Common Carrier Condemnation after *Denbury*

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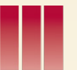
Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192 (Tex. 2012)

- CO_2 pipeline under TNRC 111.002(6)
- Landowner and its tenant farmer refused access for easement survey
- Denbury sued for injunction against interference; cross motions for sum. judgment filed.
- Denbury granted MSJ as "common carrier" and permanent injunction issued
- Affirmed by Court of Appeals
- Supreme Court overturns MSJ, remands case
- T-4 Certificate from RRC not enough—merely a "registration process, clerical act"
- Filing written acceptance of Chapter 111 only first element.
- "To or for the public for hire" is an additional element in 111.002(6)
- Standard: must show "a ***reasonable probability*** . . . 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."
- Website statements indicated private use intended
- Denbury officer deposition—only "possibility" would transport third party gas
- Corporate separateness ignored—*see* footnote 23
- Filing of tariff with RRC not enough
- Court uses example of an "oil company" using a "ruse" for eminent domain power
- Footnote 28—only CO_2 lines addressed, not other lines where common carrier at issue



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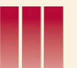
Subsequent proceedings in *Denbury*—New Summary Judgment Reversed on Appeal

- Summary judgment granted to Denbury on remand February 18, 2014
- Denbury amended petition after summary judgment granted, to add declaratory judgment claim on "common carrier" status, then filed Motion for Final Judgment, signed four days later. Potential procedural implications
- Case appealed again; oral argument Dec. 2014
- Decision issued February 12, 2015. **<u>REVERSED AND REMANDED</u>**. Key takeaways:
  - Business Org. Code Sec. 2.105 not independent ground for common carrier status—still must meet *Denbury* "reasonable probability" standard
  - Denbury's proofs not enough for summary judgment. Intent of operator <u>at time of plan to construct the line</u> is the key. Later contracts not enough.
  - Subjective beliefs of operator not probative—i.e., statements about anticipating future contracts, third parties, availability for use. Use is a public use "only when there results to the public some *definite* right or use in the business or undertaking to which the property is devoted." *Citing Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958) (emphasis added by *Denbury* court).
  - Denbury's alleged third party contracts came after the probative time frame. Plus, whether these contracts establish public use is a matter for "reasonable jurors" to decide
  - Contracts between Denbury Green and Denbury Onshore, ratified by some other small working interest owners, not enough for summary judgment. Also, ExxonMobil did not ratify these contracts for its 9.7% interest, and other interest owners do not take title to nor possession of CO2
  - Public interest must be ***substantial***. According to the Court, "Specifically, the evidence raises a fact issue regarding whether the taking serves a *substantial* public interest." *Citing Pate*, 309 S.W.2d at 833 ("A taking of property for public use does not become a private use simply because a private entity benefits from the taking, as long as the public has a direct, tangible and substantial interest and right in the undertaking.").
  - Knowledge and intent are rarely appropriate for summary judgment. Jury trial is the proper mechanism.
  - Post-SJ amendment of pleadings irrelevant due to decision that summary judgment was inappropriate

Crosstex NGL Pipeline, LP v. Reins Road Farms, 404 S.W.3d 754 (Tex.App.—Beaumont 5/23/13)

- Natural gas liquids line
- Trial court denied injunction to CrossTex against interference with surveying efforts
- Affirmed on appeal—no abuse of discretion, Crosstex not likely to prevail on its claims
  - NGL line not same as crude petroleum line
  - Common carrier under Bus. Org. Code Section 2.105? No—"there is evidence supporting the inference that the pipeline will not actually be used by the public."
  - Process of T-4 permitting applies to non-CO2 lines
- Court rejects CrossTex evidence of public use under *Denbury* "probability" standard
- Only interlocutory on temporary relief but is the most striking rejection to date of a company's proofs of public use—
  - Five unaffiliated contracts with third parties
  - CrossTex would purchase the liquids under four of them
  - Fifth contract involved a location not connected with CrossTex line as currently designed
  - Unsuccessful efforts to obtain other contracts under initial public tariff not enough, because CrossTex did not alter original tariff or conduct another open season
- Texas Supreme Court granted a motion to extend the time to file a petition for review, but it does not appear that any petition for review was ever actually filed.



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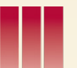
Rhinoceros Ventures Group, Inc. v. Transcanada Keystone Pipeline, LP, 388 S.W.3d 405 (Tex.App.—Beaumont 11/29/12, pet. denied)

- Landowner challenged condemnation in MSJ based on lack of jurisdiction because pipeline is interstate common carrier
- MSJ denied.
- Affirmed on appeal, holding that operator of crude petroleum line was a common carrier and had right to exercise eminent domain
- This case involved 111.002(1) and not 111.002(6)
- Rejects argument that "interstate" pipelines cannot qualify under 111.002(1) because not subject to each and every provision of Chapter 111. Court relies on 111.002(1) language—"a pipeline or ***any part*** of a pipeline . . ."
- Notes that the *Denbury* Court did not address subsection 111.002(1), and instead expressly noted in footnote 28 that its decision is limited to persons seeking common-carrier pipeline status under Section 111.002(6)
- Furthermore, the record in *Denbury* included evidence suggesting that the pipeline would be exclusively for private use. Apparently the "public use" issue was not viable in this case because Keystone clearly a common carrier for hire.

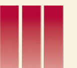
Crawford Family Farm Partnership v. Transcanada Keystone Pipeline, LP, 409 S.W.3d 908 (Tex.App.—Texarkana 8/27/13, pet. denied, reh'g pet. denied)

- Discussion at 922-923: Affirmed decision of trial court granting MSJ that pipeline company was a common carrier with right of eminent domain and that the pipeline was a public use under Texas constitution.
- MSJ also granted on "no evidence" grounds dismissing landowner claims of gross negligence and fraud
- Also denied landowner's motion to dismiss for lack of jurisdiction
- Cites *Crosstex* for the notion that Denbury's reasoning applies to non-CO2 lines.
- At 923: Even if *Denbury* should apply in this case, the pipeline company in the case (TransCanada) would pass the "reasonable probability test" set forth in *Denbury*
- There was evidence of several agreements with third party shippers and Transcanada would not own any of the crude shipped in the pipeline
- "Crawford submitted no evidence to the trial court to contradict or otherwise challenge the evidence of TransCanada as a common carrier 'to or for the public for hire.' "



In re Texas Rice Land Partners, Ltd. 402 S.W.3d 334 (Tex.App.—Beaumont 5/23/13) [same day as *Crosstex decision*] (mandamus denied 9/6/13)

- Texas Rice filed a petition for writ of mandamus to order trial court to vacate writ of possession issued to TransCanada after Commissioners' hearing awarded $20,808 in compensation for easements
- Texas Rice objected, requested jury trial and asserted TransCanada did not possess power of eminent domain
- Footnote 1: Cites *Rhinoceros* and repeats holding that interstate operators are entitled to common carrier status if other elements met
- Prop. Code Section 21.021 "Possession Pending Litigation" allows party with eminent domain authority to take possession pending the results of further litigation if pay required amounts into court registry
- "[W]e recognize 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."
- Court finds trial court's error harmless due to uncontroverted evidence of TransCanada's common carrier status



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RRC Issues New Rules effective March 1, 2015

- A copy of the Commission Staff's Memorandum to the Commission with responses to various comments and the public hearing September 22, 2014, along with the adopted amendments to 16 TAC § 3.70 is located at the following link:
- Adopt-amend-3-70-common-carrier-120214-SIG.pdf
- Key takeaways:
  - Does not resolve *Denbury* litigation issues or challenges to eminent domain status:

    "The Commission disagrees with assertions made by TSCRA and other commentators that the Court in Denbury suggested the Commission should expand its processing of applications for T-4 permits to encompass investigation and adversarial testing of, particularly, the common carrier assertions made by T-4 applicants. . . . [T]he parties point to no regulation or enabling legislation directing the Commission to investigate and determine whether a pipeline will in fact serve the public."
  - No routing or siting authority, so no pre-permit review of routing and siting appropriate
  - A court's disagreement with an operator's assertion of common carrier does not necessarily make that assertion a falsehood or false filing, so no penalties or standards for revocation are appropriate. Revocation amendment is based on failure to comply with the Commission's rules and Texas law.
  - No notice, hearings or comments on T-4 applications. Routing and ownership are not the Commission's job. Permit is to operate the line; not about ownership or routing or authority to condemn.
  - Remedy for disagreement with common carrier classification is a "court challenge"
  - Commission agrees that a T-4 permit does not preempt a court challenge but does not believe an express statement to that effect is necessary.
  - Commission is not an interstate agent and has no authority to regulate interstate pipelines

Key Provisions of Amended § 3.70

- Applicant must submit sworn statement of factual basis supporting classification as common carrier, gas utility or a private line
- Statement must include, if applicable, an attestation to knowledge of eminent domain provisions in Property Code and the Landowner's Bill of Rights published by Attorney General
- Supporting documentation and any other information requested by the Commission
- RRC has 15 days to determine if application is complete
- Once application is complete, Commission "shall issue, amend, or cancel the pipeline permit or deny the pipeline permit **as filed**" within 45 days
- If Commission is satisfied from its review of the application and supporting documentation that the proposed line is, or will be, laid, equipped, managed and operated in accordance with the "laws of the state and the rules and regulations of the Commission, the permit may be granted." [deleted references to "conservation laws" and "waste reduction"]
- Permit revocable at any time after a hearing held after 10 days' notice if the Commission finds that the pipeline is not being operated in accordance with the laws of the state and the rules and regs of Commission
- Permit is renewable annually

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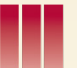
FERC Certificate Comparison

- Note the contrast between RRC position on T-4 permit meaning and scope and FERC Certificate of Convenience and Public Necessity for natural gas common carriers—FERC Certificate conveys the power of eminent domain under federal law.
- Many of the comments to the RRC proposed rule changes seem to advocate for a FERC-type process and scope in the issuance of a T-4 permit. The difference is legislative. Texas law does not provide for such application, while federal law does.
- FERC permit process is much more involved, requiring notice, environmental review, allowing for comments and intervention by affected landowners, and often involving public hearings. RRC process does not include any of that.



CONCERNS AND ISSUES GOING FORWARD

- Timing of landowner challenges
- Procedural aspects—pretrial, interlocutory, MSJ, injunction
- Possession pending litigation—does it make sense in this context?
- Nebraska court issued temporary injunction against Keystone to protect landowners this week
- Are these really "matter of law" determinations under the *Denbury* standard? Many factual issues involved in "reasonable probability"
- Legislative response forthcoming? Express delegation of authority to RRC similar to FERC authority?
- Rather than multiple challenges in various jurisdictions to the same pipeline, a single adversarial procedure in Commission on the issue of common carrier status seems to make the most sense

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