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TEXAS SUPREME COURT DENIES RIGHT OF EMINENT DOMAIN FOR A PIPELINE IF THE ONLY END USER IS THE PIPELINE OWNER OR AN AFFILIATE

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas LLC, the Texas Supreme Court reversed a court of appeals decision allowing Denbury Resources, Inc. ("Denbury") to use the power of eminent domain to condemn private property for a carbon dioxide pipeline. At issue was whether a common carrier permit granted by the Texas Railroad Commission (the "Railroad Commission") automatically granted a pipeline company the right to use eminent domain and whether a landowner could challenge the eminent domain power of a pipeline company in court.

The dispute arose when the landowner, Texas Rice Land Partners, Ltd. ("Texas Rice Land"), denied Denbury access to their land in order to survey Denbury's proposed pipeline route. Denbury sued claiming that it qualified as a common carrier by virtue of a permit granted by the Railroad Commission and therefore, Denbury had the right to take private property for a public use pipeline and Texas Rice Land could not challenge the taking in court.

The court of appeals held that under Texas law (1) a pipeline owner could obtain the right to condemn private property by selecting a box designating itself as a common carrier on a form filed with the Railroad Commission, and (2) a landowner could not challenge whether the proposed pipeline would in fact be for public rather than private use in court.

In reversing the court of appeals decision, the Texas Supreme Court noted that the Railroad Commission's common carrier permit was issued without confirming that Denbury's pipeline would actually be for public, rather than private, use and without notice to the landowners. Therefore, the permit alone did not conclusively establish Denbury's status as a common carrier because there was no inquiry as to Denbury's qualification as a common carrier. Denbury asserted that making the pipeline accessible for public use was sufficient to establish common carrier status. However, Denbury had not identified potential customers that owned carbon dioxide near the Denbury pipeline route. Therefore, it was unlikely that the pipeline would be for public use.

EMINENT DOMAIN AND COMMON CARRIERS

The Natural Resources Code regulates carbon dioxide pipelines serving as common carriers. Section 111.002(6) states:

> 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, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter.

Furthermore, Section 111.019 states in part: "(a) Common carriers have the right and power of eminent domain."

The Natural Resources Code Sec. 111.003(a) expressly provides that the common carrier chapter does not apply to pipelines that are limited in their use to wells of the owner. The Texas Supreme Court did not permit Denbury to declare that its proposed pipeline would be available to the public in order to circumvent the public use requirement and held "unadorned assertions of public use are constitutionally insufficient." Denbury merely registered as a common carrier by checking a box on a form filed with the Railroad Commission. This did not conclusively convey the "extraordinary power of eminent domain." Furthermore, landowners were not barred from contesting in court whether a proposed pipeline meets statutory common carrier requirements.

The statutes cited above apply to crude petroleum and carbon dioxide pipelines. Therefore, it is unclear how the Texas Supreme Court's decision could affect natural gas pipelines governed by different statutory provisions, such as the gas utility statute, which provides in part, "a gas or electric corporation has the right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation." (*See* Texas Utilities Code Section 181.004). This issue has been addressed by lower courts. In Thedford v. County of Jackson, the court held that gas pipeline companies transporting gas produced from their own wells to distant markets are not engaged in the business of transporting gas for hire or of purchasing gas from other producers and are not common carriers or common purchasers of gas. *Thedford v. County of Jackson*, 502 S.W.2d 899 (Tex. Civ. App. Corpus Christi 1973, writ ref'd n.r.e.).

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