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March 06, 2012

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Supreme Court Revises Test to Establish Common Carrier Status in Condemnation Cases

By [Amy Baird](#), [Tré Fischer](#), and [Robert Neblett](#)

On March 2, 2012, the Texas Supreme Court revised its opinion in the controversial case, *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*. In its original decision, the Supreme Court held that merely filing the paperwork and offering to make the pipeline available for public use does not make the pipeline a "common carrier" with the power of eminent domain. Instead, the Supreme Court held that Denbury Green Pipeline-Texas, LLC ("Denbury") must also show that a reasonable probability exists, at or before the time common carrier status is challenged, that the pipeline will serve the public by transporting gas for customers who will use the gas themselves or sell it to another party other than the carrier.

For more details on the Court's original decision, please [click here](#).

The **revised decision** generally maintains the original decision, but makes one key change that clarifies when a pipeline company must show that the public use will occur. As indicated above the Court originally held:

[T]o qualify as a common carrier of CO₂ under Chapter 111, a reasonable probability must exist, **at or before the time common-carrier status is challenged**, that the pipeline will serve the public by transporting gas for customers who will either retain ownership of their gas or sell it to parties other than the carrier.

In the revised opinion, the court altered the language of the test to establish common-carrier status, stating:

We accordingly hold that for a person intending to build a CO₂ pipeline to qualify as a common carrier under Section 111.002(6), 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.

A careful reading of the two opinions shows that both tests require a pipeline company to demonstrate a "reasonable probability" that the pipeline company will serve the public. Under both tests, it is the pipeline company's burden to demonstrate that this "reasonable probability" exists when the common-carrier status is challenged. What the revised opinion does is clarify that the "public use" is not required to have already occurred at or before the time common-carrier status is challenged, but merely that a "reasonable probability" exists that such use will occur. Thus, even under its

revised requirements for establishing common-carrier status, the Court continued to hold that Denbury was not a common-carrier, because it had failed to demonstrate "a reasonable probability that such transportation would ever occur."

If you have any questions regarding this e-Alert, please contact **Amy Baird** (713.752.4525 or abaird@jw.com), **Tré Fischer** (713.752.4530 or tfischer@jw.com) or **Robert Neblett** (512.236.2020 or rneblett@jw.com).

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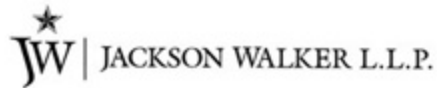
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