

Texas Supreme Court Rules Against Landowner in Denbury Green Eminent Domain Decision

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Although the Texas Supreme Court decision in *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.* has put an end to the litigation, there are a number of unanswered questions and potential issues that remain in the opinion's aftermath. [Read full opinion [here](#).] This case will continue to have serious impacts on landowners and pipeline companies dealing with the use of eminent domain in Texas.

Factual Background

When the Denbury Green Pipeline project planned to build a CO2 pipeline from Mississippi to Brazoria and Galveston Counties in Texas, the company declared themselves a "common carrier" on a Railroad Commission form in March 2008, which granted them the power of eminent domain. Under Texas law at that time, Denbury was not required to provide any other additional information to prove its common carrier status to the Railroad Commission.

Denbury's planned pipeline route crossed two tracts of land owner by Texas Rice Partners. When Denbury contacted the landowner to conduct a survey over the Texas Rice Partners property, they were denied entry. Denbury then sued for an injunction to get access to the property for surveying.

Applicable Law

The Texas Constitution provides that no person's property shall be taken for public use without adequate compensation. *See* Texas Constitution Article 1, Section 17. Texas law is clear that private property may not be taken for private use, but for public use only. Common carrier pipelines have the power of eminent domain. *See* Texas Natural Resources Code 111.019. The Texas Natural Resources Code 111.002(6) states that 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..."

Procedural History

The trial court found in favor of Denbury on summary judgement, holding that the company was a common carrier and that, as such, it had the right of eminent domain. The court of appeals affirmed, holding that Denbury was a common carrier as a matter of law. The court relied on testimony that the pipeline would be available for public use from the time it became operational. The case was then appealed to the Texas Supreme Court.

The Court issued its decision in 2012 (“Denbury I”) and reversed. [Read full opinion [here](#).] The Court made a number of important holdings. First, it made clear that a landowner could challenge the Railroad Commission’s decision to deem an entity a common carrier. Next, it noted that the fact that an entity could obtain eminent domain power by simply checking a box on a Railroad Commission form was improper. “Private property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more.” Third, the court found that a common carrier pipeline may not be built for the builder’s exclusive use—it must, instead, serve the public. The mere fact that a company checks the common carrier box on the Railroad Commission form or even files a tariff and agrees to make the line publicly available is not sufficient to prove common carrier status. Instead, the Court set forth the following standard: “We accordingly hold that for a person intending to build a CO₂ pipeline to qualify as a common carrier under Section 111.002(6), 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.”

Based on this test the Court articulated, Denbury did not establish it was a common carrier as a matter of law. The evidence that the pipeline *could* transport gas for others, there was a *possibility* of transporting other people’s gas in the future, and their inability to identify any possible customers fell short of the “reasonable probability” requirement. Therefore, the Court remanded the case back to the trial court.

On remand back to the trial court, Denbury offered evidence that it was the only CO2 pipeline in the area, that it was built near a number of refineries, plants and other industrial facilities, and that it is currently moving product for Denbury, affiliates, and non-affiliated companies. It produced transportation agreements with two non-affiliated companies. The trial court, hearing this evidence, found that Denbury was a common carrier and granted summary judgment. The court of appeals reversed, finding that “reasonable minds could differ regarding whether, at the time Denbury Green intended to build the Green Line, a reasonable probability existed that the Green Line would serve the public.” The court of appeals focused on the intent of the company at the time they intended to build the pipeline, rather than what actually occurred after the line was built. Again, the case was appealed.

Supreme Court Decision

The Supreme Court sided with Denbury, finding that it had proved by a “reasonable probability” that it was a common carrier. The Court noted that while the evidence introduced in the *Denbury I* appeal was insufficient to rise to the level of a “reasonable probability,” the evidence in this case met that standard. The Court focused not only on the pre-building intent of the company, but also on the post-construction contracts that existed. These contracts, even though signed after the line was built, offer evidence that “at some point after construction” the pipeline will serve the public, therefore satisfying the eminent domain test. Specifically, the Court relied upon the 2013 contract with a third party to transport gas, its proximity of the line to potential customers, and the lack of other pipelines to offer similar transportation services in the area satisfied the “reasonable probability” that “at some point after construction” the line would serve the public.

Thus, the trial court’s judgement was affirmed and Denbury is, as a matter of law, a common carrier pipeline with the power of eminent domain.

Remaining Issues/Why We Care

Texas landowners should pay close attention to this case as it is the latest analysis from the Texas Supreme Court with regard to the proper test to analyze eminent domain authority for common carrier pipelines. Although the Court’s opinion in *Denbury I* seemed to offer some hope to landowners seeking to challenge common carrier status, this opinion seems to dial back the level of proof needed in order to be deemed a common carrier.

Another issue that arose after *Denbury I* is whether this analytical framework for determining common carrier status will have application beyond CO₂ pipelines. Would the court apply the same test when looking at a natural gas or crude oil pipeline? Appellate-level courts have split on this issue. For now, without any express language from the Supreme Court opinion on whether the analysis is so limited, it seems at least plausible that it would apply to all pipelines.

The Texas Legislative session is gearing up to begin, and it is already very clear that eminent domain reform is a major item on the landowner rights side of the aisle. Will the legislature try and address this issue in the next 90 days? That remains to be seen.