will benefit the public or contribute to the public good, rather than simply being able to be used by the public.

The Texas statutory requirement found in Section 111.019(c) should also be included in the national oil pipeline regulatory scheme.[\[87\]](#) This would require oil pipelines to respond to resident or landowner requests for information concerning the commodities being transported through a given pipeline. The scope of the information request process should be extended, however, to include requests for confirmation of continued maintenance of common carrier status. This might include information such as the number of requests for use, the number of suppliers given capacity, and what capacity those suppliers receive.

## **Conclusion**

The disjointed, state-by-state patchwork of oil pipeline laws and regulations causes issues for interstate oil pipeline construction. A unified, national regulatory scheme administered by FERC should be implemented to rectify the current circumstance. This scheme should draw from the current national natural gas regulatory model, as well as relevant state statutes. One national agency not only tasked with rate-setting, but with influence over construction and maintenance, would go a long way to clarify the interstate oil pipeline industry. As that agency, FERC would also be able to grant federal eminent domain authority when necessary to insure a project truly “in public service” is able to reach completion. This heightened standard would be drawn from Kentucky statutory law, and is reflective of the national sentiment against eminent domain authority wielded by private companies, something allowed by the United States Supreme Court in its landmark decision *Kelo v. City of New London*. The continued oversight by FERC would also simplify the implementation of the Texas statutory provision requiring pipeline companies to answer landowner requests for information concerning the actual use of a given pipeline. The types of pipeline projects facilitated by this new, unified system are integral in America’s push for independence from foreign oil, and a key component facilitating America’s growing need for increased oil infrastructure.

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[1] J. Paul Getty (1892-1976), Oil Tycoon.

[2] *Oil and natural gas import reliance of major economies projected to change rapidly*, U.S. Energy Information Administration (Jan. 22, 2014) <http://www.eia.gov/todayinenergy/detail.cfm?id=14691> [perma.cc/LG43-RPL5] (last visited Oct. 15, 2014).

[3] Ángel González, *Expanded Oil Drilling Helps U.S. Wean Itself From Mideast*, The Wall Street Journal (June 27, 2012, 11:30 AM), <http://online.wsj.com/news/articles/SB10001424052702304441404577480952719124264> [perma.cc/7DVR-HYHG] (last visited on Oct. 15, 2014).

[4] See Jennifer A. Dlouhy, *Pipeline growth points to shale boom's infrastructure demands*, Fuel Fix (Oct. 7, 2014, 5:23 PM), <http://fuelfix.com/blog/2014/10/07/pipeline-growth-climbing-to-ferry-oil-ngls-to-markets/> [perma.cc/B9MA-6UH3] (last visited Oct. 15, 2014).

[5] Association of Oil Pipe Lines & American Petroleum Institute, *U.S. Liquids Pipeline Usage & Mileage Report*, (Oct. 2014), <http://www.aopl.org/wp-content/uploads/2014/10/U.S.-Liquids-Pipeline-Usage-Mileage-Report-Oct-2014-s.pdf> [perma.cc/25D6-GCNG].

[6] *Id.*

[7] *Keystone XL Pipeline Project*, TransCanada (Nov. 11, 2013, 11:04 AM), <http://www.transcanada.com/keystone.html> [perma.cc/YKE9-4RSX] (last visited Oct. 15, 2014).

[8] *Keystone XL: #TimeToBuild*, United States House of Representative Energy & Commerce Committee, <http://energycommerce.house.gov/content/keystone-xl> [perma.cc/QVU9-B6CT] (last visited Oct. 15, 2014).

[9] *Id.* (2011 and 2014, both finding the project to be safe and have minimal environmental impact).

[10] *Id.*

[11] *Thompson v. Heineman*, No. S-14-000158 (Neb. filed June 6, 2014).

[12] *Keystone XL: #TimeToBuild*, *supra* note 8.

[13] *See infra* Part II.

[14] Steven H. Brose, *FERC Oil Pipeline Regulation – The Basics & Current Issues*, Energy & Mineral L. Found. (June 2, 2014), <http://www.emlf.org/clientuploads/speakers/Brose.pptx.pdf> [perma.cc/5MSE-TD74].

[15] Mark K. Lewis & D. Kirk Morgan II, *An Uneven Playing Field Exists in Oil vs Gas Pipeline Development*, Oil & Gas Fin. J. (Oct. 1, 2011),

<http://www.ogfj.com/articles/print/volume-8/issue-10/features/an-uneven-playing-field-exists.html> [perma.cc/5KG5-PNA7] (“Pursuant to the ICA, oil pipelines are regulated as common carriers, which means that oil pipelines must provide transportation service to any party that reasonably requests service. This means that if an oil pipeline is constrained and a new customer asks for transportation service, the oil pipeline's capacity must be allocated among its customers – including the new customer – and the existing customers all lose some of the capacity they otherwise would have had.”).

[16] Brose, *supra* note 14.

[17] Interstate Commerce Act, 49 U.S.C. § 1 (1)(b) (1988).

[18] Kirk Morgan, *Not All Pipelines Are The Same: Regulatory Differences Impacting Oil Versus Natural Pipeline Development*, Interstate Natural Gas Ass'N Of Am. (April 12, 2012), <http://ingaa.org/File.aspx?id=18255> [perma.cc/A9U2-9QN3].

[19] *Id.*

[20] Christopher J. Barr, *Growing Pains: FERC's Responses to Challenges to the Development of Oil Pipeline Infrastructure*, 28 Energy L. J. 43, 50 (2007).

[21] Lewis, *supra* note 15.

[22] Steven Mufson, *Keystone Pipeline's southern leg to begin transporting oil to U.S. Gulf Coast*, Wash. Post (Jan. 21, 2014), [http://www.washingtonpost.com/business/economy/oil-to-begin-flowing-in-southern-leg-of-keystone-pipeline/2014/01/21/ffe35abc-82bb-11e3-bbe5-6a2a3141e3a9\\_story.html](http://www.washingtonpost.com/business/economy/oil-to-begin-flowing-in-southern-leg-of-keystone-pipeline/2014/01/21/ffe35abc-82bb-11e3-bbe5-6a2a3141e3a9_story.html) [perma.cc/8KQQ-EVR7].

[23] Mont. Code Ann. § 69-13-104 (2013).

[24] Mont. Code Ann. § 69-13-101 (2013); “To or for the public for hire” (shortened to “for hire”) is a term of art that signifies that the object or service is implemented in such a way as to be available to the public for a benefit.

[25] Neb. Rev. Stat. § 57-1101 (2014).

[26] Neb. Rev. Stat. § 57-501 (2014).

[27] Neb. Rev. Stat. § 57-1404 (2014).

[28] Neb. Rev. Stat. § 57-1101, *supra* note 43 (“any such person, company, corporation, or association shall comply with section 57-1503 and receive the approval of the Governor for the route of the pipeline under such section or shall apply for and receive an order approving the application under the Major Oil Pipeline Siting Act”).

[29] *See infra* Part III (C)(2).

[30] Tex. Nat. Res. Code Ann. § 111.019 (West 2013).

[31] Tex. Nat. Res. Code Ann. § 111.002 (West 2013).

[32] *Id.* at (1), (5) and (6).

[33] *See infra* Part III (C).

[34] Ky. Rev. Stat. Ann. § 278.502 (West 2014).

[35] *Id.*

[36] *Id.*

[37] Ky. Rev. Stat. Ann. § 278.470 (West 2014).

[38] Ky. Rev. Stat. Ann. § 416.675 (West 2014).

[39] *Id.* at (2)(d).

[40] *Id.* at (3).

[41] 363 S.W.3d 192 (Tex. 2011).

[42] Railroad Commission of Texas, Application For Permit to Operate A Pipeline in Texas (2012), *available at* <http://www.rrc.state.tx.us/media/8016/t-4.pdf> (T-4 Form).



[43] Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 199 (Tex. 2011).

[44] *Id.* (“A permit granting common-carrier status is prima facie valid, [b]ut once a landowner challenges that status, the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain.”).

[45] *Id.* (quoting Coastal States Gas Producing Co. v. Pate, 158 Tex. 171, 309 S.W.2d 828, 831 (1958)).

[46] *Id.*

[47] Ben Pollock, *Heightened Scrutiny of Pipeline Companies’ Common Carrier Status Perhaps a New Reality*, King & Spalding Energy Newsletter (July 2013), <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2013/July/article7.html> [perma.cc/S47F-MG2A] (last visited Oct. 15, 2014).

[48] Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd., 404 S.W.3d 754, 761 (Tex. App. – Beaumont 5/23/13) (“we are not persuaded the [Texas Supreme] Court's reasoning concerning the process of obtaining a T-4 permit applies only to carbon dioxide lines”); Crawford Family Farm Partnership v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908, 923 (Tex. App. – Texarkana 8/27/13) (“As stated by our sister court, ‘we are not persuaded the Court's reasoning concerning the process of obtaining a T-4 permit applies only to carbon dioxide lines.’”).

[49] 402 S.W.3d 334 (Tex. App. – Beaumont 5/23/13).

[50] *Id.* at 339-40.

[51] David Kent, *The Keystone Pipeline’s Legacy in Texas Condemnation Law*, Sedgwick Law Dirt Report (Dec. 2013), <http://www.sedgwicklaw.com/the-keystone-pipelines-legacy-in-texas-condemnation-law-12-04-2013/> [perma.cc/FV4Q-XHT6] (last visited Oct. 15, 2014).

[52] *In re Texas Rice Land Partners, Ltd.* 402 S.W.3d 334, (Tex.App. - Beaumont 5/23/13) *mandamus denied* (9/6/13).

[53] Katie Valentine, *TransCanada Tries to Throw More Money At Nebraskans To Allow Keystone CL On Their Land*, Climate Progress (Jan. 27, 2014, 4:35 PM), <http://thinkprogress.org/climate/2014/01/27/3208851/transcanada-increases-keystone-buyouts/> [perma.cc/LAL7-MNV9] (last visited Oct. 15, 2014).

[54] Thompson, *supra* note 11.

[55] L.B. 1161, 102nd Leg., 2nd Reg. Sess. (Neb. 2012).

[56] Deena Winter, *State, landowners make cases on Keystone XL to Nebraska Supreme Court*, Nebraska Watchdog (Sept. 5, 2014), <http://watchdog.org/169025/keystone-xl-3/> [perma.cc/27V7-Y7ZN] (last visited Nov. 10, 2014).

[57] Neb. Rev. Stat. § 57-501, *supra* note 44.

[58] Second Amended Complaint for Declaratory Judgment, Thompson v. Heineman, No. CI 12-2060 (Neb. Dist. Ct. Mar. 18, 2013).

[59] *Id.*

[60] Neb. Const. art. IV, § 20.

[61] Thompson, *supra* note 11.

[62] *Id.*

[63] Maria Gallucci, *Keystone XL Pipeline: Landowners, State Attorneys Square Off In Nebraska Supreme Court Over Proposed Pipeline Route*, Int'l Bus. Times (Sept. 5, 2014, 12:01 PM), <http://www.ibtimes.com/keystone-xl-pipeline-landowners-state-attorneys-square-nebraska-supreme-court-over-1679884> [perma.cc/GP6Y-N3G7] (last viewed Oct. 15, 2014).

[64] Erica Peterson, *Judge Rules Bluegrass Pipeline Companies Don't Have Power of Eminent Domain*, WFPL News (Mar. 25, 2014, 3:50 PM),

<http://wfpl.org/post/judge-rules-bluegrass-pipeline-companies-dont-have-power-eminent-domain> [perma.cc/37BJ-LG9S] (last viewed Oct. 15, 2014).

[65] Ky. Rev. Stat. Ann. § 278.502, *supra* note 57.

[66] *Kentuckians United to Restrain Eminent Domain, Inc. v. Bluegrass Pipeline Company, LLC*, No. 13-CI-1402 (Ky. Dist. Ct. Mar. 25, 2014).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] Erica Peterson, *Bluegrass Pipeline's Developer Is Appealing the Eminent Domain Ruling*, WKMS (Aug. 15, 2014, 11:47 AM),

<http://wkms.org/post/bluegrass-pipelines-developer-appealing-eminent-domain-ruling> [perma.cc/C8MN-NE6U] (last viewed Oct. 15, 2014).

[71] Brief for Appellant, *Kentuckians United to Restrain Eminent Domain, Inc. v. Bluegrass Pipeline Company, LLC*, No. 14-CA-000517 (Ky. App. July 29, 2014).

[72] *Id.*

[73] *Id.*

[74] Natural Gas Act, 15 U.S.C. § 717 (2005)

[75] *Industries*, Fed. Energy Regulatory Commission (June 26, 2010), <http://www.ferc.gov/industries/industries.asp> [perma.cc/2BUH-NXFM] (last viewed Oct. 15, 2014).

[76] *Id.*

[77] Natural Gas Act, *supra* note 74 at § 717f(d).

[78] *Id.* at § 717f(c)(1)(B)

[79] *Id.* at § 717f(e)

[80] *Id.* at § 717f(h)

[81] *Id.*

[82] *Id.* at § 717f(a) (“Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, that the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.”)

[83] *Id.* at § 717f(b).

[84] Morgan, *supra* note 18.

[85] Natural Gas Act, *supra* note 74 at § 717f(e)

[86] Ky. Rev. Stat. Ann. § 278.502, *supra* note 57.

[87] Tex. Nat. Res. Code Ann. § 111.019, *supra* note 52 at (c).