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## Supreme Court Rejects Railroad Commission Approval of Common Carrier Status in Condemnation Cases

By **Amy Baird, Tré Fischer, and Robert Neblett**

On August 26, 2011, the Texas Supreme Court reversed and remanded a decision by the Ninth Court of Appeals to affirm the common carrier status and the eminent domain authority of a carbon dioxide (CO<sub>2</sub>) pipeline company, Denbury Green Pipeline-Texas LLC ("Denbury Green").<sup>1</sup> The Appellate Court had determined that Denbury Green had established its common carrier status as a matter of law because it had filed an application for a T-4 Permit with the Texas Railroad Commission (the "TRRC") which the TRRC had accepted.

In reversing the Appellate Court's decision, the Supreme Court held that merely filing the paperwork and offering to make the pipeline *available* for public use does not make the pipeline a "common carrier" with the power of eminent domain. Instead, the Supreme Court held that the pipeline also must show that a reasonable probability exists, at or before the time common carrier status is challenged, that the pipeline will serve the public by transporting gas for customers who will use the gas themselves or sell it to another party other than the carrier.

This holding will make it more difficult for pipeline companies to obtain and utilize the power of eminent domain to develop pipeline systems that serve only the affiliates of the pipeline.

### Background

Under Section 111.002(6) of the Natural Resource Code, a person is a common carrier if it

owns, operates, or manages ... pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public for hire, but only if such person files with the [TRRC] a written acceptance of the provisions of [Chapter 111 of the Natural Resource Code] expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by [Chapter 111 of the Natural Resource Code].<sup>2</sup>

The Natural Resource Code further grants common carriers the power of eminent domain to condemn land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.<sup>3</sup>

The TRRC's Form T-4 application requires the applicant to designate that the pipeline either will be operated as a common carrier pipeline or a private line. Applicants wishing to operate as a common carrier with the power of eminent domain also typically submit a separate letter indicating that it accepts the provisions of Chapter 111 of the Natural Resources Code and expressly agrees that it is a common carrier subject to duties and obligations conferred by Chapter 111 of the Natural Resources Code.

If the application is approved, the TRRC will issue the T-4 Permit and a separate letter noting that the application to operate as a common carrier has been granted and that the application has made all of the currently necessary filings to be classified as a common carrier pipeline.

Previously, when determining whether a pipeline company is a common carrier, courts have given great deference to the TRRC's issuance of a T-4 Permit to operate as a common carrier and its statements that the company has made all the necessary filings to be classified as a common carrier and, accordingly, have not required any additional showing by the pipeline company beyond the TRRC filings and approvals or allowed a landowner to challenge the TRRC's determination.<sup>4</sup> Any challenge to whether the pipeline was to be operated for a public purpose was summarily addressed on the same basis.<sup>5</sup>

### **Facts**

Denbury Green is a subsidiary of Denbury Resources, Inc. ("Denbury"), which conducts tertiary recovery operations of oil by injecting CO<sub>2</sub> into oil wells to increase their production. Denbury owns a naturally occurring CO<sub>2</sub> reserve in Mississippi and planned to build a pipeline, to be operated by Denbury Green, from the CO<sub>2</sub> reserve in Mississippi to oil wells in Texas, where the CO<sub>2</sub> could be injected into the wells to increase oil production.

Denbury Green filed the required paperwork with the TRRC to operate a CO<sub>2</sub> pipeline in Texas. On the permit application, a Form T-4, Denbury Green indicated that it would be a common carrier. Furthermore, Denbury Green indicated that, in addition to transporting its own CO<sub>2</sub>, it would be transporting CO<sub>2</sub> owned by others for a fee. Finally, Denbury Green submitted a separate letter to the TRRC accepting the provisions of the Natural Resource Code and agreeing that it is subject to the duties and obligations of a common carrier.

The TRRC approved the T-4 Permit eight days after Denbury Green's filing and subsequently issued Denbury Green a letter stating:

This letter is to confirm the fact that [Denbury Green] has been granted a permit to operate a pipeline (Permit No. 07737) and has made all of the currently necessary filings to be classified as a common carrier pipeline for transportation of carbon dioxide under the provisions of [Section 111.002(6)] and as otherwise required by the [TRRC].

When Denbury Green attempted to survey the land of Texas Rice Land Partners, Ltd. ("Texas Rice") prior to condemning a pipeline easement, Texas Rice refused to allow Denbury Green on its property. Denbury Green filed suit against Texas Rice seeking access to the land. The trial court granted summary judgment to Denbury Green, holding that it had established as a matter of law that it was a common carrier as defined by the Natural Resource Code and prohibited Texas Rice from interfering with Denbury Green's entry onto the land to survey the proposed pipelines. The Appellate Court affirmed the trial court's decision, giving great weight to the TRRC's approval of Denbury's Green's T-4 and the TRRC's acceptance letter, as well as Denbury Green's statements that the pipeline would be available for public use.<sup>6</sup>

### **Holding**

The Supreme Court reversed the Ninth Court of Appeals' decision, holding that Denbury Green had failed to establish as a matter of law that it was a common carrier and thus was not entitled to summary judgment. In summarizing its holding, the Court stated, "Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets the statutory common carrier requirements."

With respect to the TRRC's actions, the Court rejected the proposition that they were entitled to any deference, characterizing the Form T-4 permit application as really being a mere registration as the form allows the applicant to self report, noting that the commission conducts no investigation and the commission's decision is not subject to any sort of notice or public participation. The Court thus held that the T-4 permit

alone did not conclusively establish Denbury Green's status as a common carrier and confer the power of eminent domain.

Instead, the Court required a further showing of specific facts, beyond the TRRC process and Denbury Green's assurances that it would be a common carrier and that the pipeline was *available* for public use. Under the Natural Resource Code, a pipeline owner is not a common carrier if the pipeline's only end user is an owner or an affiliate.<sup>7</sup> Denbury Green did not identify any possible customers and was unaware of any other entity that owned CO2 near the pipeline route in Louisiana and Mississippi. Denbury Green, however, argued that making the pipeline *available* for public use is sufficient to meet public service requirement, regardless of who the end user actually is and regardless of whether the pipeline actually will be used by the public.

The Court noted that if merely making the pipeline *available* for public use was sufficient to meet the common carrier requirement, pipeline companies could offer to make the pipeline available for public use, when it knows that there is no other person who could actually make use of the pipeline, and still secure common carrier status and the power of eminent domain. The Court held that to qualify as a common carrier under Chapter 111 of the Natural Resource Code, a reasonable probability must exist, at or before the time common carrier status is challenged, that the pipeline will serve the public by transporting gas for customers who will use the gas themselves or sell it to another party other than the carrier.

### Conclusion

Following the Court's holding, it will be more difficult for pipeline companies to obtain and utilize the power of eminent domain to develop pipeline systems that serve only the pipeline's affiliates. What level of public use will have to be demonstrated, and how, was not addressed by the Court, and industry participants will need to monitor future developments in the case to for useful guidance.

If you have any questions regarding this e-Alert, please contact **Amy Baird** (713.752.4525 or [abaird@jw.com](mailto:abaird@jw.com)), **Tré Fischer** (713.752.4530 or [tfischer@jw.com](mailto:tfischer@jw.com)) or **Robert Neblett** (512.236.2020 or [rneblett@jw.com](mailto:rneblett@jw.com)).

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<sup>1</sup> *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, \_\_ S.W.3d \_\_ (Tex. 2011).

<sup>2</sup> See TEX. NAT. RES. CODE § 111.002(6).

<sup>3</sup> *Id.* at § 111.019.

<sup>4</sup> See, e.g., *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 312-14 (Tex. App.—Tyler 2001, pet. denied).

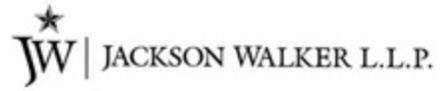
<sup>5</sup> See, e.g., *id.* at 314 (“[T]he same facts which established that Mustang was a common carrier also established that the proposed use of Mustang's pipeline was for a public purpose.”).

<sup>6</sup> *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 296 S.W.3d 877, 879-81 (Tex. App.—Beaumont 2009). The Appellate Court also noted that Denbury Green had filed a tariff with the TRRC and provided evidence in the trial court that it was negotiating with other entities to transport CO2 once the construction of the pipeline was complete. *Id.* at 880.

<sup>7</sup> TEX. NAT. RES. CODE § 111.003(a).

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