

FAIRNESS, TRANSPARENCY, AND ACCOUNTABILITY: WHERE ARE
THEY IN THE TEXAS OIL AND GAS CONDEMNATION PROCESS?

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I. INTRODUCTION

The pipeline company caught James Spriggs at the wrong time if there ever was the right one.¹ “I had been in town all day and I wasn’t happy with the traffic,” utters the soft-spoken sixty-nine-year-old rancher who runs cattle across 4,400 acres of wide-open West Texas land south of Marfa.² “So when they told me I had to sign an agreement, or they’d serve me with paperwork in forty-eight hours, I felt I was down to my last nerve, and they were stepping on it. I had been ready to sign the damn agreement, but I guess I just got tired of being pushed.”³

Eminent domain refers to the power of the government or quasi-government entities to expropriate private property for public use, with payment of compensation.⁴ Beginning in the late 1800s, eminent domain entered the scene as a public concern when the Supreme Court of the United States first acknowledged that state legislatures could delegate the power of eminent domain to agencies and non-governmental entities.⁵ Since then, eminent domain has “blossomed into an enduring, contentious social and political problem throughout the United States.”⁶

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¹ Rachel Monroe, *A Pipeline in the Sand*, TEXAS MONTHLY (Aug. 19, 2015), <https://www.texasmonthly.com/articles/a-pipeline-in-the-sand/>.

² *Id.*

³ *Id.*

⁴ Caitlyn Ashley, et. al, *A Survey of Eminent Domain Law in Texas and the Nation*, at 4, TEXAS A&M UNIVERSITY SCHOOL OF LAW.

⁵ *Id.*; see *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

⁶ Ashley, *supra* note 4, at 4.

Texas landowners face the undeniable reality that the state's population is growing at a rapid pace.⁷ An increasing need for more land and resources such as fossil fuels and highways accompanies this reality.⁸ However, private property rights are equally important, especially in Texas, and therefore must be protected.⁹ Eminent domain (specifically the condemnation process) is not a willing buyer and a willing seller transaction; it is a legally-forced sale.¹⁰ Therefore, it is imperative to consider augmenting the laws that govern the use of eminent domain, so Texas landowners are guaranteed a fair and respectful process when forced to relinquish their land.¹¹

This comment outlines the condemnation process in Texas from a landowner's perspective and proposes a need for reformation. Part II provides an illustration of how easily a pipeline company obtains eminent domain authority, the gross imbalance of negotiating power between landowners and pipeline companies, and the inadequacy of judicial remedies for a landowner. Part III offers several solutions that aim to add fairness, transparency, and accountability to the condemnation process. Since the condemnation process is a legally forced sale, reform is a necessity in the current state of the process, and this comment's goal is to provide a framework on how to improve this process.

II. THE CONDEMNATION PROCESS IN TEXAS

A. Obtaining Eminent Domain Authority

The power to take private property for public use is available only upon the state properly conferring condemnation authority.¹² Texas affords no guidelines as to who precisely has the authority to condemn within the Texas Property Code.¹³ However, the Texas legislature has provided three different classifications where oil and gas companies may acquire eminent domain authority: common carriers, public utilities, and gas corporations.¹⁴ Under

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 28.

¹³ *Id.*

¹⁴ Megan James, *Checking the Box is Not Enough: The Impact of Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC and Texas's Eminent Domain Reforms on the Common*

these statutes, oil and gas companies are handed significant power with little to no regulatory oversight.¹⁵ Oil and gas companies can simply self-designate and begin taking property.¹⁶ The self-designation process merely involves checking a box on a form; at that moment, the government bestows condemnation authority upon the pipeline company.¹⁷ Under both the gas corporation and gas utility statute, the pipeline must be for public use for the oil and gas company to become a common carrier.¹⁸ As a result, after an oil and gas company procures condemnation power with ease, landowners oftentimes seek judicial forums to dispute whether an entity lawfully classifies as a common carrier.

1. Gas Utilities and Gas Corporations

Within the Texas Utilities Code lies the most unbridled and expansive authority governing eminent domain law.¹⁹ As prescribed by the Texas Utilities Code, private oil and gas companies can acquire eminent domain power under the designation of a gas utility or a gas corporation.²⁰ However, as unambiguous as this designation appears, the Texas Utilities Code is far from a model of clarity.²¹ The Legislature defined a gas utility to include an array of different entities, with the provision pertinent to private corporations and pipelines identifying a gas utility as an “individual, company, limited liability company, or private corporation” that:

Owns, manages, operates, leases, or controls in this state property or equipment or a pipeline, plant, facility, franchise, license, or permit for a business that . . . owns, operates, or

Carrier Application Process, 45 TEX. TECH. L. REV. 959, 970 (2013); *see* TEX. NAT. RES. CODE ANN. § 111.019 (common carrier status); TEX. UTIL. CODE ANN. § 121.001 (gas utility); TEX. UTIL. CODE ANN. § 181.004 (gas corporation).

¹⁵Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 8, *TC&C Real Estate Holdings, Inc. v. ETC Katy Pipeline, Ltd.*, 2018 WL 1697353 (Tex. Mar. 27, 2018) (No. 10-0082).

¹⁶*Id.* at 10.

¹⁷*Id.*

¹⁸*Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 194 (Tex. 2012).

¹⁹Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 8, *TC&C*, 2018 WL 1697353 (No. 10-0082).

²⁰*See* TEX. UTIL. CODE ANN. § 121.001; *see also* TEX. UTIL. CODE ANN. § 181.004.

²¹Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 8, *TC&C*, 2018 WL 1697353 (No. 10-0082).

manages a pipeline: (A) that is for transporting or carrying natural gas, whether for public hire or not; and (B) for which the right-of-way has been or is hereafter acquired by exercising the right of eminent domain.²²

The above definition, however, is not where the confusion lies. Section 181.004 provides that a “gas corporation” has the power of eminent domain; unfortunately, a definition of “gas corporation” is nowhere to be found.²³ Instead, “corporation” is defined to include a “gas utility.”²⁴ This conundrum leaves us with a circular definition, thereby making the inquiry of whether an entity has the power of eminent domain dependent on whether the company uses “the right of eminent domain.”²⁵ Courts continually note that while there are clearly “statutes [that] grant the power of eminent domain to gas corporations, they offer no definition of the term ‘gas corporations.’”²⁶ In the Texas Utilities Code, while Section 181.001 defines a “corporation” as well as an “electric corporation,” the definition of a gas corporation is nonexistent.²⁷ Despite the lack of clarity, the legislature gives gas corporations the eminent domain power to “enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation.”²⁸

2. Common Carriers

The Texas Natural Resources Code creates another avenue which authorizes entities termed “common carriers” to exercise the right of eminent domain.²⁹ Under Section 81.051 of the Texas Natural Resources Code, the Texas Railroad Commission (TRRC) has jurisdiction over common

²²TEX. UTIL. CODE ANN. § 121.001.

²³Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 8, *TC&C*, 2018 WL 1697353 (No. 10-0082); *see* TEX. UTIL. CODE ANN. § 181.004.

²⁴Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 8, *TC&C*, 2018 WL 1697353 (No. 10-0082).

²⁵*Id.*

²⁶Amanda B. Niles, *Eminent Domain and Pipelines in Texas: It's as Easy as 1, 2, 3—Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEX. WESLEYAN REV. 271, 285 (2010); *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 564 (Tex. App.—San Antonio 1998, pet. denied); *see Roadrunner Invs., Inc. v. Tex. Utils. Fuel Co.*, 578 S.W.2d 151, 153 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

²⁷Niles, *supra* note 26, at 285; *see* TEX. UTIL. CODE ANN. § 181.001.

²⁸TEX. UTIL. CODE ANN. § 181.004.

²⁹*See* TEX. NAT. RES. CODE ANN. § 111.019.

carriers.³⁰ The statute states that “[i]n the exercise of the power of eminent domain . . . a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.”³¹

With this broad grant of authority, the Texas Natural Resources Code goes on to define what precisely a common carrier is. The common carrier status statute lists seven possibilities where an entity can be designated as a “common carrier.”³² These include owning, operating, or managing a pipeline for the transportation of (1) crude petroleum to or for the public, or engaging in such business; (2) crude petroleum to or for the public when the pipeline is constructed on, over, or under a public road or highway; (3) crude petroleum to or for the public, which is or may be constructed, operated, or maintained across a right-of-way of a railroad, corporation, or other common carrier; (4) crude petroleum from an oil field or place of production to any distributing, refining, or marketing center or reshipping point under agreement; (5) coal; (6) carbon dioxide or hydrogen; or (7) feedstock for carbon gasification.³³

Despite the seemingly straightforward language of the foregoing seven common carrier designations, the application and interpretation of common carrier status in Section 111.002 by Texas courts have been inconsistent and clear as crude oil. Although a rarity in the last few decades, there are older cases where courts have denied an entity’s designation for condemnation authority based on common carrier status.³⁴

B. Pre-Condemnation Requirements

Insofar as the actual process, generally, a landowner should receive a notice via certified mail informing them of the pipeline and what the company considers a bona fide offer and a number to call with questions.³⁵ Before an entity can put a pipeline beneath a landowner’s private property, it

³⁰ See TEX. NAT. RES. CODE ANN. § 81.051(a)(1).

³¹ TEX. NAT. RES. CODE ANN. § 111.019; Niles, *supra* note 26, at 281.

³² See TEX. NAT. RES. CODE ANN. § 111.002; Niles, *supra* note 26, at 281.

³³ TEX. NAT. RES. CODE ANN. § 111.002; Niles, *supra* note 26, at 281.

³⁴ Niles, *supra* note 26, at 281; see *Thedford v. Cty. of Jackson*, 502 S.W.2d 899, 901 (Tex. App.—Corpus Christi 1973, writ ref’d n.r.e.).

³⁵ Colleen Schreiber, *TSCRA Continues Work to Craft New Eminent Domain Legislation*, LIVESTOCK WEEKLY, July 5, 2018, at 3 (quoting Brian McLaughlin, committee vice chair of TSCRA’s property rights and tax committee).

is supposed to meet several pre-condemnation requirements under the Texas Property Code.³⁶ Under these provisions, the initial contact, negotiation, and offer with the landowner are regulated. However, despite such safeguards, they are often ignored, and a significant disparity culminates between the bargaining power of the oil and gas pipeline company and the landowner.³⁷ The landowner frequently leaves the negotiation with the short end of the stick and an unwanted pipeline beneath his or her ground.³⁸ Sure, some pipeline companies play by the rules, but it is undeniable that others do not.³⁹ A lucky landowner receives a phone call or a knock on the door with a request for permission to enter. However, other landowners may only know a pipeline representative has been there because something is different about the gate, or perhaps the trespasser was bold enough to put out flagging tape.⁴⁰ Some pipeline representatives might even have the audacity to secretly conduct a survey or an appraisal without the landowner ever having a clue.⁴¹

1. Initial Contact/Notice and Negotiations: The Law

Before initiating condemnation proceedings, the pipeline company must make a “bona fide offer” to purchase the property that it plans to annex.⁴² To comply with this bona fide offer requirement, a pipeline company must make an initial written offer to purchase the property, procure an appraisal from a certified appraiser of the value of the property, and deliver a final written offer that is greater than the amount of the appraiser’s report.⁴³ The final offer may come no earlier than thirty days after the initial offer, and the company must give the landowner at least fourteen days to respond to the final offer before the opportunity to file a condemnation proceeding emanates.⁴⁴

The pipeline company must provide the landowner, at the time an offer to purchase is made, any appraisal reports in the company’s possession

³⁶ See TEX. PROP. CODE ANN. §§ 21.011–016.

³⁷ Schreiber, *supra* note 35, at 4.

³⁸ *Id.*

³⁹ *Id.* at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Tiffany Lashmet, *Eminent Domain in Texas (Part 2) – Condemnation Proceedings Step by Step*, TEXAS A&M AGRILIFE: TEXAS AGRICULTURE LAW BLOG (Mar. 24, 2014), <https://agrillife.org/texasaglaw/2014/03/24/eminent-domain-in-texas-part-2-condemnation-proceedings-step-by-step/>.

⁴³ *Id.*

⁴⁴ *Id.*; see TEX. PROP. CODE ANN. § 21.0113.

relating to the landowner's property and prepared within ten years from the date of the offer.⁴⁵ Furthermore, a copy of the Texas Landowner's Bill of Rights must accompany the offer.⁴⁶ Occasionally, negotiations between the company and the landowner commence thereafter. If a landowner elects to have an appraisal conducted on his or her land to value the property and enhance negotiating power, he or she has no choice but to hand over the results to the pipeline company.⁴⁷

On the odd chance that the landowner and pipeline company successfully reach an agreement, eminent domain is irrelevant, and the sale of the easement goes forward between the parties. However, once negotiations towards an agreement go awry, the company may then file a condemnation proceeding.⁴⁸

2. Initial Contact/Notice and Negotiations: The Reality

In reality, "[e]very landman will tell you that the Producer 88 form that he's just handed to you is as good as it gets."⁴⁹ Another way pipeline companies prevent good price discovery is by strategically acquiring only five to ten-mile segments at a time to thwart landowners from forming coalitions.⁵⁰ Pipeline companies fear one attorney representing multiple landowners on one pipeline, which could lead to the landowners having an inside scoop on what's going on.⁵¹

⁴⁵TEX. PROP. CODE ANN. § 21.0111(a).

⁴⁶TEX. PROP. CODE ANN. § 21.0112; The Landowner's Bill of Rights is a document promulgated by the Texas Attorney General that sets forth Texas' eminent domain law, condemnation process, and landowner's rights. Lashmet, *supra* note 42.

⁴⁷TEX. PROP. CODE ANN. § 21.0111(b).

⁴⁸TEX. PROP. CODE ANN. § 21.012(a).

⁴⁹There is no "standard" form of oil and gas lease. Many believe a "Producer 88" is a standard form lease. This is not true. The story (or legend) concerning the Producer 88 dates back to the early stages of oil and gas exploration in the 1900s. Reportedly a company ran out of printed form leases and ran to a printer to obtain additional lease forms to use for the purpose of acquiring leases. The printer assigned the print job the title "Producer 88" and stamped the term "Producer 88" at the top of the lease form. That form was presented to landowners who executed the leases. There was success in the exploration on those lands. When the farmer's neighbor asked him what type of lease he signed, he referred to it as a "Producer 88." *Forms of Oil and Gas Leases*, US LEGAL, <https://oilandgas.uslegal.com/2010/02/18/forms-of-oil-and-gas-leases/> (last visited Apr. 30, 2019); Schreiber, *supra* note 35, at 3.

⁵⁰Schreiber, *supra* note 35, at 3.

⁵¹*Id.*

Truth be told, pipeline companies seldom hand over a survey willingly.⁵² Kaleb McLaurin of the Texas Southwestern Cattle Raiser's Association characterized the reality of the process: "They're going to try to keep you in the dark and keep as much information out of your hands as they can, because they know the less you know, the more effective they'll be at getting a better deal for their company."⁵³

As Brian McLaughlin recalls, "[he's] had cases where the landowners call them, and they say they want access to determine the route, that they don't . . . know where the line is going to go."⁵⁴ Frequently, when the moment first presents itself, the words "Did I hear you say no?" will expel from the landman's mouth, followed by, "Thank you, that's all I needed."⁵⁵ Three days later, the landowner receives notice of a temporary restraining order against him.⁵⁶ The temporary restraining order gives the pipeline company the green light to do whatever they desire.⁵⁷ Thirty days later, the pipeline company will make their final offer, likely insignificantly more than their initial offer, and the landowner will soon be on his or her way to the commissioner's court.⁵⁸

C. *The Proceedings*

A pipeline company may only exercise its eminent domain authority if it cannot strike a deal with a landowner.⁵⁹ Therefore, the second a pipeline company and a landowner fail to reach an agreement, the ability to initiate a condemnation proceeding is on hand for the pipeline company.⁶⁰

1. Condemnation Petition

When a pipeline company with condemnation authority seeks to acquire an easement on a tract of land but is unable to agree with the landowner on a dollar amount for damages, the pipeline company may begin a condemnation

⁵² Colleen Schreiber, *Landowners Gather to Gain Info on Pipelines and Eminent Domain*, LIVESTOCK WEEKLY, Nov. 8, 2018, at 5.

⁵³ *Id.*

⁵⁴ Schreiber, *supra* note 35, at 3.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See TEX. PROP. CODE ANN. § 21.012.

⁶⁰ See *id.* § 21.012(a).

proceeding by filing a petition in either the district court or the county court of law in the county where the property is located.⁶¹ The filing of a petition marks the beginning of the formal condemnation proceeding. Such petition must contain: (1) a description of the property to be condemned; (2) the purpose for which the pipeline company intends to use the property; (3) the name of owner, if known; and (4) acknowledgment that the pipeline company and the landowner are unable to agree on damages.⁶²

Once a pipeline company files a petition, Texas courts consistently recognize that injunctive relief is appropriate and grant temporary injunctions, that allow the company the right to access land to conduct preliminary survey work before instituting a condemnation proceeding.⁶³

2. Special Commissioner's Hearing

The next stage in the process involves the organization of a Special Commissioner's Hearing.⁶⁴ After a petition is filed, the judge appoints three disinterested local real property owners to sit as "special commissioners" to assess and determine adequate compensation.⁶⁵ According to the Texas Property Code, these commissioners lack jurisdiction to consider whether condemnation is proper, but instead merely have authority to determine the appropriate compensation to the landowner.⁶⁶

Upon the selection and assembly of the commissioners, the commissioners schedule a hearing for the parties at the earliest practical time.⁶⁷ After the parties receive notice of the hearing, the special commissioners hear the parties at the scheduled time.⁶⁸ Specifically, the commissioners consider evidence of the value of the condemned property, the injury to the property owner, the benefit to the owner's remaining

⁶¹ *Id.*; see *Pitts v. Sabine River Auth. of Tex.*, 107 S.W.3d 811, 815 (Tex. App.—Texarkana 2003, pet. denied).

⁶² TEX. PROP. CODE ANN. § 21.012(b); *Pitts*, 107 S.W.3d at 815.

⁶³ *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.] 2011, pet. dismissed); see *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ); see also *Lewis v. Tex. Power & Light Co.*, 276 S.W.2d 950, 954–55 (Tex. Civ. App.—Dallas 1955, writ refused n.r.e.).

⁶⁴ See TEX. PROP. CODE ANN. § 21.014.

⁶⁵ *Id.* § 21.014(a).

⁶⁶ *Id.*; Lashmet, *supra* note 42.

⁶⁷ TEX. PROP. CODE ANN. § 21.015(a).

⁶⁸ *Id.* § 21.015(b).

property, and the public use for which the property is being condemned.⁶⁹ The special commissioners then assess the damages and file an “award,” reflecting their opinions of the land’s value and adequate compensation that shall be paid by the pipeline company to the landowner for the easement.⁷⁰ Unfortunately, the Texas Property Code disallows special commissioners the right to reference previous pipeline agreements when assessments are made since the landowner does not have the right to enter such prior agreements into evidence.⁷¹

Once the commissioners set the award, regardless of whether or not the landowner agrees to the amount or plans to go the next step and take it to a jury trial, the pipeline company simply deposits the amount of the award set by the commissioners into the registry of the court.⁷² That then gives the pipeline company the immediate right to access the landowner’s property.⁷³ This right of access essentially allows the pipeline company to begin construction of the pipeline despite the case pending on appeal.⁷⁴

3. Appeal Process

A landowner, unsatisfied with the award, may then file an objection in the trial court.⁷⁵ The filed objection vacates the commissioners’ award and the court sets the condemnation case for trial, before either a judge or jury for a verdict. Once a condemnation proceeding is filed, the opportunity finally arises to challenge the legal authority of the condemnation where the landowner may file a motion to dismiss the proceeding.⁷⁶ The condemnation proceeding serves as the battlefield where a landowner may challenge a company’s common carrier status and public use proposals.⁷⁷ Unlike special commissioners, the court has the power to consider these issues.⁷⁸ Aside from the delayed opportunity to challenge a company’s condemnation authority,

⁶⁹ *Id.* § 21.041; Lashmet, *supra* note 42.

⁷⁰ TEX. PROP. CODE ANN. § 21.014(a); *Pitts v. Sabine River Auth. of Tex.*, 107 S.W.3d 811, 815 (Tex. App.—Texarkana 2003, pet. denied).

⁷¹ Schreiber, *supra* note 35, at 3.

⁷² *Id.* at 4.

⁷³ *Id.*

⁷⁴ Lashmet, *supra* note 42.

⁷⁵ TEX. PROP. CODE ANN. § 21.018(a); *Pitts*, 107 S.W.3d at 815.

⁷⁶ Lashmet, *supra* note 42.

⁷⁷ *Id.*

⁷⁸ *Id.*

the landowner faces adversity due to the uncertain and unfavorable tests courts apply when determining whether condemnation authority is proper.

As it should be easy to describe the test courts use to determine whether a pipeline company's condemnation authority is proper, that is not the case. The answer not only depends on the particular statute the pipeline company obtained its condemnation authority from but also depends on the court in which the pipeline company brought the proceeding. In 2007, a ten-year-long saga full of potential towards some clarity began, but it ended with an equal number of unanswered questions.⁷⁹ The inception of this journey started when Denbury sought permission to survey and construct a carbon dioxide (CO₂) pipeline over land owned by Texas Rice Land Partners (TRLP).⁸⁰ Denbury formed a subsidiary, Denbury Green, for the building, owning, and operating of a CO₂ pipeline known as the "Green Line."⁸¹ TRLP immediately denied Denbury access when its employees pulled up to the gate to survey for the pipeline.⁸² In response, Denbury Green filed a T-4 permit with the TRRC to obtain common carrier status and exercise eminent domain authority pursuant to the Natural Resources Code.⁸³ Armed with this permit, Denbury Green filed suit against TRLP for an injunction allowing access to TRLP's land so that it could continue its pipeline survey.⁸⁴ Meanwhile, as TRLP was challenging Denbury's eminent domain authority, Denbury Green took possession of TRLP's property and constructed the Green Line under Tex. Prop. Code § 21.021(a).⁸⁵

Before TRLP's lawsuit, a pipeline company could argue that it was a common carrier with eminent domain authority premised solely on the fact that it had declared itself a common carrier on a TRRC form.⁸⁶ When TRLP's lawsuit went up to the Texas Supreme Court, the court set forth a more stringent test for determining whether a pipeline company qualifies as a

⁷⁹ Austin Brister, *Denbury v. Texas Rice: Clarifying the Test for Common Carrier Status, Power of Eminent Domain*, OIL AND GAS LAW DIGEST (Jan. 18, 2017), <https://oilandgaslawdigest.com/primers-insights/denbury-v-texas-rice-clarifying-test-common-carrier-status-power-eminent-domain/>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* Denbury filed a T-4 permit in order to acquire eminent domain authority under TEX. NAT. RES. CODE § 111.019(a) ("Common carriers have the right and power of eminent domain."). *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

common carrier.⁸⁷ Under this test, for a private entity 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.”⁸⁸ Concerning the merits of the case, the Texas Supreme Court held that testimony from Denbury Green’s vice president of the company’s intent to negotiate with third parties and the Green Line’s ability to transport third-party-owned CO2 established only a “possibility,” and not a “reasonable probability,” that the pipeline would serve the public at some point in the future.⁸⁹ Moreover, the court held that Denbury’s website suggested that Denbury would transport gas only for its own operations, rather than for any third parties.⁹⁰ Ultimately, the court remanded the case to the trial court for further proceedings.⁹¹

On remand to the Jefferson County District Court, Denbury Green showed up this time with post-construction contracts.⁹² Standing on stronger ground with this more concrete evidence in hand, Denbury Green persuaded the court to grant its motion for summary judgment, holding that it was a common carrier with the right of eminent domain.⁹³ The Beaumont Court of Appeals, unflattered with Denbury Green’s post-construction contracts, reversed the trial court, essentially holding that such proof of the requisite intent must exist at the time the pipeline was contemplated.⁹⁴ This test has sometimes been referred to by courts as the “subjective test.”⁹⁵ However, the court of appeals did not stop there and went on to hold that a reasonable probable future use of the pipeline must serve a “substantial public interest.”⁹⁶

Ultimately, the Texas Supreme Court sided with Denbury Green as it reversed the Beaumont Court of Appeals and reinstated the trial court’s

⁸⁷ *Id.*; see *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 200 (Tex. 2012) (hereinafter referred to as “Denbury I”).

⁸⁸ *Tex. Rice Land Partners, Ltd.*, 363 S.W.3d at 202; Brister, *supra* note 79.

⁸⁹ Brister, *supra* note 79.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

judgment in favor of Denbury Green.⁹⁷ However, as the court attempted to clarify several facets of the rule previously set forth in Denbury I, it failed to settle all the chaos.⁹⁸ The Texas Supreme Court made clear that the “reasonable probability test” is an objective test, where evidence that the requisite intent existed before construction is not imperative for the pipeline company.⁹⁹ The court further explained that evidence of post-construction contracts with third-parties, showing transportation of third-party-owned CO₂, can be relevant under the reasonable probability test.¹⁰⁰ The court went on to describe scenarios where such contracts can be relevant to show that: (1) There was a reasonable probability that, “at some point after construction,” the pipeline would serve the public; and (2) There are specific, identified, potential customers that own transportable resources in the vicinity of the pipeline’s route.¹⁰¹ The court cautioned that when considering post-construction contracts in isolation, without any other relevant evidence, they usually establish only a pre-construction possibility of future public use.¹⁰² However, when combined with other evidence, such contracts could allow a reasonable observer to determine it was “more likely than not” that a pipeline would someday serve the public.¹⁰³ The court provided the following examples of potentially relevant additional evidence: (1) the regulatory atmosphere; (2) proximity of the pipeline to potential customers; (3) actual post-construction use by unaffiliated entities.¹⁰⁴

The Texas Supreme Court also rejected the “substantial public interest” test set forth by the Beaumont Court of Appeals.¹⁰⁵ Instead, the court based its holding on the premise that for the pipeline to serve the public, the public’s interest does not need to be “direct, tangible or substantial” and disregarded “existential arguments related to the power and importance of the individual.”¹⁰⁶ In the court’s opinion, “evidence establishing a reasonable probability that the pipeline will, at some point after construction, serve *even*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

one customer unaffiliated with the pipeline owner is substantial enough to satisfy the public use under the *Denbury I* test.”¹⁰⁷

The saga ended with the Texas Supreme Court’s not once, but twice-handling the case. Notwithstanding the court’s earnest efforts to make common carrier status determinations more clear, reactions from various lawyers and industry and landowner groups have widely varied.¹⁰⁸ Some groups feel that the *Denbury* test makes it far easier to condemn property and represents a windfall for pipeline companies at the expense of private property rights.¹⁰⁹ Other groups hold the opinion that this case merely provides clarity to the applicable tests and that it is still significantly more difficult for a pipeline to condemn property than it was prior to *Denbury I*.¹¹⁰

On the other hand, if a company asserts condemnation authority under the gas utility statute, there is even less clarity as to how courts will question the propriety of power. Since the Texas Supreme Court established the *Denbury* test, *TC&C Real Estate Holdings v. ETC Katy Pipeline* illustrates the confusion that has emanated.¹¹¹ As *Denbury* dealt explicitly with a pipeline company using eminent domain authority as a common carrier, *TC&C* instead dealt with a pipeline company exercising eminent domain authority under the gas utility statute.¹¹² The Waco Court of Appeals acknowledged that courts had extended the *Denbury* test beyond the scope of the facts in *Denbury* but ultimately found this distinction significant and, therefore, outside of the purview of the *Denbury* test.¹¹³ The “trap at best” nature of the gas utility statute is virtually without any process or safeguards.¹¹⁴ Texas law professes that statutes granting the power of eminent domain, such as Section 181.004 of the Texas Utilities Code, shall be strictly construed in favor of the landowner and against the condemnor.¹¹⁵ However, despite these well-settled

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *TC&C Real Estate Holdings, Inc. v. ETC Katy Pipeline, Ltd.*, No. 10-16-00134-CV, 2017 WL 7048923, at *3 (Tex. App.—Waco Dec. 20, 2017, pet. denied) (mem. op., not designated for publication).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 8, *TC&C Real Estate Holdings, Inc. v. ETC Katy Pipeline, Ltd.*, 2018 WL 1697353 (Tex. Mar. 27, 2018) (No. 10-0082).

¹¹⁵ *Id.*; see, e.g., *Coastal States Gas Producing Co., v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

precedents, the court in *TC&C* ran the opposite as it interpreted statutes like Section 181.004 in a light most favorable to the condemnor, not the landowner, and described them as “legislative declarations” of public use and delegation of eminent domain authority that is entitled to great weight.¹¹⁶

III. THE NEED FOR FAIRNESS, TRANSPARENCY, AND ACCOUNTABILITY

As the preceding illustration makes clear, the condemnation process in Texas is far from fair for a Texas landowner. This article proposes a four-part solution to put the landowner and pipeline company on an equal playing ground. The first part would grant the TRRC the express authority to formally determine with each company whether they meet the criteria to have eminent domain power. During this process, the TRRC would be required to give notice to landowners and organize a hearing where landowners could voice their opinions on whether eminent domain power is appropriate. Furthermore, if a decision could not be reached, the TRRC would allow a contested case to be held on the issue. The second part would mandate the companies to submit a route of the pipeline. Construction of the pipeline could not commence until the TRRC approved the route. During this process, the TRRC would once again be required to give notice to landowners and organize a hearing. Likewise, the TRRC would be required to allow a contested case to be held on the proposed route. The third part would require pipeline companies to include a list of specific easement provisions in their first offers to landowners. Additionally, the fair market value of the property would be the requisite baseline offer that pipeline companies could make in their first offers. The fourth and final part would leave compensation for landowners untouched. The process that is in the statute would also remain as is where a landowner could ultimately present the issue to a jury if such a trial was necessary. Lastly, the construction of the pipeline could begin during this part so long as the first and second part have been completed.

Undeniably, this four-part solution would slow down pipeline construction. Pipeline companies would face significantly more hurdles, thereby bogging them down. Before they could even begin to think about laying a pipeline beneath a landowner’s property, TRRC approval would be a prerequisite. Even though the above is true, one cannot ignore that private ownership of property is precious, and the need for fairness requires such safeguards. Eminent domain is good for the economy and is unavoidable;

¹¹⁶Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 9, *TC&C*, 2018 WL 1697353 (No. 10-0082).

however, with such immense power granted to these private companies, more protection should be implemented. The process needs fairness, transparency, and accountability. As it stands today, the condemnation process is far too efficient for pipeline companies.

A. Common Carrier Status: A Solution to the Confusion

Pipeline companies can simply self-designate and begin taking property.¹¹⁷ The TRRC makes no review or determination.¹¹⁸ Such a process cannot serve as the end-all for challenges to the taking of private property across the state.¹¹⁹ Unlike the safeguards established in electric transmission line cases where utilities must follow a strict process, pipelines offer virtually no process.¹²⁰ In the realm of electric transmission lines, construction cannot begin until electric utilities file an application with the Public Utility Commission for a Certificate of Convenience and Necessity to build the transmission line.¹²¹ As another safeguard, the need for the line and the impact of building the line can be challenged and considered in a full administrative trial.¹²² More importantly, affected landowners are allowed to be a part of the process.¹²³ In pipeline cases, trial courts serve as the only forum where the constitutional protections come into play.¹²⁴

Therefore, the most effective and straightforward solution for this lack of oversight in the pipeline condemnation process begins with borrowing the safeguards found in the transmission line cases. Instead of the current law, which allows the TRRC to effectively give pipeline companies the right to claim common carrier status without any oversight, pipeline companies should be required to file an application with the TRRC. After this application is submitted and before the TRRC issues a certificate to the pipeline companies, notice should be sent to landowners. Subsequently, a hearing should take place where landowners have the opportunity to voice their concerns. If a consensus cannot be reached, the decision to grant condemnation authority should become challengeable in a full administrative

¹¹⁷ *Id.* at 11.

¹¹⁸ *Id.* at 10.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 11.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 12.

trial. Requiring the TRRC to create such a safeguarded process to determine a company's common carrier status would best serve to level the playing field. Much less, adopting stricter qualifications beyond checking a box on a form, such as requiring more detailed information regarding the purpose of the pipeline would, at a minimum, add assurance that pipelines are operated for the public benefit and curtail adjudications.

B. Accountability with Formally Approved Pipeline Routes

Pipeline routes are devoid of any government impositions as there is no state agency that designs and approves them.¹²⁵ Pipelines are planned and routed in private boardrooms, outside the view of the TRRC, landowners, and the public.¹²⁶ Reformation in the area of this law can once again borrow principles from transmission line cases.¹²⁷ Before a transmission line company can begin construction, proposed routes are considered by the Commission, and additional routes may be developed.¹²⁸ This process should extend to pipeline cases where approval by the TRRC of the company's proposed pipeline route is mandated. Furthermore, the TRRC should additionally be required to provide landowners with notice and the opportunity to attend a hearing. Frequently landowners are the most knowledgeable parties as to the characteristics of the landscape where a proposed pipeline will be laid. Allowing public voice to be added to this part of the process will ensure that the pipeline follows a route that best coexists with the landscape.

C. Fairness with Mandatory Easement Provisions

As landmen negotiating with landowners often refer to the company's proposed contract as a "Standard 88" or "Standard Lease Form," there is no such thing as a standard easement agreement which has been prepared and approved by a state agency.¹²⁹ In reality, the easement a landman presents for the first offer is almost always unfavorable to a landowner.¹³⁰ That easement

¹²⁵ Dennis McBeth, *Oil About Ranching*, LIVESTOCK WEEKLY, Nov. 15, 2018, at 10.

¹²⁶ Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 11, *TC&C*, 2018 WL 1697353 (No. 10-0082).

¹²⁷ *See id.* at 11.

¹²⁸ *Id.*

¹²⁹ *Forms of Oil and Gas Leases*, US LEGAL, <https://oilandgas.uslegal.com/2010/02/18/forms-of-oil-and-gas-leases/> (last visited Apr. 30, 2019).

¹³⁰ *See James, supra* note 14, at 983.

will not only have a price well below fair market value but will also give the pipeline company unbridled freedom to lay its pipeline.¹³¹ Such a strong-armed take-it-or-leave-it beginning to negotiations should not be commonplace in the condemnation process. Instead, if the first offer made is signed, the landowner deserves the comfort of knowing he or she will not be left with a lowball price and scarred land. Therefore, specific provisions should be mandatory in easements, and the first offer price should be no lower than fair market value.

1. Mandatory Provisions

It should be a requirement for pipeline companies to include specific provisions in their first offers. Such a proposition is so vital, for it regulates the parties' rights for years to come. Potential provisions to include can be borrowed from the "Texas Pipeline Easement Negotiation Checklist" provided by the Texas A&M AgriLife Extension.¹³² The Negotiation Checklist lists more than thirty provisions that provide reasonable rights and remedies to landowners.¹³³ However, this section lists and describes three particular provisions. Those provisions add fairness to the condemnation process but, more importantly, prevent permanent damage to the landscape.

One of the most important provisions to include would be a provision that requires the use of the "double ditch method." The double ditch method requires the company to dig the pipeline trench so that the topsoil remains separate from the subsurface soil and is placed back on top of the subsoil when the construction is completed, and the line buried.¹³⁴ Not only will a double ditch provision allow landowners to continue the full enjoyment of their land after the pipeline is laid, but it will also preserve the Texas landscape for future generations to come. The double ditch provision should also be complemented with a provision that sets restoration standards. A restoration provision would require proper restoration of the easement area.¹³⁵ It would also establish a measurable standard to ensure that repairs are adequate. Another provision that should be mandatory is one that

¹³¹ *Id.*

¹³² Tiffany Dowell, *Texas Pipeline Easement Negotiation Checklist*, TEXAS A&M AGRILIFE EXTENSION (2014), <https://agrifliefcdn.tamu.edu/texasaglaw/files/2016/08/Texas-Pipeline-Easement-Negotiation-Checklist.pdf>.

¹³³ *See id.*

¹³⁴ *Id.* at 4.

¹³⁵ *Id.*

provides access for the landowner.¹³⁶ It is not uncommon to install a pipeline beneath an entry road or driveway to the landowner's property.¹³⁷ Therefore, the provision would ensure that the pipeline company will provide access to the landowner's property during the pipeline installation, as well as after the construction is completed.¹³⁸

2. More Fair Compensation Offers

Landowners should not be required to negotiate to the fair market value of the easement with a pipeline company that is acting as the government with condemnation authority. The TRRC does not require pipeline companies with condemnation authority to give a minimum fair market value offer on the first offer.¹³⁹ Without such a requirement, the landman tells the landowner that the first offer is the best they will get. Pipeline companies also have crafty methods of keeping prices paid to other landowners confidential. This reality becomes even more unfair for a landowner once a commissioner's hearing is scheduled. At that moment, the landowner will no longer be able to negotiate a better than fair market value price, and instead, will, at a maximum, receive the fair market value of the easement.

D. Fairness with the Availability of a Jury Trial

1. Availability of a Jury Trial while Construction Begins

Currently, surveying and construction commence well before the opportunity to challenge a pipeline company's unfettered condemnation power arises for a landowner.¹⁴⁰ The reality of this procedure makes the landowner's fight one that is costly but ultimately worthless. To make the time and expense worthwhile for a landowner, the process that is in the statute can remain unchanged. As long as the TRRC has approved the pipeline company's condemnation authority and approved the pipeline company's pipeline route under the prescribed propositions above, construction shall begin. If the landowner remained unsatisfied with the TRRC's determination, it would still have the opportunity to file a lawsuit and leave the determination

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See James, supra note 14, at 983.*

¹⁴⁰ *See Schreiber, supra note 35, at 3.*

up to a jury. This last and final safeguard would leave no stone unturned and would give the landowner piece of mind that due process has been afforded to him or her.

2. Extending the *Denbury I* Test to all Pipeline Cases

Texas law currently provides landowners with a scheme of nonuniform rights, which depend on the particular statute a pipeline company relies on for condemnation authority and the nature of the substance that will flow through the pipeline.¹⁴¹ The Texas Supreme Court recognized the dangers of allowing companies to acquire unchallengeable condemnation power merely by checking boxes on a one-page form and self-declaring its common carrier status in *Denbury I*.¹⁴² A company only holding itself out is insufficient under Texas law to thwart judicial review.¹⁴³ Despite the confusion of lower courts, sparse legislation, and unbridled administrative scheme, the recognition the Texas Supreme Court places on landowner's right to judicial review of public use is near and dear.¹⁴⁴

The grave reality is the gas utility statute provides as few protections to private property and as inadequate of process as the Texas Supreme Court addressed in *Denbury I*.¹⁴⁵ With such lack of clarity, a landowner has no certainty of his or her rights, and those rights may very well hinge on the type of substance that will flow under the property. It is difficult to reconcile this imbalance as the same special scrutiny should be required irrespective of the pipeline's purpose.¹⁴⁶ The *TC&C* case and others like it shed light on the need for the wisdom of the *Denbury I* decision to be extended to all pipeline cases.¹⁴⁷ The gas corporation and gas utility eminent domain statutes bestow momentous power to pipeline companies with nominal regulatory oversight.¹⁴⁸ Instead, landowners deserve the right to challenge public use in all pipeline cases, and the *Denbury I* standard should regulate all companies

¹⁴¹ See *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC.*, 363 S.W.3d 192, 204 (Tex. 2017).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Brief of Amicus Curiae Texas Farm Bureau in Support of Petition for Review at 2, *TC&C Real Estate Holdings, Inc. v. ETC Katy Pipeline, Ltd.*, 2018 WL 1697353 (Tex. Mar. 27, 2018) (No. 10-0082).

¹⁴⁵ *Id.* at 2–3.

¹⁴⁶ See *id.* at 3.

¹⁴⁷ *Id.* at 11.

¹⁴⁸ *Id.*

and require a “reasonable probability” showing that the pipeline will serve a public use.¹⁴⁹

This proposition to extend the *Denbury* I standard to all pipeline cases will create uniformity as to landowner’s rights. It will also ensure that a landowner’s property will not be taken through condemnation unless precise requirements are met. Anything less offends our constitutional rights, which “enshrine landownership as a keystone right, rather than one ‘relegated to the status of a poor relation.’”¹⁵⁰

IV. CONCLUSION

The Texas condemnation process is not a willing buyer and a willing seller transaction; it is a legally forced sale.¹⁵¹ Pipeline companies, equipped with immense governmental power, enter into negotiations with landowners. However, at the end of the day, the pipeline companies know they will emerge victorious with a “deal.” With the reality of the current state of the condemnation process, it is undeniable that a landowner should be allowed to receive fair market value for his or her property. It is indisputable that a landowner should have the chance to question whether a pipeline company’s condemnation authority was properly granted before a pipeline is laid under his or her land. It is undeniable that a landowner deserves an easement that will ensure his or her property will not be permanently scarred. Therefore, fairness, transparency, and accountability must be added to the Texas condemnation process. Texas’ oil and gas production and marketing are very important; however, Texas’ landowners and Texas’ landscape are even more important.

¹⁴⁹ *Id.* at 12.

¹⁵⁰ *Id.*

¹⁵¹ Ashley, *supra* note 4, at 4.