

## Texas Supreme Court Establishes a Pipeline-Friendly Threshold

Recent decision concludes an almost 10-year saga, with the court restoring balance to pipeline interests

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On Jan. 6, the Texas Supreme Court issued its long-awaited decision in *Denbury Green Pipeline-Texas v. Texas Rice Land Partners (Texas Rice II)*, reversing the Ninth Court of Appeals and reinstating the trial court judgment that a pipeline company, Denbury Green Pipeline-Texas LLC, had conclusively established its common carrier status through a transportation agreement, entered after the pipeline was constructed, with at least one unaffiliated customer.

This decision concludes an almost 10-year saga, with the court restoring balance to the interests of pipeline companies and landowners and making it relatively easy to establish common carrier status in many cases. The case began when surveyors for Denbury attempted to access private property to determine the best route for a proposed CO<sub>2</sub> pipeline, the "Green Line." The two brothers who owned the land, James and David Holland, refused to allow Denbury access to their property and ultimately took two trips to the Supreme Court to resolve the dispute. These landowners argued that Denbury, despite Texas Railroad Commission approval as a common carrier, could not exercise eminent domain authority because there was no evidence that Denbury actually would transport CO<sub>2</sub> for the public.

The Supreme Court issued its first decision in the case in 2012 (*Texas Rice I*), agreeing with the landowners and rejecting the longstanding practice for establishing common carrier pipeline status and obtaining eminent

domain authority in Texas. On remand, the trial court granted Denbury summary judgment on the basis of two third-party transportation service agreements signed after Denbury began construction of the pipeline.

After the Court of Appeals reversed, the case returned to Supreme Court. This time, the court sided with Denbury, allowing the intent to serve the public to be formed after the pipeline is constructed and deciding that even a single contract was sufficient to establish this intent. While *Texas Rice I* established new standards and rigor for obtaining common carrier status and the power of eminent domain for pipeline companies, *Texas Rice II* demonstrates that those standards are not as rigorous as many believed.

*Texas Rice II* also provides insight into the factors courts may consider in determining whether a pipeline has met standards provided in *Texas Rice I*. While the Supreme Court primarily relied on two factors in favor of granting Denbury common carrier status—the existence of a contract with a nonaffiliated third party and the proximity of the pipeline to potential customers—it did not offer that those factors were exclusive. In this way, the court appears to have left open the possibility of making the required showing even without third-party contracts through consideration of other factors such as, whether the company is actively marketing the pipeline to third parties, whether the pipeline has been designed with extra capacity for future public use, or whether there is a reasonable probability that increased demand for additional pipeline capacity will lead to third-party business for the new pipeline.

It also is important that the Supreme Court implicitly approved that common carrier status could be established on summary judgment. Absent some showing of fraud or bad faith, perhaps, the question in many cases now appears quite straightforward: Is there a contract? If there is, it appears that common carrier status can be easily established. On the other hand, if there is not a contract, *Texas Rice II* leaves open the possibility that common carrier status nonetheless could be established, with courts then having the more complicated task of evaluating whether other factors demonstrate a "reasonable probability" that the pipeline will serve the public.

As much as *Texas Rice I* favored landowners, *Texas Rice II* favors pipeline companies, bringing the balance closer to where it was before *Texas Rice I*. Prior to *Texas Rice I*, pipeline companies routinely established themselves as common carriers with the power of eminent domain by indicating on a Form T-4 that the pipeline would be operated as a common carrier. In practice, the Railroad Commission provided little scrutiny of these submissions—including whether the pipeline actually would serve the public—and, in turn, very little actual regulation of the companies; obtaining the power of eminent domain was easy, relatively quick, and routine.

In *Texas Rice I*, the court agreed with the landowners that merely "checking the box" on the appropriate Railroad Commission application form does not make the pipeline a "common carrier." Instead, the court held that, for a 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.

In so holding, the court established what appeared to be a far more rigorous standard for common carrier status with evidence that it will serve the public by transporting gas for third-party customers. With this guidance, the court remanded the case back to the trial court to determine whether Denbury was, in fact, a common carrier pipeline consistent with the new test established in *Texas Rice I*.

This holding transformed eminent domain practice in Texas and was widely considered a substantial victory for private property owners and individual property rights.

## **Lower Court Decisions**

While the case was pending on appeal, Denbury began construction of the line and entered into transportation service agreements with two unaffiliated shippers, Airgas Carbonic Inc. and Air Products and Chemicals Inc.

At the trial court, Denbury moved for summary judgment, arguing that these service agreements established as a matter of law that a reasonable probability existed that the pipeline would serve the public. The trial court agreed, granting summary judgment for Denbury.

On appeal, the Ninth Court of Appeals sided with the landowners, holding 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." In so holding, the Court of Appeals required that the pipeline company have the "intent at the time of its plan to construct the Green Line" to serve the public. The Court of Appeals also required that the reasonably probable future use of the pipeline serve a "substantial public interest," and concluded that Denbury had failed to demonstrate that the public interest was sufficiently "substantial."

*In Texas Rice II*, the Supreme Court explained that the Court of Appeals improperly focused on intent at the time the pipeline was contemplated rather than the direct evidence establishing a reasonable probability of the pipeline's future public use, even if the intent was formed and the evidence created after the construction of the pipeline.

Specifically, it held that Denbury conclusively established that there was a reasonable probability that, at some point after construction, the Green Line would serve the public. With evidence that Denbury Green entered into a contract in 2013 to transport CO<sub>2</sub> for Airgas Carbonic, along with the proximity of the Green Line to potential customers such as Airgas Carbonic and Air Products, no longer could a reasonable fact-finder determine that a genuine fact issue exists as to whether the Green Line would, at some point after construction, do what it now most certainly does: transport CO<sub>2</sub> owned by a customer who retains ownership of the gas. The court further rejected the Court of Appeal's holding that fact issues existed concerning whether the public use would be "substantial," holding that "evidence establishing a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use under the *Texas Rice I* test."

In so holding, *Texas Rice II* makes it substantially easier to comply with the *Texas Rice I* test than many previously believed.

It is, however, important to note that the court also explained that "the Air Products contract, standing alone, would not satisfy the *Texas Rice I* test because title to the CO<sub>2</sub> transfers to Denbury Green at the end of its transport." Care should be taken in structuring third-party contracts with that caveat in mind.

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