# *TEXAS RICE LAND PARTNERS, LTD. V. DENBURY GREEN PIPELINE-TEXAS, LLC*: TEXAS EMINENT DOMAIN LAW AND THE NOT-SO-COMMON COMMON CARRIER STATUS


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## I. INTRODUCTION

Pipeline companies that use and benefit from eminent domain law is a source of major contention between property owners and the energy industry, especially in Texas. While both the United States Constitution and the Texas State Constitution allow for the taking of private land for public use,[1] landowners have consistently challenged the constitutionality of such taking; specifically, that pipeline companies do not meet the requirement of qualifying as a common carrier to exercise eminent domain authority.[2] According to the Texas Natural Resource Code, a common carrier is one who "owns, operates, or manages . . . pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public."[3] If an entity meets the common carrier requirement, it has the right to enter and condemn the land for the use of a common carrier pipeline.[4]

A significant change in Texas eminent domain law came after the Supreme Court of Texas decided *Texas Rice Land Partners, Ltd. v.*

1. U.S. CONST. amend. V; TEX. CONST. art. I, § 17.
2. *E.g.*, Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908, 911 (Tex. App.—Texarkana 2013, pet. denied).
3. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).
4. *Id.* § 111.019(a).

*Denbury Green Pipeline-Texas, LLC* (*Denbury I*) in 2012.[5] In that case, the court determined that the constitutional requirement that land be taken for public use is paramount and to qualify as a common carrier, one must prove that there is a reasonable probability that the pipeline will at some point serve the public and not just the company or its affiliates.[6] On remand, the appellate court concluded that reasonable minds could differ on whether Denbury's pipeline was created for public use, and thus, reversed the trial court's granting of summary judgment.[7] A petition for review has been filed in the Supreme Court of Texas, and if granted, the court must determine whether Denbury has established a reasonable probability that the pipeline will be used for the public and subsequently qualify as a common carrier.[8]

This Note will address why Denbury should not qualify as a common carrier and therefore cannot condemn the private land through eminent domain. Part II will discuss the history and evolvement of eminent domain law and common carrier status and walk through the appellate court's decision in *Denbury II*. Part III analyzes the validity of the court's determination, and then Part IV will conclude with why the Supreme Court of Texas should rule against Denbury using the court's own test established in 2012.

## II. BACKGROUND

### *A. The Progression of Eminent Domain Law in Texas*

The Fifth Amendment of the Constitution declares that "private property [shall not] be taken for public use without just compensation."[9] Similarly, the Texas Constitution states that no person's property shall be taken for public use without adequate compensation and only if "the taking, damage, or destruction is for: (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by: (A) the State, a political subdivision of the State, or the public at large; or (B) an entity granted the power of eminent domain under law."[10] Given this constitutional authority, the legislature may give private entities the power of eminent domain if

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5. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 SW.3d 192, 204 (Tex. 2012).

6. *Id.* at 202.

7. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury II*), 457 S.W.3d 115, 121–22 (Tex. App.—Beaumont 2015, pet. filed).

8. Petition for Review at viii, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., No. 15-0225 (Tex. June 3, 2015), 2015 WL 5101747.

9. U.S. CONST. amend. V.

10. TEX. CONST. art. I, § 17.

they qualify as common carriers, public utilities, or gas corporations.[11] A pipeline can become a common carrier through a T-4 permit application as long as the transportation of carbon dioxide is to or for the public; however, this entire process only necessitates checking a box on the application and a subsequent letter agreeing to be subjected to obligations of Chapter 111 of the Texas Natural Resource Code to be granted eminent domain authority.[12]

In 2005, the United States Supreme Court decided *Kelo v. City of New London*, further reducing the minimal protections landowners had against eminent domain power.[13] In that case, the Court concluded that the common test of public use being "use by the general public" was no longer adequate and expanded the definition of public use into anything with a "public purpose."[14] However, the Court also stated, "[N]othing in [their] opinion precludes any State from placing further restrictions on its exercise of the takings power."[15] Texas took that statement and ran. In 2009, the Texas Legislature amended the Texas Constitution to its current form, addressing the *Kelo* decision by prohibiting public use from including the taking of land for the "purpose of economic development or [enhancing] . . . tax revenues."[16] This amendment was created to help ensure that when private landowner's property is taken, that it is actually taken for a public use, and not a private use camouflaged as a public use. Since the amendment, there has been a myriad of cases challenging a private entity's eminent domain authority under the common carrier status.

### *B. Challenging Common Carrier Status and Public Use*

In *Occidental Chemical Corp. v. ETC NGL Transportation, LLC*, the First Court of Appeals decided that ETC presented evidence by which the district court could conclude it was acting as a common carrier.[17] ETC, a subsidiary of a natural gas corporation, requested that Occidental allow it to enter onto Occidental's pipeline corridor to assess the area for the construction of a liquid natural gas pipeline.[18] Occidental denied the request on the grounds it had its own plans for the corridor.[19] ETC was granted a T-

11. *See* TEX. NAT. RES. CODE. ANN. § 111.019 (West 2011) (common carrier status); TEX. UTIL. CODE ANN. § 121.001 (West 2007) (gas utility); UTIL. § 181.004 (gas corporation).

12. Megan James, Comment, *Checking the Box Is Not Enough: The Impact of* Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC *and Texas's Eminent Domain Reforms on the Common Carrier Application Process*, 45 TEX. TECH L. REV. 959, 974 (2013).

13. Kelo v. City of New London, 545 U.S. 469, 488–89 (2005).

14. *Id.* at 479–80 (internal quotation marks omitted).

15. *Id.* at 489.

16. TEX. CONST. art. I, § 17(b).

17. Occidental Chem. Corp. v. ETC NGL Transp., LLC, 425 S.W.3d 354, 366 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd).

18. *Id.* at 358.

19. *Id.*

4 permit by the Texas Railroad Commission; however, Occidental still denied access, and the district court later granted ETC's temporary injunction.[20] The appellate court held that the evidence presented by ETC as proof of common carrier status was sufficient and upheld the injunction.[21] In its reasoning, the court noted that the pipeline was to transport product for others, not just for ETC's own private use, and that ETC already had multiple contracts with corporations to use their pipeline, as further proof that the pipeline was for public use.[22]

In 2012, the Supreme Court of Texas tackled this issue when it heard *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Denbury I*).[23] When the landowners in this case refused to allow Denbury access to their land despite their statutory authority to do so, Denbury filed suit, seeking an injunction to access the land.[24] Both the trial court and appellate court held for Denbury as a common carrier pursuant to the Texas Natural Resources Code.[25] However, the Supreme Court of Texas disagreed and subjected common carrier status to a higher level of scrutiny.[26] The court noted the importance that the legislative grant of eminent domain be strictly construed, and that "the statute granting such power is strictly construed in favor of the landowner and against . . . corporations."[27] Because the court concluded that filling out a form declaring public use was not sufficient, as many corporations still condemned land for private use, they imposed a new standard: for a person intending to build a carbon dioxide pipeline to qualify as a common carrier, "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."[28] Based on this standard and the burden of the corporation to prove its intended public use, the Supreme Court of Texas reversed and remanded the case.[29]

Once the *Denbury* standard was established, many cases followed with landowners challenging the public use requirement of corporations claiming common carrier status. One notable case is *Crosstex NGL Pipeline, L.P. v.*

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20. *Id.*
21. *Id.* at 366.
22. *Id.* at 365–66.
23. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 SW.3d 192, 195 (Tex. 2012).
24. *Id.* at 196.
25. *Id.*
26. *Id.* at 197.
27. *Id.* at 198 (quoting Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958)) (internal quotation marks omitted).
28. *Id.* at 202 (footnotes omitted).
29. *Id.* at 204.

*Reins Rd. Farms-1, Ltd.*[30] A corporation which was granted a permit to operate a pipeline on the landowner's property was denied a temporary injunction because it did not prove to the court that the pipeline would be used for public use.[31] Because a party may dispute whether a pipeline has a public use (despite the T-4 permit the corporation possesses), the court applied the *Denbury I* holding.[32] Crosstex did not meet their burden of proving public use because they were unsuccessful in solidifying bids from third parties to use their pipeline; additionally, the landowners brought evidence that Crosstex intended to transport their own products and that of its affiliates between its pipelines for over ninety percent of the pipeline's capacity.[33] Based on this evidence, the court determined that there was not a reasonable probability that the pipeline would serve those other than the corporation or its affiliates, so the injunction was denied.[34]

### *C.* Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC

Once the Supreme Court of Texas reversed and remanded *Denbury I*, the trial court still declared that Denbury was a common carrier under the new test, and it did not take long for Texas Rice to appeal back to the Ninth Court of Appeals.[35] With the new test in place, Denbury argued that Denbury Green was formed for the distinct purpose of owning a pipeline, and the Texas Railroad Commission regulates it as a common carrier and "does not buy, sell, explore for, or produce carbon dioxide."[36] Denbury further asserted that the pipeline would not just be used to transport carbon dioxide to and from a network of units that it and its affiliates own, and it brought evidence that it had reserved space for others to use the pipeline and that it already had contracts with third parties to use the pipeline in an attempt to satisfy the new test.[37]

The appellate court took this evidence and applied the *Denbury* test, focusing on the intent of Denbury at the time of the plan to build the pipeline, in order to determine if the corporation qualified as a common carrier.[38] In looking back at 2008, when the pipeline was first contemplated, the court found that the third party contract it entered into did not even

30. Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms–1, Ltd., 404 S.W.3d 754, 756 (Tex. App.—Beaumont 2013, no pet.).
31. *Id.*
32. *Id.* at 760; *see Denbury I*, 363 S.W.3d at 198.
33. *Crosstex NGL Pipeline*, 404 S.W.3d at 760.
34. *Id.*
35. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury II*), 457 S.W.3d 115, 117 (Tex. App.—Beaumont 2015, pet. filed).
36. *Id.*
37. *Id.* at 118.
38. *Id.* at 120.

come into play until after the pipeline was completed.[39] Therefore, there were no other parties that were going to use the pipeline besides Denbury and its affiliates when the pipeline construction began. The court also rejected Denbury's next contention, that the placement of the pipeline by oilfields created a reasonable probability that others would use the pipeline for their transportation needs.[40] The court concluded that a subjective belief of public use does not satisfy the test and does not prove that the purpose was to serve the public; in fact, the court stressed that "property is taken for public use only when there results to the public some *definite* right or use."[41] The last argument Denbury used to try to convince the court that it was a common carrier was that it did not own all of the units and products that the carbon dioxide would be transported to and from.[42] The court rejected this final argument because evidence showed that Denbury did own a controlling interest in the units and the third-party interest owners did not actually take title to or possess the carbon dioxide, thereby making a majority of the operations and product still under the control of Denbury.[43] Given these findings, the appellate court determined that reasonable minds could differ as to whether there was a reasonable probability that the pipeline was created to serve the public and not just the private interests of Denbury.[44]

## III. ANALYSIS OF *TEXAS RICE*

The appellate court's decision is in line with not only the test established in *Denbury I*, but also with prior case law interpreting the relatively new test. The test requiring a reasonable probability that the pipeline was created to serve the public is proper due to the protection it grants private landowners and the burden it puts on the large corporations. The *Denbury I* court was correct to create this test, because, while the statute specifically grants the ability of private entities to have eminent domain power as common carriers, it is up to the courts to scrutinize such cases. The power of condemnation might be "essential to the success of the energy industry," but the rights of landowners cannot be overshadowed.[45] Applying the test to *Texas Rice*, it was appropriate for the court to conclude that Denbury had not met its burden in proving that, more likely than not, the pipeline was created for and would be used by the public.

39. *Id.*
40. *Id.*
41. *Id.* (quoting Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958)) (internal quotation marks omitted).
42. *Id.* at 121.
43. *Id.*
44. *Id.*
45. James, *supra* note 12, at 961.

Similar to *Crosstex*, Denbury did not have any unrelated parties contracted to use the pipeline either prior to construction or after completion.[46] Additionally, the private landowners in both *Crosstex* and *Denbury* were able to prove that the pipelines were to be used by mainly the corporations and their affiliates.[47] If Denbury were to succeed on the merits, it would need to bring evidence similar to that in *Occidental*, in which ETC brought evidence that the pipeline was created for more than the corporation's personal use and built the pipeline with multiple contracts for unrelated third parties to use the pipeline.[48]

Based on the conclusions in *Crosstex* and *Occidental*, the court correctly interpreted the requirement of public use for a corporation to be a common carrier. A pipeline created for private use only—with a chance that third parties might want to use it—does not rise to the level of statutory eminent domain authority. It is the court's duty to protect landowners and their land from being overtaken by large corporations who, until recently, have been able to condemn land just by checking off a box on a T-4 form. Now that corporations have to prove a reasonable probability of public use at the time a pipeline was intended to be built, landowners are better protected from those who want to take private land for private economic gain only, which is expressly prohibited by the Texas Constitution.[49] The Texas courts have made it clear that after *Denbury*, a corporation needs to show a reasonable probability of public use to qualify as a common carrier, and that public use requires unrelated third party contracts and intent to keep the pipeline open.[50] If a corporation cannot meet their relatively low burden of showing a reasonable probability that the pipeline will be used for the public, then it does not qualify as a common carrier and should not be granted eminent domain power.

## IV. CONCLUSION

Though eminent domain law in Texas remains an ever-developing area of law, the Supreme Court of Texas has made the requirements clear for a corporation to be a common carrier. Requiring a reasonable probability is not a heavy burden for a corporation to prove and serves the greater purpose of protecting private landowners in a time of energy industry domination.

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46. *See* Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms−1, Ltd., 404 S.W.3d 754, 761 (Tex. App.—Beaumont 2013, no pet.).

47. *See id.* at 760; *see also* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 SW.3d 192, 204 (Tex. 2012).

48. Occidental Chem. Corp. v. ETC NGL Transp., LLC, 425 S.W.3d 354, 366 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd).

49. *See* TEX. CONST. art. I, § 17(b).

50. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury II*), 457 S.W.3d 115, 121 (Tex. App.—Beaumont 2015, pet. filed).

The burden allows for broad eminent domain authority while still giving landowners the protections they need when compared to public benefit. With multiple appellate courts using the *Denbury* test to rule on eminent domain authority and *Denbury II* going back to the same Supreme Court that created the test, the court will most likely determine that Denbury Green has not met its burden of proving by a reasonable probability that the pipeline was created for use by the public and will serve the public, thereby upholding the appellate court's decision.

*Emily Quiros*