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Eminent Domain - Texas Supreme Court Requires Common Carrier Pipeline Companies to Demonstrate Reasonable Expectation of Future Public

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EMINENT DOMAIN—TEXAS SUPREME COURT REQUIRES COMMON CARRIER PIPELINE COMPANIES TO DEMONSTRATE REASONABLE EXPECTATION OF FUTURE PUBLIC

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IN *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, the Supreme Court of Texas addressed the ability of private pipeline companies to receive classification as common carriers from the Texas Railroad Commission, thus allowing them to exercise eminent domain powers in the construction of pipelines.[1] Overturning a Beaumont Court of Appeals decision, the court held that a pipeline company cannot establish as a matter of law that it is a common carrier without presenting reasonable proof "demonstrating that the pipeline will indeed transport 'to or for the public for hire' and is not 'limited in [its] use to the wells, stations, plants, and refineries of the owner.'"[2] Although the court sought to protect the rights of private landholders,[3] the decision overlooks well-established principles of common carrier classification in Texas, and future application of the court's decision promises to be problematic.

Denbury Resources is a public corporation and the sole owner of Denbury Operating Company.[4] Denbury Green Pipeline-Texas LLC ("Denbury Green") is a subsidiary of Denbury Operating Company.[5] Denbury Resources and its affiliates (collectively "Denbury") are engaged in tertiary recovery operations in Texas involving the injection of CO_2 into existing wells.[6] In 2008, Denbury sought to construct a pipeline to transport CO_2 from Mississippi to oil fields in Texas for use in recovery

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1. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury Green II*), 363 S.W.3d 192 (Tex. 2012).

2. *Id.* at 204.

3. *Id.* ("Indeed, our Constitution and laws enshrine landownership as a keystone right . . . .").

4. *Id.* at 195.

5. *Id.*

6. *Id.*

operations.[7] Although Denbury planned to transport CO_2 from its natural reserve in Mississippi through the pipeline, evidence on the record suggested that the pipeline would also be used to move "anthropogenic" CO_2 manufactured by third parties.[8] In March of that year, Denbury Green applied with the Texas Railroad Commission ("TRC") to operate a CO_2 pipeline, as a common carrier, from the Texas–Louisiana border to Brazoria and Galveston Counties.[9] In accordance with Chapter 111 of the Texas Natural Resources Code (the "TNRC"), Denbury Green indicated on its application that it would be transporting gas "[o]wned by others, but transported for a fee," and submitted a letter accepting and expressly agreeing to be subject to a common carriers duties and obligations—among them, the obligation to avail the pipeline to use by third parties.[10] On April 2, 2008, the TRC granted Denbury Green a permit to operate a CO2 pipeline as a common carrier.[11]

Texas Rice Land Partners Ltd. ("Texas Rice") owns an interest in two tracts crossed by the proposed pipeline.[12] When Denbury Green sought to condemn a pipeline easement across the land, Texas Rice refused entry.[13] Denbury Green sued for an injunction allowing access to the land, and both sides subsequently filed for summary judgment.[14] Texas Rice attested that the pipeline was not a common carrier because it was for the exclusive use of Denbury, thus the use of eminent domain powers amounted to a "private taking" of property.[15] The trial court disagreed, finding that pursuant to Chapter 111 of the TNRC, Denbury Green is a common carrier, it has the authority to condemn under the power of eminent domain, and Texas Rice is permanently enjoined from interfering with Denbury Green's right to enter and survey.[16]

Relying on the facts that (1) Denbury Green accepted the duties and obligations of a common carrier as required by Chapter 111 and that (2) the pipeline was available for public use "from the outset," the court of appeals affirmed the decision of the trial court.[17] In its opinion, the court concluded that Denbury Green had established its common carrier status as a matter of law.[18] Texas Rice appealed the decision to the Texas Supreme Court.[19]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 196.
11. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex. LLC (*Denbury Green I*), 296 S.W.3d 877, 880 (Tex. App.—Beaumont 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012), *reh'g denied.*
12. *Denbury Green II*, 363 S.W.3d at 196.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Denbury Green* I, 296 S.W.3d 877, 880–881 (Tex. App.—Beaumont 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012).
18. *Id.* at 881.
19. *Denbury Green II*, 363 S.W.3d at 192.

TNRC § 111.019(a) states that "[c]ommon carriers have the right and power of eminent domain."[20] A person is a common carrier if he "owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide . . . to or for the public for hire";[21] however, because the taking of property for *private* use does not stand up to constitutional scrutiny, such status is not granted if the pipelines are "limited in their use to the wells, stations, plants, and refineries of the owner."[22] Simply put, a company cannot claim common carrier status with regard to a pipeline unless that pipeline is available for "public use." In *Housing Authority of Dallas v. Higginbotham*, the Texas Supreme Court articulated that whether a use is public or private depends solely on the availability to the public rather than the number of citizens who actually exercise a right to the use.[23]

Whether a pipeline company is a common carrier is a question of law.[24] In *Vardeman v. Mustang Pipeline Co.*, the Tyler Court of Appeals recognized that courts have been "instructed by the supreme court to give great weight to the TRC's determination of that issue."[25] Accordingly, the *Vardeman* Court ruled that a letter from the TRC declaring that Mustang Pipeline Co. ("Mustang") met the Chapter 111 requirements for common carrier status and evidence that Mustang held itself out for hire by filing a tariff outlining public rates for transmission were sufficient to establish as a matter of law that the pipeline company was a common carrier.[26]

In *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, the Texas Supreme Court diverged from precedent such as *Vardeman*, ruling that a TRC permit certifying that Denbury Green had agreed to subject itself to the duties and obligations of a common carrier under Chapter 111, in addition to the publishing of a public rates tariff by the company, were insufficient to establish that the company was a common carrier.[27] The court determined that because the CO_2 transported by the Denbury Green pipeline was to be used by Denbury Green subsidiaries, the company was not a common carrier absent evidence that the pipeline would also be used for the benefit of third parties.[28] According to the court, the traditional process of granting common carrier status to pipeline companies based upon their own written commitment opens a doorway for the "gaming of the permitting process," in which a company can

20. TEX. NAT. RES. CODE ANN. § 111.019(a) (West 2011).
21. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).
22. TEX. NAT. RES. CODE ANN. § 111.003(a) (West 2011).
23. Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 84 (Tex. 1940); *see also* Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469, 475 (Tex. App.—Corpus Christi 1983, writ. ref'd n.r.e.).
24. Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied).
25. *Id.*
26. *Id.* at 313.
27. *Denbury Green II*, 363 S.W.3d 192, 204 (Tex. 2012).
28. *Id.* at 202.

claim that a pipeline is open to the public even where there is no reasonable expectation that the pipeline will be used by the public.[29] Such practice, in the opinion of the court, amounts to a wielding of the eminent domain power for private use.[30]

Before determining when a pipeline serves a "public use," the court demonstrated that the TRC permit granting eminent domain power (referred to as a "T-4 permit") does not conclusively establish status as a common carrier.[31] The court reasoned that "[n]othing in the statutory scheme indicates that the Commission's decision to grant a common-carrier permit carries conclusive effect and thus bars landowners from disputing in court a pipeline company's naked assertion of public use."[32] Moreover, the court concluded that the TRC's process for granting T-4 permits "[ ]takes no effort" to confirm that an applicant's pipeline is intended for public use; thus allowing an irrefutable presumption of common carrier status to flow from the grant of a T-4 permit would irresponsibly imperil private property.[33]

After finding that the TRC's grant of a T-4 permit does not preclude a landowner from challenging the eminent domain power of a permit holder, the court turned its attention to the "core constitutional concern" of whether Denbury Green's pipeline serves a public or private use.[34] In its analysis, the court focused on TNRC § 111.002(6), which requires a common carrier pipeline to (1) operate "to or for the public for hire" and (2) file written acceptance agreeing to become "a common carrier subject to the duties and obligations conferred or imposed by [Chapter 111]."[35] Apparently disregarding the notion that a company's agreement to avail its pipeline to the public is indeed an operation "for the public for hire," the court determined that Denbury Green failed to meet the first requirement of § 111.002(6).[36] Because Denbury Green presented no evidence that the CO_2 transported by the *planned* pipeline would be used by third parties, the court reasoned that Denbury Green had not demonstrated that the pipeline would be "for the public for hire," despite the fact that Denbury Green agreed to make the pipeline available for public use and posted a tariff of public use rates.[37]

Evident in the opinion is the court's fear that the requirements of Chapter 111 will not prevent a pipeline company from exercising eminent domain power, under color of the statute, for a purely private purpose.[38] To that end, the court perilously suggested the need to discern the legitimacy of a company's expectation that others will desire to use its not-yet-

29. *Id.* at 201.
30. *Id.* at 202.
31. *Id.* at 198–200.
32. *Id.* at 198.
33. *Id.* at 199.
34. *Id.* at 200.
35. *Id.* at 200–01.
36. *Id.*
37. *Id.* at 202.
38. *Id.* at 201–02.

built pipeline.[39] The court was quick to place the onus of proving this unrealized event on the permit applicant.[40] While such a requirement appears to far exceed the statutory framework put in place by the legislature, the Texas Supreme Court clung tight to the maxim that "statutes granting eminent-domain power must be strictly construed in favor of the landowner."[41] In a statement that will certainly frustrate the efficacy of future pipeline development, Justice Willett concluded that "[i]f a landowner challenges an entity's common-carrier designation, the company must present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed transport 'to or for the public for hire.'"[42]

The court's holding in *Denbury* was incorrect because it (1) disregards the precedent of judicial deference to TRC authority concerning the common carrier status of pipeline companies,[43] (2) undermines the controlling provisions of the TNRC regarding common carriers,[44] and (3) contradicts well-established principles governing eminent domain in Texas.[45] As previously referenced, Texas courts have long recognized the need to "give great weight" to determinations made by the TRC in deciding if a pipeline company is a common carrier.[46] Such great weight, in fact, that traditionally courts have simply determined that "[w]hen the evidence before the court indicates that a pipeline . . . has subjected itself to the authority of the TRC to regulate its activities, then it is a common carrier."[47] In a stark departure from this commitment, the court quickly discounted the TRC's certification that Denbury Green had complied with the common carrier statute, despite the fact that the TRC is the administrative agency charged with its enforcement.[48]

What is more troubling is the clear contradiction between the court's position and well-established judicial principles governing the determination of "public use." Though much ado is made in the court's opinion about whether third parties will actually use the planned pipeline, this consideration is altogether irrelevant to determining whether a pipeline serves a public use.[49] Instead, the sole consideration in determining if a

39. *Id.* at 202.
40. *Id.*
41. *Id.*
42. *Id.* at 204.
43. State v. Pub. Util. Comm'n of Tex., 883 S.W.2d 190, 196 (Tex. 1994); Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied).
44. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).
45. Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 84 (Tex. 1940).
46. *Vardeman*, 51 S.W.3d at 312.
47. *Id.* at 313.
48. *Denbury Green II*, 363 S.W.3d 192, 202 (Tex. 2012).
49. *See* West v. Whitehead, 238 S.W. 976, 977–79 (Tex. Civ. App.—San Antonio 1922, writ ref'd) (holding that a railway used only to transport materials from a private mine constituted a "public use," as it was required to "accept, transport, and deliver" materials tendered by the public at any point in its line, and further finding immaterial that no public use was ever effectuated); *see also* Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469, 475 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (holding that a certain pipeline constituted a "public use," regardless of the fact that at the time of condemnation, it was only being used to transport the pipeline company's own gas).

private project is for public use is the project's *availability* to the public, as demonstrated by the Texas Supreme Court in *Housing Authority of Dallas v. Higginbotham*:

> It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it. The mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of its public character.[50]

Keeping with the common judicial commitment to this principle, the court in *Tenngasco* expanded, stating that "Texas courts have made it clear that it is the character of the right [to use a private project] which inures to the public, not the extent to which the right is exercised, that is important in evaluating enterprises which are involved in condemning private property."[51] Yet, the Texas Supreme Court directly contradicts this principle by dismissing Denbury Green's commitment to making the pipeline publicly available; instead, the court places determinative weight on whether "gas is [actually] being carried for another."[52]

While the court is seemingly concerned with what "the Legislature intended,"[53] its requirement that permit holders prove third-party use of the proposed project effectively overrides the controlling power of TNRC Chapter 111.[54] Such a requirement goes well beyond what the Texas legislature determined to be the appropriate process for granting common carrier status to pipeline companies. Moreover, the powers of condemnation are exercised *prior* to the construction of a project (and the acquisition of customers in most cases); thus requiring a permit holder to provide proof of commercial relations prior to the existence of a product is logically unsound and practically problematic.[55]

The development of pipelines in Texas is crucial given the state's fast growing energy needs.[56] To meet those needs, the state must have in place an efficient administrative system that is able to facilitate the development of pipelines without burdensome obstructions. The court's decision in *Denbury* will make it immensely difficult for future pipeline developers to obtain and defend the common carrier status necessary to place much-needed pipelines in Texas by forcing them to prove that an unrealized pipeline will be used by members of the public. It requires little imagination to conceive that with this decision, a massive increase in private landowner challenges to common carrier status will begin to appear across the state. The conclusion seems certain that this recent deci-

50. *Higginbotham*, 143 S.W.2d at 84.
51. *Tenngasco*, 653 S.W.2d at 475.
52. *Denbury Green II*, 363 S.W.3d at 200.
53. *Id.* at 201.
54. *See* TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).
55. *Denbury Green II*, 363 S.W.3d at 196.
56. *Id.* at 204.

sion by the court will stand to complicate and frustrate the process of pipeline development in Texas.

In *Denbury*, the Texas Supreme Court dramatically disrupted the administration of pipeline development in Texas. The court abandoned the long-developed practice of deferring to the TRC the adjudication of common carrier status, and it directly contradicted the long-honored principle that "public use" ought to be determined by the availability of use rather than whether the public has eventuated the actual use of a private work. In the end, the court clung to the idea that eminent domain statutes must be strictly construed in favor of landowners. While the sovereignty of private ownership is indisputably important, it is clear that the court went well beyond what is necessary—or even beneficial—in its pursuit of protecting the interests of Texas landowners.