ARTICLE

"TX RICE V. DENBURY"

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I. THE CHANGED PLAYING FIELD

The Texas Legislature's encouragement of oil and gas exploration, production, marketing, and transportation over the last century has resulted in Texas becoming the largest oil and gas producing state in the country.[1] Such active encouragement has also resulted in Texas becoming the second

1. *See* U.S. Energy Information Administration, *Texas State Profile and Energy Estimates*, EIA.GOV (Jan. 19, 2017), https://www.eia.gov/state/analysis.cfm?sid=TX (click on Texas in map) ("Texas was the leading crude oil-producing state in the nation in 2015 and exceeded production levels even from the federal offshore areas.").

largest economy in the country, and it is on pace to be the largest economy in the country.[2] In his concurrence in *Coastal Oil & Gas Corp. v. Garza Energy Trust*,[3] the case in which the Texas Supreme Court rejected a subsurface trespass claim associated with hydraulic well fracturing operations, Justice Willett stated: "'Water, not oil, is the lifeblood of Texas' . . . But together, oil and gas are its muscle, which today fends off atrophy."[4] Justice Willett further stated:

> At a time of insatiable appetite for energy and harder-to-reach deposits—iron truths that contribute to $145 a barrel crude and $4 a gallon gasoline—Texas common law should not give traction to an action rooted in abstraction. Our fast-growing [s]tate confronts fast-growing energy needs, and Texas can ill afford its finite resources, or its law, to remain stuck in the ground. The [c]ourt today averts an improvident decision that, in terms of its real-world impact, would have been a legal dry hole, juris-imprudence that turned booms into busts and torrents into trickles. Scarcity exists, but above-ground supply obstacles also exist, and this [c]ourt shouldn't be one of them.
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> Efficient energy production is profoundly important to Texas and to the nation[] . . . .[5]

Justice Willett went on to explain:

> The world will doubtless diversify its energy profile in coming decades to reduce reliance on carbon-emitting fuel sources, but even assuming major advances in both efficiency and alternative sources, fossil fuels will still meet as much as 80% of global energy demand through 2030.
>
> Bottom line: We are more and more over a barrel as "our reserves of fossil fuels are becoming harder and more expensive to find." Given this supply-side slide, maximizing recovery via fracing is essential; enshrining trespass liability for fracing (a "tres-frac" claim) is not. I join today's no-liability result and suggest another reason for barring tres-frac suits: Open-ended liability threatens to inflict grave and unmitigable harm, ensuring that much of our [s]tate's undeveloped energy supplies would stay that way—undeveloped. Texas oil and gas law favors drilling wells, not drilling consumers. Amid soaring demand and sagging supply, Texas common law must accommodate cutting-edge

2. *Texas*, FORBES (Nov. 2016), http://www.forbes.com/places/tx/.

3. Coastal Oil & Gas Corp. v Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008).

4. *Id.* at 26 (Willett, J., concurring) (footnote omitted) (quoting JAMES A. MICHENER, TEXAS A NOVEL v (1985)).

5. *Id.* at 26–27 (emphasis omitted) (footnote omitted) (citation omitted).

technologies able to extract untold reserves from unconventional fields.[6]

While hydraulic fracturing is essential to maximizing recovery of oil and gas, without pipelines, natural gas and associated liquids and large volume oil wells cannot be produced, as natural gas and large volumes of liquids cannot be economically stored on location or transported from the well location except by pipeline. Without pipelines there is simply no (or minimal) exploration and production of oil and gas. While Texas can "ill afford its finite resources, or its law, to remain stuck in the ground,"[7] the Beaumont Court of Appeals' recent decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas*, did just that, and had a chilling effect on the industry, until the Texas Supreme Court recently reversed that decision.[8]

II. PROCEDURAL POSTURE OF THE *TEXAS RICE* DECISION

Texas Rice started as a lawsuit to gain survey access.[9] Denbury Green Pipeline-Texas, LLC (Denbury Green), the owner of a proposed carbon dioxide pipeline (the Green Line), which is permitted by the Railroad Commission of Texas (the RRC) as a common carrier pipeline, filed suit in district court claiming that as a common carrier it had the preliminary right to conduct a survey across land owned by Texas Rice Land Partners, Ltd. (Texas Rice).[10] Texas Rice refused to grant Denbury Green access.[11] On cross-motions for summary judgment, the district court found that Denbury Green was a common carrier pursuant to section 111.002(6) of the Texas Natural Resources Code and possessed the power of eminent domain under

6. *Id.* at 29 (footnotes omitted) (citations omitted).

7. *Id.* at 27.

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

9. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 196 (Tex. 2012).

10. *Id.*; *see* Lewis v. Tex. Power & Light Co., 276 S.W.2d 950, 954 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (upholding an injunction entered in favor of an electric utility, and finding when the legislature enacted the condemnation statute granting a utility the right to enter upon, condemn and appropriate lands of any person, the legislature "recognized the necessity of preliminary surveys and intended to grant authority to [a utility] to make such surveys"); *see also* Occidental Chem. Corp. v. ETC NGL Transp., LLC, 425 S.W.3d 354, 367 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd) (declaring temporary injunction in favor of condemnor to conduct preliminary survey was not in error (citing I.P. Farms v. Exxon Pipeline Co., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ))); I.P. Farms v. Exxon Pipeline Co., 646 S.W.2d 544, 544 (Tex. App.—Houston [1st Dist.] 1982, no writ (affirming the court of appeals' judgment that such pre-condemnation authority is implicitly included with the broader grant by general enabling statutes, as such survey is "ancillary" to the exercise of eminent domain).

11. *Denbury I*, 363 S.W.3d at 196.

section 111.019 of that Code[12] and permanently enjoined Texas Rice from interfering with Denbury Green's right to enter and perform a survey across Texas Rice's land.[13] Denbury Green filed a separate suit in county court at law to condemn a pipeline easement, but by agreement of the parties to that case, the condemnation proceeding was abated pending the appeal of the survey case, and that case remains pending in the county court at law in Beaumont, Texas.[14]

The Beaumont Court of Appeals, relying on the fact that the pipeline "will be available for public use from the outset of its operation," affirmed the district court's judgment.[15] One justice dissented, believing "[g]enuine issues of material fact preclude[d] summary judgment."[16] The dissent reasoned that eminent domain power cannot extend to the taking of property for private use and that "[m]erely offering a transportation service for a profit does not distinguish a private use from a public use."[17] Texas Rice appealed to the Texas Supreme Court, which adopted a new "reasonably probability" test for common carrier status for carbon dioxide pipelines and reversed and remanded the case to the district court, finding that Denbury Green, in the context of cross-motions for summary judgment, "did not establish [its] common-carrier status as a matter of law" under the new test.[18] The Texas Supreme Court issued its initial opinion on August 26, 2011, and subsequently withdrew that opinion and issued an opinion on rehearing, which still provided that the appellate decision was reversed and remanded for further proceedings in the district court.[19] A second motion for rehearing was filed by Denbury Green, but it was denied.[20]

On remand from the *Texas Rice* Supreme Court decision in the *Texas Rice* survey case, the 172nd Judicial District Court granted Denbury Green

12. *Id.* Throughout this Article, all statutory references are to chapter 111 of the Texas Natural Resources Code, "which governs common carriers of CO_2 and other substances." *Id.* at 196 n.6; *see also* TEX. NAT. RES. CODE § 111.013 (West 2017) (requiring common carriers who are "in the business of transporting . . . carbon dioxide" to "be operated as a common carrier and . . . subject to the jurisdiction of the commission").

13. 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).

14. Denbury Green Pipeline-Tex v. Tex. Rice Land Partners, Ltd., Cause No. 114012 in County Court at Law No. 1, Jefferson County, Texas.

15. *Tex. Rice Land Partners, Ltd.*, 296 S.W.3d at 881.

16. *Id.* (Gaultney, J., dissenting).

17. *Id.* at 883–84.

18. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 202 (Tex. 2012).

19. *Id.* at 194, 204.

20. *Id.* at 194.

summary judgment declaring as a matter of law that Denbury Green was a common carrier under the Texas Supreme Court's newly formulated reasonable probability test. On February 12, 2015, the Beaumont Court of Appeals issued its opinion in the *Texas Rice* survey case reversing and remanding the summary judgment granted by the 172nd Judicial Court,[21] By the time of the Court of Appeals' decision, the Green Line had been in service for almost two years, with construction having been completed in 2010. Denbury Green appealed this adverse decision to the Texas Supreme Court, and after considering the new summary judgment record, the Court found that Denbury Green satisfied the reasonable probability test as a matter of law and reversed and rendered in favor of Denbury Green.[22]

III. FACTUAL BACKGROUND OF *TEXAS RICE*

In its original 2012 opinion, the Texas Supreme Court led off its factual recitation by noting that (a) "Denbury Resources, Inc. is a publicly-traded Delaware corporation that owns all of Denbury Operating Company[;]" (b) "Denbury Operating Company has no employees or physical assets, but owns all the stock of two subsidiaries—Denbury Green . . . and Denbury Onshore, LLC[;]" and (c) all the Denbury entities share officers, as well as office space in Plano, Texas.[23] Despite the separate structuring and business operations of the referenced Denbury entities, throughout its opinion, the Supreme Court referred to the separate Denbury entities collectively, simply as Denbury.[24]

Denbury Green is the owner of pipelines and is regulated by the RRC as a common carrier pipeline. Denbury Onshore is in the oil and gas exploration and production business and is regulated by the RRC as an operator of oil and gas wells and related facilities. Denbury Operating is the sole member of Denbury Onshore and sole member of the parent entity of Denbury Green, and Denbury Resources is the publicly-traded parent corporation.

"Denbury [Onshore] is engaged in tertiary recovery operations that involve the injection of CO_2 into existing oil wells to increase

21. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115, 117 (Tex. App.—Beaumont 2015, pet. granted), *rev'd*, 510 S.W.3d 909 (Tex. 2017).

22. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017). A revised opinion was issued after Texas Rice filed a motion for rehearing but the changes were not substantive.

23. *Denbury I*, 363 S.W.3d at 195.

24. *Id.*

production."[25] Denbury Onshore owns oil and gas leasehold interests (along with other third parties) and operates the West Hastings Unit in Brazoria and Galveston Counties, the Conroe Field Unit in Montgomery County, Texas, and the Oyster Bayou Unit in Chambers County, Texas. These three fields are field-wide units, unitized for the secondary/tertiary recovery of oil.

Denbury Onshore, along with other third-party leasehold owners, owns naturally occurring CO_2 produced from various fields in Mississippi, known as the Jackson Dome area.[26] Denbury Onshore, and the other owners of leasehold interests in the Oyster Bayou and West Hastings Units, desired to implement CO_2 tertiary recovery programs in those Units. To accomplish this, on behalf of itself and the other third-party leasehold owners in those two Units, Denbury Onshore contracted with Denbury Green to transport CO_2 in the Green Line from the Texas/Louisiana border, through Chambers County (where the Oyster Bayou Unit is located) and on to the West Hastings Unit in Brazoria and Galveston Counties, Texas.[27] Aside from the CO_2 reserves in Mississippi, the Texas Supreme Court noted that "[t]he record contain[ed] some evidence that, in the future, Denbury [Onshore] might purchase man-made or 'anthropogenic' CO_2 from third parties" and arrange for Denbury Green to transport this product within the Green Line to various oil and gas fields.[28]

25. *Id.*

26. *Id.*

27. In the district court, Denbury Green, relying on over a century of precedent that upheld common carrier status if a pipeline submitted itself to regulation as a common carrier by applying for and receiving a T-4 permit from the RRC as a common carrier pipeline, did not present any evidence of the other leasehold owners of the CO_2 and other leasehold shippers and end users of the CO_2, but instead relied primarily on its T-4 permit and the tariff filed in connection therewith. Motion for Summary Judgment, Denbury Green Pipeline-Tex v. Tex. Rice Land Partners, Ltd., No. 114012, (County Court at Law No. 1, Jefferson County, Texas).

28. *Denbury I*, 363 S.W.3d at 195. Air Products and Chemicals, Inc. (Air Products) filed an amicus brief in *Texas Rice* in which it informed the Texas Supreme Court that Air Products was selected to receive $285 million in funding from the United States Department of Energy under the Industrial Carbon Capture and Sequestration (CCS) Program to design, construct, and operate a system to capture CO_2 from steam methane reformers located within the Valero Refinery in Port Arthur and sequester the CO_2 underground. Brief for Air Products & Chemical, Inc. as Amicus Curiae Supporting Respondent, at 2, Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012) (No. 09–091). Air Products indicated that it intends to transport the purified CO_2 via pipeline for delivery to oil fields where it can be used in enhanced oil recovery projects, and that Air Products is not in the CO_2 pipeline business, and the expense of construction of such a pipeline would render the CCS Project uneconomical. *Id.* Denbury Green's pipeline is the only existing CO_2 pipeline near Air Products' CCS project that makes this Air Products' project feasible. *Id.* Air Products informed the court that without Denbury Green's pipeline, the recovered CO_2 could not reach those fields where it is needed to increase the amount of crude oil that can be extracted from the field. *Id.*

"In March 2008, Denbury Green" filed an application "with the [RRC] to operate a CO_2 pipeline in Texas."[29] The "pipeline would be a continuation of [the Green Line] originating at Jackson Dome in Mississippi and traversing [through] Louisiana" to the shared Texas border.[30] "Denbury Green's portion of the pipeline would extend from the Texas-Louisiana border to the [West] Hastings [Unit] in Brazoria and Galveston counties."[31] The Texas Supreme Court noted that the permit application, which is one page and "designated a Form T-4, has two boxes for the applicant to indicate whether the pipeline will be operated as 'a common carrier' or 'a private line,'" and that "Denbury Green placed an 'x' in the common-carrier box."[32] The Supreme Court further noted:

> [T-4] applicants are directed to mark one of three boxes if the pipeline will not be transporting "only the gas and/or liquids produced by pipeline owner or operator." Of the three boxes, indicating the gas will be "[p]urchased from others," "[o]wned by others, but transported for a fee," or "[b]oth purchased and transported for others," Denbury Green marked the box for "[o]wned by others, but transported for a fee." Denbury Green also submitted a letter, pursuant to Section 111.002(6) of the Natural Resources Code, stating that it "accepts the provisions of Chapter 111 of the Natural Resources Code and expressly agrees that it is a common carrier subject to duties and obligations conferred by Chapter 111."
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> In April 2008, eight days after Denbury Green filed its application, the [Commission] granted the T–4 permit. In July 2008, the [Commission] furnished a letter to Denbury Green, stating:
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> > "This letter is to confirm the fact that [Denbury Green] has been granted a permit to operate a pipeline (Permit No. 07737) and has made all of the currently necessary filings to be classified as a common carrier pipeline for transportation of carbon dioxide under the provisions of [Section 111.002(6)] and as otherwise required by the [Commission]."[33]

Air Products contended in its brief that imposing a new threshold factual determination of public use, on top of the express statutory right granted in section 111.002 of the Natural Resources Code to establish common carrier status prior to construction, will result in such significant delays that it will all but bring the construction of new CO_2 pipelines to a halt, impeding both CCS projects and the ability to transport CO_2 for delivery and injection in oil recovery projects. *Id.*

29. *Denbury I,* 363 S.W.3d at 195.

30. *Id.*

31. *Id.*

32. *Id.* at 195–96.

33. *Id.* at 196.

In November 2008, Denbury Green filed a tariff with the RRC setting out terms for the transportation of CO_2 in the pipeline.[34] The Supreme Court noted that the RRC "administrative process for granting the permit was conducted without a hearing and without notice to landowners along the proposed pipeline route."[35]

While *Texas Rice Land Partners, Ltd.* was on appeal, Denbury Green acquired the right to enter upon the lands (either through negotiation or condemnation) along the proposed route of the Green Line and constructed and is currently operating the Green Line for the transportation of CO_2.[36] Since completion of the Green Line, Denbury Green has been transporting CO_2 for Denbury Onshore and the other leasehold owners in the Oyster Bayou and West Hastings Units, and active CO_2 tertiary recovery programs are being conducted successfully in both units for the enhanced production of oil.[37]

Subsequent to remand of the case from the Texas Supreme Court, the specifics of which are more fully discussed in Part IX below, Denbury Green obtained summary judgment from the 172nd Judicial District Court declaring Denbury Green to be a common carrier as a matter of law.[38] However, the Beaumont Court of Appeals recently reversed the summary judgment and remanded the case to the trial court.[39]

IV. BACKDROP OF THE COMMON CARRIER ACT

Almost a century ago, the Texas Legislature passed the Texas Company Bill and began allowing "oil and gas companies to receive business charters to operate in more than one phase of the production-transportation-refining-marketing cycle[,]" which is referred to as "vertical integration."[40] The Texas Company Bill (now codified in part at section 2.007 of the Texas Business Organizations Code) requires that companies engaged in the oil production business create separate oil pipeline businesses so that the

34. *Id.* at 196 (footnote omitted) (citation omitted).

35. *Id.*

36. Denbury Green acquired this right in the county court at law condemnation case by depositing with the court clerk the amount awarded by the special commissioners appointed by the court for the easements sought and other security required for a condemnor to take possession under section 21.021 of the Texas Property Code. TEX. PROP. CODE § 21.021 (West 2016).

37. Denbury Green's Petition for Review, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, appendix 4, No. 09-14-00176, affidavit of Dan Cole at 5–6

38. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115, 119 (Tex. App.—Beaumont 2015, pet. granted), *rev'd*, 510 S.W.3d 909 (Tex. 2017).

39. *Id.* at 122.

40. 3 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS OIL & GAS LAW § 13.1[B][1] at 13-5 (Lexis Nexis Matthew Bender 2015).

legislature can more easily regulate pipelines as common carriers while still allowing affiliation between those businesses.[41] As a political tradeoff for allowing vertical integration, the legislature, in 1917, enacted the Common Carrier Act.[42] It sought to curb the power of pipelines to become monopolies[43] by granting the RRC authority over the oil and gas industry and by requiring virtually all pipelines to carry the product of other producers by defining them as common carrier pipelines.[44] In turn, the legislature granted common carriers the power of eminent domain.[45]

Then, in 1930, an oil glut developed. Under the existing law, while common carriers were obligated to transport indiscriminately, that right was of little value if a producer had no market for its oil and thus no need to transport it on a pipeline.[46] As a result, the legislature passed the Common Purchaser Act to require that common purchasers purchase oil in equal proportions from all producers.[47] To ensure that refineries affiliated with common carriers did not discriminate in favor of an affiliated production entity by refusing to purchase non-affiliated production, the legislature defined "common purchaser" to include both the common carrier pipeline and other purchasers affiliated with the common carrier, such as refineries and oil storage facilities.[48] Similarly, in 1931, when gas production in Texas was growing, the legislature amended the Common Purchaser Act to apply to gas producers.[49] The legislature also added provisions in the Common Carrier Act to strengthen the prohibition against discrimination by a common carrier pipeline in favor of its affiliated production arm.[50]

41. *Id.* at 13-5, 13-6.

42. Regulating Pipe Lines, 35th Leg., R.S., ch. 30, § 1, 1917 Tex. Gen. Laws 48, 49 (current version at TEX. NAT. RES. CODE § 111.002 (West 2015)). The Regulating Pipe Lines Act was initially codified in a compilation by the Vernon Law Book Company of Texas which included the 1911 revisions of Texas law. That compilation included all laws adopted through the 36th Legislature. The provisions, along with amendments to the original act, were re-codified when the 39th Legislature passed S.B. 84 and S.B. 7 adopting a fourth revision to Texas Laws. These provisions were ultimately repealed by the Texas Natural Resources Code. Texas Natural Resources Code Act, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Laws 2345.

43. To curb monopolistic power of interstate crude pipelines, the federal government passed legislation—the Hepburn Act of 1906—declaring all crude pipelines to be common carriers. 49 U.S.C. § 15721 (2012); 3 SMITH & WEAVER, *supra* note 40, at § 13.1[B][1]; George S. Wolbert, Jr., *The Pipe Line Story*, 4 OKLA. L. REV. 305, 305–36 (1951).

44. 3 SMITH & WEAVER, *supra* note 40, § 13.1[B][1], at 13-4, 13-5.

45. *Id.*

46. *Id.* at 13-7.

47. *Id.* at 13-6.1, 13-7.

48. *Id.*at 13-7; *see also* TEX. NAT. RES. CODE § 111.081(a)(1) (West 2015) (codifying the definition of a "common purchaser").

49. 3 SMITH & WEAVER, *supra* note 40, at § 13.1[B][1].

50. *See* NAT. RES. CODE §§ 111.016–.017 (preventing common carriers from discriminating

In 1955, the legislature amended the Texas Company Bill and codified a statute first enacted in 1899,[51] granting corporations engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions, all the rights and powers conferred on

"between or against shippers with regard to facilities furnished" and disallowing a common carrier to "charge, demand, collect, or receive . . . lesser compensation for a service rendered than from another for a like and contemporaneous service").

51. Prior to 1917, the year the Common Carrier Act was adopted, the Texas Legislature had authorized the formation of pipeline companies through legislation adopted in 1899 (Act of 1899). Acts of May 15, 1899, 26th Leg., R.S., ch. 117, §§ 1–7, 1899 Tex. Gen. Laws 202, 202–03, *repealed by*, Texas Natural Resources Code Act, 65th Leg., R.S., ch. 871 § 1, sec. 111.002, 1977 Tex. Gen. Laws 2345, 2689 (codified at TEX. NAT. RES. CODE §§ 111.002 (West 2015)). Prior to 1899, the right of eminent domain was limited to a few companies. *See* former TEX. REV. CIV. STAT. arts. 548 (water works), 642(54) (roads from mines, gins, quarries and mills to a line of railroad), 688 (macadam and plank roads for toll-houses), 698-99 (magnetic telegraph lines), 704(6) (canal corporations), 723(1) (dock corporations), 3126 (irrigation, mining, milling, waterworks for cities and towns, and stock raising, or for dam sites and reservoirs), 4439 (railroads) (Austin, 1895), repealed. Corporations organized under the 1899 Statute were the only pipeline companies granted the right of eminent domain. The 1899 Statute was published at articles 1303-1308 of the 1911 Revised Civil Statutes of Texas. *See* former TEX. REV. CIV. STAT. arts. 1303-08 (Vernon 1911) (citing Acts 1899, p. 202, sec.1), now codified at TEX. BUS. ORGS. CODE § 2.105 (Vernon 2014). Article 1303 authorized the organization of corporations for the purpose of "storing, transporting, buying and selling of oil and gas, salt, brine and other mineral solutions in this state," Article 1306 granted such corporations the right of eminent domain, and Article 1308 prohibited discrimination in the charge for storage or transportation, or in the service rendered. *Id.* at arts. 1303, 1306, & 1308, respectively. In 1915, article 1303 was amended to include the production of oil and gas and also sand and clay for the manufacture and sale of clay products, and in 1919 was amended to include fuller's earth. *See* Act approved March 6, 1915, 34th Leg., R.S., ch. 41 (S. S. B. No. 78), § 1, 1915 Tex. Gen. Laws; Act approved April 7, 1915, 34th Leg., R.S., ch. 152 (H.B. No. 93), § 1, 1915 Tex. Gen. Laws 259, and Act approved Mar. 31, 1919, 36th Leg., R.S., ch. 146 (S.B. No. 78), § 2a, 1919 Tex. Gen. Laws 272, 273. In the 1925 Revised Civil Statutes of Texas, Articles 1303-1308 were restated at Articles 1495-1507. Act approved April 1, 1925, 39th Leg., R.S. (S.B. No. 84), § 1, p. 2; see also Acts 1928, 40th Leg., S.S., Final Title— Record of Enactment, p. 1038, published at former TEX. REV. CIV. STAT. arts. 1495-1507 (Vernon 1925), now codified at TEX. BUS. ORGS. CODE § 2.105 (Vernon 2014). In 1935, Article 1495 was amended to include liquefied minerals. Act approved Apr. 27, 1935, 45th Leg., R.S., ch. 169 (S.B. No. 169), § 1, 1935 Tex. Gen. Laws 296. In 1955, the Texas Business Corporation Act repealed articles 1495-1507 and restated relevant provisions at Article 2.01.B(3)(b) of the Act. Act approved Apr. 15, 1955, 54th Leg., R.S., ch. 64 (H.B. No. 16), Art. 1.01, 1955 Tex. Gen. Laws 64. The Article 1495 list was amended to include "oil products" and revised to state that "any corporation engaged as a common carrier in the pipe line business for transporting oil, oil products, gas, salt brine, fuller's earth, sand, clay, liquefied minerals or other mineral solutions, shall have all the rights and powers conferred by Articles 6020 and 6022, Revised Civil Statute, 1925." *Id.* Article 6020 (right to lay, maintain and operate pipe lines along, across and under public streams or highways) and Article 6022 (power of eminent domain) were part of the Common Carrier Act enacted in 1917. The phrase "engaged as a common carrier in the pipe line business" was added to clarify that such corporations were common carriers, but other provisions from Articles 1495-1507, like the power of eminent domain, were excluded since they were redundant to provisions in the Common Carrier Act.

a common carrier under the Common Carrier Act.[52]

In 1977, 1981,[53] and 2007,[54] coal slurry pipelines, then carbon dioxide pipelines, and then pipelines transporting the feedstock for carbon gasification or their products (including derivative products) were added as common carriers.[55] The Texas Natural Resources Code provides:

> a person is a common carrier if it:
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> (1) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline;
> (2) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire and the pipeline is constructed or maintained on, over, or under a public road or highway, or is an entity in favor of whom the right of eminent domain exists;
> (3) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire which is or may be constructed, operated, or maintained across, on, along, over, or under the right-of-way of a railroad, corporation, or other common carrier required by law to transport crude petroleum as a common carrier;
> (4) under lease, contract of purchase, agreement to buy or sell, or other

52. The Texas Business Corporation Act, 54th Leg., R.S., ch. 64 § 1, sec. 2.01(B)(3)(b), 1955 Tex. Gen. Laws 239, 241.

53. The Texas Legislature amended the common carrier statute to include carbon dioxide pipelines in 1981. Acts Apr. 30, 1981, 67th Leg., R.S., ch. 93, § 1, sec. 111.002(6), 1981 Tex. Gen. Laws 199, 200. One purpose of this amendment was to encourage oil exploration by providing the power of eminent domain to companies planning to build carbon dioxide pipelines. *See* Texas Natural Resources Code Act, 65th Leg., R.S., ch. 871, § 1, sec. 111.019, 1977 Tex. Gen. Laws 2345, 2580 (granting common carriers the right of eminent domain). The 1981 House Bill Analysis explains that the addition of carbon dioxide pipelines to the common carrier statute was necessitated by "[t]he diminished sources of energy available within the State of Texas caused by the depletion of oil" and "the importance of pipelines transporting carbon dioxide[.]" *See* H. Comm on Energy Res., H.B. 1199, 67th Leg., R.S. (1981) ("It is felt that large amounts of oil remain to be tapped by feasible tertiary methods from Texas oilfields.")

54. Texas Natural Resources Code Act, 65th Leg., R.S., ch. 871, § 1 sec. 2, 1977 Tex. Gen. Laws 2345, 2692 (codifying coal slurries as common carriers); Acts Apr. 30, 1981, 67th Leg., R.S., ch. 93, § 1 sec. 111.002(6), 1981 Tex. Gen. Laws 199, 200 (amending common carriers to include carbon dioxide pipelines); Acts of June 16, 1991, 72d Leg., R.S., ch. 689, § 1, sec. 6, 1991 Tex. Gen. Laws 2491 (modifying section 112.002 to include hydrogen pipelines as common carriers); Acts of May 4, 2007, 80th Leg., R.S., ch. 22, § 1, sec. 7, 2007 Tex. Gen. Laws 20 (adding a new subsection to section 111.002 relating to "feedstock for carbon gasification").

55. 3 SMITH & WEAVER, *supra* note 40, at § 13.1[B][1].

> agreement or arrangement of any kind, owns, operates, manages, or participates in ownership, operation, or management of a pipeline or part of a pipeline in the State of Texas for the transportation of crude petroleum, bought of others, from an oil field or place of production within this state to any distributing, refining, or marketing center or reshipping point within this state;
> (5) owns, operates, or manages, wholly or partially, pipelines for the transportation for hire of coal in whatever form or of any mixture of substances including coal in whatever form;
> (6) owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public for hire, but only if such person files with the 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; or
> (7) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of feedstock for carbon gasification, the products of carbon gasification, or the derivative products of carbon gasification, in whatever form, to or for the public for hire, but only if the 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, under section 111.020(d) a person may acquire the rights of a common carrier to lay, maintain and operate lines across public streams and highways by filing with the RRC a written acceptance of the Common Carrier Act and in consideration for the rights conferred, the person becomes a common carrier under the Common Carrier Act—thus, the legislature provided for an opt-in as a common carrier, provided that the opting person accepts the duties and obligations imposed under the Act.[56] This provision, which shows the legislature's intent that a pipeline can opt in for common carrier status if it accepts the duties and obligations of a

56. *See* TEX. NAT. RES. CODE § 111.002 (West 2015) (outlining the duties of a common carrier). Under section 111.003, the Act "do[es] not apply to pipelines that are limited in their use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of a common carrier" under section 111.002. NAT. RES. CODE § 111.003; *see also* NAT. RES. CODE § 111.020(d) (allowing op-in by filing an application with the Railroad Commission of Texas); 3 SMITH & WEAVER, *supra* note 40, at § 13.2[B][2].

common carrier under the Common Carrier Act, was not addressed by the Supreme Court in *Texas Rice*.

Under section 2.105 of the Texas Business Organization Code (formerly article 2.01(B)(3) of the Texas Business Corporation Act), a separate, independent grant[57] of eminent domain rights is conferred by the Texas Legislature on entities engaged as a common carrier in the pipeline business:

> In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions has all the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code.[58]

Under this provision, the common law definition of common carrier is used.[59]

V. COMMON CARRIER STATUS BEFORE *TEXAS RICE*

The common carrier doctrine developed under English common law, dating as far back as 1300.[60] At common law, persons transporting their own goods, as well as those operating under contracts to transport goods for others, were deemed common carriers.[61] Since the late 1800s, American

57. Courts have found that oil pipelines possessed the power of eminent domain under both section 111.002(1) of the Natural Resources Code and section 2.105 of the Business Organizations Code and its predecessors. *See* ExxonMobil Pipeline Co. v. Bell, 84 S.W.3d 800, 803–04 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (stating the pipeline was common carrier under the Texas Business Corporation Act); Lohmann v. Gulf Ref. Co., 682 S.W.2d 612, 614–15 (Tex. App.—Beaumont 1984, no writ) (affirming the trial court's conclusion the oil pipeline company was a common carrier with right to exercise eminent domain under the Natural Resources Code and the Texas Business Corporation Act); Harris Cnty. v. Tenn. Prods. Pipe Line Co., 332 S.W.2d 777, 780 (Tex. Civ. App.—Houston 1960, no writ) (same).

58. TEX. BUS. ORGS. CODE § 2.105 (West 2016) (emphasis added).

59. *See* Tex. Att'y Gen. Op. H-830 (1976) (opining a gas pipeline would be a common carrier if it held itself out as available to anyone who would use their services); China-Nome Gas Co. v. Riddle, 541 S.W.2d 905 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (finding the line was to be used for private wells).

60. *See* Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 147 n.31 (1914) ("The earliest carriers were porters, boatmen, and the like."); *see also* SELDEN SOCIETY, BEVERLY TOWN DOCUMENTS 22 (Arthur F. Leach, ed. 1900) ("The old order of porters and creelmen and other common carriers was read. . . .").

61. *See* Nugent v. Smith, 1 CPD 423 (1876) (holding the test is whether person holds out expressly or impliedly that he will carry all persons' goods for hire); WALTER HENRY MACNAMARA & W.A. ROBERTSON, THE LAW OF CARRIERS OF MERCHANDISE AND PASSENGERS BY LAND 6 (2d ed.

courts have recognized that various businesses enjoy common carrier status.[62]

The traditional common law test for a common carrier has been whether the entity holds itself out for hire to the public, not what it actually does. "To or for hire" is a term of art long used to define common carriers. As the Texas Supreme Court stated as recently as 2003: "We have defined common carriers as those in the business of carrying passengers and goods *who hold themselves out* for hire by the public."[63] Holding oneself out for hire is significant, because by doing so the entity subjects itself and its facilities to significant statutory obligations and government regulations, whether the public comes or not. Common carriers are required to serve all comers (subject to capacity limits) at nondiscriminatory rates, even if there are no current takers.[64]

In Texas, under the common law (as opposed to certain express provisions of the Texas Natural Resources Code), the pre-*Texas Rice* test for whether a pipeline was a common carrier was:

1908) (defining "private carrier" as one who carries goods for fee on occasion); *see also* JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 495 (5th ed. 1851) (noting to be deemed a common carrier one "must exercise it as a public employment[,] he must undertake to carry goods for persons generally[,] and he must hold himself out" to transport "goods for hire as a business" rather than "casual occupation").

62. *See, e.g.*, United States v. Ohio Oil Co., 234 U.S. 548, 559–60 (1914) (Pipe Line Cases) (upholding federal statute making all interstate oil pipelines common carriers); Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 437 (1889) (stating a ship carrying goods for hire is a common carrier is settled law); Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 490 (8th Cir. 1959) (holding an air carrier who holds itself out to the public as willing to transport all passengers for hire indiscriminately was a common carrier).

63. Speed Boat Leasing, Inc. v. Elmer, 124 S.W.3d 210, 212 (Tex. 2003) (emphasis added) (quoting Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 213 (Tex. 1989)). Besides the Texas Natural Resources Code, statutes in California, Montana, Nevada, and North Dakota expressly define pipelines as common carriers if they ship products "to or for the public for hire." Producers' Transp. Co. v. R.R. Comm'n of Cal., 251 U.S. 228, 229 (1920) (applying California statute subjecting pipelines to regulation as common carriers if they transport products "to or for the public[,] for hire"); MONT. CODE ANN. § 69-13-101 (2016) (defining common carrier pipelines as those which carry various products "to or for the public for hire"); NEV. REV. STAT. ANN. § 708.020 (2016); N.D. CENT. CODE § 49-19-01 (2016). Similarly, federal statutes define certain carriers from ocean vessels to telecommunications as common carriers if they hold themselves out to the public for hire. *See, e.g.*, 15 U.S.C. § 375(3) (2012) ("The term 'common carrier' means any person . . . that holds itself out to the general public as a provider for hire of the transportation by water, land, or air of merchandise"); 46 U.S.C. § 40102(6) ("The term 'common carrier' means . . . a person that . . . holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation"); 47 U.S.C. § 153(51), (46) (defining "telecommunications carriers" as common carriers if they offer telecommunications services).

64. Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 213 (Tex. 1989) ("Those in the business of carrying passengers and goods who hold themselves out for hire by the public are burdened with the duties of a common carrier.").

> If, in fact, the line is available to all producers seeking its services—that is, to the public generally—it is a common carrier. Otherwise it would be a private carrier.[65]

This was consistent with the English common law. From the enactment of the Common Carrier Act up until the Texas Supreme Court issued its *Texas Rice* decision, Texas courts, consistent with the common law, uniformly determined whether an entity was a common carrier or gas utility[66] by determining whether the entity had devoted its private property and resources to public service by submitting itself to regulation by the RRC as a common carrier:

- "When the evidence before the court indicates that a pipeline carrying oil products (such as ethylene) has subjected itself to the authority of the RRC to regulate its activities, then it is a common carrier."[67]
- "[C]ourts have determined that a corporation operating a gas pipeline has the power of eminent domain if it devotes its private property and resources to public service and allows itself to be publicly regulated."[68]
- Once an entity submits itself to regulation, "ownership of a pipeline becomes a public use—regardless of whether it is available for public use. By showing that the pipeline company here submitted itself to the regulations of the Commission and is considered to be affected with a public interest, it proved that the company is operating for public use."[69]
- "Oasis submits to regulation by the State of Texas and thereby becomes charged with numerous statutory duties to the public. Hence its use of its pipeline is by legislative declaration a 'public

65. China-Nome Gas Co. v. Riddle, 541 S.W.2d 905, 908 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (citation omitted); *see also* Burnett v. Riter, 276 S.W. 347, 349 (Tex. Civ. App.—Beaumont 1925, no writ) ("A common carrier is one . . . who holds himself out to the public as ready and willing to serve the public, indifferently, in the particular line in which he is engaged.").

66. Gas utilities are discussed later in the Article.

67. Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 313 (Tex. App.—Tyler 2001, pet. denied).

68. Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565 (Tex. App.—San Antonio 1998, pet. denied).

69. Grimes v. Corpus Christi Transmission Co., 829 S.W.2d 335, 339 (Tex. App.—Corpus Christi 1992, writ denied) (citing Loesch v. Oasis Pipe Line Co., 665 S.W.2d 595, 598 (Tex. App.—Austin 1984, writ ref'd n.r.e.)).

use' within the meaning of Tex. Const. Art. 1, § 17."[70]

When determining whether a person is a common carrier or gas utility, Texas courts have historically given great weight to the RRC's determination of that issue.[71]

VI. PUBLIC PURPOSE AND USE PRIOR TO *TEXAS RICE*

Prior to *Texas Rice,* Texas courts consistently held that the judiciary's role in determining whether eminent domain is exercised for a public purpose is an "extremely narrow one," and "[w]here the Legislature declares a particular use to be a public use[,]" that determination is "binding upon the courts unless such use is clearly and palpably of a private character."[72] In other words, the legislature's determination of what constitutes a public use is binding unless it is manifestly wrong.[73] Furthermore, Texas courts were

70. Loesch v. Oasis Pipe Line Co., 665 S.W.2d 595, 599 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (citing Borden v. Trespalacios Rice & Irrigation Co., 86 S.W. 11, 14 (Tex. 1905)); *see also* Tex. Att'y. Gen. Op. No. H-830 (1976) (opining while oil pipelines are expressly declared to be common carriers, a pipeline carrying gas or other substance is a common carrier if "it holds itself out as available to transport gas [or other substance] to all who may desire its services"); Tex Att'y. Gen. Op. No. H-1217 (1978) ("[A] natural gas pipeline or a gas utility is a common carrier if it holds itself out as available to transport gas to all who may desire its services."); Tex. Att'y. Gen. Op. No. JM-432 (1986) (suggesting a common carrier's right to lay its lines across public roads and highways is in exchange for submitting itself to regulation); Tex. Att'y. Gen. Op. No. GA-0517 (2007) (citing the *Vardeman* case for determination of common carrier status).

71. *See, e.g.*, Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312–13 (Tex. App.—Tyler 2001, pet. denied) ("[W]e have been instructed by the supreme court to give great weight to the TRC's determination of that issue."); *see also* Dodd v. Meno, 870 S.W.2d 4, 7 (Tex. 1994) ("Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute." (quoting Tarrant Appraisal Dist. v. Moore 845 S.W.2d 820, 823 (Tex. 1993))); State v. Pub. Util. Comm'n of Tex., 883 S.W.2d 190, 196 (Tex. 1994) ("[T]he contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.").

72. Davis v. City of Lubbock, 326 S.W.2d 699, 704 n.11 (Tex. 1959).

73. *Id.* at 704; *see also* Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 85 (Tex. 1940) (proclaiming the legislature's declaration is entitled to great weight and Texas courts liberally view what is a public use); Laird Hill Salt Water Disposal, Ltd. v. E. Tex. Salt Water Disposal, Inc., 351 S.W.3d 81, 90 (Tex. App.—Tyler 2011, pet. denied) ("The legislative declaration that the use is presumptively public is binding on courts unless the use is "clearly and palpably" private.") (quoting Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 83 (Tex. 1940)); Circle X Land & Cattle Co., Ltd. v. Mumford Indep. Sch. Dist., 325 S.W.3d 859, 864 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) ("[T]he legislative declaration that the use is presumptively public is binding on the courts unless the use is 'clearly and palpably' private.") (quoting Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 83 (Tex. 1940)); Malcomson Rd. Util. Dist. v. Newsom, 171 S.W.3d 257, 266 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (explaining the discretion by the legislature in determining the right of public use); Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565 (Tex. App.—San Antonio 1998, pet. denied) ("We must give great weight to the legislature's declaration that a use is public. . . ."); West v.

consistent in holding that the presumption of public use was conclusive and could not be overcome except upon proof by the landowner of fraud or abuse of discretion.[74]

By statute, the Texas Legislature has declared that operation of common carrier pipelines in Texas "is a business in which the public is interested."[75] The court, in *Continental Pipe Line Co. v. Gandy*,[76] explains:

> The construction and operation of common carrier pipe lines are now recognized as necessary and indispensable to a proper and economical exploitation of the petroleum, natural resource. They are of great importance to the public. Private property owners, the producers of crude oil, and the public are interested in the expeditious and economical transportation of oil from the producing fields and the distribution of it to the consuming public and industry. Pipe line transportation is the best mode yet provided. The public has an interest in relieving other methods of transportation and its highways of the burden they would have to carry but for pipe line transportation. Hence, the Legislature has recognized the pipe line as a public convenience and modern necessity and a business of public concern.[77]

"The broad authority given to private corporations has been the way of the State since the early twentieth century when the Legislature realized the need for an extensive pipeline system to handle the oil output."[78]

The Texas Legislature, Texas Attorneys General, and the Texas courts have long acknowledged the public nature of common carrier pipelines due

Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd) ("[W]here the [l]egislature declares a particular use to be a public use the presumption is in favor of this declaration, and will be binding upon the courts unless such use is clearly and palpably of a private character.").

74. *See Higginbotham,* 143 S.W.2d at 88 ("The law is well established in this state that where the power of eminent domain is granted, a determination by the condemner of the necessity for acquiring certain property is conclusive in the absence of fraud."); Whittington v. City of Austin, 174 S.W.3d 889, 897–98 (Tex. App.—Austin 2005, pet. denied) (stating the deference shown to the legislature's determinations is undone upon a showing of fraud).

75. TEX. NAT. RES. CODE § 111.011 (West 2015) ("The operation of common carriers covered by this chapter is a business in which the public is interested and is subject to regulation by law."); *see also* Texaco, Inc. v. R.R. Comm'n of Tex., 583 S.W.2d 307, 310 (Tex. 1979) ("The business of producing, storing and transporting oil and gas is a business affected with a public interest. . . ."); Cont'l Pipe Line Co. v. Gandy, 162 S.W.2d 755, 757 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.) ("In the Act defining them to be common carriers and regulating them as such it has been declared it to be a business in the conduct of which the public is interested.").

76. Cont'l Pipe Line Co. v. Gandy, 162 S.W.2d 755 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.).

77. *Id.* at 757.

78. 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, 280 (2010).

to the benefits conferred by such pipelines on Texas and its citizens as a whole.[79] As stated by the court of appeals in *Tenngasco Gas Gathering Co. v. Fisher*:[80]

> The test for determining whether a given use is public is to see if there results to the public some definite right or use in the business or undertaking to which the property is devoted.[81] Initially, this test sounds rather narrow and restrictive. However, Texas courts have made it clear that it is the character of the right which inures to the public, not the extent to which the right is exercised, that is important in evaluating enterprises which are involved in condemning private property.[82] As the *Higginbotham* court quoted from *Whitehead:* "It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it. The mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of its public character."[83]

In *Fisher,* the appellate court determined that public use was established where the purpose for which the legislature enacted the gas utility statutes was not clearly or probably private, and where the court determined it could not say that the then-present use of the pipeline was not an authorized use under that statute (*i.e.*, the appellate court deferred to the legislature's declaration of public use). The Beaumont Court of Appeals followed this line of cases in *Texas Rice*, finding that the Green Line would be available to the public from the onset and affirmed the judgment of the district court. The court's decision followed long-standing precedent holding that when the legislature delegates the power of eminent domain to a common carrier that "shorn of the power to discriminate, is open to the use of the public at large," that fact conclusively proves that the property taken by the common

79. *See* Tex. Att'y Gen. Op. No. WW-1263 (1962) ("The construction and operation of common carrier pipelines are now recognized as necessary and indispensible . . . . [and] are of great importance to the public") (quoting Cont'l Pipe Line Co. v. Gandy, 162 S.W.2d 755, 757 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.))); *see also* NAT. RES. CODE. § 111.011 ("The operation of common carriers covered by this chapter is a business in which the public is interested and is subject to regulation by law.").

80. Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

81. *Id.* at 475; Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958); Davis v. City of Lubbock, 326 S.W.2d 699, 706 (Tex. 1959).

82. *Tenngasco Gas Gathering Co.*, 653 S.W.2d at 475; Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 84 (Tex. 1940); West v. Whitehead, 238 S.W. 976 (Tex. Civ. App.—San Antonio 1922, writ ref'd).

83. *Tenngasco Gas Gathering Co* , 653 S.W.2d at 475.

carrier is for a public use.[84]

The question of whether a use is a public one depends upon the character and not the extent of such use.[85] So long as a carrier is "open to the promiscuous and uniform use of the public such facts conclusively make it a public use, and the extent of the public need and probable use thereof is not a question for the courts, and may not be inquired into."[86]

VII. THE TEXAS SUPREME COURT ADOPTS A NEW TEST FOR COMMON CARRIER STATUS FOR CO_2 PIPELINES AND DISREGARDS THE SEPARATENESS OF AFFILIATES

In its initial *Texas Rice* decision, the Supreme Court began its analysis of Denbury Green's status as a common carrier with respect to its CO_2 Green Line by stating that the power of eminent domain is "strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith."[87] However, as previously stated by the Texas Supreme Court:

> Strict construction is not, however, the exact converse of liberal construction, for it does not require that the words of a statute be given the narrowest meaning of which they are susceptible. The language used by the legislature may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute . . . .[88]

The Supreme Court then addressed whether the T-4 permit issued by the RRC to Denbury Green conclusively established eminent domain power. The court first noted that the legislature did not state anywhere in the statutory scheme that a permit was conclusive, and then adopted Texas Rice's "checking the box argument"—that an entity should not be entitled to common carrier status, and the rights afforded a common carrier, by simply checking the box on the application form that it is a common carrier, with the RRC simply granting the pipeline permit for administrative purposes with no investigation or adversarial testing of the application.[89] The Supreme Court then noted that to qualify as a common carrier the pipeline must serve the public—it "would not serve a public use if it were

84. *Higginbotham,* 143 S.W.2d at 84.

85. *Id.*

86. *Id.*

87. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 198 (Tex. 2012).

88. Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958).

89. *Denbury I*, 363 S.W.3d at 198–99 (citations omitted).

built and maintained only to transport gas belonging to Denbury from one Denbury site to another."[90] The court then, without addressing the genesis of the condemnation statute, prior condemnation precedent, or other precedent on the issue, stated:

> The relevant statutes also confirm that a CO_2 pipeline owner is not a common carrier if the pipeline's only end user is the owner itself or an affiliate. Section 111.002(6) states a person is a common carrier if it owns or operates a pipeline "for the transportation of carbon dioxide . . . to or for the public for hire." If Denbury consumes all the pipeline product for itself, it is not transporting gas "to . . . the public for hire." Nor can such an arrangement be characterized as transportation of gas "for the public for hire." The term "for the public for hire" implies that the gas is being carried for another who retains ownership of the gas, and that the pipeline is merely a transportation conduit rather than the point where title is transferred. Section 111.003(a) further confirms these notions, since it states that the common-carrier provisions "do not apply to pipelines that are limited in their use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of a common carrier as defined in Section 111.002 of this code."[91]

Elaborating further in a footnote, the Supreme Court stated:

> We further note that the pipeline does not serve a public use if it only

90. *Id.* at 200. The court indicated that in such circumstances, "and in the absence of compelling legislative findings and declaration of public purpose, we can see no purpose other than a purely private one." *Id.* However, the legislature specifically declared a public use under section 111.002(6) if the pipeline is owned or operated for the transportation of CO_2 to or for the public for hire—and the common law in effect when the statute was passed provided that "to or for hire" is established when it is held open for use by all, and "the mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of its public character." West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd).

91. *Denbury I*, 363 S.W.3d at 200–01. Section 111.003(a) does not provide that a pipeline is not a common carrier if the pipeline's only shipper or end user is the owner itself or an affiliate, and in fact makes no mention of affiliates. Section 111.003(a) describes a closed system, where the pipeline's use is limited to the pipeline owner only and the owner has not submitted the line to regulation as an open access common carrier line. Furthermore, the section specifically states that in order for the Common Carrier Act provisions to not apply, the pipeline must serve only the wells, stations, plants, and refineries of the owner, and also must not be part of the pipeline transportation system of a common carrier as defined in section 111.002. However, under section 111.002, if the pipeline is engaged in the business of transporting crude petroleum in Texas or transports some other product and holds itself out as to or for hire and available to all who want to use it, the pipeline is part of a common carrier transportation system. Section 111.003(a) is much like the opt-out provision applicable to gas utilities, which allows pipelines that qualify to opt out of gas utility status and be classified as private lines that do not have the power of eminent domain, but also are not subject to the regulatory burdens of a gas utility. *See* concurrence in the *Texas Rice* case for further discussion concerning affiliates.

> transports gas for a corporate parent or affiliate. Hence, we see no significance to the fact that Denbury Green Pipeline–Texas, LLC, the owner of the pipeline here, is a wholly owned subsidiary of the company engaged in the tertiary recovery operations. Transporting gas solely for the benefit of a corporate parent or other affiliate is not a public use of the pipeline. Moreover, even if the [l]egislature included findings and an explicit declaration of public purpose, such material, while undeniably instructive, would not be entitled to insurmountable deference.[92]

A. *Rejection of Separateness of Affiliates*

By precluding consideration of transportation to or for an affiliate of a pipeline owner in determining common carrier status, the *Texas Rice* opinion disregards the legislative framework behind the enactment of the Common Carrier Act, ignores the separateness required by the legislature of affiliates who are involved in both the production and pipeline business and ignores many prior Texas judicial decisions.

The legal relationship between energy companies and their affiliates has a long history borne of economic realities, effective regulation, and fairness in the market. As described above, the framework behind enactment of the Common Carrier Act demonstrates that the legislature assumed common carriers would deal with their own affiliates and did not preclude common carrier status because the carrier deals (even exclusively) with its affiliates.

The ability to deal with affiliates is found elsewhere. The legislature delegated to the RRC broad discretion in administering the laws relating to natural resources.[93] If discrimination in favor of affiliates on CO_2 pipelines occurs, the RRC is empowered to investigate and determine whether corporate separateness should be considered for a limited, regulatory purpose, such as to prevent waste or discrimination.[94] To obtain common-carrier status, a pipeline must fill out the RRC's T-4 form. This document focuses the common carrier inquiry on whether the pipeline will "carry only

92. *Denbury I*, 363 S.W.3d at 200 n.23. This is at odds with prior precedent. Prior to the *Texas Rice* decision, Texas courts had consistently held that the judiciary's role in determining whether eminent domain is exercised for a public purpose is an "extremely narrow one," and "[w]here the legislature declares a particular use to be a public use[,]" that determination is "binding upon the courts unless such use is clearly and palpably of a private character." Davis v. City of Lubbock, 326 S.W.2d 699, 704 n.11, 712 n.40 (Tex. 1959).

93. R.R. Comm'n of Tex. v. Lone Star Gas Co., 844 S.W.2d 679, 686 (Tex. 1992); *accord* Stewart v. Humble Oil & Ref. Co., 377 S.W.2d 830, 834 (Tex. 1964) (acknowledging the court's consistent recognition of the commission's administrative discretion).

94. *See, e.g.*, *Lone Star Gas Co.,* 844 S.W.2d at 688–89 (stating "commission shall make inquiry . . . to prevent discriminatory production and taking of natural gas, prevent waste, and promote conservation").

the gas and/or liquids produced by the pipeline owner or operator." By excluding from its inquiry affiliates of the pipeline owner or operator, the RRC necessarily recognizes those affiliates as "others" for purposes of common carrier status. The evolution of the law—as crafted by the legislature for a century—shows that affiliates should be considered independent entities for purposes of conducting the common carrier analysis. The legislature has shown that it will, and does, modify the law to meet the changes and complexities in the industry. As it previously has done with oil and gas pipelines, the legislature could once again modify the common carrier/common purchaser scheme if there is a danger of common carriers using affiliates for some nefarious purpose.

Aside from condemnation laws and cases, the separate legal character of affiliates is "deeply ingrained in our economic and legal systems."[95] Courts recognize that affiliates must be treated as "separate and distinct 'persons' as a matter of law," even where one company "may dominate or control the other company, or may even treat [the other company] as a mere department, instrumentality, or agency."[96] Maintaining this separation is rooted in a simple premise: predictability is valuable to companies making business and investment decisions.[97] By disregarding this separation, the Supreme Court's opinion creates confusion by treating properly constituted affiliates as a single legal entity. This type of uncertainty in established legal relationships creates instability and discourages investment and economic development.[98]

The Texas Supreme Court recognized early on in *West v. Whitehead* that

95. United States v. Bestfoods, 524 U.S. 51, 61–62 (1998) (quoting William O. Douglas & Carroll M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929)); *see also In re* Merrill Lynch Tr. Co., 235 S.W.3d 185, 191 (Tex. 2007) ("[A]ffiliates are generally created to separate the businesses, liabilities, and contracts of each.").

96. CNOOC Se. Asia Ltd. v. Paladin Res. Ltd, 222 S.W.3d 889, 898 (Tex. App.—Dallas 2007, pet. denied) (quoting Valero S. Tex. Processing Co. v. Starr Cty. Appraisal Dist., 954 S.W.2d 863, 866 (Tex. App.—San Antonio 1997, pet. denied)); Storguard Invs., LLC v. Harris Cty. Appraisal Dist., No. 01-10-00439-CV, 2011 WL 2937240, at *6 (Tex. App.—Houston [1st Dist.] July 21, 2011), *opinion withdrawn and superseded on rehearing* 369 S.W.3d 605, 661 (Tex. App.—Houston [1st Dist. 2012) (quoting Gregg Cty. Appraisal Dist. v. Laidlaw Waste Sys., Inc., 907 S.W.2d 12, 17 (Tex. App.—Tyler 1995, writ denied)).

97. *See* Willis v. Donnelly, 199 S.W.3d 262, 272 n.12 (Tex. 2006) (noting the "uproar" in the business community over a "flexible" approach to piercing the corporate veil) (quoting Farr v. Sun World Sav. Ass'n, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ)); Fed. Deposit. Ins. Co. v. Coleman, 795 S.W.2d 706, 710 (Tex. 1990) (asserting commercial transactions require "predictability and certainty").

98. *See* Lenape Res. Corp. v. Tenn. Gas Pipeline Co., 925 S.W.2d 565, 572 (Tex. 1996) (declining to alter well-established legal rules, in part, because doing so would create instability in the relationship between parties and discourage investment).

even though a common carrier line was to initially serve only one customer in which the line owner was primarily interested, the line was not private, but conclusively public because the line was regulated by the RRC and open to all who desired to use it:

> The question of whether or not in a given case the use is a public one depends upon the character, and not the extent, of such use. It depends upon the extent of the right the public has to such use, and not upon the extent to which the public may exercise that right. It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it. The mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of its public character. Nor does the public use, if a railroad, depend upon its length, nor whether it is only a branch road, nor that its equipment is to be furnished by another corporation, nor that its stockholders are also stockholders in a corporation which will be primarily benefitted by its construction. If a railroad invoking the power of eminent domain is to be a highway, or a common carrier, and open to promiscuous and uniform use of the public, such facts conclusively make it a public use, and the extent of the public need and probable use thereof is not a question for the courts, and may not be inquired into; and the right to take property "will not be denied a railroad corporation having proper authority from the Legislature, merely because . . . it will be chiefly of service in bringing out the products of a particular mine, even if the stockholders of the railroad are also interested in the business which its construction will especially benefit." These principles are well settled, and have often been declared by the text-writers and in the decisions of the principal states, including this state.[99]

Texas courts have held that when a common carrier or gas utility has submitted to RRC regulation as an open access line, that pipeline is for public use even if it currently transports gas or other substances only for the owner of the line or its shareholders or affiliates.[100]

99. West v. Whitehead 238 S.W. 976, 978 (Tex. Civ. App—San Antonio 1922, writ ref'd).

100. *See* Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312–13 (Tex. App.—Tyler 2001, pet. denied) (explaining petroleum products pipeline which transported products owned by the pipeline company's parent was a common carrier because it was regulated by the RRC as a common carrier line); Phillips Pipeline Co. v. Woods, 610 S.W.2d 204, 206–07 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (stating a pipeline carrying oil products was common carrier with the power of eminent domain despite the contention by the landowner that the pipeline's usage was limited to the products and facilities of the owner); Loesch v. Oasis Pipe Line Co., 665 S.W.2d 595, 596, 598–99 (Tex. App.—Austin 1984, writ ref'd n.r.e) (explaining that a pipeline transporting gas for only its

B. *Adoption of the "Reasonable Probability Test"*

The Supreme Court rejected Denbury Green's contention that merely making the pipeline available for public use was sufficient to confer common-carrier status, finding the argument inconsistent with the wording of section 111.002(6) of the Texas Natural Resources Code. Departing from prior precedent and long established common law dealing with common carriers, the court held that "to or for hire" is a separate requirement from the requirement that Denbury Green subject itself to the statutory and regulatory burdens under the Natural Resources Code.[101] However, as discussed above, this phrase has long been construed as merely a term of art used to define common carriers under the common law. Construing this phrase as a separate *requirement* for common carriers (rather than as a *description* of common carriers) ignores several hundred years of jurisprudence. Interpreting "to or for the public for hire" as a description of common carriers does not make it surplusage, as section 111.002(6) of the Natural Resources Code still has two requirements. An entity that wishes to become a common carrier by making itself available "to or for the public use for hire" must still hold itself out as such. "Holding out" is accomplished by filing a Form T-4 "Application for Permit to Operate a Pipeline in Texas," even if it is accomplished by the simple checking of a box, as by doing so, the pipeline submits itself to the significant statutory and regulatory obligations and burdens imposed under the Common Carrier Act.

After all but rejecting the long standing common law test, in its initial opinion, the Supreme Court held that although a T-4 permit granting common carrier status is prima facie valid, once a landowner challenges that status, the burden shifts to the pipeline company to establish its common carrier status under the reasonable probability test:

> [T]o qualify as a common carrier of CO_2 under Chapter 111, a reasonable probability must exist, *at or before the time common-carrier status is challenged*, that the pipeline will serve the public by transporting gas for customers who will either

shareholders was vested with the power of eminent domain since it subjected itself to regulation by the RRC); Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469, 475 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (detailing how a pipeline company, which transported only its own gas, had the power of eminent domain).

101. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC(*Denbury I*), 363 S.W.3d 192, 201 (Tex. 2012).

retain ownership of their gas or sell it to parties other than the carrier.[102]

After receiving many amicus briefs contending that such a test would stymie future pipeline projects for all types of pipelines, not just CO_2 lines, the Supreme Court issued a second opinion, withdrawing its initial opinion, and revising the reasonable probability test as follows:

> We accordingly hold that for a person intending to build a CO_2 pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist that the pipeline will *at some point after construction* serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.[103]

Additionally, in a clear effort to limit its holdings and opinion to common carrier status for CO_2 lines only, the Supreme Court expressly stated that its opinion was limited to Section 111.002(6) in noting "Our decision today is limited to persons seeking common-carrier pipeline status under Section 111.002(6). We express no opinion on pipelines where common-carrier status is at issue under other provisions of the Natural Resources Code or elsewhere."[104]

Despite the court's significant efforts to restrict its holdings and opinions to CO_2 pipelines, in actual practice, as discussed, below, most if not all landowners' counsel are contending that the court's opinion applies to all pipelines that allege common carrier status, whether they transport, oil, crude petroleum, gas, liquefied minerals, natural gas liquids, and even natural gas as a gas utility. Recently, the Beaumont Court of Appeals, in a unanimous decision (from the same panel that issued the appellate decision in *Texas Rice*), held that the Texas Supreme Court meant what they said—that the *Texas Rice* decision is limited to CO_2 lines and has no application to other common carrier lines, including crude petroleum lines.[105] As discussed later in this Article, the adoption of the new reasonable probability test has substantially increased the number of challenges to common carriers' right to take, typically at the earliest stages of the process (i.e., the survey stage), and has resulted in the delay of much-needed pipeline projects

102. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., No. 09-0901, 2011 Tex. LEXIS 607, at *22 (Tex. Aug. 26, 2011) (emphasis added).

103. *Denbury I*, 363 S.W.3d at 202.

104. *Id.* at 202 n.28.

105. *See* Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, pet. denied) (identifying the issue in *Texas Rice* as whether a carbon dioxide pipeline was considered a common carrier).

to transport oil, gas, and natural gas liquids produced from the many wells being drilled in the Eagle Ford Shale and Permian Basin.

VIII. POST-*TEXAS RICE* ISSUES WHICH AROSE PRIOR TO RECENT BEAUMONT APPELLATE OPINION IN *TEXAS RICE*

A. *General*

Before the Texas Supreme Court's issuance of its opinion in *Texas Rice*, the legislature devised a condemnation process that protected landowners' due process rights and promoted the speedy construction of pipelines. This process had been uniformly embraced by Texas courts.[106] This process allowed construction of a pipeline to begin, while affording the landowner the ability to challenge the right to condemn.[107] A pipeline company could establish common carrier status by submitting to the jurisdiction of the RRC and regulation as a common carrier under the Common Carrier Act or a gas utility under the Texas Utilities Code. In exchange for subjecting itself to the significant statutory and regulatory burdens and obligations of a common carrier or gas utility, the pipeline owner would acquire the power of eminent domain and could then begin surveying the land along a proposed route and acquiring right of way, either by negotiating with the

106. *See, e.g.*, Gulf Energy Pipeline Co. v. Garcia, 884 S.W.2d 821, 824 (Tex. App.—San Antonio 1994, orig. proceeding) (stating the Texas Property Code provides condemnors "a substantial right to an expedited hearing and possession of the easement immediately after the commissioners" make their award).

107. A pipeline company initiates condemnation proceedings by filing a petition in the trial court. TEX. PROP. CODE § 21.012 (West 2016). The trial court then appoints three commissioners who must provide notice and promptly schedule a hearing to determine the value of the property and enter an award in that amount. *Id.* §§ 21.014, 21.015, 21.016. After the hearing, if either side files objections (including an objection to the condemnor's right to take), the case proceeds to trial as in any other civil case. *Id.* § 21.018. If objections are filed, the condemnor can deposit twice the amount of the commissioners' award in the court's registry, take possession of the property, and begin construction. *See Id.* § 21.021; City of Houston v. Adams, 279 S.W.2d 308, 315 (Tex. 1955) ("When the City has made the deposit . . . the City shall be allowed immediately to take possession of its rights in [the property], pending the final hearing of the cause on its merits."). The Texas Legislature has long recognized that one of the most critical rights afforded a party with the power of eminent domain is the right to speedy possession of the real property it seeks to condemn for the project(s) for which such right exists. *See Garcia*, 884 S.W.2d at 824 (stating the Texas Property Code provides condemnors "a substantial right to an expedited hearing and possession of the easement immediately after the commissioners" make their award); City of Houston v. Plantation Land Co., 440 S.W.2d 691, 693 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.) (applying the courts administrative authority in eminent domain matters). This right is critical to condemnors, because in the absence of prompt possession, the condemnor is not only subject to significant damages that can quickly exceed the value of the property at issue by many multiples, but public projects are subject to being interrupted indefinitely, without due consideration to the public for whose benefit the project is being undertaken.

landowners or failing successful negotiations, initiating condemnation proceedings. Under this long-accepted procedure, there were few challenges to such a pipeline's status as a common carrier or gas utility (and even fewer, if any, at the early survey stage of a pipeline), and when challenged, Texas courts uniformly upheld common carrier or gas utility status if the pipeline had subjected itself to regulation as a common carrier or gas utility.

The Supreme Court's new reasonable probability test invites landowners to avoid this procedure and contest a common carrier's or gas utility's status at the earliest stage of a pipeline—the survey process stage. Typically, common carrier and gas utility lines cross numerous counties. Despite the Supreme Court's efforts to limit the scope of its holdings, landowners throughout Texas are contesting the common carrier and gas utility status of all pipelines (whether crude, natural gas liquids, or gas utility) at the survey stage of such pipelines, and are contending that they must all satisfy the reasonable probability test before a route for the proposed pipeline is even selected.[108] Most landowners insist on detailed discovery into all contracts and seek to delay the survey of tracts and construction of pipelines until a pipeline establishes it has third-party shipping contracts in place—not merely a reasonable probability that it will have one or more contracts when or after the pipeline is constructed.[109] Even when one or more such contracts are provided, many landowners are still not satisfied and contend that one third-party contract is not enough, and that a substantial volume of the pipeline must be devoted to third-parties and not affiliates of the owner of the pipeline. Others have gone so far as to suggest that even where a third-party contract exists, unless the shipper is absolutely required to ship specified volumes (or presumably suffer a financial consequence), the contract is not sufficient to satisfy the new test.[110]

The Supreme Court's limitation of its *Texas Rice* decision to CO_2 pipelines, and where applicable, providing that the reasonable probability test can be met by proof that the "pipeline will at some point after construction serve the public by transporting gas for one or more customers

108. *See*, *e.g.*, Crosstex NGL Pipeline, L.P. v. Reins Road Farms -1, Ltd., 404 S.W.3d 754, 756 (Tex. App.–Beaumont 2013, no pet.) (reviewing Reins Road Farms' claim that a natural gas carrier could establish common carrier status).

109. *See*, *e.g.*, *Crosstex NGL Pipeline, L.P.*, 404 S.W.3d at 761 (upholding decision to deny common carrier status where the pipeline company had been unable to obtain customers).

110. Under a "firm" transportation agreement, the shipper generally agrees to ship a specified monthly volume, or pay a fee or suffer some other financial consequence for failing to do so, whereas under an "interruptible" transportation agreement, the shipper has the right, but not necessarily the ongoing obligation, to ship a specified volume in the line.

who will either retain ownership of their gas or sell it to parties other than the carrier," have fallen on deaf ears.[111] Multiple early challenges to a pipeline's status have delayed access to lands to conduct surveys and have caused substantial delays to the entire easement negotiation and pipeline construction processes. If a single court in any county finds against a potential common carrier or gas utility, or fails to grant it survey access or the right of possession after condemnation, that entity may have to delay progress on the entire proposed line until it obtains a final non-appealable determination of one adverse ruling. These procedural hurdles at the outset of a pipeline project have and will unduly delay, or entirely eliminate, pipeline projects. Additionally, the reasonable probability test (as least as interpreted by most landowners) does not take into account that CO_2 differs from crude and other petroleum substances, as most CO_2 supplies are not readily available, because significant infrastructure needs to be installed to capture CO_2 as a by-product or waste product of manufacturing or industrial processes. As articulated by Air Products in its amicus brief,[112] manufacturers and industrial plants that generate CO_2 as a by-product or waste product in their processes are not in the CO_2 pipeline business, and the expense of construction of a pipeline to facilitate the capture and transport of CO_2 to a market would render such CO_2 capture programs uneconomical. Without a pipeline such as the Denbury Green pipeline in place, such CO_2 capture projects will likely never be constructed. However, under *Texas Rice*, landowners will still likely argue that the potential that a CO_2 pipeline may encourage the eventual construction of CO_2 capture and recovery programs is not enough.[113] In fact, landowners are already arguing at the earliest stages of a CO_2 pipeline that the owner of the pipeline must establish that it has contracts in place with third-party shippers, not merely an expectation that manufacturers or industrial plants will spend the monies necessary to capture CO_2 by-products or wastes once a pipeline is constructed and available to receive such anthropogenic CO_2 supplies. A few examples of post-*Texas Rice* challenges follow.

111. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 202 (Tex. 2012) ("We accordingly hold that for a person intending to build a CO_2 pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.").

112. *See supra* note 26

113. *See* West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922) (determining the initial primary benefits of the use of the line might accrue to the owner of the line do not deprive it of its public character, and holding that the line was for a public use on the theory that the public might in the future explore and develop the entire area).

B. *Crude/Natural Gas Liquid and Gas Utility Pipelines*

1. Crude Petroleum Lines in General

Sections 111.002(1) through (4) of the Common Carrier Act, which apply to crude petroleum lines, differ from section 111.002(6), which applies to CO_2 lines. Under Texas law, when a person "engages in the business of transporting crude petroleum by pipeline" or has otherwise subjected itself to the authority of the agency or agencies that have authority to regulate its activities as a common carrier, then it is a common carrier.[114] The automatic common carrier status conferred on one who engages in the business of transporting crude petroleum by pipeline stems from both the Federal Government's[115] and the Texas Legislature's desire to curb monopolistic pipeline power held by crude lines in the early 1900s, and particularly Standard Oil Company, which had numerous interstate pipelines that traversed through Texas.[116] As noted by Weaver and Smith, the Common Carrier Act "requires that crude oil pipeline companies be common carriers."[117] Not only in the context in which it was passed, but the broad language used by the Texas Legislature in the Common Carrier Act reflects the Texas Legislature's intent that the Act apply to interstate and intrastate pipelines by expressly declaring anyone who "owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire," or simply "engages in the business of transporting crude petroleum by pipeline" to be

114. Rhinoceros Ventures Grp. Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405,408 (Tex. App.—Beaumont 2012, pet. denied); *see also supra* discussion in Part V.

115. Federal regulation of interstate oil pipelines was initiated under the Hepburn Act of 1906 (Act). This Act brought oil pipelines under the Interstate Commerce Act of 1887 (ICA) that originally applied only to railroads and made interstate oil pipelines common carriers subject to rate regulation by the Interstate Commerce Commission (ICC). The ICA applies to the transportation of oil and oil products from one state to any other state and from a foreign country to any place in the United States. The ICA leaves unregulated all aspects of common carrier lines except for the charging of rates. The responsibility for regulating oil pipeline rates was vested in the ICC until 1977, when the Department of Energy Organization Act was enacted. That Act transferred jurisdiction over oil pipeline rate regulation from the ICC to the new Department of Energy and the Federal Power Commission, the predecessor of the Federal Energy Regulatory Commission (FERC). 49 U.S.C. §§ 7155, 7172(b) (2012). FERC now regulates oil pipelines rates and tariffs. Under Title 18 of the Code of Federal Regulations, FERC's jurisdiction over oil pipelines is limited primarily to interstate pipeline rates. FERC does not have jurisdiction over oil pipeline construction, safety, commencement of new services, or abandonment. *See* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1509 n.51 (D.C. Cir. 1984); *see also* W. Refining Sw., Inc. v. FERC, 636 F. 3d 719, 724 (5th Cir. 2011) (noting how the FERC regulatory approval process applicable to the acquisition of a carrier's property does not apply to oil pipeline companies).

116. *See supra* Part IV.

117. 3 SMITH & WEAVER, *supra* note 40, § 13.1 [B][1], at 13-6.1.

a common carrier.[118]

Likewise, all pipelines engaged in the transportation of crude petroleum, natural gas liquids, or refined petroleum products by pipeline in interstate commerce are common carriers.[119] Interstate crude and liquid pipelines are by federal statute declared to be common carriers and must operate as such. The Texas Legislature drafted the Common Carrier Act broadly to include interstate pipelines by applying the statute to anyone owning, operating or managing any pipeline located in whole or in part in Texas, and anyone who is simply engaging in the business of transporting crude by pipeline anywhere in the State of Texas.

The reference in section 111.002(1) to a pipeline or any part of a pipeline in the State of Texas under the Texas Natural Resources Code clearly indicates that the statute applies to interstate pipelines, which are by their nature located only in part in the State of Texas.[120] Specifically, in *Bullock v. Shell Pipeline Corp.*,[121] the appellate court held:

> [T]he Railroad Commission has primary and plenary jurisdiction over the pipeline here involved. "The commission has jurisdiction over all . . . persons owning or operating pipelines in Texas."[122] "The commission may adopt all necessary rules for governing and regulating" those persons.[123]
>
> In addition to its general jurisdiction over pipelines, the Commission has the specific jurisdiction and duty to issue a permit or certificate of clearance

118. TEX. NAT. RES. CODE § 111.002(1) (West 2015) (emphasis added). *See also* BML Stage Lighting, Inc. v. Mayflower Transit, Inc., 14 S.W.3d 395, 402 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (stating the phrase "engaged in the business of transporting" is used at common law to signify common carrier status, e.g., "'one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally'" (citation omitted)).

119. *See* 49 U.S.C. §§ 1 (1)–(3) (1976) (discussing the kinds of carriers subject to regulation and defining "common carrier" under to include pipeline companies and others); Champlin Ref. Co. v. United States, 329 U.S. 29, 33–35 (1946) (providing a pipeline engaged in transporting oil or liquid mineral through pipeline in interstate commerce is a common carrier even if it only ships its own products to and from its own facilities and has never filed tariffs with any regulatory agency); United States v. Ohio Oil Co., 234 U.S. 548, 559–60 (1914) ("The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines."); Belle Fourche Pipeline Co., 28 F.E.R.C. 61,150, 61, 281 (1984) (citation omitted) (stating liquid pipeline companies are common carriers under federal statutes are common carriers).

120. NAT. RES. CODE §111.002(1). Section 111.002(1) makes *no* distinction between (i) interstate and intrastate transporters of crude petroleum; or (ii) transporters of foreign-produced crude petroleum and Texas-produced crude petroleum. *Id.* §111.002(1).

121. Bullock v. Shell Pipeline Corp., 671 S.W.2d 715 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

122. *Id.* at 719 (quoting TEX. NAT. RES. CODE § 81.051(a)(3) (West 1978)).

123. *Id.* (quoting TEX. NAT. RES. CODE § 81.052 (West Supp. 1984)).

> for the transportation of *oil products* by pipelines.[124] Oil products include "any and all . . . by-products derived from crude petroleum oil or gas. . . ."[125] By definition ethylene is a gas "derived from natural gas and petroleum."[126] The Commission's own rules specifically define ethylene as a petroleum product.[127]
>
> Shell applied for and received a "Permit to Operate Pipe Line" from the Railroad Commission for this pipeline. This permit, to our knowledge, is the only permit, certificate, or license issued by the Commission to petroleum, natural gas, or petroleum products pipelines.
>
> * * * *
>
> [F]inding of fact No. 1 recites "Petitioner [Shell] is a common carrier pipeline licensed and certificated by the Interstate Commerce Commission and by the Texas Railroad Commission." . . . The Comptroller and his counsel should not now be heard to complain that Shell is not a licensed and certificated carrier.[128]

Additionally, under section 81.051 of the Texas Natural Resources Code, the Texas Legislature delegated the RRC the authority to regulate pipelines that are common carriers.[129] The RRC has jurisdiction over all "persons owning or operating pipelines in Texas."[130] The statute delegating this authority to the RRC makes no distinction between intrastate and interstate pipelines, such that the RRC has been held to have regulatory authority over anyone who "owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline."[131] Simply put, had the legislature intended to take the step of

124. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 6066a §§ 1(g), 4(d) (West 1962)).

125. *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 6066a §§ 1(c) (West 1962)).

126. *Id.* (citation omitted).

127. *Id.* (citations omitted)).

128. *Id.* at 720 (emphasis added).

129. TEX. NAT. RES. CODE § 81.051(West 2015).

130. *Id.*

131. *Id.* § 111.002(1); *see also Bullock*, 671 S.W.2d at 719 (holding RRC has jurisdiction over an *interstate* crude products line, with "specific jurisdiction and duty to issue a permit . . . for the transportation of oil products by pipeline" and noting the pipeline held a permit from the ICC (predecessor to FERC and the RRC); *see also* Atlas Pipe Line Co. v. Sterling, 4 F. Supp. 441, 442–43 (E.D. Tex. 1933) (holding RRC has jurisdiction to regulate interstate oil pipelines that transport oil "into or out of" Texas). Section 81.051 of the Texas Natural Resources Code provides as follows:

> (a) The commission has jurisdiction over all: (1) common carrier pipelines defined in Section

excluding interstate transporters of crude petroleum or transporters of foreign-produced crude petroleum from exercising eminent domain, it would not have used such broad language and instead would have expressly excluded interstate pipelines. However, had the legislature done so it would likely have run afoul of the Commerce Clause.[132]

2. The *Rhinoceros* Case (Keystone Crude Petroleum Line)

Despite the Supreme Court's attempt to limit its *Texas Rice* decision to CO_2 pipelines under section 111.002(6) of the Natural Resources Code, a landowner in Jefferson County, Texas challenged the common carrier status of the Keystone crude petroleum line proposed by TransCanada to ship crude petroleum from Cushing, Oklahoma (including crude produced in Texas, Oklahoma and surrounding states and Canada) to the Port Arthur area, contending that under *Texas Rice*, TransCanada cannot subject its pipeline to regulation by the RRC (which the landowner alleges is required under *Texas Rice*) because the proposed pipeline is an interstate pipeline regulated by the Federal Energy Regulatory Commission (FERC) under federal statutes.

In *Rhinoceros Ventures Group, Inc. v. TransCanada Keystone Pipeline, L.P.,* the landowner filed a plea to jurisdiction in the administrative phase of the case (i.e., before the special commissioners made their award and objections were filed) contesting TransCanada's common carrier status in light of *Texas Rice*.[133] The trial court denied that plea and a later filed plea during the judicial phase, and the landowner appealed. Despite the Supreme Court's express limitations on its holdings in *Texas Rice*, the landowner, citing dicta

111.002 of this code in Texas; (2) oil and gas wells in Texas; (3) persons owning or operating pipelines in Texas; and (4) persons owning or engaged in drilling or operating oil or gas wells in Texas.

(b) Persons listed in Subsection (a) of this section and their pipelines and oil and gas wells are subject to the jurisdiction conferred by law on the commission.

NAT. RES. CODE § 81.051.

132. The Commerce Clause has been held to foreclose discrimination against the exercise of eminent domain by entities acting in interstate commerce. In *West v. Kan. Natural Gas Co.*, the U.S. Supreme Court held—*prior* to the Texas Legislature's enactment of its provisions granting common carrier status and eminent domain to oil companies—that an Oklahoma statute that restricted eminent domain authority to companies that transported natural gas through its pipelines to points within the state violated the Commerce Clause. West v. Kan. Natural Gas Co., 221 U.S. 229, 262 (1911). As the Court stated, "in matters of foreign and interstate commerce there are no state lines." *Id.* at 255.

133. Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405,409 (Tex. App.—Beaumont 2012, pet. denied).

concerning an oil line[134] and *Vardeman v. Mustang Pipeline Co.*,[135] contended that *Texas Rice* applied to crude pipelines as well as CO_2 lines.[136] Then, citing *Texas Rice*, the landowner contended that since the proposed Keystone line is an interstate line regulated by FERC and, therefore, allegedly could not subject itself to regulation by the RRC, it could not qualify as a common carrier.[137] The landowner further contended that the Common Carrier Act did not apply to interstate pipelines that transport crude petroleum into (as opposed to out of) Texas.[138] The trial court rejected the landowner's arguments, finding that the statute does apply to

134. The dicta stated as follows:

> Suppose an oil company has a well on one property and a refinery on another. A farmer's property lies between the oil company's two properties. The oil company wishes to build a pipeline for the exclusive purpose of transporting its production from its well to its refinery. Only about [fifty] feet of the proposed pipeline will traverse the farmer's property. The farmer refuses to allow construction of the pipeline across his property. The oil company knows that no party other than itself will ever desire to use the pipeline. In these circumstances, the application for a common-carrier permit is essentially a ruse to obtain eminent-domain power. The oil company should not be able to seize power over the farmer's property simply by applying for a crude oil pipeline permit with the Commission, agreeing to subject itself to the jurisdiction of the Commission and all requirements of Chapter 111, and offering the use of the pipeline to non-existent takers.

Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 201–02 (Tex. 2012).

135. In *Vardeman,* the appellate court for some reason referenced section 111.002(6) of the Texas Natural Resources Code when dealing with an ethylene pipeline, which the court treated as crude petroleum. Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet denied). Section 111.002(6), by its express language, only applies to CO_2 and hydrogen gas, and not to crude petroleum. NAT. RES. CODE § 111.002(6). In *Vardeman*, the pipeline company transported ethylene, which the court determined to be a product of crude petroleum, but the parties appeared to agree that section 111.002(6) applied. *See Vardeman*, 51 S.W.3d at 313 (failing to discuss any dispute over the applicability of section 111.002(6)). The Tyler Court of Appeals affirmed a summary judgment awarding an easement to the pipeline company after concluding that there was evidence that the pipeline operator had "subjected itself to the regulatory jurisdiction of the [Railroad Commission]," in satisfaction of section 111.002(6). *Id.* Nowhere in *Vardeman* did the Tyler court state that section 111.002(6)'s requirement that a pipeline operator provide written acceptance of the statute's terms and subject itself to the statute's duties and obligations are requirements of common carrier status under section 111.002(1). Just because *Vardeman* accepted certain evidence for what a pipeline *may* do to satisfy section 111.002(6) in subjecting itself to the duties and obligations of chapter 111 (pursuant to the parties' apparent agreement that section 111.002(6) applied to their case) does not impose that requirement on a person who qualifies as a common carrier of crude petroleum under section 111.002(1).

136. Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, pet. denied)

137. *Id.*

138. *Id.* at 409–10.

interstate crude pipelines, and the landowner appealed.[139] The Beaumont Court of Appeals affirmed the rulings of the trial court in a unanimous opinion, concluding that the *Texas Rice* decision was limited to CO2 lines and, further stated:

> The parties agree that TransCanada engages in the business of transporting crude petroleum in Texas by a pipeline or part of a pipeline. Therefore, construing section 111.002(1) according to its plain meaning, TransCanada is a common carrier. . . . As previously discussed, appellants contend that section 111.002(1) applies only to intrastate pipelines. However, the [l]egislature 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. . . . . In addition, we note that, in other portions of the Natural Resources Code, the Legislature expressly includes the term "intrastate" when it wishes to limit the application of a particular statute to intrastate pipelines.[140]

The Texas Supreme Court recently denied petition for review.[141]

3. The Crawford Case (Keystone Crude Petroleum Line)

Julia Trigg Crawford made many headlines in her contest of the TransCanada Keystone crude petroleum line on behalf of The Crawford Family Farm Partnership ("Crawford").[142] Crawford attacked TransCanada's status as a common carrier and essentially adopted all of the arguments made by the landowner in the *Rhinoceros* case.[143] TransCanada

139. *See id.* at 407 (indicating the landowner challenged the trial court's denial of summary judgment because an interstate pipeline owner is not within the scope of the statute and that pipelines transporting crude outside of the state contravenes the purpose of the statute).

140. *Id.* at 408–09 (citations omitted). In undergoing this analysis, the court noted that "a court may consider other laws on the same or similar subjects" when construing a statute. *Id. (*citing TEX. GOV'T CODE § 311.023(4) (2015).

141. TransCanada Keystone Pipeline*, L.P.*, 388 S.W.3d 405.

142. Saul Elbein, *An Old Texas Tale Retold: The Farmer vs. the Oil Company*, N.Y. Times (May 7, 2012), http://www.nytimes.com/2012/05/08/us/old-texas-tale-retold-farmer-vs-transcanada.html (reporting on Crawford's opposition to the pipeline's condemnation of their land, and noting a website for their legal defense fund has raised over $6,000).

143. *Compare Rhinoceros*, 388 S.W.3d at 407 (indicating the landowners challenge was based upon the pipeline's common carrier status because it was an interstate pipeline to which chapter 111 does not apply and over which the RRC has no regulatory authority), *with* Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908, 914 (Tex. App.—Texarkana 2013, pet. denied) (reciting the landowner's arguments, which included challenging the categorization of the pipeline as a common carrier since it is not governed by the provisions in chapter 111 of the Texas Natural Resources Code and because it is not subject to the RRC's jurisdiction).

filed a summary judgment motion claiming common carrier status with a right of eminent domain under section 111.002(1) of the Natural Resources Code and section 2.105 of the Business Organizations Code.[144] TransCanada also sought a no-evidence summary judgment on Crawford's claims for gross negligence, exemplary damages and claims that TransCanada acted fraudulently and in bad faith.[145] Crawford moved to dismiss for lack of subject matter jurisdiction, essentially copying the briefing from the landowner in the *Rhinoceros* case, arguing that TransCanada, as an interstate pipeline, was not a common carrier with the right of eminent domain.[146] The trial court denied Crawford's motion to dismiss, and granted TransCanada's summary judgment motions in all respects.[147]

On appeal to the Texarkana Court of Appeals, Crawford argued that "because TransCanada is an interstate pipeline which contemplates the transmission of crude oil, it is not a common carrier under section 111.002(1) and (6) of the Texas Natural Resources Code."[148] Specifically, Crawford alleged that (1) because a common carrier is subject to the provisions of Chapter 111 of the Texas Natural Resources Code and TransCanada is not subject to (all of) those provisions, it is not a common carrier, (2) TransCanada is not a common carrier because the Texas Railroad Commission determined that it lacks jurisdiction over TransCanada's interstate pipeline, and (3) legislative history supports Crawford's arguments.[149] In addressing Crawford's arguments the Texarkana Court of Appeals first noted that "from an early date in its history, Texas courts have recognized that the [l]egislature may delegate its power of eminent domain to nongovernmental entities"[150], and that "[t]he scope of the delegation of the government's power of eminent domain rests entirely with the elected

144. Plaintiff's Motion for Summary Judgment and No Evidence Summary Judgment, Transcanada Keystone Pipeline, L.P., v. Crawford Family Farm P'ship, 409 S.W.3d 908 (Tex. App.—Texarkana 2013, pet. denied). (No. 80810).

145. *Id.*

146. Defendant's Motion to Dismiss for Lack of Jurisdiction, Transcanada Keystone Pipeline, L.P., v. Crawford Family Farm P'ship, 409 S.W.3d 908, (Tex. App.—Texarkana 2013, pet. denied). (No. 80810).

147. Order on Defendant's Motion to Dismiss for Lack of Jurisdiction, Transcanada Keystone Pipeline, L.P., v. Crawford Family Farm P'ship, 409 S.W.3d 908 (Tex. App.—Texarkana 2013, pet. denied). (No. 80810); Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908, 912 (Tex. App.—Texarkana 2013, pet. denied).

148. *Id.* at 911.

149. *Id.* at 915–16.

150. *Id.* at 910 (citing Buffalo Bayou, Brazos & Colo. R.R. Co. v. Ferris, 26 Tex. 588, 588 (1863)); *see, e.g.*, Buffalo Bayou, Brazos & Colo. R.R. Co. v. Ferris, 26 Tex. 588, 588 (1863) (applying "public use" and eminent domain to a railroad granted such power by the legislature).

representatives of the people, the [s]tate [l]egislature."[151]

The court noted that Crawford's arguments focused on section 111.014, which requires common carriers to make and publish tariffs pursuant to the Railroad Commission's rules, and section 111.181, which obligates the Commission to establish crude transportation and delivery rates.[152] Furthermore, Crawford argued that:

> TransCanada cannot comply with these provisions under any circumstance, Crawford contended, because the tariff of an interstate crude oil pipeline is not subject to the rate-setting powers of the Railroad Commission of Texas but, instead, is subject to that jurisdictional power of the Federal Energy Regulatory Commission (FERC).[153]

Because TransCanada cannot subject itself to these provisions of the state law, Crawford contended that TransCanada cannot meet the definition of a common carrier (carrying with it, the right of eminent domain) under Section 111.002(1) of the Natural Resources Code.[154] The appellate court

151. *Crawford Family Farm P'ship*, 409 S.W.3d at 910; *see also* Buffalo Bayou, Brazos & Colo. R.R. Co. v. Ferris, 26 Tex. 588, 588 (1863) (allowing legislative delegation of the power of eminent domain to a railroad); Imperial Irr. Co. v. Jayne, 138 S.W. 575, 587 (1911) (acknowledging legislative grants of the power of eminent domain).

152. *Crawford Family Farm P'ship*, 409 S.W.3d at 910 (citing TEX. NAT. RES. CODE §§ 111.014, 111.181 (2015)).

153. *See* 49 U.S.C. § 60502 (2012) ("[FERC] has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline"). The appellate court noted that, "Federal regulation of oil pipelines began in 1906 when Congress passed the Hepburn Act." *Crawford Family Farm P'ship*, 409 S.W.3d at 915 n.18 (citing ExxonMobil Oil Corp. v. Fed. Energy Regulatory Comm'n, 487 F.3d 945, 956 (D.C. Cir. 2007) (per curiam)). "The Act applied the Interstate Commerce Act to oil pipelines and gave the Interstate Commerce Commission jurisdiction over interstate oil pipelines." *Id.* "In 1977, Congress transferred responsibility for oil pipeline regulation to the FERC." *Id.* (citing ExxonMobil Oil Corp. v. Fed. Energy Regulatory Comm'n, 487 F.3d 945, 956 (D.C. Cir. 2007) (per curiam)). "The FERC's jurisdiction over oil pipelines is limited primarily to interstate pipeline rates." *Id.* (citations omitted); *see* Farmers Union Cent. Exch., Inc. v. Fed. Energy Regulatory Comm'n, 734 F.2d 1486, 1509 n.51 (D.C. Cir. 1984) (explaining the FERC's lack of authority in response to an interstate pipeline choosing to abandon service); *see also* W. Ref. Sw., Inc. v. Fed. Energy Regulatory Comm'n, 636 F.3d 719, 724 (5th Cir. 2011) (stating the "FERC has no jurisdiction over decision by pipeline to "'purchase, lease, or contract to operate"' pipeline"). "The limited scope of the FERC's regulation of oil pipelines stands in contrast to its pervasive role in pipeline infrastructure under the Natural Gas Act, which prohibits a would-be pipeline sponsor from digging a line until a certificate of public convenience and necessity is issued." Independence Pipeline Co., 91 F.E.R.C. 61102, 61347 (Apr. 26, 2000). The FERC does, however, have exclusive jurisdiction to determine whether pipeline rates and terms of service are just, reasonable, and not unduly discriminatory. 18 C.F.R. § 342.4 (2011); Christopher J. Barr, *Unfinished Business: FERC's Evolving Standard for Capacity Rights on Oil Pipelines,* 32 ENERGY L.J. 563, 565 (2011).

154. *See Crawford Family Farm P'ship*, 409 S.W.3d at 915–16 (explaining Crawford's argument for TransCanada not being subject to all provisions of chapter 111).

disagreed for several reasons:

> Crawford's conclusion that TransCanada cannot meet the definition of a common carrier is based on the premise that the introductory phrase ("A person is a common carrier subject to the provisions of this chapter.") means that any such common carrier must comply with each and every provision set forth in Chapter 111 of the Natural Resources Code. We do not believe this is a proper reading of the statute. First, the language preceding the definition of "common carrier" does not specifically state that such common carrier is subject to all of the provisions of the chapter. It merely states, in a descriptive manner, that a common carrier under this section is one that is subject to the provisions of the chapter. Moreover, this language does not confer common carrier status to such carriers only if they are subject to each of the provisions of the chapter.
>
> Crawford misinterprets this opening phrase as being prescriptive, rather than descriptive. The language "subject to the provisions of this chapter" is merely descriptive of the type of common carrier to which reference is made. . . .[155]
>
> * * * *
>
> The Texas Railroad Commission is imbued with the authority to regulate common carrier pipelines.[156] This authorization of power makes no distinction between intrastate and interstate pipelines. Instead, this section has been held to give the commission regulatory authority over anyone who owns or operates pipelines in Texas.[157]
>
> * * * *
>
> Moreover, had the [l]egislature intended to exclude interstate petroleum pipelines from the definition of common carrier, it could have easily done so with an express limitation. It did not. The principle of exclusion unius

155. *Id.* at 916–17.

156. NAT. RES. CODE § 81.051.

157. *Crawford Family Farm P'ship*, 409 S.W.3d at 918 (footnote omitted) (citation omitted); *see also* Bullock v. Shell Pipeline Corp., 671 S.W.2d 715, 719 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (noting that the commission has jurisdiction over crude products line running from Texas to Louisiana with "specific jurisdiction and duty to issue a permit . . . for the transportation of oil productions by pipeline" and that pipeline owner held permit from ICC (predecessor of FERC)); *see also* Atlas Pipe Line Co. v. Sterling, 4 F. Supp. 441, 442 (E.D. Tex. 1933) (per curiam) ("No reason presents itself to our minds for believing that the Legislature, having the authority to conserve the natural resources of the state, is without power to impose upon common carriers by pipeline, inter and intra state, police regulations to make its prohibition against wasteful production effective.").

recognizes that "[]'[t]he inclusion of the specific limitation excludes all others.'[]"[158]

While the Texarkana Court of Appeals properly construed the common carrier statutes and reached the right result, the court stated, in dicta, that "TransCanada produced undisputed evidence, through the sworn affidavit and deposition testimony of [a TransCanada representative], that [TransCanada] w[ould] ship crude petroleum for one or more customers who would retain ownership of the oil" and concluded that TransCanada had "therefore complied with the reasonable probability test in *Denbury*."[159] This again is at odds with the Texas Supreme Court's clear holding in Texas Rice that its decision was limited to carbon dioxide lines seeking common carrier status under section 111.002 (6) of the Texas Resources Code,[160] and it is also at odds with the appellate court's earlier statement in its opinion that: "In [the *Rhinoceros Ventures* case], the parties agreed that TransCanada—as here—engages in the business of transporting crude petroleum in Texas by a pipeline or a part of a pipeline. 'Therefore, construing [section 111.002(1)] according to its plain meaning, TransCanada is a common [carrier.]'"[161]

The recent *Saner v. BridgeTex Pipeline Co., LLC*[162] case discussed below, embraced the dicta in the *Crawford* case and applied the *Texas Rice* reasonable probability test to a crude petroleum line.

4. *Texas Rice* and Natural Gas Liquid Lines[163]

Landowners have also been challenging the common carrier status of natural gas liquid lines citing the *Texas Rice* decision. Natural gas liquids (NGLs) are typically separated at a gas plant from natural gas produced from wells, and the liquids contained in natural gas (a mix of ethane, propane, butane, and lighter hydrocarbons, known as raw make or Y-grade) are separated from the natural gas (i.e., methane) and transported by pipeline to

158. *Crawford Family Farm P'ship*, 409 S.W.3d at 916–918 (Tex. App.—Texarkana 2013, pet. denied) (citation omitted).

159. *Id.* at 924.

160. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 202 n.28 (Tex. 2012) ("Our decision today is limited to persons seeking common-carrier pipeline status under Section 111.002(6). We express no opinion on pipelines where common-carrier status is at issue under other provisions of the Natural Resources Code or elsewhere.").

161. *Crawford Family Farm P'ship*, 409 S.W.3d at 919 (quoting Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405, 408 (Tex. App.—Beaumont 2012, pet. denied)).

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

163. These statements are based on the experience and industry knowledge of this author.

a fractionation plant where the raw liquid make is fractionated (typically through refrigeration) into separate components like ethane, butane, propane, and lighter hydrocarbons.

NGL pipelines transport large volumes of NGLs for marketing affiliates of the owner of the pipeline under "firm" transportation agreements.[164] Many producers or owners of NGLs prefer not to enter into firm transportation agreements with pipeline owners, because that requires the producer/owner to retain title and risk of loss for the NGLs throughout the transporting pipeline. It also requires owners to pay for firm transportation space for contractually specified volumes of NGLs in the pipeline, whether or not the producer/owner tenders the contractually specified volumes. To avoid these risks, many producers prefer to enter into a "purchase agreement" with an affiliate of the owner of the pipeline, pursuant to which the producer/owner sells the NGLs to the affiliate at the inlet of the pipeline, and the affiliate then enters into a firm transportation agreement with the pipeline owner to transport the NGLs to a fractionation plant. Under the purchase agreement, the producer/owner typically receives proceeds obtained from the affiliate from the sale of the products fractioned from the delivered NGLs at the tailgate of the fractionation plant, less transportation and fractionation fees. In many instances, the producer/owner has the right to take in kind its share of certain products (such as propane or ethane) at the tailgate of the plant. The affiliate in turn pays a transportation fee to the pipeline owner.

The owner of the pipeline typically commits a large portion of the pipeline's capacity to such firm shipping arrangements (to ensure recoup of its capital investment) and reserves a portion of the pipeline capacity for interruptible shippers (i.e., those who do not want firm shipping obligations but desire to ship on an interruptible basis). Under these customary arrangements, and in light of *Texas Rice*, landowners are contending that the producer/owner purchase agreements and affiliate firm transportation agreements are not relevant to the reasonable probability test because they are not third party shipping contracts. Then some landowners go so far as to suggest that even if a pipeline has third party shipping contracts, they should not be considered unless they are firm contracts (because the shipper is not obligated to ship), or cover a significant amount of capacity in the pipeline. Even assuming the *Texas Rice* decision is applicable, such

164. See generally *Transportation Service Agreement for Firm Transportation of Natural Gas Alliance Pipeline Limited Partnership,* https://www.alliancepipeline.com/Business/Regulatory/Documents/Appendix1_FirmTransportationService_010909.pdf for an example of what a firm transportation agreement looks like.

allegations fly in the face of such decision as the Texas Supreme Court made it clear that all that needs to be shown is "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."[165] These types of arguments by landowners are delaying the construction of numerous NGL pipelines that are much needed to transport natural gas liquids from the many Eagle Ford shale wells that have been drilled, and are currently planned to be drilled.[166]

Natural gas liquids are not refined products.[167] At least two Texas courts have treated natural gas liquids or components thereof as crude petroleum.[168] If natural gas liquids are considered crude petroleum then common carrier status is determined under Sections 111.002(1) through (4)[169] of the Common Carrier Act (in which case an NGL line is a common carrier if it is engaged in the business of transporting NGLs within the State) or section 2.105 of the Texas Business Organizations Code (in which case it must satisfy the common law test—submit itself to regulation as available to all). If NGLs are not considered crude petroleum, the common carrier determination is made exclusively under section 2.105. In any event, many landowners have been contesting the common carrier status of natural gas liquid lines, again at the earliest stage—the survey stage.

165. *Denbury I*, 363 S.W.3d at 202 (emphasis added) (footnotes omitted).

166. Energy Transfer Partners' Amicus Brief, Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017) 15-0225, 2017 WL 65470.

167. "The extraction of liquid hydrocarbons from gas, and the separation of the liquid hydrocarbons into propanes, butanes, ethanes, distillate, condensate, and natural gasoline, without any additional processing of any of them, is not considered to be refining" TEX. NAT. RES. CODE § 101.017(b) (West 2015).

168. *See* Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied) (holding that ethylene, also a refined product, was crude petroleum for purposes of the common-carrier statutes (citing Bullock v. Shell Pipeline Corp., 671 S.W.2d 715, 719 (Tex. App.—Austin 1984, writ ref'd n.r.e.)); Bullock v. Shell Pipeline Corp., 671 S.W.2d 715, 719 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (concluding ethylene to be a petroleum product (citation omitted)).

169. In section 111.002(4) of the Texas Natural Resources Code, the legislature provided that an entity is a common carrier if it

> [U]nder lease, contract of purchase, agreement to buy or sell, or other agreement or arrangement of any kind, owns, operates, manages, or participates in ownership, operation, or management of a pipeline or part of a pipeline in the State of Texas for the transportation of crude petroleum, bought of others, *from an oil field or place of production within this state to any distributing, refining, or marketing center or reshipping point within this state.*

NAT. RES. CODE § 111.002(4) (emphasis added). Thus, if affiliates are to be disregarded pursuant to *Texas Rice,* then the purchase agreements of the pipeline owner's affiliate should be considered purchases by the pipeline for purposes of common carrier status under this section.

With respect to crude petroleum, including natural gas liquid lines and despite the limiting language in *Texas Rice,* many landowners are filing pleas to jurisdiction or for abatement contending that a NGL pipeline cannot conduct preliminary surveys or file condemnation actions until the pipeline owner first satisfies the reasonable probability test. In fact, a Beaumont district court recently denied an injunction requested by Crosstex to survey a tract in Jefferson County, Texas, and the Beaumont Court of Appeals affirmed the district court's denial.[170]

Crosstex filed suit in a Beaumont district court on May 12, 2012, seeking injunctive relief against Reins Road to prevent Reins Road from interfering with an initial survey sought to be performed by Crosstex in connection with a planned common carrier NGL line from Mont Belvieu to fractionation plants in Eunice and Riverside, Louisiana, owned and operated by an affiliate of Crosstex.[171] Crosstex first asserted that NGLs fell within the definition of "crude petroleum" and that under the Beaumont Court of Appeals' earlier *Rhinoceros* case, that Crosstex was, therefore, a common carrier as it was engaged in the business of transporting crude petroleum in Texas.[172] Crosstex further claimed that the Texas Rice reasonable probability test did not apply to Crosstex's NGL pipeline, and that Crosstex was nevertheless a common carrier under 2.105 of the Texas Business Organizations Code as it held itself out as available to all shippers.[173]

Reins Road filed a counterclaim for declaratory judgment, seeking among other things, a declaratory judgment that Crosstex failed to "establish its status as a common carrier as a matter of law"[174] and seeking attorneys' fees. Crosstex's request for a temporary restraining order was denied, and after five months of discovery (in which the district judge forced Crosstex to produce all contracts with customers, all correspondence with such customers, and internal analyses of the feasibility and proposed construction of the proposed pipeline), the trial court held an injunction hearing. Three weeks after the injunction hearing, and without any explanation, the court

170. *See* Crosstex NGL Pipeline, LP v. Reins Road Farm-1, Ltd., 404 S.W.3d 754, 761–62 (Tex. App.—Beaumont 2013, no pet.) (upholding the trial court's view that the public would not actually use Crosstex's pipeline).

171. Crosstex NGL Pipeline, L.P.'s Original Petition And Request for Injunctive and Other Relief, Crosstex NGL Pipeline, LP v. Reins Road Farm-1, Ltd., 404 S.W.3d 754, 761–62 (Tex. App.—Beaumont 2013, no pet.), (No. 0192430).

172. *Id.*

173. *Id.*

174. Reins Road Farms –1, LTD.'s Original Answer and Counter-Claim for Declaratory Judgment, Crosstex NGL Pipeline, LP v. Reins Road Farm-1, Ltd., 404 S.W.3d 754 (Tex. App.—Beaumont 2013, no pet.)„(No. 0192430).

denied Crosstex's request for injunctive relief.[175] Crosstex appealed the denial of the injunction to the Beaumont Court of Appeals, and that court, in an unbalanced, result-based opinion, affirmed the trial court's denial of injunctive relief, holding the trial court did not clearly abuse its discretion.[176] While an initial reading of the appellate decision may lead the reader to believe that conflicting evidence and some law supports the trial court's ruling, the appellate court disturbingly ignored previous Texas decisions on material issues before the court (including those of the very appellate court issuing the *Crosstex* opinion), omitted undisputed facts, and recast facts (contrary to the facts as presented in the appellate record) to support the desired result.

The following represents the facts as actually presented by the parties, and demonstrates where the appellate court either ignored or recast undisputed testimony and facts:

Crosstex held an open season, as required by FERC, to provide firm and interruptible transportation service on the proposed line to all shippers desiring to ship thereon.

Crosstex submitted undisputed evidence that under 18 C.F.R. § 341.2(b), that "[a]ll tariff publications . . . must be filed with [FERC] and posted *not less than* [*thirty*]*,* nor more than [sixty], days prior to the proposed effective date . . ." and that Crosstex did not yet have a tariff on file because it was precluded from filing one at the time of the injunction hearing.[177] In any event, Crosstex provided Reins Road with a pro forma tariff.[178] *The appellate court recited that Reins Road contended that the pipeline had no tariff and stated that Crosstex did not later alter its proposed tariff after its initial open season or conduct another open* [*season*.][179]

Crosstex established through uncontroverted evidence that the proposed pipeline was regulated by FERC as an interstate common carrier pipeline, and as such, FERC requires Crosstex to reserve and make available 8–10% percent of the capacity of the proposed line for the shipment of NGLs by shippers under interruptible contracts. Furthermore, the undisputed evidence established that the initial planned capacity of the proposed line was 77,000 barrels of NGLs per day (leaving capacity of approximately 7,000 barrels per day for interruptible shippers), readily expandable to

175. *Crosstex NGL Pipeline, L.P.*, 404 S.W.3d at 757.

176. *Id.* at 762.

177. Affidavit of Brad Iles, Crosstex NGL Pipeline, L.P.'s Original Petition And Request for Injunctive and Other Relief, Crosstex NGL Pipeline, LP v. Reins Road Farm-1, Ltd., 404 S.W.3d 754 (Tex. App.—Beaumont 2013, no pet.), (No. 0192430).

178. *Id.*

179. *Crosstex NGL Pipeline, L.P.*, 404 S.W.3d at 761.

125,000 barrels per day with the addition of a pump station. *Rather than recite and consider this undisputed evidence, the appellate court instead referenced a press release by Crosstex which listed the initial capacity of the proposed line at 70,000 bbl/day and then noted that Crosstex had transportation agreements with an affiliate for 70,000 bbl/day.*[180] *As a result, the appellate court determined that the evidence allowed the trial court to find (as a preliminary matter) that Crosstex was building the pipeline for the exclusive purpose of transporting its own natural gas liquids for further processing by Crosstex affiliates, and that the pipeline's entire capacity would probably be used by Crosstex.*[181] *The undisputed and uncontroverted testimony at the injunction hearing of Crosstex's vice-president, however, established that the initial capacity was 77,000 bbl/day, not 70,000 bbl/day (and that the press release was preliminary and inaccurate), that under [f]ederal law and regulations, Crosstex was required to hold 8–10% of the capacity available for interruptible shippers, leaving 7,000 bbls/day of capacity available for interruptible shippers, including the one interruptible customer (i.e., BP) with whom Crosstex had a signed and binding transportation agreement in place.*[182]

Crosstex submitted uncontroverted testimony that there was an extremely high probability that one or more third-party customers will ship on its pipeline once it is constructed and that Crosstex already had a third-party contract in place with BP to ship NGLs in the proposed line. The uncontroverted evidence established that BP could deliver its NGLs under the interruptible agreement into the proposed line at the contractually-specified delivery points (LoneStar/Energy Transfer, Chevron, or DCP interconnects in Texas), and then ship its NGLs to either the contractually-specified redelivery points at Eunice or Riverside fractionation facilities.[183] Uncontroverted evidence was also submitted that with a simple extension to the proposed line, additional volumes could be transported for BP to the ExxonMobil plant in Baton Rouge. *Rather than considering this uncontroverted evidence, and despite clear responses at oral argument that BP had outlets on the proposed lines to have its NGLs fractionated at the Eunice and Riverside fractionation facilities to which the line would be connected, the appellate court chose instead to recast the facts, stating that the pipeline as currently designed, would not connect to the fractionation facility in Baton Rouge "where the unaffiliated shipper desired to process its own natural gas liquids."*[184] *But the uncontroverted evidence established that BP entered into the transportation agreement to have its NGLs transported to Eunice and Riverside and fractionated there, not at the Baton Rouge fractionation facility.*

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

Crosstex submitted uncontroverted testimony that with the raw make purchase agreements, Crosstex would have space on its pipeline to ship interruptible volumes for BP and other shippers, and that Crosstex was still soliciting other shippers to ship on the proposed pipeline system and would continue to do so.[185]

In a clear effort to exclude NGLs from the definition of "crude petroleum" in section 111.002(1), the appellate court ignored that the term "crude petroleum" used in the Common Carrier Act enacted in 1917, which has been broadly defined, has been referenced by at least four Texas courts, including the Beaumont Court of Appeals itself, as including liquid hydrocarbons, which includes natural gas liquids.[186]

Rather than address the broad definition of crude petroleum (as used in a statute enacted in 1917), the appellate court instead looked to statutes enacted many years later, engrafting a definition of "oil" and "crude oil"—not "crude petroleum"—contained in Sections 40.003 (6) and 115.001 of the Natural Resources Code onto Section 111.002(1). Section 40.003, enacted in 1991 as the Oil Spill Prevention and Response Act, defines crude oil as "any naturally occurring liquid hydrocarbon at atmospheric temperature and pressure coming from the earth, including condensate."[187] Section 115.001 simply defines oil as including crude petroleum—it does not define "crude petroleum," let alone define it to exclude natural gas liquids.[188] Moreover, Chapter 115 was not enacted until eighteen years after

185. *Id.* at 760

186. *See* Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, pet. denied) (stating ethylene fits within the "broad definition of 'crude petroleum'"); Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied) ("Ethylene is included in the broad definition of 'crude petroleum.'" (citing Bullock v. Shell Pipeline Corp., 671 S.W.2d 715, 719 (Tex. App.—Austin 1984, writ ref'd n.r.e.))); Bullock v. Shell Pipeline Corp., 671 S.W.2d 715, 719 (Tex. App.—Austin 1984, writ ref'd n.r.e (determining "ethylene" is, by definition, natural gas and petroleum derivative (citation omitted)); State v. Stack, 199 S.W.2d 701, 703 (Tex. Civ. App.—Austin 1947, no writ) (determining "gasoline," which is comprised of the liquids within casing head gas, is another form of oil). As the court noted in *General Petroleum Corp. of Cal.* v. *United States*: "The coupling of the words 'crude' and 'petroleum' is, from a strictly scientific standpoint, tautological. For the word 'petroleum' conveys all the meaning which the words 'crude petroleum' do." Gen. Petroleum Corp. of Cal. v. United States, 24 F. Supp. 285, 287 (S.D. Cal. 1938). The court also noted that when "crude petroleum" is used in tariff acts, it is given a broad interpretation. *Id.*; *see also* Tide-Water Pipe Co. v. Blair Holding Co., 202 A.2d 405, 415 (N.J. 1964) (holding that carrying No. 2 fuel oil through pipeline did not violate easement authorizing transportation of petroleum, because evidence was that "'petroleum' in its crude state technically is composed of the various products,—gasoline, kerosene, naptha, fuel oil, etc.—subsequently separated and distilled from it by a mechanical, not a chemical, process as well as that the term is used in the industry as a generic term to include both such products and the crude substance").

187. TEX. NAT. RES. CODE § 115.001(6) (West 2015).

188. *See id.* § 115.001(5) (providing alternative meanings for the term "oil").

the Common Carrier Act, and deals primarily with the transportation of illegally-produced oil by vehicle. The definitions of "oil" and crude oil in these sections are irrelevant to the definition of "crude petroleum" in the Common Carrier Act. Likewise, the definition of "crude petroleum" used in the Common Carrier Act has nothing to do with well classification by the Railroad Commission under unrelated statutes and rules relied upon by the appellate court, which deal with definitions of oil, casinghead gas, and natural gasoline, not crude petroleum.

The appellate court, apparently not satisfied with Reins Road's definition of crude petroleum (which would encompass NGLs that are obtained from processing, not refining), also cited *Webster's Dictionary* for a definition of crude petroleum as "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."[189] The Appellate Court also noted that Webster's defined "crude" as "a substance in its natural, unprocessed state" and "crude oil" as "initial products of distillation of crude oil without cracking or other treatment."[190] The court's reliance on Webster's Dictionary ignores that crude petroleum has been broadly defined since the first use of that phrase back in 1917 in the Common Carrier Act and that the Legislature did not distinguish between oil, gas, and casinghead gas in the Common Carrier Act, but instead chose the phrase crude petroleum. The Appellate Court also conveniently omitted reference to the definition of crude petroleum cited by Reins Road as "[c]rude" means in "an unrefined natural state," and, "crude petroleum" as a noun, means petroleum in its "unrefined state."[191]

Crosstex presented uncontroverted testimony that NGLs are obtained through processing by reduced temperature to separate the natural gas from the liquids and not from any refining or actual alteration of the NGLs (other than mere separation of the gas from liquids). This process is not any more significant than distillation, which uses heat to separate components, rather than temperature reduction, and Webster's Dictionary includes the products of distillation in its definition of crude oil. Furthermore, Crosstex submitted that the Texas Legislature had expressly provided that "[t]he extraction of liquid hydrocarbons from gas, and the separation of the liquid hydrocarbons into propanes, butanes, ethanes, distillate, condensate, and natural gasoline, without any additional processing of any of them, is not considered to be

189. *Crosstex NGL Pipeline, L.P.*, 404 S.W.3d at 758.

190. *Id.*

191. *Crude,* THE AMERICAN HERITAGE DICTIONARY (New College Ed. 1978); *Crude petroleum,* THE AMERICAN HERITAGE DICTIONARY (New College Ed. 1978).

refining."[192] Crosstex presented uncontroverted evidence that NGLs were not the result of refining, and this was reinforced at oral argument.

Although the Supreme Court made it clear in its *Texas Rice* decision that its holding in that case is limited to CO_2 lines seeking to establish common carrier status under the Texas Natural Resources Code[193] and the Beaumont Court of Appeals in its unanimous *Rhinoceros* opinion (from the same panel that issued the appellate decision in *Texas Rice*), held that the Texas Supreme Court meant what they said—that the *Texas Rice* decision is limited to CO_2 lines and has no application to other common carrier lines, including crude petroleum lines[194], the Beaumont Court of Appeals in its *Crosstex* opinion ignored those two earlier decisions and applied the reasonable probability test to Crosstex's NGL line, stating:

> Although Crosstex points out that the *Texas Rice* Court's holding is limited to carbon dioxide lines, regulated by section 111.002(6) of the Natural Resources Code, we are not persuaded the Court's reasoning concerning the process of obtaining a T-4 permit applies only to carbon dioxide lines. Assuming that courts are allowed to consider all of the relevant evidence regarding a pipeline's probable use, the record before us contains evidence supporting the trial court's inference that the public would not, in all probability, actually use Crosstex's pipeline. Crosstex also asserts that the evidence conclusively demonstrates that the pipeline has been dedicated to the public's use. Nevertheless, a common carrier pipeline is one that serves the public; it is not one that will be used only by the builder.[195]

In so holding, the Beaumont Court of Appeals ignored the Supreme Court's express and unequivocal limitation of its *Texas Rice* holding to CO_2 lines and Section 111.002 (6) of the Texas Natural Resources Code, but then erroneously applied the *Texas Rice* reasonable probability test and affiliate limitations—applicable only to CO_2 lines—to the Beaumont Court of Appeals' improperly recast "facts."[196]

The *Texas Rice* reasonable probability test and affiliate limitations do not apply to NGL lines, let alone to the determination of common carrier status

192. NAT. RES. CODE § 101.017(b).

193. Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 202 n.28 (Tex. 2012).

194. Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P., 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, pet. denied) (citing Tex. Rice Land Partners, Ltd. V. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192, 202 n.28 (Tex. 2012)).

195. *Crosstex NGL Pipeline, LP.* 404 S.W.3d at 761.

196. *See id.* ("Given the conflicting evidence, the trial court could conclude that Crosstex and its affiliated companies would be using the pipeline's entire capacity.").

under Section 2.105 of the Texas Business Organizations Code, under which the common law definition of common carrier is utilized.

Even though Crosstex presented uncontroverted evidence that Crosstex, well in advance of construction of the line, had a transportation agreement (not the mere reasonable probability of obtaining one) with one unaffiliated third party who would retain ownership of its NGLs in the line, the appellate court ignored the contract itself which identifies the two points of redelivery agreed to by the shipper (the Eunice and Riverside plants owned by Crosstex affiliates where the shipper elected to have its NGLs transported for processing), and stated that since the proposed line as currently configured does not connect to a third fractionation plant in Baton Rouge, owned in part by the shipper,[197] that the evidence allowed the trial court to conclude that Crosstex was building the line for the exclusive purpose of transporting its own NGLs.[198] Under the Appellate Court's erroneous application and analysis of *Texas Rice*, in addition to satisfying the reasonable probability test of one or more unaffiliated shippers, apparently a pipeline (at least in the Beaumont Court of Appeals' jurisdiction) may also have to show that the unaffiliated shipper's NGLs will not be delivered to a fractionator or other end location owned in whole or in part by the pipeline or its affiliates.

Rather that endure the costs and delays of a further appeal to the Texas Supreme Court to address the significant errors of the Beaumont Court of Appeals, Crosstex re-routed its pipeline around the Reins Road tract and dismissed its litigation against Reins Road. Although the *Crosstex* appellate decisions remains, it is merely is a review of the trial court's decision under an abuse of discretion standard and the appellate court did not resolve any issues on the merits, so the decision is of little, if any, precedential value, but is nevertheless being cited by landowners as if the appellate court decided the issues on the merits.

In *Saner v. BridgeTex Pipeline Co.*,[199] the Eastland Court of Appeals, citing the *Crawford* and *Crosstex* cases, but ignoring the *Rhinoceros* case and the express language in section 111.002(1) of the Texas Natural Resources Code, applied the *Texas Rice* reasonable probability test to a crude petroleum pipeline, nevertheless concluded that since 10% of the capacity of the

197. The uncontroverted evidence established that the shipper entered into the transportation agreement to ship its NGLs to the Eunice and Riverside fractionation facilities for fractionation of the shipper's NGLs at such plants owned by a Crosstex affiliate, and later inquired about potential extension of the proposed line to give the shipper access to a third fractionation plant, which would allow the shipper to ship even greater volumes of NGLs on the proposed lines.

198. *Crosstex NGL Pipeline, LP*, 404 S.W.3d at 761–62.

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

pipeline was available to any shipper per FERC requirements, a reasonable probability existed that at some point after construction the pipeline would serve one or more third party shippers and was thus a common carrier.[200]

5. *Texas Rice* and Gas Utility Pipelines

Section 181.004 of the Texas Utilities Code provides: "A gas or electric corporation has the power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation."[201]

In determining whether a particular entity is a "gas corporation," Texas courts have historically looked to whether the entity is regulated by the RRC as a gas utility.[202] Specifically, in determining whether a particular entity is a "gas corporation," Texas courts look to whether the entity has devoted its private property and resources to public service and has allowed itself to be publicly regulated through the various agencies and commissions of the State of Texas, and in determining whether an entity involved in the gas pipeline business has devoted its private property and resources to public service and allowed itself to be publicly regulated through various agencies and commissions, courts have focused their inquiry on whether the entity is subject to regulation by the RRC of Texas as a gas utility.[203] There are currently two different statutory definitions for a gas utility. Section 101.003 of the Texas Utilities Code defines a gas utility as "includ[ing] a person or river authority that owns or operates for compensation in this state equipment or facilities to transmit or distribute combustible hydrocarbon natural gas . . . for sale or resale in a manner not subject to [federal]

200. *Id.* at *11.

201. TEX. UTIL. CODE § 181.004 (West 2016).

202. *See id.* (stating that a "corporation" as used in section 181.004 is expressly defined to include a gas utility).

203. *See* Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 313 (Tex. App.—Tyler 2001, pet. denied) ("When the evidence before the court indicates that a pipeline carrying oil products (such as ethylene) has subjected itself to the authority of the TRC to regulate its activities, then it is a common carrier"); *see also* Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 564 (Tex. App.—San Antonio 1998, pet. denied) (defining "gas corporation" for the purposes of eminent domain); Grimes v. Corpus Christi Transmission Co., 829 S.W.2d 335, 339 (Tex. App.—Corpus Christi 1992, writ denied) (noting when an entity is designated as a gas utility, the entity submits itself to regulation by the RRC and, "[a]s a result, ownership of [the] pipeline becomes public use—regardless of whether it is available for public use"); Loesch v. Oasis Pipe Line Co., 665 S.W.2d 595, 598 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (holding a gas utility is subject to the onerous regulatory provisions such that pipelines owned by it and operated as gas utility pipelines are declared to be public uses by legislative declaration, irrespective of whether the pipeline is available for public use); Roadrunner Invs., Inc. v. Tex. Utils. Fuel Co., 578 S.W.2d 151, 154 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (stating the fact that the RRC regulates an entity as a gas utility is indicative that the entity is operating as a gas corporation for purposes of section 181.004).

jurisdiction . . . ."[204]

Section 121.001 of the Utilities Code defines "gas utility" as:

> a person[205] who owns, manages, operates, leases, or controls in this state property or equipment of a pipeline, plant, facility, franchise, license or permit for a business that: (1) transports, conveys, distributes, or delivers natural gas: (A) for public use or service for compensation . . . [or] (2) owns, operates, or manages a pipeline: (A) that is for transporting or carrying natural gas, whether for public hire or not; and (B) for which the right-of-way has been . . . acquired by exercising the right of eminent domain. . . .[206]

As is readily apparent, these statutes are vastly different from the Common Carrier Act provisions construed in the *Texas Rice* decision. Notwithstanding, this vast difference, and the Supreme Court's express limitation of the *Texas Rice* decision to CO_2 lines under section 111.002(6), landowners are claiming that *Texas Rice* also applies to lines claiming gas utility status, again causing attendant delays in the construction of such lines.

6. Recent Condemnation Procedural Issues Arising Post-*Texas Rice*

Since Crosstex had been unduly delayed in conducting an on the ground survey of the Reins Road property (as discussed above), Crosstex elected to tie its description to an existing line across the Reins Road tract and proceed with condemnation while it pursued its appeal in the injunction case. The county court at law appointed three commissioners. Reins Road timely struck one commissioner, and, at the same time, filed a motion to strike the entire panel contending that the trial court must consider commissioners agreed to by the parties (even though no such agreement had been reached). The court failed to appoint a replacement commissioner or rule on the motion to strike the panel (presumably waiting on the outcome of the injunction appeal), and after waiting months for the county court at law to take action, Crosstex filed a mandamus action requesting the appellate court to direct the trial judge to perform his ministerial duty and appoint a replacement commissioner and enter an order denying Reins Road's unfounded request to strike the entire panel of commissioners. The appellate court issued a per curiam opinion denying the petition for

204. UTIL. CODE § 101.003(7).

205. "Person" is defined as "an individual, company, limited liability company, or private corporation and includes a lessee, trustee, or receiver of an individual, company, limited liability company, or private corporation." *Id.* § 121.001(b).

206. *Id.* § 121.001(a).

mandamus, and held that "[t]he trial court did not unreasonably delay acting on pending motions during the accelerated appeal of the parallel proceeding."[207] This is inconsistent with over 100 years of condemnation jurisprudence that requires the prompt appointment of commissioners and replacement commissioners, and an expedited administrative phase so that the condemnor can obtain prompt possession of the property rights sought, pending further proceedings and resolution of all issues including the right to take and damages.

An eminent domain proceeding commences as an administrative proceeding, and depending upon certain filings, may become a judicial proceeding, which has been described as

> a two-part procedure involving first, an administrative proceeding, and then if necessary, a judicial proceeding. When a party desires to condemn land for public use but cannot agree on settlement terms with the landowner, that party must file a statement seeking condemnation in the proper court, either district court or county court at law, of the county in which the land is located. Upon the filing of this statement, the trial court judge is to appoint three Special Commissioners who assess the damages and then file an award which, in their opinion, reflects the value of the sought-after land . . . From the time the condemnor files the original statement seeking condemnation up to the time of the Special Commissioners' award, these initial proceedings are administrative in nature.
>
> * * * * * *
>
> [If either party] is dissatisfied with the Special Commissioner's award, he must timely file his objection in the appropriate court. Upon the filing of objections, the Special Commissioners' award is vacated and the administrative proceeding converts into a normal pending cause in the court with the condemnor as plaintiff and the condemnee as defendant . . . .[208]

Section 21.011 of the Texas Property Code provides that the "[e]xercise of the eminent domain authority in all cases is governed by sections 21.012 through 21.016 of this code."[209] "The judge of a court in which a

207. *In re* Crosstex NGL Pipeline, L.P., No. 09-13-00168-CV, 2013 WL 2444192, at *1 (Tex. App.— Beaumont May 30, 2013, no pet.) (per curiam) (mem. op.).

208. *In re* State, 65 S.W.3d 383, 385–86 (Tex. App.—Tyler 2002, no pet.) (citation omitted); *see also* Musquiz v. Harris Cty. Flood Control Dist., 31 S.W.3d 664, 666–67 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (discussing an eminent domain proceeding).

209. TEX. PROP. CODE § 21.011 (West 2016).

condemnation petition is filed shall appoint three disinterested freeholders who reside in the county as Special Commissioners to assess the damages of the owner of the property being condemned."[210] Section 21.014(a) further requires that "[if] a person fails to serve as commissioner or is struck by a party to the suit, the judge shall appoint a replacement."[211] Section 21.015(a) and (b) of the Texas Property Code requires that the Special Commissioners in an eminent domain proceeding "promptly schedule a hearing for the parties at the earliest practical time," and provides that "the special commissioners shall hear the parties at the scheduled time and place or at any other time or place to which they may adjourn the hearing."[212]

The Texas Legislature intended for the administrative phase of a condemnation proceeding to hasten the legal process, in order to enable condemnors to gain quicker access to the property and landowners to gain quicker access to damages.[213] Any action taken by the trial court during the administrative phase of a condemnation case (other than the statutory ministerial acts of appointing commissioners, receiving award, and entering judgment on award in the absence of objections) are void, as the trial court lacks subject matter jurisdiction.[214] Until recently, Texas courts uniformily held that even where a condemnee contends that the condemnor lacks the right to take and that the court lacks jurisdiction to entertain the condemnation suit, the trial court cannot address these contentions until it obtains subject matter jurisdiction upon the filing of objections to the commissioners' award.[215] The Texas Supreme Court recently held otherwise in *In re Lazy W District No. 1*,[216] at least where subject matter jurisdiction is concerned.[217]

The appointment of a replacement special commissioner is a statutory

210. *Id.* § 21.014(a).

211. *Id.*

212. *Id* § 21.015(a), (b).

213. *In re State*, 65 S.W.3d at 386.

214. *See In re* Energy Transfer Fuel, LP, 250 S.W.3d 178, 181 (Tex. App.—Tyler 2008, no pet.) (holding the court lacked authority to include provisions in judgment, not included in commissioners' award); *In re State*, 85 S.W.3d at 876–77 (noting that a court's order for bill of costs made during administrative phase was void); Gulf Energy Pipeline Co. v. Garcia, 884 S.W.2d 821, 823 (Tex. App. —San Antonio 1994, no pet.) (observing a grant of an injunction or continuance during the administrative phase of a condemnation proceeding is outside trial court's jurisdiction and is void).

215. *See* Metropolitan Transit Auth. of Harris Cty., Tex. v. Graham, 105 S.W.3d 754, 757–59 (Tex. App. —Houston [14th Dist.] 2003, pet. denied) (holding the condemnee can contest right to take on grounds of alleged lack of jurisdiction only during judicial phase); *In re* ETC Katy Pipeline, Ltd., 2008 WL 4444487, *3 (Tex. App. —Waco 2008, no pet.) (holding the trial court improperly granted motion to dismiss for lack of the right to take during the administrative phase of condemnation case).

216. *In re* Lazy W Dist. No. 1, 493 S.W.3d 538 (Tex. 2016).

217. *Id.* at 544-45.

ministerial duty imposed on the trial court by section 21.014(a).[218] The refusal and failure to carry out this duty thwarts the express intention of the statute by preventing the special commissioners from performing their duty to promptly schedule a hearing for the parties at the earliest practical time in accordance with section 21.015, and in assessing damages in accordance with section 21.042. Section 21.014(a) is clear and leaves no room for discretion, providing that "if a person fails to serve as commissioner or is struck by a party to the suit, the judge *shall* appoint a replacement."[219] The prompt and efficient appointment of special commissioners, and a replacement commissioner, is also consistent with the legislative policy to quickly award just damages to the landowner without the delays that can occur in court proceedings.[220] Allowing the trial court to improperly attempt to oversee this administrative phase would clearly circumvent this policy.[221]

Reins Road's request to strike the panel was likewise void because the only statutory remedy available to a party in such circumstances is "[within] a reasonable period to strike *one* of the three commissioners appointed by the judge."[222] Reins Road sought to re-write and expand the scope of this remedy from one commissioner to the entire panel of three commissioners. Significantly, the legislature amended the Texas Property Code on September 1, 2011, to include this language granting a party to a condemnation proceeding the right strike one of the three commissioners.[223] Prior to the enactment of this amendment, the parties had no statutory right to strike a commissioner.[224] If the legislature intended to allow a party to strike the entire panel of special commissioners, then the legislature would have amended section 21.014(a) to expressly grant such a right. Under the plain language of the statute, the legislature intended the parties to have only one strike to a panel of commissioners.[225] Consequently, having exercised that strike, Reins Road exhausted its statutory remedy for challenging the appointment of a commissioner. Any order by the trial court granting Reins Road's motion to strike the entire

218. TEX. PROP. CODE § 21.014(a) (West 2016).

219. *Id.*

220. *In re* State, 65 S.W.3d 383, 386 (Tex. App.—Tyler 2002, no pet.).

221. *Id.*

222. PROP. CODE § 21.014(a) (emphasis added).

223. Act of May 5, 2011, 82nd Leg., R.S. ch. 81 § 10, 2011 Tex. Gen. Laws 354, 359 (codified at TEX. PROP. CODE § 21.014(a)).

224. *Id.*

225. PROP. CODE § 21.014(a).

panel would, therefore, be void.[226]

For example, a party's challenge to the entire panel of commissioners was considered and expressly rejected in *Schooler v. State*.[227] In *Schooler*, the landowner cited the following reasons in support of striking the panel appointed by the court:

> [The Commissioners] had sat as Special Commissioners in approximately forty other condemnation suits involving land in the Big Bend National Park area, and had entered more than forty awards involving similar land; that they had discussed the value of the land with the officials of the Park Board prior to the hearing; and that they had received compensation for acting as Special Commissioners in more than forty cases prior to the hearing, and would receive such compensation in many cases that had not been disposed of.[228]

The court rejected this argument as insufficient to set aside the commissioners' award.[229] In fact, according to the court, "the experience acquired by the Commissioners through their service in other cases, could but tend to better qualify them for service as Special Commissioners."[230] Reins Road made the same argument rejected by the court in *Schooler*. Reins Road, however, failed to state a single basis as to why the commissioners' service in other proceedings would in any way impact their ability to render a fair and impartial decision in this matter, or otherwise disqualify them from service.[231] On the contrary, each of the commissioners, as required by statute, swore under oath, to assess value and damages in such proceeding fairly and impartially and in accordance with the law.

Postponing the appointment of a replacement commissioner and a ruling on the motion to strike panel, while the trial court familiarizes itself with matters not properly before it and outside its jurisdiction, serves only to

226. *See In re* Energy Transfer, 250 S.W.3d 178, 181 (Tex. App.—Tyler 2008, orig. proceeding) ("When the court that renders a judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act, the judgment is void.").

227. Schooler v. State, 175 S.W.2d 664 (Tex. Civ. App.—El Paso 1942, writ ref'd w.o.m.).

228. *Id.* at 670.

229. *Id.* at 671.

230. *Id.* at 670.

231. The trial court waited nearly a month from the date Crosstex filed its petition on or about January 10, 2013, to the date it appointed commissioners on or about February 7. During that entire time, Reins Road, despite having notice the very day Crosstex filed its petition, did not propose a single commissioner, nor make any attempt to contact Crosstex as to the possibility of agreeing upon commissioners. Only after the trial court appointed commissioners did Reins Road, for the first time, raise the issue and suggest that the parties should have been given an opportunity to agree upon commissioners.

delay the proceedings, and deprives Crosstex of its statutory right to an expedited procedure under the Property Code, for which Crosstex has no adequate remedy by appeal. As the court in *City of Houston v. Plantation Land Co.*, explained:

> By the enactment of the eminent domain statutes, the legislature had established an expeditious procedure whereby possession of property may quickly be had for its application to public use. It would be inconsistent with the public policy so expressed in those statutes to permit the owner to delay the condemnor's right to take possession of property by the trial, in another judicial proceeding, of one of the very issues for the trial of which those statutes provide a procedure.[232]

In holding that the county court properly awaited the decision in the injunction case before appointing a replacement commissioner, the appellate court ignores clear legislative directives, statutory procedures in place for over 100 years, and clear Texas precedent honoring those directives, all of which dictate that a trial judge promptly appoint commissioners and a replacement commissioner, so that a condemnor is afforded its statutory right to the expeditious procedure whereby possession of property may quickly be had for its application to public use. Additionally, the appellate court's holding improperly suggests that a landowner can contest the condemnor's right to take during the administrative phase and substantially delay the administrative process by delaying or frustrating the appointment of commissioners or the appointment of a replacement commissioner, pending resolution, on which the landowner will undoubtedly seek significant and time-consuming discovery, just as Reins Road did in the injunction case.

The appellate court's cryptic conclusion suggests that even it realizes the motion to strike the entire panel is improper: "Now that an opinion has issued in Crosstex's appeal, we presume the trial court will, *if requested*, proceed with a ruling on any motions *properly* before it. Accordingly, we deny the petition for writ of mandamus *without prejudice*."[233] Since Crosstex chose to re-route its line around the Reins Road tract and dismiss its litigation against Reins Road, the Texas Supreme Court did not get an opportunity to review the appellate court's decision for error. However, in

232. City of Houston v. Plantation Land Co., 440 S.W.2d 691, 695 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.),

233. *In re* Crosstex NGL Pipeline, Ltd., 2013 WL 2444192 at * 1 (Tex. App.—Beaumont May 30, 2013, no pet.) (per curiam) (mem. op.).

a TransCanada case argued on the same day as the Crosstex injunction case, the appellate court ignored the long-established condemnation procedure for a condemnor to obtain possession of lands or easements sought to be condemned and held that a condemnor must make a preliminary showing of its common carrier status before it is entitled to take possession.

In *In re Texas Rice Land Partners, Ltd.,*[234] Texas Rice filed an original proceeding (mandamus) with the Beaumont Court of Appeals claiming that the trial court abused its discretion when it entered an order in Keystone's favor for issuance of a writ of possession (in which Keystone had undisputedly satisfied all of the statutory prerequisites for possession under the Texas Property Code) without resolving Texas Rice's challenge to Keystone's status as a common carrier. Specifically, Texas Rice argued that the Texas Supreme Court's decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*,[235] requires that Keystone, if its right to take is challenged, demonstrate that it qualifies as a common carrier prior to the trial court issuing a writ of possession.[236] Keystone argued that because it had complied with the statutory requirements of section 21.021 of the Texas Property Code (i.e., deposited the amount of the commissioners award, posted a surety bond in the same amount, and executed a bond to secure payment of additional costs), that it was a ministerial duty of the trial court to issue the writ of possession.[237] The trial court agreed with Keystone and concluded that the ultimate right to condemn under the statutory scheme would require resolution through the judicial process and that resolution of Keystone's ultimate right was not determinative as to possessory rights under the statute ("[n]othing in *Denbury* . . . suggests to this court that a pre-possession determination of common carrier status is required or allowed under the statutory scheme").[238]

Significantly, as the Texas Supreme Court held in *Harris County v. Gordon*,[239]a condemnor is entitled to possession once it makes the required deposits and a court is "not justified in writing exceptions into the [immediate possession] statute so as to make it inapplicable under special factual circumstances not mentioned in the statute."[240] These statutory

234. *In re* Tex. Rice Land Partners, Ltd.*,* 402 S.W.3d 334 (Tex. App.—Beaumont 2013, pet. denied).

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

236. *In re Tex. Rice Land Partners, Ltd.*, 402 S.W.3d at 339–40.

237. *Id.* at 340

238. *Id.* at 338

239. Harris County v. Gordon, 616 S.W.2d 167 Tex. 1981).

240. *Gordon,* 616 S.W.2d at 169; *see also* Thomas v. Housing Auth. of Dall., 153 Tex. 137, 264

procedures specifically contemplate that a condemnor will be placed in possession while other issues, such as the right to take, are resolved through further litigation. These procedures are specifically designed to place the condemnor in prompt possession of the property rights sought for the public purpose it seeks to perform, while providing the landowner with an adequate remedy in the event it is later found that the condemnor did not have the right of possession.[241] This right is critical to condemnors, because in the absence of prompt possession the condemnor is not only subject to significant damages that can quickly exceed the value of the property at issue by many multiples, but public projects are subject to being interrupted indefinitely, without due consideration to the public for whose benefit the project is being undertaken. Following this line of clear authority, the trial court held that once TransCanada satisfied the statutory requirements for possession, it was entitled to possess the easements sought and issued an order of possession, directing the clerk to issue a writ of possession for the easements sought. Texas Rice filed a mandamus seeking reversal of such ruling with the Beaumont Court of Appeals, and oral argument was presented in March, 2013. The parties are awaiting a decision in that proceeding.

The court of appeals denied Texas Rice's petition for mandamus, concluding that the trial court did not abuse its discretion in granting Keystone's motion for writ of possession.[242] While the court of appeals' opinion was favorable to Keystone as Keystone retained its right of possession to the property pending further appeal or litigation, its reasoning is flawed and could be detrimental to the industry. The fundamental problem with the opinion is that the court of appeals has determined that "there must be evidence in the record that reasonably supports TransCanada's assertion that it is an entity with 'eminent domain authority' and it was error for the trial court to refrain from making such a preliminary finding."[243] Fortunately for Keystone, while it did argue that it was the

S.W.2d 93, 140 (1954) (holding the purpose of the statute, which allows the condemning authority to take possession of the property upon the payment of damages awarded by the Special Commissioners, is to enable the landowner to be dispossessed by the condemnor even though the landowner has refused to accept the money tendered to it by the condemnor).

241. *See* Gulf Energy Pipeline Co. v. Garcia, 884 S.W.2d 821, 824 (Tex. App.—San Antonio 1994, orig. proceeding) (indicating the Texas Property Code provides condemnors a substantial right to an expedited hearing and possession of the easement immediately after the commissioners make their award); City of Houston v. Plantation Land Co., 440 S.W.2d 691, 693 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.)

242. *In re* Tex. Rice Land Partners, Ltd., 402 S.W.3d 334, 340 (Tex. App.—Beaumont 2013, pet. denied).

243. *Id.* at 339–40.

ministerial duty of the trial court to grant the writ of possession once Keystone satisfied the statutory prerequisites (which was undisputed), Keystone, in an abundance of caution and in light of the *Texas Rice Land* Supreme Court opinion, did not rely solely on that argument but also *submitted argument and evidence to support its right to take (under the Supreme Court's opinion*) as a common carrier; which evidence included Keystone's T-4 and the affidavit of Louis Fenyvesi which established that the crude petroleum shipped by Keystone would be owned by third parties unaffiliated with Keystone, an open season was held and various third-party shippers committed to binding transportation agreements, that the pipeline would be operated as a common carrier, that Keystone's shippers would include refiners, producers and marketers and that Keystone did not own any refineries or produce any crude petroleum.[244] Unfortunately, even though the Beaumont Court of Appeals ultimately determined that the trial court did not abuse its discretion in granting the writ of possession, the court held that it was an abuse of discretion for the trial court not to make a preliminary finding on Keystone's assertion that it is an entity with the power of eminent domain. Because Keystone presented uncontested or unchallenged evidence that it was a common carrier, however, the Court concluded that any error committed by the trial court was harmless.[245]

The Texas Supreme Court denied petition for review. With that denial, the pipeline industry must now be prepared to submit evidence that reasonably supports its assertion that it is an entity with eminent domain authority at least by the time it files its motion for writ of possession. Absent clarification or reversal, the appellate court's opinion can and probably will be used by landowners objecting to an entity's authority of eminent domain to delay, if not stop, survey operations, the appointment of commissioners, commissioners' hearing and, ultimately, possession of the property (claiming that the court must make a preliminary finding of common carrier status as a condition precedent). There is nothing in the appellate court's opinion that limits when or at what stage such a challenge can be made or when the trial court must make such a preliminary finding. There is also little guidance on what proof would be sufficient for the trial court to make a preliminary finding as to an entity's authority of eminent domain. In fact, the court's opinion may prove very problematic for the industry since Keystone presented conclusive evidence as to its status; evidence sufficient under the

244. *Id.* at 340
245. *Id.*

Supreme Court's analysis. Even though the appellate court appears to recognize that the Supreme Court's opinion is limited to the transportation of carbon dioxide and hydrogen, the court of appeals' reliance on the type of evidence necessary under the Supreme Court's analysis will invite problems for those entities that may not be able to submit the same type of conclusive proof. Worse yet, requiring a preliminary finding as to an entity's power of eminent domain will certainly cause landowners to begin discovery at the earliest possible opportunity (*i.e.,* interrogatories, requests for production, requests for admissions, and depositions) to counter or test the evidence to be presented to establish the preliminary finding as to status, thereby prolonging the trial court's determination for several months if not years.

IX. THE TEXAS SUPREME COURT REVERSES THE BEAUMONT COURT OF APPEALS' DECISION

As noted above, the Texas Supreme Court recently reversed the Beaumont Court of Appeals' decision in Texas Rice and reinstated the trial court's summary judgment in favor of Denbury Green, in which Judge Floyd applied the reasonable probability test formulated by the Texas Supreme Court in its first *Texas Rice* decision.[246]

A. *Evidence Offered on Remand*

On remand from the Texas Supreme Court, Denbury Green presented evidence (1) of two transportation agreements, one with Airgas Carbonics, Inc. ("Airgas") and one with Air Products and Chemicals, Inc. ("Air Products"); (2) of transportation agreements between Denbury Green and Denbury Onshore pursuant to which Denbury Green shipped CO_2 for Denbury Onshore and its working interest owners in the West Hastings oil field for tertiary recovery operations; and (3) that the Denbury Green Pipeline was specifically routed close to existing refineries and plants with the expectation that anthropogenic CO_2 would be shipped through the line. Based on this evidence, Judge Floyd entered summary judgment declaring Denbury Green to be a common carrier. On appeal, the Beaumont Court of Appeals rejected all of Denbury Green's evidence, except for the Air Products' agreement, which it found did not conclusively establish a

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

reasonable probability under the Supreme Court's test.

B. *The Texas Supreme Court Rejected the Beaumont Court of Appeals' Attempt to Convert the Supreme Court's Objective Reasonable Probability Test into a Subjective Intent Test*

After considering the summary judgment evidence, the Beaumont Court of Appeals found that a fact issue existed requiring remand, and presumably trial, on common carrier status. The Beaumont Court of Appeals recognized and recited the Supreme Court's reasonable probability test, but focused its attention on the phrase "for a person intending to build" a pipeline within the reasonable probability test, and reasoned that "central to our inquiry is Denbury Green's *intent at the time of its plan to construct the Green Line*."[247] But as the Texas Supreme Court made clear in its recent opinion, intent—which is a subjective standard—is not part of the Supreme Court's test, and the "prefatory phrase demonstrates who must prove common-carrier status—the pipeline company."[248] Erroneously focusing on Denbury Green's subjective intent, the Beaumont Court of Appeals disregarded the relevant evidence submitted by Denbury Green, and discredited evidence of Denbury Green's "subjective" beliefs, as mere conclusions that were not competent summary judgment proof and that could not demonstrate reasonable probability of use by a customer.

C. *The Texas Supreme Court Finds Denbury Green's Evidence Conclusive*

As noted above, when Denbury Green filed its initial motion for summary judgment in the survey case, it presented as evidence in support thereof only its RRC T-4 permit, the tariff it had filed with the RRC, and affidavit testimony that Denbury Green was negotiating with parties to transport CO_2 over the Green Line. As the Texas Supreme Court noted in

247. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115, 120 (Tex. App.—Beaumont 2015, pet. granted), *rev'd*, 510 S.W.3d 909 (Tex. 2017). This all but ignores that that the Supreme Court, after receiving many amicus briefs from the oil, gas, and pipeline industry complaining about the reasonable probability test being determined based on circumstances existing "*at or before the time common-carrier status is challenged,*" withdrew its initial opinion and revised the reasonable probability test to determine reasonable probability based on circumstances existing *"at some point after construction*." Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, No. 09-0901, 2011 WL 3796574 (Tex. Aug. 26, 2011); Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC (*Denbury I*), 363 S.W.3d 192, 202 (Tex. 2012). In so doing, the Supreme Court clearly envisioned the presentation of evidence of not only potential, but also actual shippers, whether anticipated or actually obtained at some point after construction of a pipeline.

248. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909, 915 (Tex. 2017).

its most recent opinion, that evidence testimony did not indicate whether the gas would be used solely by Denbury Green or for the benefit of other parties. On remand, however, Denbury Green submitted significant additional evidence in support of the newly formulated reasonable probability test.

1. Pipeline Routing

On remand, Denbury Green presented evidence that (1) the Green Line's route through Texas was designed to be close to refineries, plants, and other facilities that could use the line as a means to transport CO_2; (2) Denbury Green chose the pipeline's specific location for its proximity to those industrial facilities, which could transport anthropogenic CO_2 to oil fields, underground storage reservoirs, or other locations where CO_2 could be used or stored; and (3) the Green Line was the only pipeline currently available to transport CO_2 to those refineries, plants, and other industrial facilities.[249] The court noted that this evidence, considered alone, showed only a mere possibility of possible future public use, but such evidence coupled with the Airgas agreement discussed below "would allow a reasonable observer to determine that, given the regulatory atmosphere and proximity of the pipeline to potential customers, at the time common-carrier status was challenged it was "'more likely than not' that a pipeline would someday serve the public."[250]

2. Air Gas

On remand, Denbury Green presented evidence that in 2012, Airgas approached Denbury Green to ship CO_2 volumes it owned in Jackson Dome, Mississippi, through the Green Line to a new plant it planned to construct and did ultimately construct in Brazoria County, Texas, to replace a supply of CO_2 it had lost in the Deer Park area, so that Airgas could continue to serve its customers. Airgas entered into several agreements to accomplish this, including a transportation agreement with Denbury Green to have Airgas's CO_2 transported through the Green Line, from the Louisiana/Texas border to Airgas's plant in Brazoria County, Texas. The CO_2 belongs to Airgas when it enters the Green Line in Louisiana and when the CO_2 exits the Green Line at Airgas's now constructed Brazoria County plant. The Beaumont Court of Appeals discounted this undisputed evidence because the Airgas transportation agreement did not come into being until

249. *Id.* at 910.
250. *Id.* at 915.

2012, after Airgas lost its supply of CO_2 from a refinery in the Deer Park area. Because the Airgas agreement was reached after the completion of the Green Line, the Beaumont Court of Appeals determined that the evidence could not "speak[] to Denbury Green's intent at the time of its plan to construct the Green Line *Texas Rice*."[251] In addressing the Airgas transportation agreement, the Texas Supreme Court stated:

> While post-construction contracts considered without any other relevant evidence would normally establish only a pre-construction possibility of future public use, such contracts can be relevant to showing a reasonable probability that, "at some point after construction," a pipeline will serve the public. For example, such contracts can speak directly to whether specific, identified potential customers own CO_2 near a pipeline's route, as in this case. Moreover, when combined with other evidence, post-construction contracts could allow a reasonable observer to determine that, given the regulatory atmosphere and proximity of the pipeline to potential customers, at the time common-carrier status was challenged it was "more likely than not" that a pipeline would someday serve the public. . . . When considered in the light most favorable to Texas Rice, indulging every reasonable inference in its favor, Denbury Green 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_2 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_2 owned by a customer who retains ownership of the gas. The Airgas Carbonic contract does more than show that it is "more likely than not" that the Green Line will someday be used for public use; it shows that the Green Line is used for public use today.*[252]

3. Air Products

Denbury Green also presented summary judgment evidence on remand that when the Green Line was first proposed in 2007, Denbury Onshore, the operator of the West Hastings Unit, Air Products, and the Department of Energy (DOE) began discussing a government grant to Air Products to construct CO_2 recovery facilities at a plant in Jefferson County, Texas, and the transport of CO_2 in the Green Line (once constructed) to the West Hastings Unit for ultimate sequestration in the West Hastings reservoir as

251. *Tex. Rice Land Partners, Ltd.*, 457 S.W.3d at 120.
252. *Tex. Rice Land Partners, Ltd.*, 510 S.W.3d at 916

part of tertiary oil recovery operations.[253] The DOE awarded Air Products a $285 million grant for the installation of carbon capture facilities and required that Air Products sequester the captured CO_2 in the West Hastings Unit.[254] The grant and underlying documents carrying out the requirements of the grant were consummated in 2012, including a shipping agreement between Denbury Green and Air Products for the shipment of the Air Products' captured CO_2 in the Green Line from the plant where it was captured to the West Hastings Unit, where the CO_2 would be used for tertiary recovery operations and sequestered in the West Hastings reservoir.[255] In addressing the Air Products' transportation agreement the Supreme Court stated:

> [T]he Air Products transportation agreement supports Denbury Green's contention that the pipeline route was designed in part to facilitate the transfer of gas owned by third parties. According to Air Products, "[w]ithout the Denbury Green Pipeline, the Air Products CO_2 capture program would not have been economical and would not have been undertaken." The proposed Green Line was not only within geographic proximity to Air Products' reformers in the Valero Refinery, but it was the only pipeline close enough to transport Air Products' CO_2. The close proximity, and lack of competing pipelines, caused Air Products to begin negotiating with Denbury Green in 2008, before the pipeline was constructed. It is true that the Air Products contract, standing alone, would not satisfy the *Texas Rice I* test because title to the CO_2 transfers to Denbury Green at the end of its transport. ("If Denbury consumes all the pipeline product for itself, it is not transporting gas 'to . . . the public for hire.'"). However, when considered together with the Green Line's proximity to identified potential customers, including Air Products, and the Airgas Carbonic transportation contract, under which Airgas Carbonic retains title to the CO_2, the summary judgment evidence conclusively establishes that it was "more likely than not" that, "at some point after construction," the Green Line would serve the public.[256]

253. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115, 118–19 (Tex. App.—Beaumont 2015, pet. granted), *rev'd*, 510 S.W.3d 909 (Tex. 2017).

254. Denbury Green's Petition for Review at Appendix 5, Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015, pet. granted), *rev'd*, 510 S.W.3d 909 (Tex. 2017); (No. 09-14-00176), affidavit of Gloria Power.

255. *Id.*

256. *Id.* at *2

4. Transportation Agreements with Denbury Onshore

Denbury Green also presented evidence on remand that it had entered into transportation agreements with Denbury Onshore, on behalf of itself and the other working interest owners in the West Hastings Unit, for shipment of CO_2 produced from CO_2 wells in Jackson Dome, Mississippi, for tertiary recovery operations in the West Hastings Unit. Most of the working interest owners in the West Hastings Unit ratified the transportation agreement and paid their share of transportation fees and purchase costs of the Jackson Dome CO_2. The Beaumont Court of Appeals rejected the transportation agreements between Denbury Onshore, on behalf of itself and the Unit Owners, concluding that (1) Denbury Onshore owned the controlling interest in the West Hastings Unit and Jackson Dome Wells, (2) "a very small percentage of the non-operator working interest owners ratified" the transportation agreements for the delivery of CO_2 to the West Hastings Unit, and (3) the other working interest owners in the units did not take title to or possession of the CO_2 obtained from Jackson Dome at the Oyster Bayou and Hastings Units and from Air Products at the Hastings Unit.[257] Specifically, the Beaumont Appellate Court stated, "the evidence raises a fact issue regarding whether the taking serves a *substantial* public interest."[258] While the Supreme Court rejected the substantial public interest theory espoused by the Beaumont Court of Appeals (as discussed below), since the Supreme Court found that the Airgas, Air Products, and routing evidence conclusively satisfied the reasonable probability test, it expressed no opinion on whether contracts between affiliated entities that may benefit unaffiliated working interest owners satisfied the test.[259]

D. *"Substantial" Degree of Public Use Is Not Required*

Citing *Coastal States Gas Producing Co. v. Pate*,[260] the Beaumont Court of Appeals concluded that "the evidence raises a fact issue regarding whether the taking serves a *substantial* public interest."[261] In so holding, it discounted Denbury Green's claim that small interest owners in the West Hastings and Jackson Dome fields benefitted from CO_2 transferred from those units over the Green Line, even though Denbury Onshore owned the controlling interests in both units, concluding that it raised a fact issue of whether such

257. *Texas Rice Land Partners, Ltd.*, 456 S.W.3d at 121–22.

258. *Id.*

259. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909, 912 n.3 (Tex. 2017).

260. Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958)

261. *Texas Rice Land Partners, Ltd.*, 456 S.W.3d at 121.

use was substantial. Additionally, the court of appeals determined that the Air Products agreement—under which Air Products would transfer ownership of its CO_2 to Denbury Green, even though Denbury Green was required to sequester the gas in a method that complied with Air Products' agreement with the federal government—was not sufficiently *substantial*. The Texas Supreme Court held that the Beaumont Court of Appeals erroneously relied on the *Pate* decision:

> We did not hold [in *Pate*] that the interest need be direct, tangible, or substantial, but rather that the facts before us in *Pate* supported that the public's interest would be served. To the extent that the degree of service to the public was woven into our test in *Texas Rice I*, we held that for the pipeline to serve the public it must "transport[] gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." Existential arguments related to the power and importance of the individual notwithstanding, we hold 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.[262]

The Texas Supreme Court made it clear a long time ago that the question of whether a use is a public one depends upon the character and not the extent of such use.[263] As long as a carrier is "open to the promiscuous and uniform use of the public such facts conclusively make it a public use, and the extent of the public need and probable use thereof is not a question for the courts, and may not be inquired into."[264]

E. *Section 2.105 as a Separate Source of Condemnation Authority*

Denbury Green argued that it was a common carrier under the reasonable probability test for chapter 111 of the Texas Natural Resources Code and under the common law test codified in section 2.105 of the Texas Business Organizations Code (i.e., whether the entity holds itself out for hire to the public).[265] The Beaumont Appellate Court held that because section 2.105 grants entities engaged as common carriers in the pipeline business for transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth,

262. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909, 912 (Tex. 2017). This is consistent with description of public use in *Tenngasco Gas Gathering Co. v. Fisher*, 653 S.W.2d 469, 475 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.), set out in Part VI, *supra*.

263. Hous. Auth. of Dall. v. Higginbotham, 143 S.W.2d 79, 84 (Tex. 1940).

264. *Id.*

265. *Tex. Rice Land Partners, Ltd.*, 457 S.W.3d at 119.

sand, clay, liquefied minerals, or other mineral solutions, all the rights and powers conferred on a common carrier under sections 111.019 through 111.022 of the Texas Natural Resources Code, an entity "must still meet Chapter 111's common carrier requirement" and, thus "[s]ection 2.105 is not an independent basis for exercising eminent domain authority."[266] There is nothing in sections 111.019 through 111.022, which sets forth any common carrier requirements. Those requirements are contained in section 111.002 of the Texas Natural Resources Code, which is not referenced anywhere in Section 2.105.[267] Additionally, section 111.002 does not address many of the substances referenced in 2.105 of the Texas Business Organizations Code. So, does this mean that pipelines shipping NGLs no longer have the power of eminent domain since they are not included as common carriers under section 111.002? More importantly, what is now codified under section 2.105 was first enacted in 1899, some eighteen years before the Common Carrier Act contained in chapter 111 of the Texas Natural Resources Code was even enacted. Section 2.105 and its predecessor statutes have always provided a separate and independent grant of eminent domain authority.[268] In its recent *Texas Rice* decision, the Texas Supreme Court declined to address this issue, stating that because it held that Denbury Green was a common carrier under chapter 111 of the Texas Natural Resources Code, it did not need to address or decide such issue.[269]

X. CONCLUSION

The first *Texas Rice* decision changed the playing field for all common carriers and gas utilities. Even though the court expressly limited its holdings in *Texas Rice* to only common carrier status for CO_2 lines, its limitation fell on deaf ears, and many Texas trial courts applied the new *Texas Rice* test to all pipelines seeking to exercise the power of eminent domain. Many of the challenges to common carrier or gas utility status came at the early survey stages of proposed pipelines, resulting in either attendant delays in the surveying and construction of those lines and the placement of those lines into service, or the avoidance of such delays by pipeline owners paying many multiples of the market value of the land rights sought to avoid the costs, delays, and risks associated with proving common carrier or gas

266. *Id.*

267. *See* TEX. NAT. RES. CODE § 111.002 (West 2015)*;* TEX. BUS. ORG. CODE § 2.105 (West 2016) (excluding any reference to section 111.002, and merely referencing 111.019–111.022).

268. BUS. ORG. CODE ANN § 2.105.

269. Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909, 914 n.6 (Tex. 2017).

utility status under the newly-formulated test. Many landowners suggested that the test required the presentation of evidence at the time common carrier gas utility status was first challenged—even if the challenge occurred well before construction even started on the pipeline—of: (i) substantial use of a proposed line by third-party shippers; and (ii) that multiple third parties would be shipping enough oil, gas, or liquids in the line to comprise a substantial portion of the entire capacity of the pipeline.

In the first *Texas Rice* decision, the Texas Supreme Court made it clear that the reasonable probability test applied only to CO_2 lines. In its most recent decision, the court did not revisit its earlier qualification, which presumably remains undisturbed. In any event, the *Texas Rice* test cannot be properly applied to crude petroleum lines, as those lines are common carrier lines under the Texas Natural Resources Code by virtue of engaging in the business of transporting crude petroleum in Texas, even if the only crude petroleum shipped in the line is owned by the pipeline company, Nor can the test be properly applied to gas utilities, which by statute qualify as such even if they carry only gas owned by the pipeline company and whether or not they are operated "to or for hire."[270]

While the Beaumont Court of Appeals' recent decisions in *Texas Rice, In re Texas Rice,* and *Crosstex* demonstrate an anti-condemnation trend for pipelines, the Texas Supreme Court reversed this trend and made it abundantly clear in its recent decision that where the *Texas Rice* test does apply, such test: (i) only requires evidence that demonstrates that it is more likely than not that a proposed pipeline will have at least one third-party shipper at some point after it is constructed, (ii) is properly addressed and resolved through summary judgment proceedings, and (iii) does not require proof of a substantial public use.[271]

270. TEX. NAT. RES. CODE § 111.002 (4)(West 2015); TEX. UTIL. CODE §§ 101.003, 121.001 (West 2016).

271. In *Crosstex NGL Pipeline, LP v. Reins Road Farm-1, Ltd.*, the Beaumont Appellate Court upheld the denial of Crosstex's request for injunctive relief to conduct a preliminary survey by (1) ignoring uncontroverted testimony by Crosstex that it had reserved 10% of the pipeline capacity for third party shippers, (2) stating that a third party shipping agreement was not relevant to Crosstex's status as a common carrier because the shipper had no points of outlet on the Crosstex pipeline as originally planned, even though the shipping agreement specified the only two redelivery points on the pipeline system as originally configured (the shipper also wanted a third delivery point which Crosstex and the shipper were still negotiating), (3) ignoring that the pipeline was regulated by FERC as a common carrier line and as required by the FERC to maintain capacity on the pipeline for third party shippers, and (4) stating that Crosstex had no tariff on file even though it was undisputed that Crosstex could not even file a tariff with FERC until the "effective date" under FERC regulations, which had not yet occurred. Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd., 404 S.W.3d 754, 760–61 (Tex. App.—Beaumont 2012, no pet.).

Before the Texas Supreme Court issued its recent *Texas Rice* decision, some landowner groups suggested a Legislative solution. While many condemnation reform bills were presented during the 2015 legislative session, none passed.[272] Recently the RRC revised Rule 70, which deals with the permitting process for private, gas utility and common carrier pipelines.[273] The revised Rule 70, which became effective on March 1, 2015, requires that new pipeline permit applications (form T-4) must include the operator's requested classification as either a common carrier, gas utility or private pipeline and "a sworn statement from the pipeline applicant providing the operator's factual basis supporting the [requested] classification[,]" and may include documentation to support the requested classification and any other information requested by the RRC.[274] The RRC has fifteen days to determine if the application is administratively complete,[275] and once the permit application is deemed administratively complete, the RRC has forty-five days to review the application, "classify the pipeline as [either] a common carrier, a gas utility or a private pipeline" and issue the pipeline permit.[276] Revised Rule 70 only "applies to applications made for new pipeline permits and to amendments, renewals and cancellations" submitted after March 1, 2015.[277] Pipeline permit renewals or amendments will not be required to submit documentation supporting the existing pipeline classification unless the pipeline's classification has changed. While the Texas Supreme Court in its recent *Texas Rice* decision again stressed that checking the box on a T-4 form was not enough to conclusively establish one's status as a common carrier, now that the RRC has a procedure for verifying the status of both common carriers and gas utilities (for regulatory purposes), it remains to be seen how much deference courts will give to that classification in addressing a challenge to a pipeline's status as a common carrier or gas utility.

The recent *Texas Rice* decision was a major setback for landowners, adversely affecting their ability to demand and receive many multiples of fair market value for easement rights sought, due to the risks, expense, and delay and uncertainty in establishing common carrier or gas utility status. Landowners and landowner groups have aligned this legislative session and are proposing legislation that awards landowners their attorney's fees in

272. S.J. of Tex., 84th Leg., R.S. 3481–84 (2015).
273. 16 TEX. ADMIN. CODE § 3.70 (West 2016) (Tex. R.R. Comm'n., Pipeline Permits Required).
274. *Id.* § 3.70(b)(3)–(4).
275. *Id.* § 3.70(d).
276. *Id.* § 3.70(e).
277. *Id.* § 3.70(f).

almost every condemnation case, again attempting to leverage pipeline companies to pay more than just compensation as determined by licensed real estate appraisers, to avoid the substantial costs of litigation, and placing little incentive on landowners to accept offers based on just compensation as determined by licensed real estate appraisers.