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Texas Pipeline Companies Seeking Common-Carrier Status Now Have Additional Guidelines, But Issues Regarding "Public Use" Remain.

In its blockbuster 2012 opinion *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC (Texas Rice I)*, the Texas Supreme Court upended the way pipeline operators establish common-carrier status to exercise the power of eminent domain. On January 6, 2017, the Court issued a second major decision in the same case, dubbed *Texas Rice II*, finding certain evidence of public use sufficient to establish common-carrier status. While *Texas Rice II* provides some guidance to pipeline operators planning projects post-*Texas Rice I*, it is unlikely to prevent future litigation regarding the level of public use required to support pipeline companies' claims of eminent domain authority.

Texas Rice I: Holding Oneself Out As a Common Carrier Is Not Sufficient for Exercise of Eminent Domain

Under Section 111.019 of the Texas Natural Resources Code, "Common carriers have the right and power of eminent domain." As noted in *Texas Rice II*, before 2012 "a pipeline owner needed to do little more than 'check[] a certain box on a one-page government form' to obtain common-carrier status." In *Texas Rice I*, however, the Court made clear that the Takings Clause of the Texas Constitution requires that to be a common carrier, a pipeline must "serve the public" and not "be built only for the builder's exclusive use." The record before the Court in *Texas Rice I* only included evidence that pipeline-builder Denbury was negotiating with third parties to transport CO2. Absent was evidence that the transported CO2 would remain the property of a third party or would be transported to a third party. The Court thus decided that Denbury did not establish common-carrier status because it only showed the possibility of public use rather than a reasonable probability that public use would result. The Court made clear that post-*Texas Rice I*, "[m]erely holding oneself out [as a common-carrier would be] insufficient under Texas law to thwart judicial review."

In remanding the case for further proceedings, the Court concluded that pipeline companies seeking to condemn property interests for their projects must "present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed transport 'to or for the public for hire' and is not 'limited in [its] use to the wells, stations, plants, and refineries of the owner.'" While the Court made clear that mere "holding out" would not establish common-carrier status, the Court left open the question of what evidence would suffice.

Texas Rice II: Public Use May Be Established By Transport Contracts with Non-Affiliates

In *Texas Rice II*, the Court emphasized that because an essential condition of a lawful exercise of the power of eminent domain "is that the professed use be a public one in truth, . . . mere assertions of the possibility of public use" are not enough to establish common-carrier status. The Court added that, at a minimum, there must be a reasonable probability, meaning "more likely than not," 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."

On the evidence adduced on remand, the *Texas Rice II* Court decided that the test set forth in *Texas Rice I* had been met. That evidence included a showing of proximity of the pipeline to potential customers, a transportation contract with a non-affiliate that provides for its retention of title to its CO2, and a contract with a non-affiliate for the purchase and transport of CO2. In conclusion, the Court held that the test was met because the evidence established that the pipeline would serve the public "by transporting CO2 for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."

In Conclusion: Questions Remain

Before *Texas Rice I*, a company wanting to condemn easements for a common-carrier pipeline needed only to fill out a form to obtain a permit from the Texas Railroad Commission reflecting its status as a common carrier. *Texas Rice I* changed that standard but gave rise to uncertainty regarding how pipeline transactions, planning, and construction must be carried out for pipelines to attain common-carrier status. *Texas Rice II* provides some answers but also suggests that pipeline projects will be scrutinized by courts seeking to strike a balance between "the property rights of Texas landowners [and] our state's robust public policy interest in pipeline developments."

Additional questions remain to be answered. In particular, it remains unclear whether transport or eventual sale of carried materials to indirect affiliates, affiliated joint ventures, or certain categories of customers will constitute "public use." Further litigation regarding these and other issues is likely.

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