ARTICLE

PIPE(LINE) DREAMS POST-*DENBURY GREEN*

NICHOLAS LAURENT[*]
CHRISTOPHER ODDO[**]

[*] Nicholas Laurent is a partner in the Austin Office of Barron, Adler, Clough & Oddo, LLP where he exclusively represents landowners in eminent domain, inverse condemnation, and land use transactions and litigation. Nick's practice has an emphasis on utility takings throughout Texas, including pipeline, power line, and other similar utility lines. Nick also represents landowners in contested cases on power line routing before the Public Utility Commission of Texas and the State Office of Administrative Hearings. Nick graduated with a B.B.A. in Finance from Southern Methodist University in Dallas, Texas. He attained his law degree from the University of Tulsa College of Law where he graduated with highest honors, served on the Energy Law Journal, and was awarded the Order of the Curule Chair, the Rocky Mountain Mineral Law Foundation Joe Rudd scholarship and the Energy and Mineral Law Foundation scholarship.

[**] Christopher Oddo is a partner of Barron, Adler, Clough & Oddo, LLP where he focuses on representing land owners in eminent domain and inverse condemnation cases. He currently serves as a Director for the State Bar of Texas, is the former President of the Austin Bar Association, and is a member of the American Board of Trial Advocates. Prior to joining Barron, Adler, Clough & Oddo, LLP, Christopher was a partner with the law firm of McGinnis, Lochridge & Kilgore, LLP where he served as chair of the firm's Eminent Domain and Inverse Condemnation Practice Group and represented corporate and individual property owners in all aspects of eminent domain and condemnation matters. Christopher is a member of the State Bar of Texas and has been admitted to practice in the United States District Courts for the Eastern, Southern and Western District of Texas, as well as the United States Court of Appeals for the Fifth Circuit. Prior to entering into private practice, Christopher served as an Assistant Attorney General for the State of Texas where he tried more than thirty cases to conclusion. Christopher graduated from Texas A&M University and the University of Tulsa, College of Law.

I. BACKGROUND

For many years in Texas, purported common carrier pipeline companies would quickly and easily obtain summary judgments affirming their power to condemn private property for the permanent installation of their pipelines. In 2012, the tide started to shift in favor of landowners when the Supreme Court of Texas handed down its opinion in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC* ("*Denbury I*").[1]

In *Denbury I*, for the first time in many years, the Supreme Court of Texas recognized that simply obtaining a T4 permit from the Railroad Commission of Texas (the Commission), or "merely by checking boxes on a one-page form" did not in and of itself irrefutably confirm a pipeline company's power to condemn.[2] Rather, the court held:

> Merely holding oneself out is insufficient under Texas law to thwart judicial review. . . . If a landowner challenges an entity's common-carrier designation, the company must present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed transport "to or for the public for hire" and is not "limited in [its] use to the wells, stations, plants, and refineries of the owner."[3]

Following *Denbury I*, other Texas courts have begun to find instances in which, when tested, a purported common-carrier pipeline company's power

1. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012).

2. *Id.* at 204

3. *Id.* (quoting TEX. NAT. RES. CODE ANN. § 111.002 (West 2011); TEX. NAT. RES. CODE ANN. § 111.003 (West 2001).

to condemn does not always and necessarily withstand statutory muster.[4] While the pipeline industry paints a bleak picture in the wake of *Denbury I*, from the landowner's perspective, the Texas Court of Appeals in Beaumont's decision on remand, and other similar cases, provide a fair and workable configuration recognizing Texas landowners' private property rights, yet still allowing for condemnation by true common-carrier pipeline companies.[5]

II. *DENBURY GREEN*

A. *Procedural Posture*

In 2008, Denbury Green Pipeline-Texas, LLC (Denbury Green) sought an injunction to survey for the impending condemnation of a carbon dioxide underground pipeline on the landowner's property.[6] The Jefferson County District Court granted summary judgment in favor of the pipeline company, acknowledging the pipeline company's power to condemn, and the Texas Court of Appeals in Beaumont affirmed.[7] The Supreme Court of Texas, however, reversed and remanded the case back to the district court, famously noting:

> Apparently, in order to receive a common-carrier permit, the applicant need only place an "x" in a box indicating that the pipeline will be operated as a common carrier, and to agree under Section 111.002(6) to subject itself to "duties and obligations conferred or imposed" by Chapter 111. Under these minimal requirements, Denbury Green reported itself as a common carrier and obtained a permit a few days later. There was no investigation, and certainly no adversarial testing, of whether Denbury Green was indeed entitled to common-carrier status and the extraordinary power to condemn private property. Denbury Green concedes in its brief that the Commission "did not adjudicate anything." Private property cannot be imperiled with such

4. *See, e.g.*, Crosstex NGL Pipeline, LP v. Reins Rd. Farms-1, Ltd., 404 S.W.3d 754, 756 (Tex. App.—Beaumont 2013, no pet.) (denying Crosstex the right to survey a property for "its planned natural-gas-liquids pipeline").

5. *See Denbury I*, 363 S.W.3d at 204 ("Pipeline development is indisputably important given our [s]tate's fast-growing energy needs, but economic dynamism . . . also demand[s] strong protections for individual property rights."); *see also In re* Crosstex NGL Pipeline, LP, No. 09-13-00168-CV, 2013 WL 2444192 at *1 (Tex. App.—Beaumont, May 30, 2013, no pet.) (denying Crosstex mandamus relief "to an expedited procedure for exercising [the power of] eminent domain").

6. *See Denbury I*, 363 S.W.3d at 196 (detailing Denbury Green's suit for an injunction).

7. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex. LLC, 296 S.W.3d 877, 878 (Tex. App.—Beaumont 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012) (finding "Denbury Green established its common carrier status as a matter of law").

> nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more.[8]

On remand, the district court again granted summary judgment on an amended motion filed by the pipeline company.[9] The Texas Court of Appeals in Beaumont, however, reversed, holding "the [summary judgment] evidence raises a fact issue regarding whether the taking serves a *substantial* public interest. . . . The duty of weighing this evidence belongs to the jury."[10] The Supreme Court of Texas granted the pipeline company's petition for review; briefing at the Supreme Court concluded on January 22, 2016.[11] Oral argument was held on September 15, 2016 and the case was then[12] submitted to the Court.[13]

B. *The Pipeline Industry's Argument in* Denbury I

The pipeline company and its numerous amici in *Denbury I*[14] and in the current case[15] (pending before the Supreme Court of Texas) "seek a condemnation procedure where the for-profit (common carrier) private pipeline industry exercises absolute and guaranteed power to select which private property it will take for pipeline purposes. Coupled with this power is the right for the pipeline to expeditiously take possession of said property

8. *Denbury I*, 363 S.W.3d at 199 (quoting NAT. RES. §111.002(6)).

9. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 457 S.W.3d 115, 117 (Tex. App.—Beaumont 2015, pet. granted), *rev'd*, 510 S.W.3d 909 (Tex. 2017) (announcing Denbury prevailing on remand when the district court granted Denbury's summary judgment motion).

10. *Id.* at 121 (emphasis in original).

11. *See* Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 2017 WL 65470, at *1–3 (Jan. 6, 2017) (granting the pipeline company's petition for review); *see also* Petitioner's Reply Brief at 2, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017), at *2 (detailing petitioner's final arguments and concluding the briefing period).

12. This Article was originally drafted while the *Denbury II* case was still pending before the Court. See *infra* Part IV for a supplement detailing the Court's decision in Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) (*Denbury II*).

13. *Denbury II*, 510 S.W.3d at 909

14. *See* Brief of Amicus Curiae ETC NGL Transport, LLC at 1, Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012) (No. 09-0901) (filing an amicus curiae brief agreeing with Denbury Green Pipeline-Tex., LLC's argument); *see also* Amicus Curiae Brief Koch Pipeline Company, LP in Support of Motion for Rehearing at 1, Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012) (No. 09-0901); Brief of Amicus Curiae Tex. Oil and Gas Association in Support of Respondent's Motion for Rehearing at 4, Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012) (No. 09-0901).

15. *See* Brief of Plains Pipeline, LP as Amicus Curiae in Support of Petitioner at 5, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) (submitting a brief in support of the pipeline industry); Brief of Amicus Curiae Tex. Pipeline Association at 1, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017).

for their pipeline projects.[16] The pipeline industry argues that to economically install infrastructure in Texas that supports oil and gas production and the Texas economy generally, pipeline companies should prospectively know they will always be able to obtain summary judgment on the right to condemn from the outset and any risk of adverse summary judgment rulings on the power to condemn threatens the viability of future pipeline projects.[17]

C. *Affirming the Texas Court of Appeals in Beaumont's Opinion in the Current* Denbury *Case Would Appropriately Balance the Protection of Private Property Rights with the Need for True Common Carrier Pipeline Companies to Condemn Private Property.*

The common carrier pipeline industry currently has no regulatory oversight on the power to condemn.[18] Rather, for decades, pipeline companies simply represented to the Commission they were or would become a common carrier and that was enough to obtain summary judgment on the power to condemn, despite whether the pipeline was truly a common carrier or not.[19]

16. Brief of Amicus Curiae Barron & Adler, LLP at 2, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017), 2016 WL 5795539, at *2 [hereinafter Barron & Adler] (the Barron & Adler amicus brief was drafted by the same author of this Article); *see also* Brief of Amicus Curiae ETC NGL Transport, LLC., *supra* note 14, at 24 (claiming common-carrier pipelines should be able to obtain land through eminent domain as without it "acquiring easements is a much more lengthy and expensive process—if it can be done at all"); Amicus Curiae Brief of Koch Pipeline Company, LP in Support of Motion for Rehearing, *supra* note 14, at 8 (allocating the burden of proof and production so that "true common-carrier pipelines will be entitled to summary judgment").

17. *See* Brief of Amicus Curiae Tex. Pipeline Association, *supra* note 15, at 11 (arguing for the reversal of the court of appeals' holding imposing obstacles that would cause the pipeline industry more time in constructing infrastructure); *see also* Brief of Amici Curiae in Support of Petitioner Denbury Green Pipeline-Tex., LLC at 13, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) (alleging the "intent" standard imposed by the court of appeals will create uncertainty in the pipeline industry because it is unforeseeable whether one or more jurors will determine the necessary intent was present and thus the Supreme Court of Texas should intervene).

18. Gas utility pipelines are treated differently than common carrier pipelines. *Compare* TEX. UTIL. CODE § 181.004 (West 2007) ("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."), *with* NAT. RES. § 111.019(b) ("In the exercise of the power of eminent domain . . . a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.").

19. *See* Paul DeBenedetto, *Texas Agency Tightens 'Common Carrier' Pipeline Rules*, LAW360 (Feb. 24, 2015, 8:23 PM), https://www.law360.com/articles/624669/texas-agency-tightens-common-carrier-pipeline-rules (reporting "previous rules were not as stringent" concerning contractors seeking permits from the Texas Railroad Commission, but the new rule adoptions will require the "operators to verify

The Texas Court of Appeals in Beaumont, following the guidance of the Supreme Court of Texas in *Denbury I*, has now held that bald representations to the Commission of common-carrier status are not necessarily enough for pipeline companies to quickly and easily prove the power to condemn as a matter of law.[20] Landowners argue this is a positive development in the preservation of private property rights and ensures a fair, adversarial system in which claims of common-carrier status can truly be tested in a timely manner.[21] Pipeline companies, however, seek to limit the role of the judiciary in reviewing the pipelines' alleged common-carrier status, as well as the pipelines' power to condemn, until after the installation of the pipeline and after the condemned property has been irreparably altered.[22]

Landowners argue the pipeline industry's desired scenario violates a Texas and United States constitutional mandate—prohibiting government from taking private property unless it is for a public purpose—and, therefore, should not be the law in Texas.[23] Such a scenario, from the landowner's perspective, unfairly grants the pipeline industry much more power than the Texas Department of Transportation (TxDOT) and other condemnors in Texas, because, in addition to regulatory oversight, those other condemnors are required to go through an approval process that allows the affected landowners to become involved and participate in the process.[24]

their status as a 'common carrier"' with sworn statements and documentation).

20. *See Tex. Rice Land Partners*, 457 S.W.3d at 119–20(upholding the new Supreme Court of Texas new test focused on assessing intent to serve the public at the time the pipeline is built to determine common carrier status, rather than relying solely on the filings of Denbury Green to the Texas Railroad Commission).

21. *See* Brief of Amicus Curiae Melvin Lipsitz in Support of Respondents at 14, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) [hereinafter Melvin Lipsitz] (noting the court of appeals' decision will ensure legitimate common carriers have little difficulty obtaining summary judgment and that the "decision creates no conflict between economic growth and private property rights"); *see also* Brief of Amicus Curiae Tex. Land and Mineral Owners Association at 12, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) (alleging the Beaumont Court of Appeals' decision holding "brought balance to a system that had swung too far against private property rights").

22. Barron & Adler, *supra* note 16, at *3; *see also* Melvin Lipsitz, *supra* note 21, at 13 (alleging pipeline companies "could operate as a private line for [many] years while litigation" is pending and further "delay a hearings or trial on its common-carrier status").

23. Barron & Adler, *supra* note 16, at *3; *accord* Melvin Lipsitz, *supra* note 21, at 13–14 (emphasis added) ("Even great economic benefit does not justify ignoring *constitutions* to take property for private use.").

24. Barron & Adler, *supra* note 16, at *3; *accord* Melvin Lipsitz, *supra* note 21, at 9–10 ("[P]ipeline companies occupy a unique position even among condemnors: they are unfettered by the state regulations and political constraints that circumscribe the authority of all other condemnors in Texas.").

While the project-driven expectations and economic considerations of the pipeline industry are important, landowners argue that a citizen's private property rights in Texas are just as—if not more—significant.[25] Landowners arguing in support of the holding in *Denbury I* do not suggest that pipeline projects should cease or even be delayed; rather, they advocate for a scenario in which the landowner can simply seek judicial review to ensure the validity of the pipeline's common-carrier status before the landowner's property is permanently altered by the installation of the pipeline project.[26] If the condemning pipeline is truly a common carrier, then prompt and early judicial review should not be difficult or cause any delay for the pipeline.[27]

From the landowner's perspective, the Supreme Court of Texas's opinion in *Denbury I* and the Texas Court of Appeals in Beaumont's ruling on remand, protects important private property rights that have been recognized in Texas for decades, as well as ensuring adherence to the requirements of both the United States' and Texas' Constitutions.[28]

1. Texas and Federal Law Have Historically Protected Landowner Rights.

The Supreme Court of Texas recently recognized in *Severance v. Patterson*,[29] private property rights are "fundamental, natural, inherent, inalienable, not derived from the legislature" and pre-date not only the United States Constitution and the Texas Constitution, but also the United States itself.[30] The Bill of Rights was added to the United States Constitution, in part, to address concerns about the preservation of property rights.[31] Ratified in

25. Barron & Adler, *supra* note 16, at *3; *see also* Melvin Lipsitz, *supra* note 21, at 13–14 (arguing economic benefits should trump private property rights).

26. Barron & Adler, *supra* note 16, at *3; *see also* Melvin Lipsitz, *supra* note 21, at 11 ("Denbury's right to condemn has still not been adjudicated . . . landowners have little or no power to stop companies like Denbury from taking their land before anyone knows whether they are legally entitled.").

27. Barron & Adler, *supra* note 16, at *3; *see also* Brief of Amicus Curiae Texas Land and Mineral Owners Association, *supra* note 21, at 16 (asserting all challenges to a common carrier status will not always go to a jury and delay the process).

28. Barron & Adler, *supra* note 16, at *3–4; *accord* Melvin Lipsitz, *supra* note 21, at 7–8 (maintaining the Texas Constitution demands that private property owners not be effortlessly stripped of their right to property).

29. Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

30. Barron & Adler, *supra* note 16, at *4; *see also Patterson*, 370 S.W.3d at 709 ("Private property rights have been described 'as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions.'" (quoting Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977))).

31. Barron & Adler, *supra* note 16, at *4; *see also* Bute v. Illinois, 333 U.S. 640, 650–51 (1948)

1791, decades before Texas would become a state, the Bill of Rights amended the United States Constitution, specifically stating: "nor shall private property be taken for public use without just compensation."[32]

Texas adopted its own Constitution in 1876, and consequently included its own protections of private property rights: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ."[33] Since 1876, Texas courts have consistently affirmed the value of private property rights.[34] For example, in 1913 the Supreme Court of Texas held:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowed sense of that word, it is not 'taken' for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[35]

(noting that the Bill of Rights was added to the Constitution in 1791 "to secure . . . 'unalienable Rights' as those of 'Life, Liberty and the pursuit of Happiness").

32. Barron & Adler, *supra* note 16, at *4; *see also* U.S. CONST. amend. V; Tom W. Bell, *"Property" in the Constitution: The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243, 1248 (2012) ("The Fifth Amendment became effective on December 15, 1791, almost three and a half years after the original Constitution . . . .").

33. Barron & Adler, *supra* note 16, at *4; *accord* TEX. CONST. art. I, § 17; *see also* Barshop v. Medina Cty. Underground Water Conservation Dist., 925 S.W.2d 618, 636 (Tex. 1996) (stating the "Texas Constitution was adopted in 1876").

34. Barron & Adler, *supra* note 16, at *4–5; *see, e.g.*, Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 804 (Tex. 2016) ("This Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to 'freedom itself.'" (quoting Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192, 204 (Tex. 2012))).

35. Barron & Adler, *supra* note 16, at *5; *see also* Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth, 158 S.W. 164, 169 (Tex. 1913) (citing Pumpelly v. Green Bay Co., 80 U.S. 166, 177 (1871))

Texas courts have continued to underscore the importance of private property, calling real property both "valuable" and "unique."[36]

The right to exclude others from property is a fundamental right of private property ownership.[37] Both the Supreme Court of Texas and the United States Supreme Court have recognized the right to exclude all others from use of property as one of the "most essential sticks in the bundle of rights that are commonly characterized as property."[38]

2. Contrary to Other Governmental Bodies with Condemning Authority, Private, For-Profit Common Carrier Pipelines Operate with Effectively Zero Regulatory Oversight or Regulation in the Forcible Taking of Private Property.[39]

Currently, a private, for-profit company purporting to be a common carrier needs only to determine that public convenience and necessity require property to be taken.[40]

(recognizing the importance of real property).

36. Barron & Adler, *supra* note 16, at *5; *see also* Sayeg v. Fed. Mortg. Co., 54 S.W.2d 238, 239 (Tex. Civ. App.—Waco 1932, no writ) (referring to "valuable real property"); City of San Antonio v. Rische, 38 S.W. 388, 390 (Tex. Civ. App. 1896, writ ref'd) (discussing "valuable real property"); *In re* Stark, 126 S.W.3d 635, 640 (Tex. App.—Beaumont 2004, orig. proceeding) ("[E]very piece of real estate is unique . . . .").

37. Barron & Adler, *supra* note 16, at *5–6; *see also* Severance v. Patterson, 370 S.W.3d 705, 713 (Tex. 2012) ("[T]he right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.").

38. Barron & Adler, *supra* note 16, at *6; Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982), *abrogated by* Seawell Associates v. City of N.Y., 74 N.Y.2d 92 (1989) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 634 (Tex. 2004) (recognizing property as "one of the most essential sticks in the bundle of rights" (quoting Dolan v. City of Tigard, 512 U.S. 374, 393 (1994))); Marcus Cable Assoc., LP v. Krohn, 90 S.W.3d 697, 700 (Tex. 2002) ("A property owner's right to exclude others from his or her property is recognized as 'one of the most essential sticks in the bundle of rights' . . . ." (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1994))).

39. Barron & Adler, *supra* note 16, at *6; *see also* Amanda Buffington Niles, *Eminent Domain and Pipelines in Texas: It's as Easy as 1, 2, 3—Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEX. WESLEYAN L. REV. 271, 277 (2010) (noting the low threshold requirements as "courts justified the takings as long as there was a public benefit derived from the activity, regardless of what entity effectuated the taking"); Saul Elbein, *Pipeline Companies Seize Land in Texas at Will: Landowners have Little Recourse When a Pipeline Company Uses Eminent Domain Authority*, TEX. OBSERVER (Wed., Aug. 22, 2012 at 5:34 pm CST), https://www.texasobserver.org/pipeline-companies-seize-land-in-texas-at-will/ ("It appears that pipeline companies in Texas can seize whatever land they want and that no one is regulating the process.").

40. Barron & Adler, *supra* note 16, at *6; *see, e.g.*, Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565–66 (Tex. App.—San Antonio 1998, pet. denied) ("Therefore, once a company establishes that its right to condemn is derived from these articles and that its board of directors determined that the

This determination is not public; usually, the pipeline company's board of directors makes the decision in an internal, private meeting.[41] Frequently, this determination is made without ever holding a meeting.[42] For example, some pipeline companies have recently used a "Written Consent of Managers in Lieu of Meeting" in which an internal decision is made as to what private property the pipeline company desires to forcibly take without the formality of even holding an actual meeting among the board of directors.[43]

Under current law, once the privately held pipeline company has unilaterally determined that it desires to take private property as part of a pipeline project, it can in many instances immediately gain condemnation power.[44] The taking may only be a pipeline easement, or the company could decide, by itself, for example, that it desires to take permanent access roads across private property, surface easements for above-ground compressor stations or pump stations, or any other facility the pipeline company decides it would like to obtain.[45]

taking was necessary, a court should approve the taking unless the landowner demonstrates fraud, bad faith, abuse of discretion, or arbitrary and capricious action."); *see also* Amanda Buffington Niles, *supra* note 39, at 279 ("When Texas courts have addressed the definition of 'public use,' the courts admittedly have adopted a 'rather liberal view as to what is or is not a public use.'" (quoting Coastal States Gas Prod. Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958))); Amy Hardberger, *Landowners Under Siege in the Big Bend*, SAN ANTONIO EXPRESS-NEWS (JAN. 25, 2016), http://www.mysanantonio.com/opinion/commentary/article/Landowners-under-siege-in-the-Big-Bend-6777875.php (highlighting the requirement in Texas that condemned land be for public use, but acknowledging that "the mechanisms for balancing private property rights against the public good are now being exploited by profit-driven companies").

41. Barron & Adler, *supra* note 16, at *7; *see* Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565–66 (Tex. App.—San Antonio 1998, pet. denied) (recognizing Teco produced "a unanimous consent of shareholders and a unanimous consent of the directors"); Hardberger, *supra* note 40 (arguing the current process "entitles [pipeline owners] to access the powers of eminent domain condemnation without public involvement or regulatory oversight"); Elbein, *supra* note 39 (criticizing the current process for condemnation for pipelines because the landowner "will not be invited to [the] hearing" and only provide access to subsequent hearings to determine the amount of compensation).

42. Barron & Adler, *supra* note 16, at *7; *see* TEX. BUS. & ORGS. CODE ANN. § 6.201(b) (West 2016) ("The owners or members or the governing authority of a filing entity, or a committee of the governing authority, may take action without holding a meeting, providing notice, or taking a vote if each person entitled to vote on the action signs a written consent or consents stating the action taken.").

43. Barron & Adler, *supra* note 16, at *7; *see* Loesch v. Oasis Pipe Line Co., 665 S.W.2d 595, 599 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (holding Oasis was within its corporate power to determine that land was necessary for the public interest).

44. Barron & Adler, *supra* note 16, at *7; *see, e.g.*, *Loesch*, 665 S.W.2d at 599 (acknowledging Texas does not place express restrictions on the corporation's power to condemn land).

45. Barron & Adler, *supra* note 16, at *7; *see, e.g.,* Dyer v. Tex. Elec. Serv. Co., 680 S.W.2d 883, 885 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) ("Even though the only present use of the tap line for which the property is sought to be condemned is to serve a single customer, Gulf, the condemnation would still be deemed a public use.").

A landowner's only hope to challenge the pipeline company's chosen route is limited to showing the choice was "made in bad faith or was arbitrary, capricious, or fraudulent"—a heavy burden.[46]

Additionally, under current law in Texas, a pipeline company does not have to apply for, or hold, a T-4 permit before it exercises the power to condemn.[47] The company need only have a T-4 permit and have filed a New Construction Report (Form PS-48) before beginning actual construction of the pipeline.[48]

Once the pipeline company has decided to condemn, it can also move very quickly in taking private property.[49] Under current Texas law, a pipeline company can make the decision to condemn and take possession of the chosen property in as few as sixty-four days.[50]

The quick decision to condemn,[51] the secretive nature of the internal

46. Barron & Adler, *supra* note 16, at *8 (quoting Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 566 (Tex. App.—San Antonio 1998, pet. denied)); *see also* Anderson v. Clajon Gas Co., 677 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1984, no writ) (declaring a condemnor is not required "to show that property is 'necessary' for public use absent some evidence of fraud, bad faith, or arbitrary and capricious action").

47. Barron & Adler, *supra* note 16, at *8; *see also* 16 TEX. ADMIN. CODE § 3.70 (Tex. R.R. Comm'n, Pipeline Permits Required) (explaining the process of applying for or renewing a pipeline permit); *Pipeline Eminent Domain and Condemnation*, R.R. COMM'N OF TEX., http://www.rrc.texas.gov/about-us/resource-center/faqs/pipeline-safety-faqs/faq-pipeline-eminent-domain-and-condemnation/ (last visited Mar. 13, 2017) [hereinafter R.R. COMM'N OF TEX.] (reiterating pipelines do not need a permit before building a pipeline, noting the absence of a "statutory or regulatory requirement that a pipeline operator seek or receive from the Railroad Commission either a determination that there is a need for the pipeline capacity or prior approval to construct a pipeline and related facilities").

48. Barron & Adler, *supra* note 16, at *8; *see also* ADMIN. § 8.115 (Tex. R.R. Comm'n., New Construction Commencement Report) (requiring each operator to file a report "at least 30 days prior to the commencement of constructions"); Elbein, *supra* note 39 ("When a multinational pipeline company says it needs your land, that claim will be judged as reasonable until you can prove otherwise in court.").

49. Barron & Adler, *supra* note 16, at *8; *see also* TEX. PROP. CODE § 21.0113(b)(3) (West 2016) (allowing the final offer to be made on the thirtieth day after the initial offer).

50. Barron & Adler, *supra* note 16, at *8; *see also* PROP. § 21.0113(b) (requiring the initial offer to be open for thirty days, and the final offer must be open for fourteen days before filing a condemnation petition); PROP. § 21.015 (providing a special commissioners' hearing must be held no sooner than twenty days from the date the special commissioners are appointed); PROP. § 21.021 (allowing a pipeline company to take possession as soon as the special commissioners' award is rendered and the amount of the award is paid to the landowner or deposited in the registry of the court).

51. Barron & Adler, *supra* note 16, at *9; *see In re* Tex., 325 S.W.3d 848, 850 (Tex. App.—Austin 2010, no pet.) (indicating that the purpose of "[t]he eminent domain statute is [] to provide a speedy and fair assessment of damages" (quoting Gulf Energy Pipeline Co. v. Garcia, 884 S.W.2d 821, 823 (Tex. App.—San Antonio 1994, no pet.))); *see also* Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 467 (2007) (postulating the reason for expedited process in delegated powers is efficiency and time).

decision-making, and the lack affected landowners' involvement in the pipeline company's decision-making process is unique in Texas.[52] Other condemning authorities are required to engage in a lengthy process that includes public involvement in almost every step.[53]

a. The TxDOT Must Undergo a Three to Twenty-Year Public and Transparent Process Before Using the Power to Condemn.

The project development process undertaken by the TxDOT is lengthy, with numerous opportunities for public comment and for governmental oversite.[54] "Project development for major improvement projects can vary from 3 to 20 years, or more, depending on required environmental and ROW (Right of Way) processes; 6 to 10 years is considered typical."[55]

52. Barron & Adler, *supra* note 16, at *9; *see* Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565–66 (Tex. App.—San Antonio 1998, pet. denied) (maintaining there should be court approval where a condemnor can establish its right to condemn and its board of directors have determined that a taking is necessary, "unless the landowner demonstrates fraud, bad faith, abuse of discretion, or arbitrary and capricious action"); Anderson v. Clajon Gas Co., 677 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1984, no writ) (acknowledging the proper method of determining whether a taking is of public necessity is through "a resolution of the board of directors 'clothed' with the right of eminent domain"); *see also* Hardberger, *supra* note 40 (arguing private companies' ability to assert eminent domain condemnation powers without regulatory oversight or public involvement stifles due process). In his article assessing the effects of privatization of eminent domain condemnation decisions in Texas, one author noted the potential threats inherent in such non-regulated decisions. *See* Johnson, *supra* note 51, at 458 ("When eminent domain is delegated to private non-profit and charitable corporations, stricter scrutiny of these delegations is often warranted, given the conflicting interests between the private delegate and the public that might lead to abusive exercises of the power.").

53. Barron & Adler, *supra* note 16, at *9–11; *see, e.g.*, TEX. DEP'T OF TRANSP., PROJECT DEVELOPMENT PROCESS MANUAL 2-18, 3-28 (July 2014), http://onlinemanuals.txdot.gov/txdotmanuals/pdp/pdp.pdf [hereinafter 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL] (designating multiple opportunities for public hearings in the process and planning of designs and environmental impact); *see also* Gulf Energy Pipeline Co. v. Garcia, 884 S.W.2d 821, 824 (Tex. App.—San Antonio 1994, orig. proceeding) (recognizing eminent domain statute was intended to expedite the condemnor's process); Hardberger, *supra* note 40 (comparing the unfettered condemnation powers of pipeline carriers to the starkly different process for permitting utility lines, which requires public comment and review before the Public Utility Commission approves of a proposed project).

54. *See generally* 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL, *supra* note 53 (listing the multiple steps that make up the approval process for new construction with several opportunities for public hearing). Pipeline companies are not required to receive any public comment and have virtually no regulatory oversight in selecting the route of the pipeline. *See* Hardberger, *supra* note 40 (rejecting private pipeline carriers' ability "to access the powers of eminent domain condemnation without public involvement or regulatory oversight," and arguing current condemnation laws applicable to pipeline carriers stifle due process for many reasons, including the lack of public hearings, the absence of public comments, the inability to challenge pipeline routing, and the absence of environmental oversight); *see also* R.R. COMMISSION OF TEX., *supra* note 47 (asserting the TRC has "no authority over the routing or siting of intrastate or interstate pipelines" except "when the pipeline contains 'sour gas'").

55. TEX. DEP'T. OF TRANSP., PROJECT DEVELOPMENT PROCESS FLOWCHART (Nov. 19, 2001), http://www.dot.state.tx.us/env/pdf/resources/DESflowchart.pdf.

The project development process for the TxDOT begins with identifying a need for a project from either public or private sources, including traffic studies and modeling of future demands.[56] Once a project is identified, the project must then be approved.[57] All projects must be approved by the Texas Transportation Commission, either by inclusion in the Unified Transportation Program (UTP) or through a project specific minute order, before beginning project development but after a budget is formulated and the project has cleared the Transportation Planning and Programming Division.[58] Then, the project must be reviewed to determine how the project will meet with the department's area goals, as well as coordination with local governments and agencies.[59] The design phase of the project, where public meetings are held for comment, begins once the project plan is integrated with other planning requirements.[60] The project then moves into the Environmental Phase, after the proposed route is determined, where an "Environmental Impact Statement" ("EIS") is submitted for federal approval, if federal funds are used, or if there is control of access.[61] There is another public hearing after the EIS for public comment before the final environmental clearance.[62] Only after this multi-year process is

56. 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL, *supra* note 53, at 1-2.

57. *See id.* at 1-6 ("All projects must be approved by the Texas Transportation Commission, either by inclusion in the Unified Transportation Program (UTP) or through a project specific minute order, before beginning project development.").

58. *See id.* at 1-6–1-10 (highlighting the requirement that all projects must be approved by one of TxDOT's two approval processes). The routing of pipeline projects, on the other hand, are rarely subject to approval by the Texas Railroad Commission or any public entity. *See* R.R. COMM'N OF TEX., *supra* note 47 (recognizing its lack of authority pertaining to pipeline routing or siting, which is determined by the owner or operator of the pipeline, except "when the pipeline contains 'sour gas'" because of its highly toxic nature); *see also* Hardberger, *supra* note 40 (renouncing the current condemnation process for failing to protect landowners, lacking regulatory oversight, and stifling due process while simultaneously criticizing aspects of the process, such as the inability to challenge a pipeline's route).

59. *See* 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL, *supra* note 53, at 1-12 ("[I]ntegrating project planning with various local, regional and statewide plans.").

60. *See Id.* at 2-2–2-20 ("Public meetings may be conducted numerous times throughout the project development process."). Pipeline companies are not required to hold any public meetings. *See* Hardberger, *supra* note 40 (criticizing the non-existence of public hearings and mechanisms for public comment in regards to a pipeline carrier's condemnation decision).

61. *See* 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL, *supra* note 53, at 3-2 (emphasizing the importance of public involvement in the environmental planning stage; public must remain "informed and kept appraised of project development and given an opportunity to become involved by raising individual concerns").

62. *See* 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL, *supra* note 53, at 3-28–3-29 (discussing the requirements of a public hearing to provide the public with a "formal avenue of public involvement" during the environmental process stage). There is no public involvement in environmental clearance of pipeline projects. *See* Hardberger, *supra* note 40 (noting environmental

completed is the TxDOT cleared to begin right-of-way acquisition.[63]

b. The Public Utility Commission Must Consider Public Input and Involve Affected Landowners Before Authorizing the Power to Condemn.

Before condemning private property for a transmission power line, most utilities "must file an application with the [Public Utility Commission (PUC)] to obtain or amend a Certificate of Convenience and Necessity (CCN)[.]"[64] The application "describes the proposed line and includes a statement by the applicant describing the need for the line and the impact of building it."[65] During the CCN application process, typically a number of routes are proposed.[66]

The PUC must then consider a number of factors in deciding whether to approve the newly proposed transmission line, including:

- Adequacy of existing service;
- Need for additional service;
- The effect of approving the application on the applicant and any utility serving the proximate area;
- Whether the route utilizes existing compatible rights-of-way, including the use of vacant positions on existing multiple-circuit transmission lines;
- Whether the route parallels existing compatible rights-of-way;
- Whether the route parallels property lines or other natural or cultural features;
- Whether the route conforms with the policy of prudent avoidance (which is defined as the limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort); and
- Other factors such as community values, recreational and park areas, historical and aesthetic values, environmental integrity, and the probable improvement of service or lowering of cost to

oversight is not required when a pipeline carrier decides to condemn).

63. *See* 2014 TEX. PROJECT DEVELOPMENT PROCESS MANUAL, *supra* note 53, at 4-9–4-11 (summarizing the various times in which local public agencies and other public entities may become involved during the right-or-way planning stage).

64. PUB. UTIL. COMM'N OF TEX., LANDOWNERS AND TRANSMISSION LINE CASES AT THE PUC 2 (June 2011), http://www.puc.texas.gov/industry/electric/forms/ccn/brochure8x11.pdf.

65. *Id.* at 3

66. *Id.* at 2–3.

consumers in the area.[67]

Landowners may file an informal protest, or intervene formally in the PUC administrative proceeding.[68] If a landowner decides to intervene, the landowner is considered a party to the proceeding and is permitted to fully participate, which allows the landowner to request information through the discovery process, call witnesses, cross-examine witnesses, file briefs, submit proposals for decision, object to an administrative judge's proposal for decision, request re-hearing for determinations after proposals are submitted, and even appeal the final PUC decision to the Travis County District Court.[69]

D. *The Supreme Court of Texas'* Denbury I *Test Was Correctly Applied by the Texas Court of Appeals in Beaumont.*[70]

The Texas Court of Appeals in Beaumont, consistent with *Denbury I*,[71] held a purported common carrier's taking must serve a "*substantial* public interest."[72] This test aligns with the essential principles found in the definition of a common carrier: "one who holds itself out to the general public as engaged in the business of transporting persons or property from one place to another."[73]

Without applying this substantial public interest test to purported common carriers, a pipeline company would need to find only one unaffiliated shipper willing to send one Mcf of gas or a single barrel of oil

67. Barron & Adler, *supra* note 16, at *11–12; *see also* PUB. UTIL. COMM'N OF TEX., *supra* note 64, at 2 (listing factors the PUC considers before approving an application to amend or obtain a CCN for a transmission line); *see also* TEX. UTIL. CODE § 37.056(c) (West 2011); ADMIN. § 25.101(b)(3)(B) (2016) (Tex. Pub. Util. Comm'n, Certification Criteria) (stating pipeline companies in Texas do not have to consider any of these factors).

68. Barron & Adler, *supra* note 16, at *12; *see also* PUB. UTIL. COMM'N OF TEX., *supra* note 64, at 3 (describing the procedures in a PUC administrative proceeding). Landowners have no right to be involved in pipeline routing decisions. Barron & Adler, *supra* note 16, at *12 n.7; *see also* TEX. NAT. RES. CODE §§ 111.019–111.0194 (West 1993) (codifying the law for the right of eminent domain in Texas).

69. Barron & Adler, *supra* note 16, at *12; *see also* PUB. UTIL. COMM'N OF TEX., *supra* note 64, at 3 (describing administrative procedures at the PUC). There is no requirement of public participation or involvement with a pipeline project is proposed. Barron & Adler, *supra* note 16, at 12 n.8; *see also* NAT. RES. CODE §§ 111.019–111.0194 (restricting public participation in pipeline proposal).

70. Barron & Adler, *supra* note 16, at *12.

71. *Tex. Rice Land Partners*, 457 S.W.3d at 117.

72. Barron & Adler, *supra* note 16, at *12; *see Tex. Rice Land Partners*, 457 S.W.3d at 121 (citing Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958)) (establishing the substantial public interest standard), *rev'd*, 510 S.W.3d 909 (Tex. 2017).

73. Barron & Adler, *supra* note 16, at *13; *see* Bennett Truck Transp., LLC v. Williams Bros. Const., 256 S.W.3d 730, 733 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (defining common carrier).

through the pipeline (despite the pipeline being potentially capable of handling 750,000 Mcf per day—over 273 million Mcf per year—or 150,000 barrels per day—in excess of 54 million barrels per year) to establish its common-carrier status.[74] Landowners argue that a pipeline company's mere assertion that there is common inclusion in its pipeline should not give the pipeline an irrefutable right to take private property—that is, a single drop of common gas or oil in the line should not automatically convert the pipeline from a private operator to a common carrier.[75] If such an argument by a pipeline were to be accepted, the pipeline could, theoretically, establish common-carrier status with just one unaffiliated shipper found at the last minute, after private property has already been forcibly taken, and even after the pipeline is operational.[76]

The oil and gas industry is undoubtedly a vital part of the Texas economy, but landowners argue Texas should not sacrifice the fair treatment of private property rights to bolster the industry or the Texas economy generally.[77] Landowners further argue that a well-defined process should be deployed in pipeline takings, as it is in other types of public-use takings in the state of Texas, and that the pipeline industry's commercial interests should not prevail as a limitless justification to ignore prudent processes for any taking of private land.[78]

The pipeline industry's aim, through the *Denbury* saga, is to achieve a system where a pipeline can obtain its common-carrier status through the

74. Barron & Adler, *supra* note 16, at *13; *see* TEX. NAT. RES. CODE ANN § 111.002 (West 1993) (defining "common carrier").

75. Barron & Adler, *supra* note 16, at *13; *see* Jim Malewitz, *Pipeline Proposal Prompts Eminent Domain Debate*, TEX. TRIBUNE (Aug 1, 2014, 6:00 AM), https://www.texastribune.org/2014/08/01/pipeline-proposal-revives-eminent-domain-debate/ (detailing landowners' scrutiny of new rules).

76. Barron & Adler, *supra* note 16, at *13; *see* Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909, 910 (Tex. 2017) (discussing the common-carrier status issue).

77. Barron & Adler, *supra* note 16, at *14. In Texas, private property rights enjoy special status because they are fundamental and pre-date the Texas constitution. *See* Severance v. Patterson, 370 S.W.3d 705, 709 (Tex. 2012) ("Private property rights have been described as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions.'" (quoting Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977))).

78. Barron & Adler, *supra* note 16, at *3, *14 (comparing the process the pipelines desire to the TxDOT and illustrating how such a process would give pipelines "substantially more power than other condemnors in Texas"); *see* Melvin Lipsitz, *supra* note 21, at 13–14 ("Even great economic benefit does not justify ignoring constitutions to take property for private use.").

transportation of miniscule amounts of material through its pipeline.[79] Pipelines also wish to see a process in which a single unaffiliated shipper can agree to move trace amounts of product through a pipeline as short as seven days before a hearing on a landowner's motion for summary judgment to determine whether the pipeline company is truly a common carrier when the company's evidence responding to the landowner's motion is due.[80]

Landowners, on the other hand, argue the process the pipeline companies propose unfairly, unjustifiably, and unnecessarily deprive landowners of any meaningful private property right.[81]

E. *Making a Preliminary Determination on the Power to Condemn, Before Irreparable Damage to Real Property Occurs, Represents Good Public Policy.*

Across the state, Texas courts consistently hold that "[t]he law recognizes that each and every piece of real estate is unique."[82] Moreover, "[i]t is settled policy that a person in possession of lands, using and enjoying them will be protected from wrongful attempts by others to invade the possession, or to destroy its use and enjoyment."[83]

79. *See* Barron & Adler, *supra* note 16, at *13–14 (arguing that under the pipelines' purported system a pipeline company would only need to find a single unaffiliated shipper willing to ship a single unit of goods to establish common carrier status); *see also* Petitioner's Reply Brief, *supra* note 11, at 15 ("[U]nder this Court's *Texas Rice I* common-carrier test, use of the pipeline by one third party, unaffiliated with the pipeline owner, is sufficient for common-carrier status.").

80. Barron & Adler, *supra* note 16, at *14; *see* Petitioner's Reply Brief *supra* note 11, at 11, 14 ("Given the objective evidence (in the new summary judgment record) . . . there was a reasonable probability, at the time the Green Line was planned, that the Green Line would be used by at least one third party, unaffiliated with the pipeline owner."); *see* TEX. R. CIV. P. 166a(c) ("Except on leave of court, the adverse party, not later than seven days prior to the day of hearing [on the motion for summary judgment] may file and serve opposing affidavits or other written response.").

81. *See* Barron & Adler, *supra* note 16, at *14–15, *17–18 (stating the pipeline industry's "power to forcibly take private property should not be above reproach or a modicum of process" and explaining how landowners' desired system promotes fairness while not bogging down condemnation litigation); *see also* Melvin Lipsitz, *supra* note 21, at 13 ("This type of temporal anchoring is critical to a meaningful review of the actual facts supporting common-carrier status. Otherwise, pipeline companies can simply re-invent the facts, after the fact, to suit their needs.").

82. Barron & Adler, *supra* note 16, at *15 (quoting Home Sav. Of Am., F.A. v. Van Cleave Dev. Co., Inc., 737 S.W.2d 58, 59 (Tex. App—San Antonio 1987, no writ)); *see* Home Sav. of Am., F.A. v. Van Cleave Dev. Co., Inc., 737 S.W.2d 58, 59 (Tex. App.—San Antonio 1987, no writ) (analyzing a piece of property worth $1,500,000 that "will specifically damage the entirety of the larger development involved" and finding "ample evidence for the trial judge to find irreparable damage") (citing Greater Hous. Bank v. Conte, 641 S.W.2d 407 (Tex. App.—Houston [14th Dist.] 1982, no writ)).

83. Cargill v. Buie, 343 S.W.2d 746, 749 (Tex. Civ. App.—Texarkana 1960, writ ref'd n.r.e.) ("Robert Cargill . . . cut Buie's south fence and entered upon the right-of-way and began preparing an oil well drillsite and moving in drilling equipment. Preparation of the drillsite included clearing trees and underbrush and earth leveling work.").

When a landowner's property is prepared for the installation of a pipeline, the surface is disturbed, vegetation—including trees—are removed, and trees overhanging the easement area are often cut back or cut down altogether.[84] These sort of site preparation activities are usually permanent in nature and oftentimes taken before the company's common-carrier status has been tested by a landowner, or considered for review by a court.[85] Even if a landowner eventually succeeds on a challenge to the pipeline company's common-carrier status, irreparable damage to the landowner's property could have already been inflicted.

Landowners argue the pipeline industry's oft-repeated complaint that a quick-strike summary judgment may not be available in every case is uncompelling.[86] Texas Rule of Civil Procedure 166a and the standards set forth therein apply to all litigants.[87] Landowners also argue the balance the Supreme Court of Texas thoughtfully struck between the State's need to encourage completion of pipeline projects and to ensure that private property is not irreparably damaged before a claim of common-carrier status is adjudicated by a court, as applied in the Texas Court of Appeals in Beaumont's opinion, is good policy for Texas and appropriately protects irreparable private property rights.[88]

84. Barron & Adler, *supra* note 16, at *15; *see, e.g.*, Lucas v. Morrison, 286 S.W.2d 190, 191 (Tex. Civ. App.—San Antonio 1956, no writ) ("[T]rees growing upon land are part of the realty, unless they have a market value when detached from the land."); *see also* Ortiz v. Spann, 586 S.W.2d 560, 562 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) ("We find, from a review of the temporary injunction record, that a genuine factual dispute exists between the parties relative to the live oak trees in question. We agree with the trial court that the temporary injunction was necessarily issued to preserve the status quo so as to prevent a possible irreparable injury to the plaintiffs if they succeed in a trial on the merits.").

85. Barron & Adler, *supra* note 16, at *16; *see* Melvin Lipsitz, *supra* note 21, at 11 ("[Under the current property code,] landowners have little or no power to stop companies like Denbury from taking their land before anyone knows whether they are legally entitled. If landowners choose to contest condemnation authority, they must do so after their land has already been taken and has suffered irreparable damage.").

86. Barron & Adler, *supra* note 16, at *16; *see* Petitioner's Reply Brief at 6–7, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) (noting "[o]ur opponents' brief complains that Denbury Green and the *amici* are just criticizing the *Texas Rice I* 'reasonable probability' test" and arguing the Court of Appeals misapplied the test "thereby ensuring that the common-carrier issue will only rarely be determinable on summary judgement").

87. *See* TEX. R. CIV. P. 166 (a) (declaring a party may move for summary judgment in his favor, without enumerating or excluding specific parties).

88. *See In re* Tex. Rice Land Partners, Ltd., 402 S.W.3d 334, 338 (Tex. Ct. App.—Beaumont 2013, orig. proceeding [mand. denied]). (summarizing the landowner's arguments for overturning the trial court's decision to grant the pipeline company a writ of possession).

III. CASE LAW DEVELOPMENTS IN THE WAKE OF *DENBURY I*

A. Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, LP, *388 S.W.3d 405 (Tex. App.—Beaumont 2012, Pet. Denied)*[89]

TransCanada Keystone Pipeline sought to condemn the landowner's property for a pipeline easement for the well-known TransCanada Keystone Pipeline project.[90] The landowner filed a motion for summary judgment challenging the pipeline's purported power to condemn, which primarily addressed the interstate nature of the pipeline, arguing the trial court did not have jurisdiction to consider an interstate pipeline, and argued that TransCanada could not "subject itself to the jurisdiction of the Texas Railroad Commission."[91] The trial court denied the landowner's motion for summary judgment and the landowner appealed.[92] On appeal, the landowner argued that the trial court did not have jurisdiction to consider an interstate pipeline, "that Chapter 111 of the Natural Resources Code [did] not apply to" interstate pipelines, and that transporting oil and gas into Texas from other sources contravenes the purpose of Texas oil and gas laws.[93]

The Texas Court of Appeals in Beaumont initially found that TransCanada Keystone Pipeline was a common carrier and held that the Legislature did not expressly limit the power to condemn conferred in chapter 111 of the Natural Resources Code only to interstate pipelines.[94] The Texas Court of Appeals in Beaumont also rejected the landowner's broad policy argument, finding that "while *Peterson* generally holds that Texas' oil and gas laws were intended to conserve Texas's resources, *Peterson* does not support appellants' contention that affording common-carrier status to an entity that is transporting oil produced and sold in a foreign jurisdiction contravenes that intention."[95] The appellate court affirmed the trial court's denial of the landowner's motion for summary judgment.[96]

89. Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, LP, 388 S.W.3d 405 (Tex. App.—Beaumont 2012, pet. denied).

90. *Id.* at 406–07.

91. *Id.*

92. *Id.* at 407.

93. *Id.*

94. *See id.* at 408 ("[T]he Legislature did not use the words 'interstate' or 'intrastate' in section 111.002(1) when describing the type of pipeline to which the subsection applies, and we must presume that the Legislature excluded these terms for a purpose."); *see also* TEX. NAT. RES. CODE § 111.002(1) (West 1993) (limiting coverage only to "any part of a pipeline in the State of Texas").

95. *Rhinoceros Ventures Grp.*, 388 S.W.3d at 410 (citing Peterson v. Grayce Oil Co., 37 S.W.2d 367, 371 (Tex. Civ. App.—Fort Worth 1931), *aff'd*, 98 S.W.2d 781 (Tex. 1936)).

96. *Id.*

B. *In Re* Tex. Rice Land Partners, Ltd.,[97] *402 S.W.3d 334 (Tex. App.—Beaumont 2013, Orig. Proceeding [Mand. Denied])*

TransCanada Keystone Pipeline filed a statutory condemnation suit against Texas Rice Land Partners seeking to condemn a pipeline easement.[98] A special commissioners' hearing was held and the award of the special commissioners' was deposited with the court.[99] The landowner argued that the trial court had to resolve the issue of whether TransCanada Keystone Pipeline was a common carrier *before* granting TransCanada Keystone Pipeline a writ of possession.[100] The trial court eventually granted TransCanada Keystone Pipeline a writ of possession over the landowner's objection and the landowner filed a petition for writ of mandamus to vacate a writ of possession.[101]

The Texas Court of Appeals in Beaumont distinguished *Denbury I* because it dealt with a carbon dioxide pipeline and its holding was expressly limited to similar carbon dioxide pipelines.[102] The court went on to hold that there must be some evidence of the power to condemn in the record before a pipeline company may be granted a writ of possession, however, in this case "undisputed evidence through the sworn affidavit of [TransCanada Keystone Pipeline's representative], together with supporting documentation, [substantiated] TransCanada's contention that the Keystone Pipeline is a common carrier line."[103] The Texas Court of Appeals in Beaumont ultimately denied the landowner's requested mandamus relief.[104]

C. Crawford Family Farm P'ship. v. TransCanada Keystone Pipeline, LP,[105] *409 S.W.3d 908 (Tex. App.—Texarkana 2013, Pet. Denied)*

TransCanada Keystone Pipeline sought to exercise its "power of eminent domain to acquire an easement for a" pipeline transporting "crude

97. *In re* Tex. Rice Land Partners, Ltd., 402 S.W.3d 334 (Tex. App.—Beaumont 2013, orig. proceeding [mand. denied]).

98. *Id.* at 336.

99. *Id.*

100. *Id.* at 338

101. *Id.* at 336.

102. *Id.* at 338–39.

103. *Id.* at 340 (first citing TEX. PROP. CODE ANN. § 21.012 (West 2014); then citing TEX. NAT. RES. CODE ANN. § 111.002(1) (West 1993)).

104. *Id.* at 338–40.

105. Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, LP, 409 S.W.3d 908 (Tex. App.—Texarkana 2013, pet. denied).

petroleum across land owned by Crawford."[106] After the special commissioners' hearing, TransCanada filed a motion for summary judgment seeking a ruling that it was a common carrier and possessed the power to condemn.[107] The landowner opposed the motion arguing that TransCanada Keystone Pipeline is not a common carrier because the pipeline is interstate and Crawford also challenged the purported public use of the pipeline.[108] The trial court granted summary judgment in favor of TransCanada Keystone Pipeline and the landowner appealed.[109]

The Texas Court of Appeals in Texarkana held the mere fact that the pipeline is interstate is not dispositive[110] and further held that to be a common carrier, a company does not have to meet each and every provision of chapter 111 of the Natural Resources Code.[111] Labeling TransCanada a common carrier, the appellate court reasoned that if TransCanada Keystone Pipeline, as a transporter of crude petroleum, was subject to all the provisions of chapter 111, then TransCanada Keystone Pipeline would never be able to comply with all the provisions because, as an example, the tariff on interstate crude oil pipelines is subject to the Federal Energy Regulatory Commission and not the Commission.[112]

The court also held that *Denbury I's* "reasonable probability test" applied, even though TransCanada Keystone Pipeline's common-carrier status was not derived under section 111.002, subsection 6 of the Texas Natural Resources Code.[113] The appellate court found that there was sufficient evidence to pass *Denbury I's* reasonable probability test and noted that Crawford did not submit any evidence to the trial court that otherwise contradicted or challenged evidence of TransCanada Keystone Pipeline's common-carrier status.[114]

106. *Id.* at 910–11.

107. *Id.* at 911.

108. *Id.* at 911, 914 n.15.

109. *Id.* at 922.

110. *See id.* at 918 ("[H]ad the Legislature intended to exclude interstate petroleum pipelines from the definition of common carrier, it could have easily done so with an express limitation.").

111. *See id.* 916–17 (finding the language of chapter 111 to be merely descriptive of types of common carriers, rather than prescriptive for all common carriers).

112. *See id.* ("TransCanada is such a common carrier as contemplated in chapter 111. However, because TransCanada owns and operates an interstate crude oil pipeline, it is subject to the rate-setting jurisdiction of the FERC and not the similar powers that would otherwise be exercised by Texas regulatory authorities.").

113. *Id.* at 923.

114. *Id.* 924.

D. Crosstex NGL Pipeline, LP v. Reins Rd. Farms-1, Ltd.,[115] *404 S.W.3d 754 (Tex. App.—Beaumont 2013, No Pet.)*

Crosstex sought permission to survey on Reins Road Farm's property as part of a planned twelve-inch natural gas liquids pipeline project.[116] When permission to survey was denied by the landowner, Crosstex filed suit seeking injunctive relief.[117] The trial court eventually denied Crosstex's request for an injunction and Crosstex appealed.[118]

Crosstex argued that common carrier lines are given common-carrier status by section 111.002, subsection 1 of the Texas Natural Resources Code and common carrier crude petroleum pipelines are not used to carry *just* crude petroleum, but also natural gas liquids.[119] The landowner countered that "natural gas liquids are not encompassed by the common definitions that apply to the term 'crude petroleum'" and are thus not contemplated in section 111.002, subsection 1 of the Texas Natural Resources Code.[120] The Texas Court of Appeals in Beaumont held that the common usage of the term "crude petroleum" means "petroleum as it occurs naturally, as it comes from an oil well, or after extraneous substances (as entrained water, gas, and minerals) have been removed[.]"[121] The court went on to analyze other references in the Natural Resources Code and noted several distinctions between references to crude petroleum and other hydrocarbon substances.[122] The Texas Court of Appeals in Beaumont ultimately concluded that the trial court did not abuse its discretion in rejecting Crosstex's argument that the term "crude petroleum" in the Natural Resources Code also included a by-product like natural gas liquids.[123]

The court also held that there was evidence supporting the inference that

115. Crosstex NGL Pipeline, LP v. Reins Rd. Farms-1, Ltd., 404 S.W.3d 754 (Tex. App.—Beaumont 2013, no pet.).

116. *Id.* at 756.

117. *Id.*

118. *Id.* at 757.

119. *See id.* ("According to Crosstex, common carrier lines are used to transport crude petroleum, crude petroleum includes natural gas liquids, and crude petroleum lines are given common carrier status by section 111.002(1) of the Texas Natural Resources Code.").

120. *See id.* at 758 ("According to [Reins Road Farms], natural gas liquids are not encompassed by the common definitions that apply to the term 'crude petroleum.'").

121. *Id.* (quoting *Crude petroleum*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 546 (Merriam-Webster 2002)).

122. *See id.* at 758–59 ("Other provisions of the Natural Resources Code reflect that the Legislature appreciates a distinction between substances that are in a crude state and substances that are derived as by-products from that substance.").

123. *See id.* at 759 ("The Legislature's choice to distinguish between crude oil and by-products of crude in various other provisions found in the Natural Resources Code lends support to our conclusion that the Legislature did not conflate crude petroleum and all of its potential by-products.").

the pipeline would not actually be used by the public because evidence suggested the pipeline would be used exclusively by Crosstex and its affiliates.[124] Crosstex offered evidence of its attempts to obtain unaffiliated shippers and that the pipeline would be dedicated to the public; however, the court rejected Crosstex's evidence and affirmed the trial court's denial of Crosstex's requested injunction.[125]

E. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC,[126] *457 S.W.3d 115 (Tex. App.—Beaumont 2015, Pet. Granted),* Rev'd*, 510 S.W.3d 909 (Tex. 2017)*

On remand from the Supreme Court of Texas, Denbury Green again moved for summary judgment arguing that it is a common carrier.[127] The trial court granted Denbury Green's motion, concluding that Denbury Green was a common carrier.[128]

The Texas Court of Appeals in Beaumont held that the right of eminent domain conferred by section 2.105 of the Business Organizations Code still requires Denbury Green to meet chapter 111 of the Texas Natural Resources Code's common carrier requirement.[129] The court further held that the Supreme Court of Texas' new test for determining common-carrier status is still good and applicable law.[130] The court found that summary judgment was inappropriately given by the trial court because reasonable minds could differ regarding whether Denbury Green's evidence demonstrated a reasonable probability that the pipeline will, at some point after construction, serve the public.[131]

The Supreme Court of Texas granted a petition for review and reversed the court of appeals' ruling.[132]

124. *See id.* 760 ("[W]e conclude there is evidence supporting the inference that the pipeline will not actually be used by the public.").

125. *See id.* at 762 ("[T]he trial court's conclusion that Crosstex would probably be using the pipeline's entire capacity to transport its own natural gas liquids to Crosstex affiliates for further processing is reasonable.").

126. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC., 457 S.W.3d 115 (Tex. App.—Beaumont 2015, pet. granted), *rev'd,* 510 S.W.3d 909 (Tex. 2017).

127. *Id.* at 117.

128. *Id.*

129. *See id.* at 119 ("Thus, to have the right of eminent domain conferred by chapter 111, as referenced in section 2.105, an entity must still meet chapter 111's common carrier requirement.").

130. *See id.* at 120 (quoting Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192, 202 (Tex. 2012)).

131. *See id.* at 121–22 ("In this case . . . we conclude that reasonable minds could differ regarding whether . . . a reasonable probability existed that the Green Line would serve the public.").

132. *See* Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909, 918 (Tex. 2017) ("Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's

F. Allen v. Enbridge G&P (E. Tex.) LP,[133] *12-14-00034-CV, 2016 WL 364003 (Tex. App.—Tyler Jan. 29, 2016, No Pet.) (Mem. Op.)*

Enbridge brought a condemnation action against Allen for a natural gas pipeline.[134] Allen did not contest that Enbridge was a common carrier, but rather contested Enbridge's proposed taking of an easement that would allow a pipeline that would transport natural gas *and its associated products*.[135] Enbridge amended its petition, narrowing the scope of the materials that could permissibly be sent through the pipeline to "natural gas and its constituent elements."[136]

After a jury trial, the trial court rendered judgment on Enbridge's amended petition. The landowner filed a motion to set aside the judgment and the trial court thereafter rendered an amended judgment that included a handwritten footnote which stated that Enbridge was entitled to transport only natural gas, "which may include various constituent elements from the well."[137] The landowner then filed a motion for new trial or, alternatively, to reform the amended judgment to delete references to Enbridge's amended petition and to limit future assignment of the pipeline. The trial court denied the landowner's motion and the landowner appealed.[138]

The Texas Court of Appeals in Tyler concluded that the term "constituent elements" of natural gas means "the fundamental substances of matter that make up natural gas" and that the term "natural gas" necessarily includes a variety of hydrocarbons.[139] The court went on to hold that "use of [the] term [natural gas] alone is sufficient to describe the substance as including a varying combination of elements" and "constituent elements," therefore, "is redundant and unnecessary to describe the product [being] transported."[140]

The Texas Court of Appeals in Tyler also held that the sought after easement could not be assigned without restriction and that such an

judgment.").

133. Allen v. Enbridge G&P (E. Tex.) LP, No. 12-14-00034-CV, 2016 WL 364003 (Tex. App.—Tyler Jan. 29, 2016, no pet.) (mem. op.).

134. *Id.*

135. *See id.* at *1 (noting that Enbridge's original petition alleged it was engaged in "the business of . . . pipeline facilities 'to transport, measure and control the flow of natural gas, its constituents and associated products").

136. *Id.* ("Enbridge amended its petition to change 'natural gas, its constituents and associated products' to 'natural gas and its constituent elements.'").

137. *Id.* at *2 (citation omitted).

138. *See id.* ("Thereafter, Appellants filed a motion for new trial . . . the court denied Appellant's motion, and this appeal followed.").

139. *Id.* at *4.

140. *Id.*

unrestricted right conflicts with the law because it did not properly limit the easement to be used in the future for public use.[141] Consequently, the court modified the trial court's amended judgment by adding the following language: "[N]otwithstanding any language or provision to the contrary in this judgment or in any attachments or exhibits incorporated therein, the easements can be assigned only to an assignee that qualifies as a transporter of natural gas as defined in the Texas Utilities Code."[142] The appellate court affirmed the trial court's judgment as modified.[143]

G. Saner v. BridgeTex Pipeline Co.,[144] *11-14-00199-CV, 2016 WL 4009973 (Tex. App.—Eastland July 21, 2016, Pet. Denied)*

BridgeTex was designated by the Texas Railroad Commission as a common carrier and granted a T-4 permit.[145] BridgeTex thereafter exercised its power of eminent domain to obtain a crude oil pipeline "easement by condemnation across Saner's [] property."[146] The trial court found that BridgeTex was a common carrier after a one-day bench trial and the landowner appealed.[147]

The Texas Court of Appeals in Eastland applied *Denbury's* reasonable probability test, despite the fact that BridgeTex was designated a common carrier under Natural Resources Code, section 111.002(1) (crude petroleum pipelines) as opposed to *Denbury I's* narrow holding under 111.002(6) (carbon dioxide pipelines).[148] The court found that there was no persuasive distinction in the reasonable probability standard set by *Denbury I* between crude petroleum common carriers and carbon dioxide common carriers, and went on to find sufficient evidence that BridgeTex was a common carrier sufficient for purposes of applying the *Denbury* reasonable probability test.[149]

The landowner also argued that there was no public use because only crude oil producers could use the pipeline and not the general public at large,

141. *Id.* at *7 (citing Aycock v. Hous. Lighting & Power Co., 175 S.W.2d 710, 714 (Tex. Civ. App.—Houston [1st Dist.] 1943, writ ref'd w.o.m.).

142. *Id.*

143. *Id.*

144. Saner v. BridgeTex Pipeline Co., No. 11-14-00199-CV, 2016 WL 4009973 (Tex. App.—Eastland July 21, 2016, pet. denied).

145. *Id.* at *1.

146. *Id.*

147. *Id.*

148. *Id.* at *2–3.

149. *See id.* at *3 ("There is no distinction between crude petroleum common carriers under Section 111.002(1) and carbon dioxide common carriers under Section 111.002(6) that would justify a departure from *Denbury*'s reasonable probability test.").

offering the example of an electricity line connecting a private individual's house to the public electrical grid.[150] The Texas Court of Appeals in Eastland rejected this argument, finding such argument in conflict with settled law.[151] The court affirmed the judgment rendered by the trial court in favor of BridgeTex.[152]

IV. SUPPLEMENT TO PIPE(LINE) DREAMS POST-*DENBURY GREEN*[153]

On January 6, 2017, the Supreme Court of Texas handed down its opinion in *Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd.*[154] This opinion is the second Supreme Court of Texas opinion in the *Denbury* saga that has now stretched almost decade.[155] The Court began its opinion by reciting the test for common-carrier status, in which the court had to consider whether the pipeline company "established as a matter of law a reasonable probability that, at some point after construction, the [subject pipeline] would 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."[156] The Court, foreshadowing its ultimate determination early in the opinion, noted, "Denbury Green satisfied the test established in *Texas Rice I* and is a common carrier pursuant to Chapter 111 of the Natural Resources Code."[157] The Court first concluded that the Texas Court of Appeals in Beaumont incorrectly applied the intent test

150. *Id.*

151. *Id.* (citing Hous. Auth. of City of Dall. v. Higginbotham, 143 S.W.2d 79 (Tex. 1940)).

152. *Id.* at *4.

153. The original paper styled Pipe(line) Dreams Post-*Denbury Green* was prepared on September 21, 2016.

154. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017)

155. *See id.* (introducing the second and latest Texas Supreme Court opinion in the *Denbury* saga); Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015), *rev'd*, 510 S.W.3d 909 (Tex. 2017) (delineating an appeal from suit remanded after first Texas Supreme Court ruling, and the subsequent reversal of the Beaumont Court of Appeals' treatment of the case); Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012) (articulating the Texas Supreme Court's initial opinion in the *Denbury* saga); Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex. LLC, 296 S.W.3d 877 (Tex. App.—Beaumont 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012) (indicating the case has been in the court system for nearly ten years).

156. *Denbury Green*, 60 Tex. Sup. Ct. J. at 208 (applying the test initially followed in *Texas Rice I*).

157. *Id.* at 205. The Supreme Court of Texas oddly suggested that obtaining a T-4 permit "would give [Denbury] eminent domain authority pursuant to the Natural Resources Code." *Id.* at 202. This is despite its prior holding that "[p]rivate property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form." *Denbury I*, Fat 199.

established in *Texas Rice I*.[158] The Texas Supreme Court clarified that the intent test it previously established required the showing of a "reasonable probability that, at some point after construction, the [subject pipeline] would 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."[159] Rather than limiting its analysis, for example, to concrete agreements to ship on behalf of others in place at the time of planning or construction of the pipeline, the Texas Supreme Court held that post-construction "contracts can be relevant to showing a reasonable probability that, 'at some point after construction,' a pipeline will serve the public."[160] The Court went on to hold that the evidence presented by the pipeline company in its amended motion for summary judgment, including a post-construction contract, "conclusively established that there was a reasonable probability that, at some point after construction, the Green Line would serve the public."[161] The Court also held that the Texas Court of Appeals in Beaumont incorrectly required a substantial public interest to support common-carrier status, finding that to satisfy the public use requirement Texas law only requires "evidence establishing a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner . . . ."[162]

158. *See Denbury Green*, 60 Tex. Sup. Ct. J. at 205 (specifying the court of appeals misinterpreted the phrase "for a person intending to build" and its reliance on it was improper because the phrase "does not describe the requisite intent of a party at the time the pipeline was contemplated") (citing *Tex. Rice Land Partners*, 457 S.W.3d 115)).

159. *Denbury Green*, 60 Tex. Sup. Ct. J. at 208.

160. *Id.* at 206.

161. *Id.*

162. *Id.* at 207.