

FARMERS FIGHT: TEXAS EMINENT DOMAIN AND THE 2015 *TEXAS RICE II* CASE

Synopsis: Since the oil shale boom and the 2016 political races, the use of eminent domain by private entities has garnered a significant amount of attention from the public. States, railroads, oil companies, and landowners all have a stake in the outcome of court cases that determine the rights of landowners who are threatened with the taking of their land by private entities through eminent domain. Some believe the weakening of private common carriers' eminent domain power could slow oil industry growth in the future.

In Texas, oil pipeline companies, defining themselves as common carriers, use eminent domain authority granted by the state legislature and the Texas Railroad Commission's permitting process to take ranchers and landowners land for pipeline development. The 2012 *Texas Rice Land Partners v. Denbury Green Pipeline—Texas* decision, known as *Texas Rice I*, allowed the Texas Supreme Court to define a new public use evidentiary requirement that pipeline companies must meet in order to take landowners' property for the laying of pipelines. The Texas Railroad Commission's T-4 Permits are no longer dispositive of common carrier status in Texas courts. Consequently, pipeline companies may have to defend their takings past a court's summary judgment phase more often in the future.

In 2015, the Beaumont Court of Appeals again considered Texas Rice Land Partners' case in *Texas Rice II* and further added to the evidentiary burden necessary to establish a pipeline's common carrier status. Denbury Green then appealed to the Texas Supreme Court where the parties delivered oral arguments this past September. This article explains why the Texas Supreme Court may partially reject the Beaumont Court of Appeals' additional evidentiary burdens. When the Texas Supreme Court decides the *Texas Rice II* case, it may reverse the 2015 Beaumont Court of Appeals' decision and conclude that Denbury Green satisfactorily met the Court's existing evidentiary burdens for summary judgment established in *Texas Rice I*.

I. BACKGROUND

A. Case History

The primary dispute in the February 2015 *Texas Rice Land Partners v. Denbury Green Pipeline-Texas* case, also known as *Texas Rice II*, revolved around the alleged common carrier status of a CO_2 pipeline owned by Denbury Green (Denbury).[1] If Denbury's pipeline was a common carrier, it could exercise eminent domain against Texas Rice Land Partner's (Texas Rice) private property.[2]

In 2008, Denbury Resources, owner of subsidiary Denbury, planned to build a CO_2 pipeline from Louisiana to the Galveston region in Texas to facilitate tertiary recovery operations on oil wells.[3] Denbury Onshore, also a subsidiary of Denbury Resources, owned a CO_2 plant in Jackson Dome, Mississippi, where Denbury's pipeline would originate.[4] The pipeline would traverse across Louisiana to the Louisiana-Texas border where Denbury's portion of the pipeline would carry the Denbury Onshore owned CO_2 to Hastings Oil Field in the Texas counties of Galveston and Brazoria.[5] The pipeline would be the only CO_2 pipeline in the southern Texas region.[6] Evidence showed that Denbury anticipated it might purchase "man-made or 'anthropogenic' CO_2 from third parties" to transport in its pipeline in addition to the naturally occurring CO_2 produced at Denbury Onshore's own Jackson Dome plant.[7] Denbury Offshore had a major controlling interest in both the Mississippi Jackson Dome plant and the West Hastings Unit, both of which the Denbury pipeline connects.[8] Additionally, Denbury was the operator of the pipeline and Denbury Onshore, its affiliate, was the operator on the West Hastings Unit.[9]

In March 2008, Denbury applied for common carrier status with the Texas Railroad Commission (TRRC).[10] To exercise eminent domain in Texas, a private pipeline company must claim in a TRRC T-4 Permit application that it is a common carrier.[11] A common carrier in Texas is defined in section 111.002(6) of the Texas Natural Resource Code as an entity that "owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide [or crude petroleum] . . . to or for the public for hire."[12] The pipeline must also agree to subject itself to TRRC regulation under chapter 111 of the Texas Natural Resource Code for common carrier status.[13] A common carrier pipeline, as described by the

1. *See generally* Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (Tex. App. 2015).
2. Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 363 S.W.3d 192, 195 (Tex. 2012).
3. *Id.*
4. *Id.*
5. *Id.*
6. Petitioner's Supplemental Reply Brief on the Merits at 40, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).
7. *Tex. Rice Land Partners*, 363 S.W.3d at 195.
8. *Tex. Rice Land Partners*, 457 S.W.3d at 121.
9. *Id.*
10. *Tex. Rice Land Partners*, 363 S.W.3d at 195.
11. *Id.* at 195-96.
12. *Id.* at 197.
13. *Id.* at 201.

Texas Natural Resource Code, cannot be one that limits its "use to the wells, stations, plants, [or] refineries of the owner."[14] The Texas Natural Resource code further states that common carriers may employ eminent domain to condemn necessary private property.[15]

Denbury's T-4 Form had two boxes in which the pipeline could indicate whether it was a "common carrier" or "private line" and an additional three boxes where it could indicate it would not use the pipeline to exclusively transport gas and liquids produced by the owner of the pipeline.[16] The three categories of gas Denbury could indicate its pipeline would carry were gas: (1) "[p]urchased from others;" (2) "[o]wned by others, but transported for a fee;" or (3) "[b]oth purchased and transported for others."[17] Denbury chose the second option.[18]

Pursuant to section 111.002(6) of the Texas Natural Resource Code, Denbury submitted a letter, expressly agreeing that it would be "a common carrier subject to the duties and obligations conferred by chapter 111."[19] Eight days later the TRRC sent Denbury a letter confirming it was a common carrier according to section 111.002(6), and Denbury filed a tariff in November 2008.[20] The administrative process through which the TRRC granted Denbury's common carrier status required no hearing or notice for landowners along the pipeline route.[21]

Before Denbury built the pipeline in 2010, Texas Rice and Mike Latta, a local landowner and tenant along the pipeline's route, tried to prevent the "taking" of their land.[22] When Denbury came to survey Texas Rice's land, Texas Rice refused it entry.[23] Denbury sought an injunction against Texas Rice so it could survey the land and build the pipeline.[24] After the parties made cross-motions for summary judgment, the trial court ruled that Denbury was a common carrier and could condemn Texas Rice's land.[25] Texas Rice appealed the decision to the Texas Court of Appeals in Beaumont and the appellate court affirmed the trial court's decision that Denbury was a common carrier as a matter of law.[26]

B. Texas Rice I: The 2012 Supreme Court Decision

On appeal, the Texas Supreme Court reversed the Court of Appeals' finding of common carrier status and remanded the case back to the district court, determining there must be a stricter interpretation of the public use requirement stated in section 111.002(6) of the Texas Natural Resource Code.[27] Citing precedent, the

14. TEX. NAT. RES. CODE § 111.003(a) (2016).
15. *Id.* § 111.019.
16. *Tex. Rice Land Partners*, 363 S.W.3d at 196.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Tex. Rice Land Partners*, 363 S.W.3d at 196.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 296 S.W.3d 877, 881 (Tex. App. 2009); *see also Tex. Rice Land Partners*, 363 S.W.3d at 196.
27. *Tex. Rice Land Partners*, 363 S.W.3d at 195, 201, 204.

Court required "strict compliance" with the statutory requirements to exercise eminent domain.[28] It also concluded that a pipeline was not entitled to unchallengeable common carrier status in Texas courts "simply because it obtained a common-carrier permit."[29] The filling out of the TRRC T-4 form and agreeing to the requirements of Chapter 111 was insufficient.[30]

The Texas Supreme Court held that for a person or company to be classified as a common carrier, a "reasonable probability must exist that the pipeline will at some point after construction serve the public."[31] The Court also observed that common carriers must serve the public by transporting gas "for one or more customers who will retain ownership of their gas or sell it to parties other than the carrier."[32] The mere "possibility" of transporting third-parties' CO_2 cited by Denbury did not establish a "*reasonable probability* that such transportation would ever occur."[33]

As to the its reasoning for reversing and denying summary judgment to Denbury, the Court stated that the Texas Legislature understood the case law when it wrote the statutes relevant to common carrier status.[34] Accordingly, if the Texas Legislature intended a T-4 Permit to give a company common carrier status with unchallengeable eminent-domain power, the legislature's statutes would state "explicitly" that an administrative body such as the TRRC had exclusive jurisdiction.[35] In contrast, the Court stated that the TRRC's process for granting T-4 Permits appeared only "to be one of registration, not of application."[36] The TRRC never denied a T-4 Permit, and the Court concluded that the TRRC granted the permits for administrative purposes as a "clerical rather than an adjudicative act."[37]

Texas' Constitution gave Texas landowners greater protection, and a common carrier T-4 Permit did not bar a landowner "from disputing in court a pipeline company's naked assertion of public use."[38] Though a permit from the TRRC granting common-carrier status is prima facie valid, if a landowner challenges the pipeline's common carrier status, "the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain."[39] According to the Court, Denbury's T-4 Permit by itself did not constitute reasonable proof of a future third-party use supporting its common carrier status, and, therefore, the Court reversed the appellate court's affirmance of summary judgment and remanded to district court.[40]

28. *Id.*
29. *Id.* at 202.
30. *Id.*
31. *Id.*
32. *Tex. Rice Land Partners*, 363 S.W.3d at 202.
33. *Id.* at 203 (emphasis added).
34. *Id.* at 199.
35. *Id.*
36. *Id.*
37. *Tex. Rice Land Partners*, 363 S.W.3d at 199.
38. *Id.* at 198.
39. *Id.* at 202.
40. *Id.* at 204.

C. Texas Rice II: The 2015 Beaumont Appeals Court Decision

On remand, the district court heard the case for a second time in 2014 and again granted summary judgment in favor of Denbury.[41] Texas Rice again appealed, and in February 2015, the Texas Court of Appeals in Beaumont, in the case known as *Texas Rice II*, reversed the district court's summary judgment decision and remanded once more to district court.[42] Denbury consequently appealed and filed a petition for review of this ruling to the Texas Supreme Court where *Texas Rice II* is currently pending.[43] In its 2015 *Texas Rice II* appellate decision, the Court of Appeals ruled that the district court erred in granting summary judgment because "reasonable and fair-minded jurors could differ in their conclusion [of Denbury's common-carrier status] in light of all of the evidence presented."[44]

The appellate court concluded that the earlier 2012 Texas Supreme Court decision created a new test for determining common carrier status.[45] The Beaumont appellate court emphasized the Texas Supreme Court's conclusion that there must be a reasonable probability that a pipeline *intended to build* a pipeline for public use pursuant to section 111.002(6) of the Natural Resource Code *at the time* of planning.[46] The appellate opinion reasserted the Texas Supreme Court's observation that "reasonable probability" meant more likely than not.[47] Timing was important in determining a common carrier status, and "Denbury Green's intent at the time of its plan to construct the Green Line" was central to the appellate court's inquiry.[48] The court asked whether, at the time Denbury *planned* to construct the pipeline, there existed as a matter of law a reasonable probability that the pipeline's purpose was to serve the public.[49] It concluded that reasonable jurors could differ on this point and, therefore, summary judgment was not appropriate.[50]

Texas Rice II turned on the fact that Denbury did not acquire contracts to carry third-party CO_2 with third parties Airgas and Air Products until after the pipeline was already built in 2010, one of which told Denbury, only after the Texas Supreme Court 2012 decision, that "it might be advantageous" to have third-party business.[51] Even though Denbury allegedly located its pipeline in anticipation that third-party anthropogenic CO_2 producers could use the pipeline to transport their gas to Texas destinations, the *Texas Rice II* appellate court concluded that *anticipation* of third-party contracts was not enough; when property is taken for public use, there must be a "*definite* right or use in the business or undertaking to which

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

42. *Id.* at 122.

43. *Case Detail, Case: 15-0225*, TEX. JUD. BRANCH, http://www.search.txcourts.gov/Case.aspx?cn=15-0225&coa=cossup.html (last visited Nov. 4, 2016).

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

45. *Id.* at 120.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

50. *Id.*

51. *Id.*

the property is devoted."[52] The appellate court found Denbury's subjective beliefs did not demonstrate a reasonable probability that "at the time Denbury Green intended to build the Green Line the pipeline's purpose was to serve the public."[53]

Finally, the *Texas Rice II* court added more to the Texas Supreme Court's previous reasoning in the 2012 *Texas Rice I* decision when the appellate court stated that the evidence in the case raised "a fact issue regarding whether the taking serves a *substantial* public interest."[54] The *Texas Rice II* appellate court determined that there must be a direct, tangible, and substantial public interest for a private company to execute a taking.[55]

Texas Rice II ultimately concluded that reasonable jurors could differ as to whether Denbury's post-construction contracts with third-parties were sufficient to establish an intent to substantially serve the public at the time of pipeline planning.[56] The court remanded the case back to the district court noting, "[i]ssues of knowledge and intent are rarely appropriate for summary judgment."[57] Denbury consequently filed a petition for review to the Texas Supreme Court, and the Texas Supreme Court granted the petition for review of *Texas Rice II*.[58]

II. ANALYSIS

The *Texas Rice I* and *Texas Rice II* decisions may mean that pipeline companies will have to defend their takings past the summary judgment phase in Texas courts more often in the future.[59] In *Texas Rice I*, the Texas Supreme Court defined a new public use evidentiary requirement that pipeline companies must meet in order to take landowners' property for the laying of pipelines.[60] *Texas Rice II* went further and concluded that pipeline companies must present proof that when they *planned* their pipelines there concurrently existed a reasonable probability of public use.[61] *Texas Rice II* added to the evidentiary burden of pipeline companies by creating an additional evidentiary hurdle for summary judgment.[62] When the Texas Supreme Court decides *Texas Rice II* this fall, the Court may reverse the 2015 Beaumont Court of Appeals decision and conclude that Denbury's pipeline met the reasonable probability of public use requirement when it took Texas Rice's property.[63] Nonetheless, it should leave intact the *Texas Rice II* Court of Appeal's reasoning that there should be evidence of the pipeline company's good faith *intent* to likely be a common carrier at the time of planning for a court to grant summary judgment.[64]

52. *Tex. Rice Land Partners*, 457 S.W.3d at 120 (quoting Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (1958) (emphasis added)).

53. *Id.* at 120-21.

54. *Id.* at 121.

55. *Id.*; *see generally Coastal States Gas Producing Co.*, 309 S.W.2d at 833.

56. *Tex. Rice Land Partners*, 457 S.W.3d at 121.

57. *Id.* at 121-22 (quoting Murray v. Cadle Co., 257 S.W.3d 291, 302 (Tex. App. 2008)).

58. *Case Detail, Case: 15-0225*, *supra* note 43.

59. *See generally* Crosstex NGL Pipeline v. Reins Road Farms-1, 404 S.W.3d 754 (Tex. App. 2013).

60. *See generally Tex. Rice Land Partners*, 363 S.W.3d at 192.

61. *See generally Tex. Rice Land Partners*, 457 S.W.3d at 115.

62. *Id.*; *see generally Case Detail, Case: 15-0225*, *supra* note 43.

63. *See generally Tex. Rice Land Partners*, 457 S.W.3d at 115.

64. *Id.*

A. Intent to Build a Public Pipeline is Necessary at the Time of Planning

The Court of Appeals in *Texas Rice II* accurately stated that for the district court to grant summary judgment, a pipeline company must show that reasonable jurors could not differ on their conclusion based on the evidence presented.[65] It correctly ruled that at the time a company intends to build and is planning a pipeline, there must be a reasonable probability that the pipeline will serve third parties for a court to consider the pipeline a common carrier.[66]

The court's reasoning is strong in this regard since a pipeline can exercise eminent domain and take a landowner's land before a landowner can successfully stop the taking in court.[67] If the pipeline company is planning to exercise eminent domain, it must apply for a T-4 Permit from the TRRC before it actually starts building its pipeline.[68] To even qualify for the T-4 Permit for eminent domain purposes, the pipeline company must verify that its future pipeline will be a common carrier (i.e. that the company is *intending* that the soon to be built pipeline will be open to third parties).[69] For the pipeline to do this in good faith, it must actually intend to be a common carrier at the time of application.[70]

In its *Texas Rice II* brief on the merits to the Texas Supreme Court, Denbury argued that the appellate court erroneously interpreted *Texas Rice I*'s reasonable-possibility test, which called for an objective determination of whether the pipeline would have future third-party clients, with a different, difficult to assess, subjective-intent test.[71] Intention, however, is a relevant element because without it, a pipeline will not qualify as a common carrier according to the Texas Natural Resource Code, which requires pipelines to have a T-4 Permit.[72]

The other element in *Texas Rice II* is that there must be a reasonable probability that a pipeline company's intention will come to fruition.[73] *Texas Rice II*'s ruling that a reasonable probability of there being a third-party client for the pipeline, at least in the planning stage of the pipeline and before the pipeline company exercises eminent domain, is correctly reasoned.[74] The court made a valid point when it concluded that for an intention to have weight there must be objective evidence and not just a statement of subjective intent of what the pipeline thinks it might do in the future.[75]

The Court of Appeals also reasoned that Denbury was not a common carrier because it did not have any definite contracts with third-party suppliers until 2010, after the company already exercised eminent domain and built the pipeline.[76]

65. *Id.* at 119; *see generally* Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754 (Tex. 2007).

66. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

67. *Tex. Rice Land Partners*, 363 S.W.3d at 196.

68. *Id.* at 195.

69. *Id.* at 195-96.

70. TEX. NAT. RES. CODE § 91.143 (2015).

71. Petitioner's Brief on the Merits at 1, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

72. *Tex. Rice Land Partners*, 363 S.W.3d at 196.

73. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

74. *Id.*

75. *Id.*; *see generally Coastal States Gas Producing Co.*, 309 S.W.2d at 833.

76. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

Texas Rice argued to the Texas Supreme Court that the *ex post facto* third-party Airgas contract (entered into after Denbury already exercised eminent domain) does not support the pipeline having the intent to be a common carrier at the time of planning in 2008.[77] The Texas Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution afford landowners greater protection.[78] The U.S. Supreme Court explains that "one person's property may not be taken for the benefit of another private person [or company] without a justifying public purpose, even though compensation be paid."[79] Therefore, an entity cannot exercise eminent domain if it is not legitimately taking the land for future public use despite post-construction negotiations.[80] Based on this reasoning the appellate court correctly ruled on the required early timeframe in which the pipeline should already have the legitimate intent to operate for the public use before it deprives landowners of their property, which is protected under the Texas and U.S. Constitutions.[81] Post-construction contracts, such as the one Denbury made with Airgas after the 2012 *Texas Rice I* Texas Supreme Court decision, do not constitute dispositive evidence of a pipeline company's intent when the company planned the pipeline and exercised eminent domain.[82]

B. Evidence of Definite Contracts May Not Be Required for Summary Judgment

The Texas Supreme Court may reject the appellate court's ruling that the location of the pipeline is not legitimate evidence of a future likelihood of *definite* third-party use.[83] Though Denbury did not have an actual contract with a third party when planning its pipeline, courts could consider the other evidence that the company planned and built its pipeline near third parties and designed it for general third-party use.[84] Depending on the circumstances, evidence of a permanent pipeline location near many third-parties may be no more anticipatory of a possible future public use than a single completed contract that is capable of being broken.[85] A court should be able to consider the indisputable factual evidence of both the pipeline's location and the pipeline company's completed contracts as equally legitimate evidence for summary judgment in regards to possible future public use.[86]

In the past, courts could determine a pipeline company's authority to condemn property as a matter of law during summary judgment.[87] The question in *Texas Rice II* is whether the Texas Supreme Court in *Texas Rice I* changed this

77. Respondents' Brief on the Merits at 25-26, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

78. *Tex. Rice Land Partners*, 363 S.W.3d at 201; *see also* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

79. Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937).

80. *Kelo*, 545 U.S. at 477; *See also Tex. Rice Land Partners*, 363 S.W.3d at 202.

81. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

82. *Id.*

83. *Id.*

84. Petitioner's Supplemental Reply Brief on the Merits at 21, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

85. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

86. *Id.*

87. Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. App. 2001).

analysis and now sees disputed pipeline common carrier status as a fact question for a jury.[88] The Texas Rules of Civil Procedure and the Texas Supreme Court require the movant for summary judgment to establish that there is no genuine issue of material fact, with any doubts resolved in the non-movant's favor.[89] Nonetheless, *Texas Rice I* appears only to require that factual evidence show a reasonable probability of a pipeline's future public use for the granting of summary judgment.[90] The Texas Supreme Court could view indisputable facts such as the location of Denbury's pipeline as evidence of a reasonable probability of future public use and still grant summary judgment as a matter of law.[91]

The Court could view the asserted good faith planning of the pipeline to be located near third-party industrial facilities for tertiary recovery operations as evidence of Denbury's intent for a public use.[92] The pipeline is the only pipeline in the region of southern Texas, and it was reasonably likely to ship CO_2 from companies like Airgas that were located in the region.[93] Furthermore, Denbury had an economic incentive to operate its pipeline at full capacity in order to reduce its transportation costs.[94] Therefore, the Court has reasons to rule in Denbury's favor should it disregard the appellate court's preference for actual completed contracts at the time of planning the pipeline.[95]

C. Only "Some Public Use" Should Be Necessary to Be a Public Carrier

The Court of Appeals also ruled on the extent of the evidence of third-party use and contracts required at the planning stage of the pipeline when it ruled that there must be evidence of a "substantial public interest" and not just some public use that the Texas Supreme Court in *Texas Rice I* states the law requires.[96] Denbury argued that the Texas Supreme Court's 2012 *Texas Rice I* decision only required that there be "*some* public use."[97] *Texas Rice II*, however, reasoned that the requirement for a public use must meet a higher "substantial interest" evidentiary standard.[98] A court is to use the intent of the authors of the statute and the plain meaning of the words of the statute when interpreting the phrase "public use."[99] "Public use" can be construed broadly.[100] *Texas Rice II* may have added a "substantial interest" evidentiary requirement that may be more demanding than *Texas Rice I* requires.[101] In *Texas Rice I*, the Texas Supreme Court determined

88. *See generally Tex. Rice Land Partners*, 363 S.W.3d at 192; *see also Vardeman*, 51 S.W.3d at 311.

89. *Vardeman*, 51 S.W.3d at 311.

90. *Tex. Rice Land Partners*, 363 S.W.3d at 202.

91. *Id.*; *see generally Vardeman*, 51 S.W.3d at 308.

92. Petitioner's Supplemental Reply Brief on the Merits at ii, 21, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

93. *Id.* at 40.

94. *Id.* at 39.

95. *Tex. Rice Land Partners*, 457 S.W.3d at 120.

96. *Id.* at 121; *see also Tex. Rice Land Partners*, 363 S.W.3d at 202; *Kelo*, 545 U.S. at 477.

97. Petitioner's Brief on the Merits at 49, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

98. *Tex. Rice Land Partners*, 457 S.W.3d at 121.

99. *Tex. Rice Land Partners*, 363 S.W.3d at 201.

100. *Kelo*, 545 U.S. at 480.

101. *Tex. Rice Land Partners*, 457 S.W.3d at 121.

that evidence presented by Denbury would be sufficient for summary judgment if it showed just "a public use."[102]

D. A Possible T-4 Permit Process Solution

The Beaumont Court of Appeals based its decision in *Texas Rice II* on the *Texas Rice I* Texas Supreme Court decision, which appeared to eliminate judicial deference to TRRC determinations of T-4 Permit common carrier status.[103] In its review of the *Texas Rice II* case this fall, the Texas Supreme Court may modify or clarify its earlier 2012 decision to possibly leave space in its reasoning for allowing greater evidentiary weight for TRRC determinations of common carrier status without reverting to giving TRRC determinations unchallengeable status.[104] The Court, however, may only be able to modify its previous reasoning if it believes that there is a possibility that the TRRC will apply sufficiently stricter T-4 Permit requirements.[105] If the TRRC had stronger evidentiary requirements for approval of common carrier status for T-4 Permits, then a district court may give greater weight to existing TRRC common carrier documentation and T-4 common carrier status when determining whether there is enough evidence to grant summary judgment for a pipeline.[106]

Recently, there was debate on whether TRRC common carrier determinations should be more stringent.[107] In 2015, many concerned groups and citizens offered comments on how to possibly strengthen T-4 Permit requirements during the comment period of a TRRC rulemaking for T-4 Permit amendments.[108] During the comment period for the new rules, the TRRC received several recommendations concerning new proposed amendments to section 3.70 of the Texas Administrate Code which controls grants of the T-4 Permit.[109]

Though not ultimately adopting most proposed amendments in the rulemaking, the TRRC believed that "proposed amendments [would] add to the transparency and completeness of the permitting process by requiring pipelines to substantiate the basis for the requested classification."[110] The TRRC asserted that the possible extra time requirements placed on the applicant would be reasonable and would not cause undue delays or costs to applicants or the state.[111]

The 2015 TRRC rulemaking comments also highlighted the concern that injudicious and poorly thought changes in TRRC rules could cause the oil and gas

102. *Tex. Rice Land Partners*, 363 S.W.3d at 202.

103. *See generally Tex. Rice Land Partners*, 457 S.W.3d at 115; *see also Tex. Rice Land Partners*, 363 S.W.3d at 199.

104. *See generally Tex. Rice Land Partners*, 363 S.W.3d at 192.

105. *Id.*

106. *Id.* at 195, 197.

107. Memorandum from Christina Self, Office of Gen. Council, Tex. R.R. Comm'n, to Christi Craddick, Chairman, Tex. R.R. Comm'n 1 (Nov. 25, 2014) [hereinafter R.R. Comm'n Memo], http://www.rrc.state.tx.us/media/25385/adopt-amend-3-70-common-carrier-120214-sig.pdf.

108. *Id.* at 11.

109. *Id.* at 1.

110. *Id.* at 15.

111. *Id.* at 15-16.

industry harm and showed the necessity for the State of Texas to define clear consistent standards for common carrier classification.[112] Likewise, the comments further elucidated the necessity for there to be a thorough investigative process either at the TRRC permitting stage, the judicial stage, or both.[113]

As of now, the amended T-4 Permit process, like in 2012, does not protect landowners from takings before landowners challenge in court and does not require evidence of contracts with third parties for a pipeline to be granted initial common carrier status.[114] If the Texas Supreme Court finds that the new 2015 amendments or future TRRC rules could bolster the evidentiary weight of the TRRC's judgments on common carrier status, it could possibly modify its former 2012 decision's reasoning in the current *Texas Rice II* appeal.[115]

III. CONCLUSION

In light of the above concerns, the Court may consider modifying its ruling in *Texas Rice I* and demand that the TRRC's T-4 Permit process produce more credible and reliable evidence that a pipeline has a reasonable probability of catering to the public before a company builds a pipeline or even enters a landowner's property.[116] Another possible solution could be provided by the Texas legislature in the creation of new laws which will give greater deference to TRRC administrative determinations of public carrier status while also making those determinations subject to judicial review.[117] The potential new Texas laws would have to create an equitable and consistent process for both landowners and pipelines.[118]

The Texas Supreme Court may also follow the appellate court's ruling on a pipeline's intent, and decide that intent at the time of planning a pipeline is necessary to determine whether a pipeline is a common carrier.[119] Nonetheless, the Court might conclude that, based on the facts of the case, Denbury's pipeline meets this requirement due to the planned location of the pipeline and reverse *Texas Rice II*.[120]

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112. R.R. Comm'n Memo, *supra* note 107, at 1-2, 8-25.

113. Letter from David C. Holland to Lindil Fowler, Tex. R.R. Comm'n, at 6 (Aug. 25, 2014), http://www.rrc.state.tx.us/media/23074/comments-3-70-july2014-holland.pdf.

114. R.R. Comm'n Memo, *supra* note 107, at 3-4.

115. *See generally Tex. Rice Land Partners*, 363 S.W.3d at 192.

116. R.R. Comm'n Memo, *supra* note 107, at 4.

117. *Tex. Rice Land Partners*, 363 S.W.3d at 199.

118. R.R. Comm'n Memo, *supra* note 107, at i.

119. Respondents' Brief on the Merits at 22, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

120. Petitioner's Supplemental Reply Brief on the Merits at ii, Tex. Rice Land Partners v. Denbury Green Pipeline–Tex., 457 S.W.3d 115 (2015).

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