



Denbury Green Continues with Fact Questions Surrounding Condemnation

The *Denbury Green* case continues with a recent reversal by the Beaumont Court of Appeals. See *Tex. Rice Land Partners, Ltd., v. Denbury Green Pipeline-Texas, LLC*, No. 09-14-00176-CV, 2015 Tex. App. LEXIS 1377 (Tex. App.—Beaumont February 12, 2015, no pet. h.). On February 12, 2015, the Court of Appeals held that there were fact issues as to whether Denbury satisfied the Texas Supreme Court’s test for common carrier status with respect to Denbury’s carbon dioxide pipeline. The *Denbury Green* decision clarifies that satisfying the Texas Supreme Court’s test for common carrier status under Section 111.002(6) of the Texas Natural Resources Code is typically a fact-intensive inquiry, which may make it difficult for pipeline companies to prevail on summary judgment. The decision also emphasizes that to satisfy the test, a pipeline company must demonstrate that it will serve the public *at the time the company intends to build the pipeline*. Accordingly, pipeline companies may need to engage in substantive commercial activities, such as soliciting shipper contracts, prior to commencing construction of a pipeline to satisfy the test. While this case is limited to carbon dioxide pipelines, it may also foreshadow additional cases.

Background

The *Denbury Green* case began when the plaintiffs, who own a Texas cattle ranch and rice farm, refused to allow Denbury to survey its property after Denbury sought to construct a carbon dioxide pipeline across the property. Denbury took advantage of the then-existing case law in Texas, which effectively allowed a pipeline entity to obtain eminent domain power by checking a box labeled “common carrier” on the Texas Railroad Commission’s T-4 form. This act of self-identification bestowed *de facto* common carrier status on the entity and allowed the pipeline carrier to exercise the powers of eminent domain. See *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 197-202 (Tex. 2012) (discussing pipelines and common carrier status). With this legal backdrop, the trial court granted summary judgment in favor of Denbury and permanently enjoined the plaintiffs from interfering with Denbury’s right to enter and survey the property or harassing Denbury while it conducted its survey.

While the Ninth District Court of Appeals affirmed the grant of summary judgment, the Texas Supreme Court reversed and raised concerns with the level of deference given to obtaining common carrier status. The Court established a new test to qualify as a common carrier under Section 111.002(6) of the Texas Natural Resources Code, holding that “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.” *Denbury*, 363 S.W.3d at 202 (Tex. 2012). The Court further held that “once a landowner challenges [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.” *Id.* This standard requires courts to scrutinize the substance of the pipeline project and not just the completion of the administrative task of checking a box on a Railroad Commission form. The Court ultimately narrowed the *Denbury* holding to apply to the facts before it in that matter—carbon dioxide pipelines—leaving open questions for the Courts of Appeals.¹

The February 2015 Decision

On remand, *Denbury* again moved for summary judgment, arguing that it was a common carrier under the Texas Natural Resources Code and the Texas Business Organizations Code. The trial court granted *Denbury*’s motion, declaring that *Denbury* was a common carrier under both statutory provisions and has the right of eminent domain. The Ninth District Court of Appeals reversed and made two notable holdings.

First, the court held that a pipeline company seeking to exercise eminent domain authority as a common carrier under the Natural Resources Code could not invoke Section 2.105 of the Texas Business Organizations Code as an independent and additional basis for exercising eminent domain authority. The court held that in order to have the right of eminent domain conferred by the Natural Resources Code—which is referenced in

Section 2.105 of the Texas Business Organizations Code—an entity must still meet the requirements for common carrier status found in the Natural Resources Code. See *Denbury Green*, 2015 Tex. App. LEXIS 1377 at *8.

Second, the court held that reasonable minds could differ regarding whether a reasonable probability existed that *Denbury* would serve the public at the time it intended to build the pipeline. The court emphasized that the Texas Supreme Court’s new test for determining common carrier status applied to “a person *intending to build* a [carbon dioxide] pipeline.” *Denbury*, 2015 Tex. App. LEXIS 1377 at *8 (emphasis in original). Accordingly, the court scrutinized *Denbury*’s intent at the time of its plan to construct the pipeline. In doing so, the court noted that the plaintiffs challenged *Denbury*’s common carrier status as early as mid-2008, which then shifted the burden to *Denbury* to “establish its common-carrier bona fides.” *Denbury*, 2015 Tex. App. LEXIS 1377 at *9 (internal citations omitted).

Denbury set forth several arguments as to why it is a common carrier under the Texas Supreme Court’s test. *Denbury* pointed to its agreement with Airgas Carbonic, Inc., which uses the pipeline to transport its own carbon dioxide to its own facility, retaining ownership of the carbon dioxide at all times. The court pointed out, however, that Airgas did not approach *Denbury* until *after* the pipeline was completed and, therefore, this agreement does not speak to *Denbury*’s intent back in 2008. Next, *Denbury* argued that it intentionally placed the pipeline near potential shippers, intending to transport carbon dioxide for hire and to enter into transportation contracts. The court dismissed these subjective beliefs and declared that these “mere conclusions” are not competent summary judgment evidence. *Denbury*, 2015 Tex. App. LEXIS 1377 at *10-11.

Finally, *Denbury* argued that even though the pipeline serves its affiliate *Denbury Onshore*, the pipeline also serves other interest owners in the West Hastings Unit by transporting carbon dioxide from the Jackson Dome Unit. The court noted

1. In response, some Courts of Appeals extended the Texas Supreme Court’s reasoning to other types of pipelines. For example, the Ninth District Court of Appeals in Beaumont extended *Denbury*’s reasoning to both natural gas and crude oil pipelines. See *Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd.*, 404 S.W.3d 754 (Tex. App.—Beaumont 2013, no pet. h.); *In re Texas Rice Land Partners, Ltd.*, 402 S.W.3d 334 (Tex. App.—Beaumont 2013). In an appellate decision that the Texas Supreme Court declined to review, the Sixth District Court of Appeals also adopted the view that *Denbury* applies to crude oil pipelines, holding that, “[a]s stated by our sister court, ‘we are not persuaded the Court’s reasoning concerning the process of obtaining a T-4 permit applies only to carbon dioxide lines.’” *Crawford Family Farm P’ship v. TransCanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 923 (Tex. App.—Texarkana 2013, pet. denied) (quoting *Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd.*, 404 S.W.3d 754, 760-61 (Tex. App.—Beaumont 2013, no pet. h.)).

that given the evidence indicating that (i) Denbury Onshore owns the controlling interest in the West Hastings Unit and the Jackson Dome Unit, (ii) a very small percentage of non-operator working interest owners ratified the transportation agreements, and (iii) the other interest owners do not take title or possession of the carbon dioxide, there is a fact issue as to whether the taking serves a *substantial* public interest. *Denbury*, 2015 Tex. App. LEXIS 1377 at *13.

The court concluded by emphasizing that “[i]ssues of knowledge and intent are rarely appropriate for summary judgment.” *Denbury*, 2015 Tex. App. LEXIS 1377 at *13 (internal citations omitted). The court held that only when reasonable minds cannot differ does the issue of intent become a question of law.

Potential Implications

The *Denbury* decision suggests that Texas courts considering whether an entity satisfies the Texas Supreme Court’s test for common carrier status will look closely at the facts, making it difficult to prevail on summary judgment. Additionally, pipeline companies may need to be mindful of what they do *before* seeking to invoke the right of condemnation. For example, pipeline companies may want to consider advertising the proposed pipeline earlier than usual in an effort to secure shipper contracts prior to any condemnation proceedings.

At bottom, landowners will likely be quick to challenge a pipeline’s purported status as a common carrier, knowing that such a challenge will result in the burden being shifted to the pipeline company to prove its “common carrier bona fides,” and pipeline companies will need to be prepared for a potential factual fight over the intent of the pipeline at the time of its plan to construct the pipeline. While this ruling focuses on carbon dioxide pipelines, it may also serve as the first step in a change toward requiring more proof that the pipeline will serve the public.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Jason F. Leif

Houston / Washington

+1.832.239.3727 / +1.202.879.5449

jfleif@jonesday.com

J. Laurens Wilkes

Houston

+1.832.239.3796

jlwilkes@jonesday.com

William R. Taylor

Houston

+1.832.239.3860

wrtaylor@jonesday.com