

Protecting Property Rights Amidst the Energy Boom

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Findings

- Texas should adopt an evidence-based process for determining whether a pipeline should be a common carrier.
- The process should include the opportunity of property owners to challenge a common carrier designation after the owners have been served notice that their property is subject to condemnation.

In March 2008, Denbury Green Pipeline-Texas (Denbury) applied to the Texas Railroad Commission (RRC) for a permit to operate a CO₂ pipeline as a common carrier with eminent domain authority to deliver the company's own CO₂ from its facilities in Mississippi to its Texas oil wells near Houston in order to facilitate tertiary operations. The Railroad Commission granted the permit without examining whether the pipeline operation qualified Denbury to operate as a common carrier and without a hearing or notice to landowners along the proposed pipeline route. Texas Riceland Partners and Mr. Latta, whose property Denbury wished to acquire for the pipeline via eminent domain, filed suit asking the courts to look at the facts of the case, which they believed would show that Denbury was not entitled to common carrier status. The court of appeals said the property owners did not have the right to review by the courts. The Supreme Court disagreed, and opined:

This property-rights dispute asks whether a landowner can challenge in court the eminent domain power of a CO₂ pipeline owner that has been granted a common carrier permit from the Railroad Commission. The court of appeals answered no, holding that (1) a pipeline owner can conclusively acquire the right to condemn private property by checking the right boxes on a one page form filed with the Railroad Commission, and (2) a landowner cannot challenge in court whether the proposed pipeline will in fact be public rather than private. We disagree. Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings.

The Foundation supports giving the RRC or the State Office of Administrative Hearings (SOAH) authority to make an administrative determination as to whether an applicant for common carrier status meets the standards for a common carrier. In addition to the current standards in law, we also support adding a standard that at least 25 percent of a pipeline's capacity must be used to transport product for one or more completely unaffiliated third parties, based on the Texas Supreme Court's decision in *Denbury*.

The Foundation opposes removing the ability of a property owner to challenge in district court an eminent domain taking for a pipeline on public use grounds de novo. Property owners facing condemnation for a pipeline easement should be able to challenge the taking on public use grounds, like other property owners can today. They should not have that right taken away based on an administrative determination made before the property owner has been notified of eminent domain proceedings by a bona fide offer under Sec. 21.0113, Property Code.

As Justice Willet said in a recent Texas Supreme Court case (*Crown, Cork and Seal*), "Judges are properly deferential to legislative judgments in most matters, but at some epochal point, when police power becomes a convenient talisman waved to short-circuit our constitutional design, deference devolves into dereliction." Additionally, in *City of Dallas v. Heather Stewart*, the Texas Supreme Court upheld Ms. Stewart's constitutional right to have the courts hear de novo her challenge to an administrative decision by the city of Dallas.

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The Foundation's approach would still make the process much more streamlined than it is today because we'd see very few challenges in court with the RRC or SOAH making these determinations, just like we see very few public use challenges on roads and transmission lines. But there needs to be a check on the administrative hearings—state agencies don't always get things right. And property owners should be the ones to be able to make that challenge after they have received a bona fide offer under Sec. 21.0113, Property Code. ★

