

**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 CARRIER APPLICATION PROCESS**

Comment\*

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\* Selected as the Volume 45 Outstanding Student Article by the Volume 45 Board of Editors. This award was made possible through the generous donations of Mr. Glenn D. West and Kaplan.

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#### I. KEYSTONE XL PIPELINE: AN ILLUSTRATION OF THE INADEQUATE COMMON CARRIER APPLICATION PROCESS

I don’t even have to ask my hairdresser if he can legally cut my hair because the state requires that they post their license for everybody to see . . . . So why aren’t we requiring any real checks and balances for something that’s as important as the condemnation of land?<sup>1</sup>

Although Julia Trigg Crawford’s statement may seem like an exaggeration, it paints an accurate picture of the common carrier application process as it existed for many years prior to the *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* decision.<sup>2</sup> Landowners, lawmakers, and courts have begun to fight back against the decidedly inequitable process.<sup>3</sup> Julia Trigg Crawford owns land in northeast Texas that is currently in the path of TransCanada’s planned Keystone XL pipeline.<sup>4</sup> Crawford has challenged TransCanada’s common carrier status granted by the Railroad Commission of Texas, which bestows on TransCanada the ability to use eminent domain to construct the pipeline.<sup>5</sup> The Keystone XL pipeline is an extension of the existing Keystone pipeline that ends in Cushing, Oklahoma.<sup>6</sup> The planned pipeline will extend from Cushing to the Texas Gulf Coast, covering many Texas landowners’ properties in the process.<sup>7</sup> The Oklahoma-to-Texas part of the pipeline is only a small portion of the overall pipeline project, which TransCanada plans to extend from Alberta, Canada, to Texas.<sup>8</sup>

1. Kelly Connelly, *Why Changes to Eminent Domain in Texas May Be Imminent*, STATEIMPACT TEX. (July 25, 2012, 11:43 AM), <http://stateimpact.npr.org/texas/2012/07/25/why-changes-to-eminent-domain-in-texas-may-be-imminent/> (quoting Julia Trigg Crawford, a Texas landowner challenging TransCanada’s attempt to condemn her land to build a pipeline) (internal quotation marks omitted).

2. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192 (Tex. 2012); *infra* Part V.A.

3. See *infra* Part VI.

4. Connelly, *supra* note 1.

5. TEX. NAT. RES. CODE ANN. § 111.019(a) (West 2011); see Connelly, *supra* note 1.

6. *What Is the Keystone XL Pipeline?*, STATEIMPACT TEX., <http://stateimpact.npr.org/texas/tag/keystone-xl-pipeline/> (last visited Apr. 22, 2013).

7. *Id.*

8. *Id.*

TransCanada's Keystone XL pipeline is one of many pipeline projects currently in progress throughout Texas due to increased oil and gas production in the state.<sup>9</sup> Texas's current "oil boom" benefits the state, the oil and gas companies, and even citizens, as long as their property is not located on a pipeline project's route.<sup>10</sup> Texas boasts more than 270,000 miles of pipeline systems with the number ever increasing.<sup>11</sup> As long as the Texas energy industry continues to grow, the number of new pipeline systems will likewise increase.<sup>12</sup>

Although pipeline systems play an important role in the expansion of the energy industry in Texas, bringing benefits to the state and citizens alike, the condemnation of land to construct the pipelines has created a backlash from landowners.<sup>13</sup> The ability of pipeline companies to condemn land is essential to the success of the energy industry; however, the process by which pipeline companies were granted eminent domain authority provided few protections for landowners.<sup>14</sup> Texas enacted many eminent domain reforms, yet pipeline companies were allowed to continue bypassing the public use requirement of the Texas Constitution.<sup>15</sup> Pipeline companies were granted eminent domain authority as common carriers—transporting oil, gas, or coal to or for the public for hire—by simply putting an "x" in a box on a T-4 form submitted to the Railroad Commission without any investigation into its accuracy.<sup>16</sup> Thus, Crawford's statement is not as exaggerated as it originally seemed. In response to the lack of oversight, the Texas Supreme Court deemed the Railroad Commission's application process no longer sufficient to establish common carrier status in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*.<sup>17</sup> In doing so, the court rejected the process because it bypassed constitutional requirements but failed to set out an alternative process.<sup>18</sup> The decision placed the burden on landowners to challenge pipeline companies to protect their rights.<sup>19</sup> Consequently, Crawford now spends her time in state

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9. See *infra* Part II.B.

10. See David Milenberg, *Texas Starts Budget Debate Flush with Energy Boom Cash*, BLOOMBERG (Jan. 7, 2013, 1:18 PM), <http://www.bloomberg.com/news/2013-01-07/texas-starts-budget-debate-flush-with-energy-boom-cash.html>.

11. SUNSET ADVISORY COMM'N, SELF-EVALUATION REPORT: RAILROAD COMMISSION OF TEXAS 10 (2009) [hereinafter SELF-EVALUATION REPORT], available at <http://www.sunset.state.tx.us/82ndreports/rct/ser.pdf>.

12. See *infra* Part II.B.

13. See Connelly, *supra* note 1.

14. See *infra* Part V.A.

15. See *infra* Part VI.A-C.

16. See *infra* Part V.A & Appendix.

17. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 198-99 (Tex. 2012); *infra* Part VI.D.

18. See *infra* Part VI.D.

19. See Terri Hall, *Property Rights Activists Seek Clarity on Eminent Domain Use by Private Entities*, EXAMINER (July 24, 2012), <http://www.examiner.com/article/property-rights-advocates-seek-clarity-on-eminent-domain-use-by-private-pipeline>.

courts and before the legislature, fighting to protect her property rights because no specific procedure is in place to protect her interests—she must take enforcement of the public use requirement of the Texas Constitution into her own hands.<sup>20</sup>

This Comment focuses on whether *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* and Texas's eminent domain reforms ensure that the public use requirement of the Texas Constitution provides adequate protections to private landowners in common carrier condemnations. To gain a perspective of the need for pipelines, Part II discusses the importance of oil, gas, and pipelines to Texas.<sup>21</sup> Part III provides a discussion of eminent domain jurisprudence throughout Texas history from its early years as a sovereign through statehood, tracking the changing meaning of public use in the takings clause along the way.<sup>22</sup> To provide the basis for common carriers' ability to utilize condemnation, Part IV discusses legislative designations of eminent domain authority.<sup>23</sup> Part V then addresses the effects of *Kelo v. City of New London* and the minimal common carrier application process in Texas on the public use requirement in the United States and Texas Constitutions.<sup>24</sup> Texas's eminent domain reforms in response to increased eminent domain abuse are examined in Part VI to evaluate the current protections afforded to landowners.<sup>25</sup> Included in this Section is a discussion of the *Denbury* decision's creation of uncertainty for both landowners and pipeline companies by allowing a landowner to challenge common carrier status in court but failing to provide guidance as to what is specifically required to prove common carrier status and what application process is sufficient.<sup>26</sup> Finally, Part VII concludes that the Railroad Commission of Texas (Commission) should be given jurisdiction over common carrier applications and disputes but that the Commission needs to undergo some reforms to remove any perceived bias.<sup>27</sup> Additionally, the legislature should adopt an evidentiary framework to aid pipeline companies in determining what evidence will be sufficient to prove common carrier status.<sup>28</sup> The proposal aims to create the most efficient and fair adjudication of common carrier issues that protects landowners and fosters energy development.

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20. See Connelly, *supra* note 1.

21. See *infra* Part II.

22. See *infra* Part III.

23. See *infra* Part IV.

24. See *infra* Part V.A-B.

25. See *infra* Part VI.

26. See *infra* Part VI.

27. See *infra* Part VII.

28. See *infra* Part VII.

## II. THE IMPORTANCE OF OIL, GAS, AND PIPELINES TO TEXAS

A. *History of Oil and Gas in Texas*

Oil and Texas are so intertwined that it is inconceivable to imagine a time when oil did not play an important role in the economy or culture of Texas. Yet, this was the reality before 1859.<sup>29</sup> Although oil was not an important economic source for Texas until 1859, oil had been found and used since at least 1543.<sup>30</sup> In fact, Texas's coast was the site of the first recorded occurrence or use of oil in North America.<sup>31</sup> In 1543, survivors of De Soto's expedition traveling along Texas's coast in the Gulf of Mexico, attempting to reach Mexico, came ashore and used petroleum tar found along the shore to caulk their boats.<sup>32</sup> Other various uses for oil in Texas existed before it became a vital resource, but most of these uses were on a small scale or were mere novelties.<sup>33</sup> "Rock oil" was used for medicinal and therapeutic purposes, while petroleum seeps were utilized as spas.<sup>34</sup> Other limited uses included lubrication for wagon wheels or axles.<sup>35</sup>

In 1859, all of this changed.<sup>36</sup> Oil seeps were no longer novelties; rather, they were opportunities to strike it rich.<sup>37</sup> This was the year Edwin L. Drake discovered oil in Pennsylvania by drilling near oil seeps.<sup>38</sup> Drake's new drilling technique prompted a race to discover oil in economic quantities in Texas as well.<sup>39</sup> Lynis T. Barrett, the earliest Texas wildcatter, drilled a well near Nacogdoches in 1866 that became the first producer in Texas, but there would still be a struggle to discover oil in economically profitable quantities.<sup>40</sup> Without an understanding of the geologic conditions under which oil accumulates, the numerous oil discoveries across the state were a result of random drilling and accidental discoveries of oil in holes drilled for water.<sup>41</sup> There were numerous discoveries of oil across the state, but none were

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29. See generally DIANA DAVIDS HINTON & ROGER M. OLIEN, OIL IN TEXAS: THE GUSHER AGE, 1895-1945, at 1-2 (2002) (discussing the unknown economic significance of oil until the discovery of vast quantities of oil in Pennsylvania by Edwin L. Drake in 1859).

30. See C. A. WARNER, TEXAS OIL AND GAS SINCE 1543, at 1-3 (1939).

31. See *id.* at 1.

32. See HINTON & OLIEN, *supra* note 29, at 1; WARNER, *supra* note 30, at 1.

33. See HINTON & OLIEN, *supra* note 29, at 1.

34. See *id.* at 1-2 (describing how Sour Lake's petroleum seeps were utilized as spas in which "[v]isitors drank acidic, sulfury spring water and bathed in pools on which . . . 'a dense brown, transparent liquid'" was floating (quoting FREDRICK LAW OLMSTED, A JOURNEY THROUGH TEXAS; OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER: STATISTICAL APPENDIX 376 (1857))).

35. See WARNER, *supra* note 30, at 1-2.

36. See HINTON & OLIEN, *supra* note 29, at 2.

37. See *id.*

38. *Id.* at 2, 17.

39. *Id.* at 2-3, 17.

40. See *id.* at 2-3.

41. See *id.* at 17.

commercially profitable until the production of oil in Corsicana in 1894—accidentally discovered through the drilling of artesian wells.<sup>42</sup> The Corsicana wells, however, were modest compared to other parts of the country where oil was produced, such as Pennsylvania.<sup>43</sup> The real beginning of the oil boom came with the discovery of Spindletop in 1901.<sup>44</sup>

Upon the discovery of the Lucas Gusher at Spindletop—a gusher of a size unprecedented by any other gusher in the nation—oilmen and spectators poured into Beaumont, Texas, to witness the discovery and try their hand at finding their own gusher.<sup>45</sup> Soon, Spindletop was full of wells, and Beaumont was bursting at the seams with people from all over the nation hoping to strike it rich; even the locals who provided services looked to profit from Spindletop.<sup>46</sup>

Concurrent with the discovery of oil throughout Texas, oilmen discovered and recognized natural gas as a valuable fuel source.<sup>47</sup> The first discovery of gas occurred only five years after Barrett drilled the first producing oil well.<sup>48</sup> In 1908, economically viable quantities of gas were found near Greenvine, Texas.<sup>49</sup> The energy boom in Texas had begun.<sup>50</sup> The attitude towards oil and gas in Texas evolved from one of novelty to one of fervor towards a vital commodity and resource.<sup>51</sup> The incredible oil and gas discoveries—and the unbridled exploration and production that followed—forever changed Texas.<sup>52</sup> It would now be impossible to imagine Texas without the effects of oil and gas.<sup>53</sup>

### B. Pipelines

Initially, railroad cars primarily transported oil from the wells.<sup>54</sup> In 1902, the first oil pipeline in Texas was constructed and spanned from Spindletop to

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42. *See id.* at 4-5.

43. *See id.*

44. *See id.* at 1-2, 8; WARNER, *supra* note 30, at 1.

45. *See* HINTON & OLIEN, *supra* note 29, at 30-32.

46. *See id.* at 36-40 (describing a local cleaner who “promise[d] to build a ninety-story skyscraper” off of the huge increase in business from the oil field).

47. WARNER, *supra* note 30, at 10-11 (describing a man who drilled for water and encountered “‘a strange air’ from the well” that was ignited by a farmer’s pipe and how upon this discovery, the farmer had the gas “piped to [his] house . . . and burned as fuel”).

48. *Id.* at 10.

49. *Id.* at 10-11.

50. *See* HINTON & OLIEN, *supra* note 29, at 42.

51. *See generally id.* at 1-2 (explaining that before the oil rush, use of oil was limited to “opportunistic use of natural phenomena”).

52. *See* Mary G. Ramos, *Oil and Texas: A Cultural History*, TEX. ALMANAC (2000-2001), available at <http://www.texasalmanac.com/topics/business/oil-and-texas-cultural-history>.

53. *See infra* Part II.B.

54. *See* Laura A. Hanley, Comment, *Judicial Battles Between Pipeline Companies and Landowners: It’s Not Necessarily Who Wins, But by How Much*, 37 HOUS. L. REV. 125, 127 (2000).

the Neches River.<sup>55</sup> Pipelines were an important development because they introduced an efficient, low-cost, and convenient method of transporting oil.<sup>56</sup> Oil companies utilized pipelines to transport crude product to refineries or the finished product to consumers at low cost to meet the demands for the vital resource.<sup>57</sup> Pipelines also transported natural gas as it was discovered along with oil.<sup>58</sup> Another early Texas pipeline, constructed in 1910, provided natural gas to Fort Worth and Dallas.<sup>59</sup> Due to the ease and lower cost of transportation through pipelines, they became a vital component of the oil and gas industry—providing an important service to all Texans.<sup>60</sup>

Pipelines are essential to the oil and gas industry because they allow the transportation of oil and gas resources in a cost-efficient manner to provide consumers with lower-cost access to these vital resources.<sup>61</sup> Currently, Texas has over 270,000 miles of pipelines, which is the largest state pipeline network in the nation.<sup>62</sup> Pipeline use has increased with the more frequent use of enhanced recovery of oil wells.<sup>63</sup> A common enhanced recovery method is to inject carbon dioxide into the oil well to increase production from the well after it has ceased to produce under the typical methods of pumping and reservoir pressure.<sup>64</sup> Pipelines are needed to transport carbon dioxide or other gases to the wells, and Texas enjoys 1,700 miles of carbon dioxide pipelines out of the nation's 4,000-mile pipeline network.<sup>65</sup> Although pipelines are of great importance in Texas, disadvantages do exist.<sup>66</sup> The primary disadvantage is the tension between landowners and the pipeline companies' right of eminent domain, which allows the pipeline companies to condemn an easement across a landowner's property to lay a pipeline.<sup>67</sup> The increase in need for and use of pipelines across Texas has created more frequent clashes between pipeline companies and landowners.<sup>68</sup>

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55. *See id.*

56. *See* JOHN L. KENNEDY, OIL AND GAS PIPELINE FUNDAMENTALS 2 (2d ed. 1993).

57. *See id.*; Hanley, *supra* note 54, at 127.

58. *See* Hanley, *supra* note 54, at 127.

59. *See id.*

60. *See id.* at 127-28.

61. *See* KENNEDY, *supra* note 56, at 2.

62. SELF-EVALUATION REPORT, *supra* note 11, at 9-10.

63. *See* Mella McEwen, *Study of CO2 Pipelines Offers Picture of Existing Infrastructure*, MIDLAND REP.-TELEGRAM (Feb. 9, 2011, 3:00 PM), [http://www.mywesttexas.com/business/oil/article\\_b754305f-3db3-5fd7-b99b-ed99dfbb7003.html](http://www.mywesttexas.com/business/oil/article_b754305f-3db3-5fd7-b99b-ed99dfbb7003.html).

64. *See Enhanced Oil Recovery/CO2 Injection*, FOSSIL ENERGY OFF. COMM., <http://www.fossil.energy.gov/programs/oilgas/eor/> (last visited Apr. 22, 2013). Injected carbon dioxide expands in the reservoir and pushes remaining oil to the wellbore. *Id.*

65. *See* McEwen, *supra* note 63.

66. *See* Hanley, *supra* note 54, at 127-28.

67. *See id.*

68. *See id.* at 128-29.

## III. EVOLUTION OF TEXAS EMINENT DOMAIN LAW

Eminent domain is the governmental power to take private property and apply that property to a public use, provided compensation is paid for the taking.<sup>69</sup> Texas has utilized the important governmental power of eminent domain since its early acts as a sovereign.<sup>70</sup> Because eminent domain is an essential governmental power with vast consequences for private citizens, both the United States and the Texas Constitutions contain takings clauses with limitations on the use of eminent domain.<sup>71</sup>

The Constitution of the Republic of Texas, drafted in 1836 at a convention for the declaration of independence from Mexico, contained the first version of Texas's takings clause.<sup>72</sup> The clause provided that "[n]o person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representative, without just compensation being made therefor according to law."<sup>73</sup> Although there was no debate—thus no recorded discussion—over this provision at the convention, the language of the clause closely resembled the Tennessee and Indiana Constitutions.<sup>74</sup> Tennessee and Indiana courts interpreted the parallel takings clauses in their constitutions to have a strict application of the term "public use."<sup>75</sup> This suggests that the framers of the Constitution of the Republic of Texas intended eminent domain to have a severely limited use.<sup>76</sup> The first Constitution of the State of Texas, drafted in 1846, slightly modified the takings clause, which remained unchanged in the Constitutions of 1861, 1866, and 1869.<sup>77</sup> Texas courts

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69. BLACK'S LAW DICTIONARY 239 (3d pocket ed. 2006).

70. See *Davis v. City of Lubbock*, 326 S.W.2d 699, 704-05 (Tex. 1959) (describing the use of eminent domain by the Republic of Texas in 1839 to obtain a site for the capitol, which is now part of the city of Austin).

71. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); TEX. CONST. art. I, § 17 (amended 2009).

72. REPUB. TEX. CONST. of 1836, Declaration of Rights, § 13, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1069, 1083 (Austin, Gammel Book Co. 1898), available at <http://texashistory.unt.edu/ark:/67531/metaph5872/>; Timothy Sandefur, *Don't Mess with Property Rights in Texas: How the State Constitution Protects Property Owners in the Wake of Kelo*, 41 REAL PROP. PROB. & TR. J. 227, 231 (2006).

73. REPUB. TEX. CONST. of 1836, Declaration of Rights, § 13, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1069, 1083 (Austin, Gammel Book Co. 1898), available at <http://texashistory.unt.edu/ark:/67531/metaph5872/>.

74. See Sandefur, *supra* note 72, at 231-32 (analyzing the Constitution of the Republic of Texas takings clause through comparison to the Indiana and Tennessee Constitutions with similar wording and cases that interpret those clauses).

75. See *id.* (discussing the Tennessee case, *Harding v. Goodlet*, 11 Tenn. (3 Yer.) 41 (1832), which interpreted the Tennessee Constitution to "prohibit[] the use of eminent domain for private profit and [to] allow[] private parties to benefit from eminent domain only in cases when those parties could reasonably be described as 'public servants'").

76. See *id.*

77. TEX. CONST. of 1845, art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person . . .");



interpreted the public use requirement of the takings clause to only allow condemnation for “government buildings, public highways, or regulated common carriers.”<sup>78</sup> The use of eminent domain to transfer private property to another private entity for the general purpose of economic development was not considered to be a public use.<sup>79</sup> Naturally, a growing concentration on industrialization and a narrow interpretation of the term “public use” created a conflict between the needs of the state and the protections of the constitution.<sup>80</sup>

The proliferation of railroads throughout Texas presented the courts with one of their first main eminent domain issues.<sup>81</sup> Although railroads are private companies, the use of eminent domain was essential to allow and encourage the railroads to expand throughout the state.<sup>82</sup> Addressing these conflicting interests, the Texas Supreme Court stated with no hesitation that “[i]t cannot be questioned that a railroad for general travel, or the transportation of produce for the country at large, is a ‘public use.’”<sup>83</sup> First, the court recognized that the state had a duty to “creat[e] the necessary facilities for intercommunication for purposes of travel and commerce.”<sup>84</sup> Second, the railroad’s ability to “take and apply private property for the construction of their road[ must be] in accordance with the restrictions and conditions under which private property by the constitution may be taken.”<sup>85</sup> Essentially, the court approved the railroad’s use of eminent domain based on its common carrier status—transporting products, goods, or people to or for the public for hire.<sup>86</sup> Thus, the court required private railroads to follow restrictions and conditions to guarantee that the railroads were available for nondiscriminatory public use, thereby conforming to the restrictions of the public use requirement of the constitution.<sup>87</sup>

Recognizing the competing interests of railroad expansion and private property, a final convention was held in 1876 when the current and final version of Texas’s takings clause was drafted into the Texas Constitution.<sup>88</sup> The public use provision was not debated at the convention; the discussion only included methods of compensation for takings under the clause.<sup>89</sup> The current

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Davis v. City of Lubbock, 326 S.W.2d 699, 704-05 (Tex. 1959); Amanda Buffington Niles, Comment, *Eminent Domain and Pipelines in Texas: It’s as Easy as 1, 2, 3—Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEX. WESLEYAN L. REV. 271, 275 (2010).

78. Sandefur, *supra* note 72, at 238-39 & n.63.

79. *See id.* at 238-39.

80. *See id.*

81. *See* Niles, *supra* note 77, at 275; Sandefur, *supra* note 72, at 237-38.

82. George C. Werner, *Handbook of Texas Online: Railroads*, TEX. STATE HIST. ASS’N, <http://www.tshaonline.org/handbook/online/articles/eqr01> (last visited Apr. 22, 2013).

83. *Buffalo Bayou, Brazos & Colo. R.R. v. Ferris*, 26 Tex. 588, 598 (1863).

84. *Id.* at 598-99.

85. *Id.*

86. *See id.*; Niles, *supra* note 77, at 281.

87. *See Buffalo Bayou*, 26 Tex. at 598-99. For a discussion of legislative grants of eminent domain power to common carriers, see *infra* Part IV.

88. TEX. CONST. art. I, § 17 (amended 2009).

89. *See* Sandefur, *supra* note 72, at 238.

eminent domain provision states that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.”<sup>90</sup>

Texas courts continued to recognize the importance of railroads to westward expansion and economic growth by affirming their categorization as common carriers.<sup>91</sup> In 1898, a Texas Court of Civil Appeals upheld the condemnation of land by the Texas Transportation Company to build a railway between breweries and railroads.<sup>92</sup> The court acknowledged that the breweries may have benefited more than the public but that did not take away from the public use determination because the railway retained the “essential feature of a public use[—]the public may enjoy its benefits.”<sup>93</sup> The court further explained that a “motive of personal gain . . . cannot take from it its public character.”<sup>94</sup> As long as a railroad was available to anyone who wished to avail themselves of it, it was serving a public use.<sup>95</sup> Thus, Texas encouraged railroad growth—the base component of development in Texas at the time—by focusing on the public use rather than any private gain.<sup>96</sup>

As expected, the courts similarly upheld the use of eminent domain by other important industries and activities.<sup>97</sup> In *Borden v. Trespalacios Rice & Irrigation Co.*, the Texas Supreme Court affirmed an irrigation company’s condemnation of a right of way over private property for a canal to furnish water to others for agriculture.<sup>98</sup> Addressing the claim that the statute authorizing the condemnation by the irrigation company did not secure a right of use in the public, the court rejected a liberal interpretation of public use that defined the phrase to mean “the public welfare or good.”<sup>99</sup> Instead, the court defined public use as securing “some definite right or use in the business or

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90. TEX. CONST. art I, § 17 (amended 2009). The amended version of the Texas Constitution retains the same wording for the section quoted but adds additional limitations to the use of eminent domain. See discussion *infra* Part VI.B.

91. See *Mangan v. Tex. Transp. Co.*, 44 S.W. 998, 1001 (Tex. Civ. App.—San Antonio 1898, writ ref’d).

92. *Id.*

93. *Id.*

94. *Id.*

95. *West v. Whitehead*, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref’d); Niles, *supra* note 77, at 275-76.

96. *Whitehead*, 238 S.W. at 978-79 (“Development of the country has invariably followed the construction of such roads, industry is encouraged, natural resources are uncovered and rendered available, fields of employment and activity enlarged, and the products of this development are transported, by the very agency which made them available, to other parts of the country to add to the welfare, comfort, and convenience of the general public, and thus are created the public benefits and uses which warrant the exercise of the power of eminent domain.”).

97. See, e.g., *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11, 14 (Tex. 1905) (furnishing water to others for agriculture).

98. *Id.*

99. *Id.* (stating that a liberal interpretation of the phrase “public use” would allow any business that “promotes the prosperity and comfort of the country” to have the power of eminent domain); Sandefur, *supra* note 72, at 238.

undertaking to which the property is devoted.”<sup>100</sup> The court deemed the canal’s availability to all those who could take advantage of the water—those with land adjacent to the canal—a sufficient public use to fulfill the court’s narrow interpretation of the phrase.<sup>101</sup>

Texas turned its focus to oil and gas as a vital industry after the discovery of Spindletop in 1901.<sup>102</sup> As this new industry drove the state’s economy and development, Texas attempted to create an atmosphere that would allow the industry to prosper—much like what was done with the railroads.<sup>103</sup> In 1915, the legislature passed a statute that “provided for the incorporation of pipe line companies, with grant of power to operate pipe lines ‘between different points in this state,’ and with grant of other powers necessary to the purposes of such corporations.”<sup>104</sup> Subsequently, the legislature classified pipeline companies as common carriers in 1917<sup>105</sup> and granted the authority of eminent domain in 1919.<sup>106</sup> Courts also recognized the importance of the industry and made public use determinations in favor of oil and gas companies at the expense of landowners.<sup>107</sup>

As eminent domain became more essential to industries throughout Texas, the Texas Supreme Court acknowledged there was a “trend toward defining public use in terms of the general benefit to the state.”<sup>108</sup> In *Housing Authority of Dallas v. Higginbotham*, the court interestingly interpreted *Borden* as stating that the irrigation company operated for the public use because the public benefitted from irrigation transforming arid lands into agriculture.<sup>109</sup> The Texas Supreme Court implemented the public benefit definition of the public use phrase in *Coastal States Gas Producing Co. v. Pate*.<sup>110</sup> A statute authorized the condemnation of land adjacent to state-granted oil and gas leases to erect power machinery for the production of oil and gas under state-owned riverbeds.<sup>111</sup>

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100. *Borden*, 86 S.W. at 14.

101. *See id.* at 14-15.

102. *See* HINTON & OLIEN, *supra* note 29, at 1-2.

103. *See* *Humble Pipe Line Co. v. State*, 2 S.W.2d 1018, 1019 (Tex. Civ. App.—Austin 1928, writ ref’d).

104. *Id.* (citing Act of Apr. 7, 1915, 34th Leg., R.S., ch. 152, § 1, 1915 Tex. Gen. Laws 259, 260, repealed by Act of Apr. 15, 1955, 54th Leg., R.S., ch. 64, § 9.16, 1955 Tex. Gen. Laws 239, 306).

105. *See* Act of Feb. 20, 1917, 35th Leg., R.S., ch. 30, § 1, 1917 Tex. Gen. Laws 48, 49-53, repealed by Act of June 15, 1977, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Laws 2345 (adopting the Texas Natural Resources Code).

106. *See* Act of March 31, 1919, 36th Leg., R.S., ch. 146, § 1, 1919 Tex. Gen. Laws 272, 272-74, repealed by Act of June 15, 1977, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Laws 2345 (adopting the Texas Natural Resources Code); *Humble Pipe Line Co.*, 2 S.W.2d at 1019. For a discussion of legislative grants of eminent domain authority to common carrier pipelines, see *infra* Part IV.

107. *See* Niles, *supra* note 77, at 279-80.

108. *Dyer v. Tex. Elec. Serv. Co.*, 680 S.W.2d 883, 885 (Tex. App.—El Paso 1984, writ ref’d n.r.e.) (citing *Hous. Auth. of Dall. v. Higginbotham*, 143 S.W.2d 79, 84-85 (Tex. 1940)).

109. *See* *Higginbotham*, 143 S.W.2d at 84-85. For a critique of *Higginbotham*’s holding, see Sandefur, *supra* note 72, at 246-49.

110. *See* *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833-34 (Tex. 1958).

111. *Id.* at 830-31.

The court found a public use in condemning adjacent land to drill a directional well to produce oil and gas under the riverbed because the state received one-fourth of the oil produced, which was then put in the Permanent School Fund.<sup>112</sup> The public benefit from the income into the Permanent School Fund made the condemnation for public use.<sup>113</sup> Noticeably, a public benefit determination allows for broader authority to use eminent domain than a requirement that the public have a definite right or use in the business.<sup>114</sup>

Texas has greatly expanded its once-strict interpretation of the meaning of public use, especially in favor of the oil and gas industry.<sup>115</sup> Not only have Texas courts defined public use more expansively, but the deference afforded legislative grants of eminent domain authority by the courts has also led to a decrease in the exacting demands of the public use requirement.<sup>116</sup>

#### IV. LEGISLATIVE GRANTS OF EMINENT DOMAIN POWER

The legislature determines that certain activities qualify as a public use.<sup>117</sup> Texas courts have acknowledged that “the right of eminent domain is inherent in the Legislature” through delegation from the people in the general grant of legislative power in the constitution.<sup>118</sup> Thus, the legislature may delegate eminent domain power to an individual or a private corporation.<sup>119</sup> In Texas, the legislature has determined that private oil and gas companies may acquire eminent domain authority through three different classifications: common carriers, public utilities, and gas corporations.<sup>120</sup> This Comment will focus on the designation of common carrier status.<sup>121</sup>

The Texas Natural Resources Code defines several types of pipelines as common carriers.<sup>122</sup> The most important definition is a person who “owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum”; coal of any form or mixture; carbon dioxide or hydrogen in whatever form; feedstock for carbon gasification; the

112. *See id.* at 833.

113. *See id.*

114. *Compare id.* (requiring only a public benefit to satisfy the public use phrase to exercise eminent domain), with *Borden v. Trespacios Rice & Irrigation Co.*, 86 S.W. 11, 14 (Tex. 1905) (finding a public use only when the public has a right or use in the business).

115. *See Niles, supra* note 77, at 279-80.

116. *See* discussion *infra* Part IV.

117. *See Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 719 (Tex. App.—Corpus Christi 2000, pet. denied), *disapproved on other grounds by* *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).

118. *Imperial Irrigation Co. v. Jayne*, 138 S.W. 575, 587 (Tex. 1911).

119. *Valero Eastex Pipeline Co. v. Jarvis*, 926 S.W.2d 789, 792 (Tex. App.—Tyler 1996, writ denied) (citing *Benat v. Dall. Cnty.*, 266 S.W. 539, 540 (Tex. Civ. App.—Dallas 1924, writ ref’d)).

120. *See* TEX. NAT. RES. CODE ANN. § 111.019 (West 2011) (common carrier status); TEX. UTIL. CODE ANN. § 121.001 (West 2007) (gas utility); TEX. UTIL. CODE ANN. § 181.004 (West 2007) (gas corporation).

121. *See infra* notes 122-36 and accompanying text.

122. TEX. NAT. RES. CODE ANN. § 111.002 (West 2011).

products of carbon gasification; or the derivative products of carbon gasification as long as it is transported “to or for the public for hire.”<sup>123</sup> The Code also defines other instances in which a crude petroleum pipeline operates as a common carrier.<sup>124</sup> A pipeline transporting carbon dioxide or hydrogen to or for the public for hire must provide the Commission with a written acceptance of the Code’s Chapter 111 provisions—setting out duties and obligations of common carriers—and must agree to be subjected to those duties and obligations.<sup>125</sup> The Code similarly requires a pipeline transporting feedstock for carbon gasification, the products for carbon gasification, or the derivative products of carbon gasification to subject itself to the provisions of Chapter 111 and to provide a written acceptance to that effect to the Commission.<sup>126</sup> The legislature has conferred jurisdiction over common carriers to the Commission.<sup>127</sup>

Although a private individual or corporation is granted the power of eminent domain, the legislature retains the ability to determine the conditions and rights of the delegated power.<sup>128</sup> Texas Natural Resources Code § 111.109(b) sets out the basic abilities of a common carrier under the legislative grant of eminent domain: “In 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.”<sup>129</sup>

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123. NAT. RES. § 111.002(1), (5)-(7).

124. NAT. RES. § 111.002(1)-(4) (“A person is a common carrier . . . if [he] (1) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline; (2) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire and the pipeline is constructed or maintained on, over, or under a public road or highway, or is an entity in favor of whom the right of eminent domain exists; (3) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire which is or may be constructed, operated, or maintained across, on, along, over, or under the right-of-way of a railroad, corporation, or other common carrier required by law to transport crude petroleum as a common carrier; [or] (4) under lease, contract of purchase, agreement to buy or sell, or other agreement or arrangement of any kind, owns, operates, manages, or participates in ownership, operation, or management of a pipeline or part of a pipeline in the State of Texas for the transportation of crude petroleum, bought of others, from an oil field or place of production within this state to any distributing, refining, or marketing center or reshipping point within this state . . .”).

125. NAT. RES. § 111.002(6).

126. NAT. RES. § 111.002(7).

127. *Id.* § 81.051.

128. *City of Corpus Christi v. Taylor*, 126 S.W.3d 712, 724 (Tex. App.—Corpus Christi 2004, pet. withdrawn) (citing *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 716 (Tex. App.—Corpus Christi 2000, pet. denied), *disapproved on other grounds by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004)).

129. TEX. NAT. RES. CODE ANN. § 111.019(b) (West 2011).

With the privileges obtained from the grant of common carrier status, there are also obligations pipelines must meet to exercise common carrier benefits.<sup>130</sup> Once a crude petroleum pipeline operator is designated as a common carrier, the pipeline operator may not discriminate between third parties for receiving or transporting crude petroleum.<sup>131</sup> Additionally, an operator of a common carrier crude petroleum pipeline cannot require different compensation from consumers for similar services—similar services require similar rates.<sup>132</sup>

In granting common carriers the power of eminent domain, the legislature has determined that the utilization of pipelines is critical to society, thus, it is a public use.<sup>133</sup> Most importantly, the legislature has determined that an essential aspect of granting common carrier status is that the private individual or corporation utilizes the pipeline to transport resources “to or for the public for hire.”<sup>134</sup> Texas courts defer to these legislative determinations “unless it is manifestly wrong or unreasonable, or the purpose for which the declaration is enacted is ‘clearly and probably private.’”<sup>135</sup> Thus, legislative determinations of activities as public uses are an essential component of eminent domain law, and once a private entity acquires such a designation, the landowner possesses few opportunities for relief.<sup>136</sup>

#### V. THE PUBLIC USE REQUIREMENT NO LONGER ADEQUATELY PROTECTS LANDOWNERS

Although both the United States and Texas Constitutions prohibit the taking of private property for a private use through the public use requirement, public use became less effective in protecting landowners because of its broad interpretation and lack of enforcement.<sup>137</sup> The United States Supreme Court directly diminished the public use provision’s protections through its interpretation of the clause,<sup>138</sup> while Texas allowed pipeline companies to bypass the public use requirement.<sup>139</sup> The erosion of public use as a requisite to exercise eminent domain came both on a federal and a state level.<sup>140</sup>

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130. See generally *id.* §§ 111.013-.018 (describing the obligations of a common carrier that must be met in order to exercise its eminent domain power).

131. See NAT. RES. §§ 111.015, .016.

132. See NAT. RES. § 111.017.

133. See *Mercier*, 28 S.W.3d at 718.

134. TEX. NAT. RES. CODE ANN. § 111.002(1) (West 2011).

135. *Mercier*, 28 S.W.3d at 719 (quoting *West v. Whitehead*, 238 S.W. 976 (Tex. Civ. App.—San Antonio 1922, writ ref’d)).

136. See Niles, *supra* note 77, at 284.

137. See discussion *infra* Parts V.A-B.

138. See *Kelo v. City of New London*, 545 U.S. 469, 485-87 (2005); discussion *infra* Part V.B.

139. See *infra* Part V.A.

140. See discussion *infra* Parts V.A-B.

A. *Texas's Process of Granting Common Carrier Status Bypasses the Public Use Requirement*

The Commission was established in 1891 to oversee the railroads after their proliferation through Texas garnered resentment from many residents.<sup>141</sup> The Commission became an important agency nationally when it was given authority over the Texas energy industry, beginning with its grant of jurisdiction over common carriers by the legislature in 1917.<sup>142</sup> Eventually, the legislature gave the Commission the authority to oversee and promulgate rules governing the entire energy industry.<sup>143</sup>

Under § 81.051 of the Natural Resources Code, the Commission has jurisdiction over common carriers.<sup>144</sup> The rules promulgated by the Commission that are of importance here are the requirements for pipeline companies to be classified as common carriers.<sup>145</sup> To operate a pipeline in Texas, the pipeline owner must obtain a permit from the Commission.<sup>146</sup> Two requirements must be met to obtain a pipeline permit: the Commission must be “satisfied from such application and the evidence in support thereof, and its own investigation” must show that the pipeline (1) will be operated and constructed to reduce the possibility of waste and (2) will be operated in compliance with all applicable conservation laws, rules, and regulations.<sup>147</sup> To obtain the required permit from the Commission, pipeline companies must fill out the T-4 permit application form along with a P-5 Organization Report, which contains the financial assurance amount and lists the pipeline company’s officers.<sup>148</sup>

The T-4 permit is the method by which a pipeline company can declare to the Commission that the pipeline will be operated as a common carrier.<sup>149</sup> Although the power of eminent domain is an enormous one, the barriers to gaining that power are relatively minor.<sup>150</sup> The T-4 permit application requires the pipeline company to provide basic information about the pipeline, such as

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141. See David F. Prindle, *Handbook of Texas Online: Railroad Commission*, TEX. STATE HIST. ASS’N, <http://www.tshaonline.org/handbook/online/articles/mdr01> (last visited Apr. 13, 2013) (explaining that the Texas Railroad Commission was “giv[en] . . . jurisdiction over rates and operations of railroads, terminals, wharves, and express companies”).

142. See *id.*

143. See *id.* (describing the Commission’s authority to make well-spacing rules and conservation rules and to prorate production of oil wells).

144. TEX. NAT. RES. CODE ANN. § 81.051(a)(1) (West 2011).

145. See *infra* notes 146-78 and accompanying text.

146. See 16 TEX. ADMIN. CODE § 3.70 (2012) (Tex. R.R. Comm’n, Pipeline Permits Required).

147. *Id.*

148. *Pipeline Eminent Domain and Condemnation Frequently Asked Questions (FAQs)*, RAILROAD COMMISSION TEXAS, <http://www.rrc.state.tx.us/about/faqs/eminentdomain.php> (last visited Apr. 23, 2012) (stating that there must also be a “digitized map” of the particular pipelines that the T-4 permit will cover).

149. See *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 312-13 (Tex. App.—Tyler 2001, pet. denied); *infra* Appendix.

150. See Niles, *supra* note 77, at 284.

the identity of the owner and operator of the pipeline, the type of fluid to be transported, and the purposes of the pipeline.<sup>151</sup> The T-4 form asks the pipeline operator to specify the product to be transported: crude, condensate, gas, products, full gas well stream, full oil well stream, or other.<sup>152</sup> The pipeline classification section, however, is by far the most important aspect of the form.<sup>153</sup> The permit application directs the operator to classify the pipeline—transporting anything other than natural gas—as a common carrier or private pipeline.<sup>154</sup> A pipeline company need only check the box next to “common carrier” to be designated as such—it is an incredibly informal form.<sup>155</sup> The T-4 form merely references Chapter 111 of the Texas Natural Resources Code, which sets out the rights and obligations of common carriers, but the form does not explain or even define “common carrier status.”<sup>156</sup> In fact, the only clarifying question about the pipeline’s classification included on the form asks, “Will the pipeline carry only the gas and/or liquids produced by pipeline owner or operator?”<sup>157</sup> If the answer is “no,” the operator must then select whether product to be transported is (1) purchased from others; (2) owned by others but transported for a fee; or (3) both purchased and transported for others.<sup>158</sup> The follow-up question, however, does little to verify that the pipeline operator will in fact operate the pipeline as a common carrier.<sup>159</sup>

In addition to checking the common carrier box on the T-4 form, a pipeline operator must provide the Commission with a letter agreeing to be subjected to the duties and obligations of Chapter 111 of the Texas Natural Resources Code.<sup>160</sup> The pipeline operator is also required to “make and publish their tariffs under rules prescribed by the [C]ommission,” which sets out the rates and terms for transportation of the product.<sup>161</sup> After all of these steps are followed, common carrier status is typically conferred to the pipeline operator.<sup>162</sup> The Commission’s process of granting common carrier status does

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151. See Form T-4, Application for Permit to Operate a Pipeline in Texas, R.R. Comm’n of Tex. (Dec. 15, 2011), <http://www.rrc.state.tx.us/forms/forms/gs/T-4Permit.pdf> [hereinafter Form T-4]; *infra* Appendix.

152. See *id.* For a copy of a T-4 form, see *infra* Appendix. If the pipeline will transport natural gas, the operator answers separate questions and is subjected to a slightly different procedure that this Comment does not discuss. *Id.* A gas corporation transporting natural gas is granted eminent domain authority as a public utility rather than a common carrier. TEX. UTIL. CODE ANN. § 181.004 (West 2011).

153. See *infra* notes 156-64 and accompanying text.

154. See Form T-4, *supra* note 151; *infra* Appendix.

155. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 195-96 (Tex. 2012); *infra* Appendix.

156. See Form T-4, *supra* note 151; *infra* Appendix.

157. See *infra* Appendix, at (1)(f).

158. See *infra* Appendix, at (1)(f).

159. See generally *Denbury*, 363 S.W.3d at 195-96 (explaining that the Commission does not investigate the claims made by the pipeline operator on the T-4 form).

160. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).

161. *Id.* § 111.014.

162. See, e.g., *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied).



not involve an investigation into evidence to determine whether the pipeline will truly be operated as a common carrier, and the landowner affected is not given any notice that the pipeline operator is seeking eminent domain authority or an opportunity to challenge the application in a hearing.<sup>163</sup> Once the Commission has granted the pipeline operator common carrier status, the landowner generally does not have an opportunity for relief.<sup>164</sup>

Although it is the province of the trial court to determine a pipeline company's eminent domain authority as a matter of law,<sup>165</sup> the Texas Supreme Court stated that the Commission's determination of common carrier status should be given great weight.<sup>166</sup> When a landowner challenged the common carrier status of an ethylene pipeline company, the Texas court of appeals acknowledged the deference given to the Commission's determination of common carrier status:

A review of Commission records indicates that Mustang has met the requirements of § 111.002(6) of the Texas Natural Resources Code for common carrier status. First, Mustang has subjected itself to the jurisdiction of the Commission by declaring on its T-4 application for permit to operate a pipeline that it is a common carrier. Second, Mustang has held itself out to the public for hire as evidenced by its Texas Local Tariff No. M-3 on file with the Commission. Therefore, Mustang is a common carrier subject to the jurisdiction of the Commission.<sup>167</sup>

In theory, there is no issue with giving such great deference to the Commission's determination of common carrier status because the Commission specializes in pipeline matters and is in a better position to make this determination.<sup>168</sup> In reality, however, this assumption proves troublesome because the Commission does not have the authority to resolve disputes about common carrier status.<sup>169</sup> The Commission only has authority to hear and resolve limited questions.<sup>170</sup>

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163. See *Denbury*, 363 S.W.3d at 195-96.

164. See *Niles*, *supra* note 77, at 284.

165. *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 722 (Tex. App.—Corpus Christi 2000, pet. denied), *disapproved on other grounds by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).

166. *Mustang Pipeline Co.*, 51 S.W.3d at 312 (citing *State v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 190, 196 (Tex. 1994)).

167. *Id.* at 313 (quoting a letter from the Texas Railroad Commission to Mustang Pipeline).

168. See *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994) (“[W]e are not inclined to reverse the Commissioner's reasonable determination in an area where he possesses considerable authority and expertise.”).

169. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 199 (Tex. 2012).

170. See TEX. NAT. RES. CODE ANN. § 111.221 (West 2011 & Supp. 2012) (giving the Commission jurisdiction to hear complaints under subchapters C, D, and F of Chapter 111 and “Sections 111.004, 111.025, 111.131 through 111.133, 111.136, 111.137, and 111.140 of this code”). See generally *Amarillo Oil*

Despite these deficiencies, once a pipeline company submits itself to the jurisdiction of the Commission as a common carrier, the pipeline company has virtually unreviewable authority to exercise eminent domain.<sup>171</sup> Consequently, obtaining common carrier status also creates a presumption that the use is a public one.<sup>172</sup> The legislature's grant of eminent domain authority reflects its conclusion that the activity is important to society and should be considered a public use.<sup>173</sup> Texas courts concluded that "the same facts which established that [the pipeline operator] was a common carrier also established that the proposed use of the . . . pipeline was for a public purpose."<sup>174</sup> Once the court has determined that the pipeline company has common carrier status, and thus the power to exercise eminent domain, it will also conclude that the pipeline is condemning the property for a public use.<sup>175</sup>

Such a minimal and unsupervised process allows pipeline companies to simply check a box on the form and receive the power to condemn property.<sup>176</sup> Because the granting of common carrier status is not generally reviewable by courts and because the determination also affirms that the use is a public one, the public use requirement of the Texas Constitution is not properly enforced.<sup>177</sup> Without a meaningful requirement that a taking of private property may only occur if it is for a public use, what will prevent private property from being condemned on the whim of private companies?<sup>178</sup>

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*Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) ("The cause is properly within the jurisdiction of the courts because the Railroad Commission has no authority to determine title to land or property rights."). Subchapters C, D, and F deal with public utilities, common purchasers, and rates, respectively. TEX. NAT. RES. CODE ANN. §§ 111.051-.054, .081-.097, .181-.190 (West 2011). The Commission has authority to hear questions over the following: whether crude petroleum was produced or purchased in accordance with the law or Commission rules; abandoned connections; rules for transporting, loading, and delivering crude petroleum by common carriers, and control of common carrier receiving, loading, and transfer facilities; Commission rules for public utilities; Commission's orders subject to judicial review; enlargement and expansion of common carrier facilities; and monthly statements of common carriers and public utilities. *See id.* §§ 111.004, .025, .131-.132, .136-.137, .140.

171. *See generally Mustang Pipeline Co.*, 51 S.W.3d at 312 (affirming the Commission's determination that a pipeline was a common carrier because it had subjected itself to the authority of the Commission as a common carrier).

172. *See id.* at 314.

173. *See id.*

174. *Id.*

175. *See id.*

176. *See Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 198-99 (Tex. 2012).

177. *See Mustang Pipeline Co.*, 51 S.W.3d at 312-14.

178. *See generally Denbury*, 363 S.W.3d at 195 ("Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings.").

B. *Kelo v. City of New London Reduces Public Use Protection on a National Level*

In 2005, the United States Supreme Court decided *Kelo v. City of New London*, in which the Court vastly broadened the definition of “public use.”<sup>179</sup> While the requirement still exists, the Court greatly reduced its protections to landowners.<sup>180</sup>

The city of New London, Connecticut, set out to “revitalize its ailing economy” by economic development.<sup>181</sup> Specifically, the City planned to improve its waterfront areas and build a park to improve the city’s appearance and opportunities for leisure activities to coincide with a pharmaceutical company relocating to the city.<sup>182</sup> To create all the aesthetic improvement projects, the city bought land from willing sellers and began condemnation proceedings against those who refused.<sup>183</sup> Owners whose property was being condemned brought an action in the New London Superior Court, claiming “that the taking of their properties would violate the ‘public use’ restriction in the Fifth Amendment.”<sup>184</sup>

The Supreme Court had already weakened the protections of the public use provision.<sup>185</sup> Even before the Fifth Amendment was applied to the states through incorporation in the Due Process Clause of the Fourteenth Amendment, states imposed public use requirements on condemnation in their respective constitutions.<sup>186</sup> Most of these state courts had interpreted “public use” to mean actual “use by the public.”<sup>187</sup> The Court rejected the “use by the general public” test as inadequate.<sup>188</sup> Instead, the Court embraced “public purpose” as the definition of public use.<sup>189</sup>

The Court set out to determine whether the facts of the taking in that case constituted a public purpose.<sup>190</sup> The Court emphasized deference to the determinations made by the states, recognizing that different cities have

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179. See *Kelo v. City of New London*, 545 U.S. 469, 469 (2005).

180. See *id.* at 478-80 (stating that the Court “reject[s] any literal requirement that condemned property be put into use for the general public” (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)) (internal quotation marks omitted)).

181. *Id.* at 469, 473.

182. See *id.* at 474.

183. See *id.* 473-75.

184. *Id.* at 475.

185. See *id.* at 479 (“[T]he ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” (quoting *Haw. Hous. Auth.*, 467 U.S. at 244)).

186. See *id.* at 489.

187. See *id.* at 479. For a discussion of Texas courts’ interpretation of the Texas Constitution’s takings clause, see discussion *supra* Part III.

188. *Kelo*, 545 U.S. at 480 (quoting *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906)).

189. *Id.* at 480 (stating that the public purpose interpretation of public use is a “broader and more natural interpretation” (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896))).

190. *Id.*

different needs.<sup>191</sup> The Court held that there was a public purpose after looking at the development scheme as a whole.<sup>192</sup> The residents of the city would benefit from the economic developments of the city, even though a private party might benefit as well.<sup>193</sup> The Court expressly rejected the invitation to prohibit takings on the basis of economic development; instead, the Court endorsed the use as a function of government.<sup>194</sup>

The danger of allowing economic development to qualify as a public use is that “nothing would stop a city from transferring citizen *A*’s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes.”<sup>195</sup> Allowing economic development to qualify as a public use opens the door widely for the states or the federal government to take property to give to private entities, so long as their use is more beneficial.<sup>196</sup> Conceivably, a corporation’s use will always be more beneficial to the city, state, or nation than a private residence.<sup>197</sup> This is the danger that many landowners feared after the Court’s decision in *Kelo*.<sup>198</sup>

The Court acknowledged how far it was stretching the public use definition because the Court stated, “[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”<sup>199</sup> Texas took that suggestion to heart.<sup>200</sup>

## VI. TEXAS REFORMS EMINENT DOMAIN LAW TO PROTECT LANDOWNERS

The gradual erosion of the protections afforded to landowners in the takings clause—specifically the public use requirement—created a backlash among many citizens, lawmakers, and courts.<sup>201</sup> Although the public use requirement had lost its original, stricter definition, the Supreme Court’s decision in *Kelo* brought attention to the issue and caused legislative reactions

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191. *See id.* at 483-84 (stating that the city’s “determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference”).

192. *Id.* at 484-85.

193. *See id.* at 485-86 (explaining that even though a private entity may benefit from the taking, this does not automatically violate the public use provision).

194. *See id.* at 484-85.

195. *Id.* at 486-87 (refusing to indulge in a hypothetical, the Court rejected this argument).

196. *See* Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 *DRAKE L. REV.* 171, 221-22 (2005).

197. *See generally id.* (explaining that economic development “replace[s] low-income residents and low-tax businesses with those able to generate more income and taxes”).

198. *See id.* at 221-23.

199. *See Kelo*, 545 U.S. at 489 (recognizing that many states impose stricter public use requirements than the Federal Constitution).

200. *See infra* Part VI.

201. *See, e.g.*, TEX. GOV’T CODE ANN. § 2206.001 (West 2008 & Supp. 2012) (increasing protections for landowners in condemnation proceedings).

in Texas in an attempt to preserve the protections of the takings clause.<sup>202</sup> In addition to the attention *Kelo* brought to takings jurisprudence, increased oil and gas production in Texas has led to more frequent clashes between pipeline companies and landowners.<sup>203</sup> These two factors have led to reforms in Texas that attempt to increase the effectiveness of the public use requirement and provide more protections to landowners.<sup>204</sup>

#### A. Texas Landowner's Bill of Rights

The first response to the *Kelo* decision and the erosion of the public use requirement was the creation of a landowner's bill of rights.<sup>205</sup> The attorney general prepared the bill of rights, which informs landowners whose property may be acquired by eminent domain of their rights and the procedures for the eminent domain process.<sup>206</sup> Included in the bill of rights is the condemnation procedure set out in Chapter 21 of the Texas Property Code, the obligations owed to the landowner by the condemner, and all options the landowner has during the condemnation process.<sup>207</sup> Most importantly, the bill of rights lists the landowner's right to the following: notice that the landowner's property is to be acquisitioned; a bona fide good faith effort to negotiate by the condemner; an assessment of the landowner's damages resulting from the condemnation; "a hearing under Chapter 21, Property Code, including a hearing on the assessment of damages; and . . . an appeal of a judgment in a condemnation proceeding."<sup>208</sup> Essentially, the bill of rights explains the rights and obligations of both landowners and condemners and the procedures of the condemnation process set out in both Chapter 21 of the Property Code and § 402 of the Texas Government Code in order to educate landowners and allow them to protect their rights.<sup>209</sup>

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202. See, e.g., TEX. LEGISLATIVE COUNCIL, ANALYSES OF PROPOSED CONSTITUTIONAL AMENDMENTS NOVEMBER 3, 2009, ELECTION, 57-60 (2009), [http://www.lrl.state.tx.us/scanned/Constitutional\\_Amendments/amendments81\\_tlc\\_2009-11-03.pdf](http://www.lrl.state.tx.us/scanned/Constitutional_Amendments/amendments81_tlc_2009-11-03.pdf) (explaining that the *Kelo* decision was the reason for the proposed constitutional amendment).

203. See generally Ramit Plushnick-Masti, *Texas Landowners Take a Rare Stand Against Big Oil*, ASSOCIATED PRESS (Oct. 18, 2012, 3:24 PM), <http://www.thestreet.com/story/11739294/1/texas-landowners-take-a-rare-stand-against-big-oil.html> (article corrected on Oct. 30, 2012 to reflect that no lawsuits have been filed to date) (discussing that increased oil production has thrown off the balance between oil and agriculture in Texas, leading to clashes between the oil companies and the landowners).

204. See *infra* Part VIA-D.

205. See TEX. GOV'T CODE ANN. § 402.031 (West 2005 & Supp. 2011).

206. See *id.* (setting out the attorney general's duty to prepare the landowner's bill of rights statement and what must be included in the statement).

207. GOV'T § 402.031(a)-(c).

208. *Id.*

209. OFFICE OF THE ATTORNEY GEN. OF TEX., STATE OF TEXAS LANDOWNER'S BILL OF RIGHTS (2012) [hereinafter TEXAS LANDOWNER'S BILL OF RIGHTS], available at [https://www.oag.state.tx.us/agency/landowners\\_billofrights.pdf](https://www.oag.state.tx.us/agency/landowners_billofrights.pdf).

The purpose of the bill of rights is to provide an understandable written statement that explains a landowner's rights and options in any potential condemnation procedure.<sup>210</sup> The legislature recognized that there were few disclosure laws imposed on entities possessing eminent domain authority and that landowners may not have access to or knowledge of the statutes and case law that set out their rights and options as landowners.<sup>211</sup> Although lawyers are often hired to help guide a landowner through the condemnation process, the legislature noted that the cost is often prohibitive to some landowners; therefore, the bill of rights is an essential tool for many landowners facing condemnation proceedings.<sup>212</sup> To effectuate the usefulness of the bill of rights to landowners potentially affected by condemnation, the bill of rights must be written in plain language, easy to understand, and posted on the Texas Attorney General's website.<sup>213</sup> Additionally, condemners must provide a copy of the bill of rights to the landowner whose property is subject to the condemnation.<sup>214</sup> The bill of rights allows landowners to become aware of their rights and protect those rights independently, enabling those who would not be able to afford an attorney to ensure their rights are protected.<sup>215</sup>

While the Texas Landowner's Bill of Rights aims to inform individuals of their rights, the remainder of the reforms strive to mitigate eminent domain abuse through increased rights to landowners and equitable condemnation procedures.<sup>216</sup>

### *B. Amendment to the Constitution of the State of Texas*

In direct response to the United States Supreme Court's invitation in the *Kelo* decision for a state to limit its utilization of eminent domain authority, and despite the broad interpretation of federal authority, the Texas Legislature amended the takings clause of the Texas Constitution.<sup>217</sup> The amendment addresses the major concern of unbridled eminent domain power conjured by the Supreme Court's endorsement of employing the takings power to give

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210. See LAND & RESOURCE MANAGEMENT COMM., BILL ANALYSIS, Tex. H.B. 1495, 80th Leg., R.S. (2007).

211. See *id.*

212. See *id.*

213. GOV'T § 402.031.

214. TEXAS LANDOWNER'S BILL OF RIGHTS, *supra* note 209.

215. See generally BILL ANALYSIS, Tex. H.B. 1495 (explaining that the purpose of the bill of rights is to allow landowners to understand their rights and that the benefit of counsel "is mitigated by the costs of attorney's fees and court costs").

216. See *infra* Part VLB-D.

217. See TEX. CONST. art. I, § 17 (amended 2009); *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

property to private entities for economic development purposes.<sup>218</sup> The amendment provides that “‘public use’ does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.”<sup>219</sup> Additionally, the amendment requires that an entity be granted eminent domain power only “on a two-thirds vote of all the members elected to each house.”<sup>220</sup> The changes to the Texas Constitution ensure that, at least on a state level, the public use requirement will continue to afford protections to landowners.<sup>221</sup>

Critics of the amendment are concerned with the permanency of the change—exactly the aspect that is important to supporters—and argue that the changes would be better made statutorily, where the implications of the language can be vetted and more easily modified if unintended consequences occur.<sup>222</sup> Specifically, critics are concerned about the language in the amendment that limits the taking to the purpose of “‘ownership, use, and enjoyment’ of [the] property” by authorized entities.<sup>223</sup> This language, critics claim, is ambiguous as to the scope of eminent domain and will lead to litigation and inconsistent rulings.<sup>224</sup> Supporters, however, claim that the language will provide clear guidance for courts deciding eminent domain issues.<sup>225</sup> Clearly, the amendment does not solve all of the problems of eminent domain abuse, but it is an important step towards ensuring that the public use clause is an effective protection for landowners.<sup>226</sup>

The amendment primarily prevents entities with eminent domain authority from condemning property for economic development purposes or increasing tax revenues.<sup>227</sup> Thus, the protection provided by the Texas Constitution’s public use requirement is reinforced to prevent a result similar to the *Kelo* decision.<sup>228</sup> With a clear stance against broadening the meaning of the public use phrase, the Texas Legislature has continued to make changes to Texas eminent domain jurisprudence to allow for greater rights and protections for landowners.<sup>229</sup>

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218. See generally TEX. CONST. art. I, § 17 (amended 2009) (excluding a transfer of property taken pursuant to the takings clause to private entities for economic development purposes or to increase tax revenues).

219. See *id.* § 17(b).

220. See *id.* § 17(c).

221. See generally *id.* § 17 (limiting the meaning of “public use” to exclude economic development).

222. See TEX. LEGISLATIVE COUNCIL, *supra* note 202, at 57-60.

223. *Id.* at 60.

224. See *id.* at 57-60.

225. See *id.*

226. See generally *id.* at 59 (stating that eminent domain problems still exist but that the amendment is an important step in the right direction).

227. *Id.* at 57-60.

228. See *id.*

229. See *infra* Part VI.C.

*C. Senate Bill 18*

In furtherance of the legislature's goal to overhaul Texas's eminent domain law to better protect landowners, the legislature passed Senate Bill 18 (S.B. 18), striving to make the condemnation procedure more straightforward and fair to landowners.<sup>230</sup> S.B. 18 was adopted in 2011 in response to the *Kelo* decision and the recurrent conflict between landowners and energy development.<sup>231</sup> S.B. 18 made many changes to existing laws related to eminent domain use, including amendments to the Education Code, Government Code, Property Code, Local Government Code, Transportation Code, and Water Code.<sup>232</sup> Landowners' rights and the procedures that a condemner must follow are expanded in S.B. 18.<sup>233</sup>

The most significant aspect of S.B. 18 is the replacement of "public purpose" as the limitation on eminent domain with "public use"—the original and stricter interpretation of the takings clause.<sup>234</sup> While the Texas Constitution still utilized the "public use" language, courts had largely interpreted "public use" to be synonymous with "public purpose," and some eminent domain laws referred to "public purpose," rather than "public use."<sup>235</sup> This distinction between "public purpose" and "public use" was addressed in the *Kelo* decision, and the Supreme Court held that "public purpose" was the correct limitation on the takings clause.<sup>236</sup> The Court's use of "public purpose" as the limitation on condemnation resulted in an incredibly broad use of eminent domain authority by holding that economic development is a public purpose.<sup>237</sup> S.B. 18 changed all references from "public purpose" to "public use" in eminent domain authorization statutes for cities, counties, and school districts in an attempt to restrict takings to situations that actually involve a public use; however, the bill

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230. H. RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 18, 82d Leg., R.S. (2011) (explaining the legislative actions leading up to S.B. 18).

231. *Id.*

232. S. RESEARCH CTR., BILL ANALYSIS, Tex. S.B. 18, 82d Leg., R.S. (2011) (discussing how S.B. 18 amends existing laws relating to eminent domain use).

233. J. Allen Smith & Michael R. Steinmark, *Senate Bill 18: Important Changes for Texas Landowners in Condemnation*, SETTLEPOU BLOG (Sept. 6, 2011), <http://blog.settlepou.com/senate-bill-18-important-changes-for-texas-landowners-in-condemnation/>.

234. TEX. GOV'T CODE ANN. § 2206.001 (West 2008 & Supp. 2012). The interpretation of "public use" in the takings clause to mean "public purpose" was gradually accepted in eminent domain cases on both state and federal levels in place of the more strictly interpreted public use requirement of early takings jurisprudence. *See* discussion *supra* Parts III & V.A.

235. *See* Bill Peacock, *Bill Analysis: What's Next for Senate Bill 18?*, TEX. PUB. POL'Y FOUND. (Apr. 14, 2011), <http://www.texaspolicy.com/center/economic-freedom/reports/what's-next-senate-bill-18/>; *see, e.g.*, TEX. LOCAL GOV'T CODE ANN. § 251.001 (West 2005 & Supp. 2012) (authorizing municipalities to exercise eminent domain power for municipal public uses).

236. *See Kelo v. City of New London*, 545 U.S. 469, 478-80 (2005).

237. *See id.*; *supra* Part V.A (discussing the distinction between public purpose and public use).



does not specifically define public use.<sup>238</sup> The deliberate choice of “public use” wording over “public purpose” wording signals that the Texas Legislature is striving to reintroduce a stricter limitation on eminent domain use in the state.<sup>239</sup>

Another important aspect of S.B. 18 is the requirement that, by December 31, 2012, any entity authorized to exercise eminent domain power must have reported that the entity possesses the power of eminent domain, along with all laws that grant the entity such power, to the state comptroller by certified mail, return receipt requested.<sup>240</sup> If an entity does not report its status as required, its eminent domain authority expires on September 1, 2013.<sup>241</sup> The legislature will review this list in 2013 to determine whether further eminent domain law revisions are needed.<sup>242</sup> In addition to the reporting obligation, S.B. 18 amends existing laws to require condemners to make certain disclosures to a landowner whose property is to be condemned, such as appraisal reports and assurance that the landowner may discuss the offer with others.<sup>243</sup> S.B. 18 introduced other changes to create a fair and straightforward eminent domain procedure.<sup>244</sup>

The most significant procedural change S.B. 18 produced was the process by which offers are made to landowners before their properties are condemned.<sup>245</sup> Before an entity may exercise its powers of eminent domain, it must first attempt to purchase the property from the landowner.<sup>246</sup> In reality, however, entities with eminent domain authority have much greater bargaining power than a landowner and typically have more expertise in condemnation proceedings, more money, and more leverage to force the landowner to accept the offer.<sup>247</sup> Before S.B. 18, entities with eminent domain authority could give the landowner a “lowball” offer, knowing that the landowner either must accept

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238. See W. James McAnelly III et al., *Recent Developments in Texas, United States, and International Energy Law*, 7 TEX. J. OIL, GAS & ENERGY L. 125, 152-53 (2011-2012); Peacock, *supra* note 235.

239. See Peacock, *supra* note 235.

240. TEX. GOV'T CODE ANN. § 2206.101 (West 2008 & Supp. 2012) (stating that this reporting requirement “does not apply to any entity created or that acquired the power of eminent domain on or after December 31, 2012”).

241. *Id.* § 2206.101(d) (stating that the list of the names of entities with eminent domain power and the laws granting them this status must be provided by the comptroller to the “lieutenant governor, the speaker of the house of representatives, the presiding officers of the appropriate standing committees of the senate and the house of representatives, and the Texas Legislative Council”).

242. See Brad Raffle, Laura E. Hannusch & Joseph R. Herbster, *Texas Eminent Domain Laws Gets a Makeover—A Primer on Senate Bill 18*, PILLSBURY WINTHROP SHAW PITTMAN LLP (June 2, 2011), [http://www.pillsburylaw.com/siteFiles/Publications/ELUNRRRealEstateAlertTexasEminentDomainLaws060211\\_final.pdf](http://www.pillsburylaw.com/siteFiles/Publications/ELUNRRRealEstateAlertTexasEminentDomainLaws060211_final.pdf).

243. See TEX. PROP. CODE ANN. § 21.0111(a) (West 2004 & Supp. 2012) (requiring all entities with eminent domain power to disclose all appraisal reports of the property subject to condemnation prepared within ten years of the offer to the landowner); PROP. § 21.0111(c) (prohibiting an offer from an entity with eminent domain power to acquire a landowner’s property from including a confidentiality provision and requiring the entity to inform the landowner that he or she may discuss the offer with others).

244. See *infra* notes 245-55 and accompanying text.

245. TEX. PROP. CODE ANN. § 21.0113 (West 2004 & Supp. 2012) (Bona Fide Offer Required).

246. Smith & Steinmark, *supra* note 233.

247. *Id.*

the offer or be subjected to condemnation proceedings.<sup>248</sup> In an attempt to give the offer process actual significance, S.B. 18 requires that entities with eminent domain authority make a “bona fide” offer to purchase the landowner’s property.<sup>249</sup> A bona fide offer consists of a written initial and final offer, delivered to the property owner.<sup>250</sup> Based on a certified appraiser’s written appraisal of the value of the property to be purchased, the final offer must be “equal to or greater than the amount of the written appraisal obtained by the entity.”<sup>251</sup> The entity must also provide a copy of the appraisal, the instrument conveying the property, and the landowner’s bill of rights to the landowner, and it must allow the landowner fourteen days to respond to the final offer.<sup>252</sup> The added protections of S.B. 18 allow landowners and entities attempting to purchase the property before condemnation to negotiate on a level playing field.<sup>253</sup> Additionally, if the condemning entity cancels the use for which it was taken, no actual progress is made within ten years of the taking, or the property becomes unnecessary for the purpose within ten years of the taking, the landowner can purchase back the property for the purchase price paid to it by the condemning entity.<sup>254</sup> S.B. 18 increases the instances in which a property owner may buy back the property and allows landowners to do so at the purchase price rather than fair market value.<sup>255</sup>

S.B. 18 adds to the increased rights afforded to landowners and fosters awareness of these rights to better equip landowners to receive a fair deal from entities exercising their eminent domain authority.<sup>256</sup> Critics dispute that S.B. 18 provides any real added protections to landowners, claiming that the changes are only procedural and would not create much of a change from current common practice.<sup>257</sup> Additionally, S.B. 18’s restriction on exercising eminent domain for economic development or tax purposes does not affect the authority of entities to utilize eminent domain for certain uses—including common carriers.<sup>258</sup> The changes are recent, and it remains to be seen if S.B. 18 creates any actual benefit to landowners, but the legislature is moving

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248. *Id.* (internal quotation marks omitted).

249. *Id.* (internal quotation marks omitted).

250. PROP. § 21.0113.

251. *Id.*; S. RESEARCH CTR., BILL ANALYSIS, Tex. S.B. 18, 82d Leg., R.S. (2011).

252. *See* PROP. § 21.0113; BILL ANALYSIS, Tex. S.B. 18.

253. BILL ANALYSIS, Tex. S.B. 18.

254. *See* McAnelly et al., *supra* note 238, at 154-55.

255. *See id.* at 152-53 (discussing that S.B. 18’s change, allowing landowners to buy back the property at the purchase price, also allows them to recover the equity of the appreciating property).

256. *See generally* Smith & Steinmark, *supra* note 233 (stating that S.B. 18 provides new protections for landowners and creates an atmosphere for a fair offer process).

257. *See* McAnelly et al., *supra* note 238, at 153-54.

258. TEX. GOV’T CODE ANN. § 2206.001(c) (West 2008 & Supp. 2012) (“This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for: . . . (7) the operations of: (A) a common carrier [pipeline] . . . ; or (B) an energy transporter . . .”).

in the right direction to create a fair process for landowners.<sup>259</sup> Despite the augmented protections of S.B. 18 and other eminent domain reforms, increased conflict between landowners and pipeline companies exposed further issues in eminent domain law.<sup>260</sup> Extensive eminent domain reforms are meaningless if an entity is able to acquire eminent domain authority by self-designation as a common carrier, bypassing the public use requirement in the takings clause.<sup>261</sup> In 2012, the Texas Supreme Court addressed the loophole in enforcement of the public use requirement but, in doing so, created greater uncertainty and more conflict between landowners and pipeline companies.<sup>262</sup>

*D. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*

The recent Texas eminent domain reforms may have increased the rights of landowners, but the Texas Legislature failed to address the wholly inadequate common carrier designation process that allowed pipeline companies to bypass the public use requirement.<sup>263</sup> As discussed previously, pipeline companies encountered almost no obstacles to obtaining common carrier status, which allowed eminent domain authority to be granted without proving the pipeline would truly be operated for a public use.<sup>264</sup> Because the process allowed virtually unchecked ability to obtain the power of eminent domain, many landowners were left with no remedy to protect their rights, despite the new reforms to eminent domain law.<sup>265</sup> Finally, the Texas Supreme Court addressed the inconsistencies between the unchecked common carrier designation process and the state's progress towards greater takings limitations and increased landowner rights.<sup>266</sup>

On March 2, 2012, the Texas Supreme Court issued its revised opinion in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Denbury* decision).<sup>267</sup> The court's decision paralleled the state's reforms to

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259. See generally McAnelly et al., *supra* note 238, at 152-53 (discussing that the current process greatly favors condemning entities).

260. See *infra* Part VI.D.

261. See generally *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192 (Tex. 2012) (explaining that the Commission does not investigate any claims of common carrier status and that the T-4 form is really a clerical process).

262. See *id.* at 200-02; *infra* Part VI.D.

263. See *infra* notes 289-96 and accompanying text.

264. See *supra* Part V.A (discussing the process by which pipeline companies may obtain common carrier status).

265. See generally *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied) (explaining that courts give the Commission's determination of common carrier status great deference).

266. See *Denbury*, 363 S.W.3d at 200-02, 204; *infra* notes 285-301 and accompanying text.

267. *Denbury*, 363 S.W.3d at 192. The court originally decided the case on August 26, 2011, but the court withdrew the original opinion and replaced it with a revised opinion on March 2, 2012. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, No. 09-0901, 2011 WL 3796574 (Tex. 2011), *withdrawn and overruled by* 363 S.W.3d 192 (Tex. 2012). There was considerable concern from the energy

curb eminent domain abuse by addressing the loophole in the common carrier designation process.<sup>268</sup> In 2008, Denbury Green Pipeline-Texas, LLC (Denbury) sought to expand a pipeline it had constructed from its carbon dioxide reserve in Mississippi to Louisiana and then attempted to extend the pipeline from the Texas border to the Hastings Field.<sup>269</sup> Denbury filed a T-4 form application with the Commission indicating that it was a common carrier by placing an “x” in the corresponding box on the form.<sup>270</sup> Denbury specified on the form that the carbon dioxide transported in the pipelines was “[o]wned by others, but transported for a fee.”<sup>271</sup> To complete the common carrier application process, Denbury acknowledged in a letter to the Commission that it “accept[ed] the provisions of Chapter 111 of the Natural Resources Code” and agreed to be subjected to the duties and obligations of that chapter.<sup>272</sup> With these minimal procedures completed, the Commission granted the T-4 permit only eight days after the application was filed, thereby conferring common carrier status and eminent domain authority to Denbury.<sup>273</sup> Later that year, Denbury filed a tariff with the Commission.<sup>274</sup>

Texas Rice Land Partners, Ltd. (Texas Rice), a landowner on the pipeline route, along with its lessee, refused Denbury access to the property for surveying purposes.<sup>275</sup> Denbury sued Texas Rice, seeking an injunction that would prevent Texas Rice from interfering with Denbury’s entry onto the property.<sup>276</sup> Subsequently, both parties filed motions for summary judgment.<sup>277</sup>

The trial court rendered judgment in favor of Denbury.<sup>278</sup> The trial court found that Denbury possessed the power of eminent domain because it had been granted common carrier status by the Commission after following all of the required procedures.<sup>279</sup> Thus, Texas Rice could not interfere with

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industry that the original opinion would severely limit energy production expansion—many in the industry filed amicus curiae briefs. John S. Gray, *The Door Opens to Challenge Some Pipeline Claims of Eminent Domain*, 50 HOUS. LAW., November/December 2012, at 43, 43. The Texas Supreme Court revised the opinion to clarify that pipeline operators should be allowed to introduce evidence of customers to meet the court’s test for common carrier status. *Id.*

268. See Robert H. Thomas, *Recent Developments in Eminent Domain: Public Use*, 44 URB. LAW. 705, 706 (2012).

269. See *Denbury*, 363 S.W.3d at 195-96 (describing Hastings Field as located in Brazoria and Galveston counties in East Texas).

270. See *id.* For a discussion of the process by which the Commission grants common carrier status to entities, see *supra* Part V.A.

271. See *Denbury*, 363 S.W.3d at 196 (alteration in original) (quoting Form T-4, *supra* note 151) (internal quotation marks omitted).

272. *Id.* (quoting a letter submitted by Denbury Green) (internal quotation marks omitted); see TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).

273. See *Denbury*, 363 S.W.3d at 196 (granting the T-4 permit in April 2008).

274. See *id.* (explaining that the tariff “set[] out terms for the transportation of gas in the pipeline”).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. See *id.*

Denbury's access to the property or harass Denbury's employees.<sup>280</sup> The court of appeals affirmed.<sup>281</sup>

In the court of appeals, Texas Rice argued that there was a genuine issue of material fact as to whether Denbury was a common carrier, and it insisted that there was no evidence that the pipeline would be operated to or for the public for hire.<sup>282</sup> The court of appeals asserted that Denbury established its common carrier status as a matter of law because it had demonstrated that all of the procedures and requirements of the application process were met.<sup>283</sup> The determinative factors for the court of appeals were the adherence to the application procedures and the approval of the T-4 permit by the Commission, hardly a rigorous enforcement of the public use provision.<sup>284</sup>

Texas Rice appealed to the Texas Supreme Court.<sup>285</sup> Addressing the inconsistency in Texas's attempt to constrict eminent domain abuse and the lax process of granting common carrier status, the Texas Supreme Court reversed and held "that the T-4 permit alone did not conclusively establish Denbury Green's status as a common carrier and confer the power of eminent domain."<sup>286</sup> Immediately, the court respected the serious implications of condemnation by reiterating that a legislative grant of eminent domain power must be strictly construed by strict compliance with all statutes and said that any questions over the scope of the power were to be construed in favor of the landowner.<sup>287</sup> Self-declaration of common carrier status, thus, does not establish that all statutory requirements for exercising eminent domain power have been met—specifically, that the pipeline will be operated to or for the public for hire.<sup>288</sup>

Although the lower courts gave such incredible deference to the Commission's determination of common carrier status as to make this determination conclusive, the Texas Supreme Court noted that "[n]othing in the statutory scheme indicates that the Commission's decision to grant a common-carrier permit carries conclusive effect and thus bars landowners from disputing

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280. *See id.*

281. *See* Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 296 S.W.3d 877, 881 (Tex. App.—Beaumont 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012).

282. *See id.* at 880.

283. *See id.* at 880-81 ("Denbury Green contends it fully complied with the requirements of the Texas Natural Resources Code to conclusively prove it is a common carrier. Texas Rice had not presented any evidence that Denbury Green had not met the statutory requirements under the Texas Natural Resources Code to be authorized by the [Commission] as a common carrier.").

284. *See id.* at 881 ("[T]he same facts which established that [the pipeline company] was a common carrier also established that the proposed use of [the] pipeline was for a public purpose." (first alteration in original) (quoting *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 314 (Tex. App.—Tyler 2001, pet. denied)) (internal quotation marks omitted)).

285. *See Denbury*, 363 S.W.3d at 192.

286. *Id.* at 198-200.

287. *Id.* at 198.

288. *See generally* Thomas, *supra* note 268, at 705-06 (explaining that the mere registration as a common carrier does not grant an entity eminent domain authority as a matter of law).

in court a pipeline company's naked assertion of public use."<sup>289</sup> Instead, the courts must be able to determine whether a use is, in fact, a public one for which eminent domain may be exercised.<sup>290</sup> The court quickly focused on the deficient investigation done before common carrier status is granted, stating that the "process for handling T-4 permits appears to be one of registration, not of application."<sup>291</sup> This statement is particularly descriptive of the process because "the Commission 'does not have the authority to regulate any pipelines with respect to the exercise of their eminent domain powers,'" and an application has never been denied.<sup>292</sup> The court went on to explain that the process of granting common carrier status includes no notice to any landowner affected, no hearing, no investigation, and certainly no adversarial testing of the claims by the entity seeking common carrier status.<sup>293</sup> Almost in disbelief, the court stated that "[p]rivate property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more."<sup>294</sup> The court refused to accept that the legislature intended the constitutional question of whether the use is a public or private one to be unchallengeable in court after determination by the Commission, which has no authority to investigate and determine the character of the use.<sup>295</sup> Determining that common carrier status is challengeable in court, the Texas Supreme Court went on to investigate the public or private character of Denbury's pipeline.<sup>296</sup>

Texas Natural Resources Code § 111.002(6) states that a pipeline carrying carbon dioxide must transport the substance to or for the public for hire to be a common carrier pipeline.<sup>297</sup> Merely possessing the capability to transport the substance for the public is not enough to find a public use; rather, an entity must both (1) actually transport the carbon dioxide to or for the public for hire and (2) subject itself to regulation under Chapter 111 of the Texas Natural Resources Code.<sup>298</sup> The court left no doubt that it will not stand for a subjugation of the public use requirement of the Texas Constitution by accepting a process that allows an entity to utilize eminent domain for a private

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289. See *Denbury*, 363 S.W.3d at 198.

290. See *id.* at 198-99 (recognizing that, if the legislature had intended the Commission's determination to be conclusive and unchallengeable, the legislature would have said so in the statute).

291. See *id.* ("[T]he Commission performs a clerical rather than an adjudicative act.").

292. See *id.* (quoting *Pipeline Eminent Domain and Condemnation Frequently Asked Questions (FAQs)*, RAILROAD COMMISSION TEXAS, <http://www.rrc.state.tx.us/about/faqs/eminentdomain.php> (last visited Apr. 17, 2013)).

293. See *id.* at 199-200.

294. See *id.* at 199.

295. See *id.* at 200 ("[W]e cannot conceive that the Legislature intended the granting of a T-4 permit alone to prohibit a landowner—who was not a party to the Commission permitting process and had no notice of it—from challenging in court the eminent-domain power of a permit holder.").

296. See *id.* at 200-02.

297. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011).

298. See *id.*; *Denbury*, 363 S.W.3d at 200-01.

pipeline by merely meeting some formal procedural requirements.<sup>299</sup> Ultimately, the court held that, for an entity building a carbon dioxide pipeline to qualify as a common carrier, there must be a reasonable probability that the pipeline will transport gas to or for the public sometime after construction—meaning that it will serve “one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.”<sup>300</sup> The Commission’s common carrier determination is *prima facie* valid, but if a landowner challenges the pipeline’s status, the pipeline company has the burden to prove the reasonable probability of the pipeline’s transportation of products to or for the public for hire.<sup>301</sup>

Applying the holding, the court found that Denbury, through evidence on their website and their lack of ability to name future customers, planned to utilize the pipeline for private use; thus, it had not established common carrier status as a matter of law.<sup>302</sup> The court required reasonable proof of a future customer and looked to all forms of evidence in considering Denbury’s claim.<sup>303</sup> Additionally, the court refused to allow a pipeline company to prove its common carrier status based upon the mere availability to transfer products for third parties.<sup>304</sup>

In the Texas Supreme Court’s revised opinion, the holding was limited to carbon dioxide and hydrogen pipelines under § 111.002(6) of the Texas Natural Resources Code.<sup>305</sup> The dangers of bypassing the public use requirement, however, are still present in all other types of common carrier pipelines because the process remains the same.<sup>306</sup> The *Denbury* decision highlights the problems inherent in the entire common carrier designation process, and it will likely serve as a guide for courts hearing common carrier issues, no matter the product transported.<sup>307</sup> Although the Texas Court of Appeals in Beaumont declined to

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299. See *Denbury*, 363 S.W.3d at 200-02 (“A sine qua non of lawful taking . . . for or on account of public use . . . is that the professed use be a public one in truth. Mere fiat, whether pronounced by the Legislature or by a subordinate agency, does not make that a public use which is not such in fact . . .”) (alterations in original) (quoting *Hous. Auth. of Dall. v. Higginbotham*, 143 S.W.2d 79, 84 (Tex. 1940)) (internal quotation marks omitted).

300. See *id.* at 202 (footnote omitted).

301. See *id.*

302. See *id.* at 202-03.

303. See generally *id.* at 203 (considering the pipeline company’s website, whether there were any other entities in the area to use the product, and the purpose of the pipeline).

304. See Bruce M. Kramer, *Texas: A Renaissance Year for Oil and Gas Jurisprudence: The Texas Supreme Court*, 18 TEX. WESLEYAN L. REV. 627, 631 (2012).

305. TEX. NAT. RES. CODE ANN. § 111.002(6) (West 2011); *Denbury*, 363 S.W.3d at 202 & n.28.

306. See generally Saul Elbein, *Pipeline Companies Seize Land in Texas at Will*, TEX. OBSERVER (Aug. 22, 2012, 5:34 PM), <http://www.texasobserver.org/pipeline-companies-seize-land-in-texas-at-will> (discussing the shortfalls of the common carrier application process at the Commission for the Keystone pipeline transporting bitumen).

307. See *Keystone Pipeline Ruling* (Sept. 24, 2012), [http://www.co.jefferson.tx.us/ccourts/cc1\\_MX-B402\\_20120924\\_111720.pdf](http://www.co.jefferson.tx.us/ccourts/cc1_MX-B402_20120924_111720.pdf) (ruling issued by Tom Rugg, Sr., Judge of County Court at Law No. 1 in Jefferson County, Texas, setting out the court’s interpretation of the law pertaining to common carrier status in three condemnation cases brought by TransCanada Keystone Pipeline, L.P.).

apply the *Denbury* decision requirements to a crude oil common carrier pipeline,<sup>308</sup> the deficiencies in the process are universal to all types of common carriers, and the proposals made below should apply to all common carriers under § 111.002 of the Texas Natural Resources Code.<sup>309</sup>

The Texas Supreme Court unmistakably showed no tolerance for the complete deference given to the Commission's determination of common carrier status.<sup>310</sup> However, the court did not address how this would affect the application process in the future, other than stating that an entity must prove that the pipeline will be operated for a public use—to or for the public for hire—if a landowner challenges its common carrier status.<sup>311</sup> Although the court accomplished its goal of ensuring that the constitutional limitations of public use on eminent domain remained intact, its decision created more uncertainties than the problems that it solved.<sup>312</sup> While, in theory, a lawsuit to challenge an entity's common carrier status is an effective way to prevent an entity from utilizing eminent domain for a private purpose, in reality, the obstacles to suing these entities—costs, time, knowledge, and unequal bargaining power—are prohibitive to landowners attempting to protect their rights.<sup>313</sup> Moreover, what type of evidence will be considered sufficient to prove a reasonable probability that the pipeline will transport products for a third party sometime after construction?<sup>314</sup> The uncertainties presented by the *Denbury* decision must be addressed to give full effect to the court's attempt to prevent pipeline companies from bypassing the public use requirement of the takings clause.

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308. See *Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P.*, 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, pet. denied) (declining to extend the requirements of the *Denbury* decision to crude oil common carriers under § 111.002(1) of the Texas Natural Resources Code).

309. See NAT. RES. § 111.002 (1)-(7); Elbein, *supra* note 306.

310. See generally Thomas, *supra* note 268, at 706 (explaining that the Texas Supreme Court was concerned about entities gaming the Commission's permitting process).

311. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012).

312. See generally Josiah Neeley, *Invited Testimony Before the House Committee on Land and Resource Management*, TEX. PUB. POL'Y FOUND. (July 23, 2012), <http://www.texaspolicy.com/sites/default/files/documents/2012-07-testimony-LandResourceCommittee-ACEE-JosiahNeeley.pdf> (stating that the *Denbury* decision creates uncertainties about how the decision will work in practice).

313. See, e.g., H. COMM. ON LAND & RES. MGMT., INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE 1, 31-32 (Dec. 2012) [hereinafter INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE], available at [http://www.house.state.tx.us/\\_media/pdf/committees/reports/82interim/House-Committee-on-Land-and-Resource-ManagementInterim-Report-2012.pdf](http://www.house.state.tx.us/_media/pdf/committees/reports/82interim/House-Committee-on-Land-and-Resource-ManagementInterim-Report-2012.pdf) (discussing the prohibitive costs of challenging a pipeline company in court); *infra* Part VI.A (comparing the different forums for common carrier status oversight).

314. See generally INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36 (suggesting that the legislature needs to enact a framework for sufficient evidence to prove common carrier status); *infra* Part VII.B (proposing evidentiary frameworks to prove common carrier status).



VII. PROPOSAL TO SOLVE UNCERTAINTIES PRESENTED BY THE *DENBURY* DECISION

A. *Authority to Oversee Common Carrier Applications*

The *Denbury* decision created concerns for both landowners and pipeline companies.<sup>315</sup> Specifically, it produced uncertainty because a clear process for granting common carrier status that comports with the requirements of the decision and is a predictable avenue for adjudication of challenges to pipeline companies' statuses does not exist.<sup>316</sup> As can be expected, there are many suggestions for the solution to these problems, which vary from favoring the pipeline companies to favoring the landowners.<sup>317</sup> Because of the energy industry's importance to the Texas economy and Texas's citizens' fierce belief in the protection of private rights, this issue is surely to be quickly addressed by the legislature in order to reach an acceptable solution for everyone involved in the pipeline condemnation process.<sup>318</sup> The goals are a fair and detached authority to decide whether a pipeline company is operating as a common carrier, an ability to produce evidence, an investigation of the evidence, a production of notice to affected landowners, and an opportunity for a hearing.<sup>319</sup> Disagreement exists, however, about which method will best create this desired result.<sup>320</sup>

1. *District Courts*

The simplest solution, in terms of legislative action, to the uncertainty created by the *Denbury* decision would be to allow landowners to challenge the common carrier status of a pipeline company in district courts, which essentially maintains the situation as it has now evolved after the *Denbury* decision.<sup>321</sup> Challenges in district courts allow landowners to be presented with evidence from the pipeline company that there is a reasonable probability that the pipeline will transport the product to or for the public for hire in the future

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315. See Deon Daugherty, *Eminent Domain Likely Issue for Legislature*, HOUS. BUS. J. (Mar. 9, 2012, 5:00 AM), <http://www.bizjournals.com/houston/print-edition/2012/03/09/eminent-domain-likely-issuefor.html?page=all>; Hall, *supra* note 19.

316. See, e.g., Daugherty, *supra* note 315; Hall, *supra* note 19.

317. See, e.g., Jennifer Hiller, *Texas Legislators Already Tackling Property Rights*, HOUS. CHRON. (July 23, 2012, 9:18 PM), <http://www.chron.com/default/article/Texas-legislators-already-tackling-property-rights-3729111.php>.

318. See generally INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 32 (discussing the need to address the uncertainties in the common carrier status process in this legislative session and a few proposals for a solution to this problem).

319. See *id.*

320. See *id.*

321. See, e.g., Hall, *supra* note 19 (discussing how landowners must now bring challenges to common carrier status in courts).

and will give landowners the ability to investigate, through discovery, the validity and accuracy of that evidence.<sup>322</sup> While this proposal meets the strictures required by the *Denbury* decision and requires the least legislative action, neither the private landowners nor the pipeline companies would benefit from this method.<sup>323</sup>

The principal advantage this method provides to landowners is the court's close proximity to the affected property; thus, judges who are accountable to their electorate in that area and jury members from the area will likely side with the local property owner over the big, out-of-town pipeline company.<sup>324</sup> One of the most prohibitive aspects of this method to landowners is the necessity for landowners to bring the challenge to the pipeline companies in court.<sup>325</sup> This concern is summed up by a Texas farmer's frustrated comment about the process of challenging a pipeline's status in court: "Why is it my responsibility as a Texas landowner to make a foreign corporation prove it has legally obtained the power of eminent domain in Texas?"<sup>326</sup> Not only is this fundamental unfairness a problem, but it will also likely be prohibitively expensive and time consuming for most landowners to challenge a pipeline company in court.<sup>327</sup> Consequently, many landowners may not challenge a pipeline company's eminent domain status, and the common carrier status procedure will remain unchecked as it was before the *Denbury* decision.<sup>328</sup> This solution not only is not ideal for landowners but also is problematic for pipeline companies.<sup>329</sup>

While the pipeline companies have more resources than landowners to fight challenges to their common carrier status in court, the potential long delays caused by these challenges may delay pipeline projects to the point that

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322. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 31-32.

323. See generally *id.* (discussing the prohibitive costs to landowners and the inconsistent opinions and delays hearings in district courts would cause).

324. See generally *About the Office of the General Counsel*, RAILROAD COMMISSION TEXAS, <http://www.rrc.state.tx.us/about/divisions/aboutgc.php> (last visited Apr. 13, 2013) (discussing that administrative hearings in the Commission are located in Travis County and are conducted in front of a hearing examiner who acts as both judge and jury); *Frequently Asked Questions: Before the Hearing*, STATE OFF. ADMIN. HEARINGS, <http://www.soah.state.tx.us/about-us/faq/before-hearing.asp> (last visited Apr. 13, 2013) (same).

325. See Hall, *supra* note 19.

326. *Id.* (internal quotation marks omitted) (mentioning that "a farmer in East Texas [was] locked in a legal fight with Canadian company TransCanada over the use of eminent domain" (quoting Julia Trigg Crawford) (internal quotation marks omitted)).

327. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 31-32.

328. See generally *id.* ("There is also a concern that many property owners do not have the means to pursue what can be a long and expensive court battle with a pipeline company when it comes to eminent domain proceedings.").

329. See generally Hall, *supra* note 19 (discussing the need for certainty in common carrier decisions and the fact that different courts may produce conflicting decisions).

the energy industry suffers.<sup>330</sup> Without the proper pipeline infrastructure in place, less oil and gas will be drilled, and Texas's energy industry will be slowed down significantly.<sup>331</sup> Inconsistent court decisions also pose a threat to the development of pipeline projects to support Texas's energy production.<sup>332</sup> Pipelines travel across many counties, which cover many courts' jurisdictions, and this may result in varied outcomes affecting different portions of the pipelines, making it nearly impossible to complete a pipeline project.<sup>333</sup> For instance, one court may decide that the pipeline company is operating as a common carrier, while another court along the pipeline's route may find that it is instead operating as a private pipeline.<sup>334</sup> Because a common carrier designation is a question of law, the district court's decision would be reviewable *de novo* by the appellate court, creating additional uncertainty for pipeline companies on appeal.<sup>335</sup> Due to the unpredictability of the courts' outcomes—and the uncertainty as to the time and costs required to fight for common carrier status—many pipeline companies likely will be hesitant to even begin a pipeline project because there is not enough predictability to spend the resources on the project.<sup>336</sup> Pipeline projects may also become economically infeasible because the pipeline companies will not be able to ensure lenders that the pipeline will be built, thereby losing the ability to finance the project.<sup>337</sup>

The potential costs and inconvenience to both pipeline companies and landowners make this method of adjudicating common carrier challenges an unlikely and unfavorable choice.<sup>338</sup> In fact, it would be an unwise decision because of its large negative impact on the Texas energy industry with little, if any, benefit to private landowners.<sup>339</sup> Not only are the logistics of this method problematic, but it would also fail to advance the state's recent attempts to return to the stricter meaning of public use for eminent domain utilization.<sup>340</sup>

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330. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 1, 33; Thomas M. Gutting, *Implications for Pipeline Construction After Denbury*, ENERGY NEWSLETTER, KING & SPALDING (Sept. 2012), <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2012/September/article5.html>.

331. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 33; Gutting, *supra* note 330.

332. Hall, *supra* note 19.

333. *Id.*

334. See *generally id.* (explaining that there could be “conflicting court decisions to iron out”).

335. See *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 722 (Tex. App.—Corpus Christi 2000, pet. denied), *disapproved on other grounds* by *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004) (“[T]he authority of the pipeline company to condemn the land[ is] an issue that was appropriately determined as a matter of law by the court.”).

336. See Hiller, *supra* note 317 (“The energy industry depends on a predicable regulatory environment.” (quoting the Gas Processors Association's attorney) (internal quotation marks omitted)).

337. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 34.

338. See *supra* notes 325-27 and accompanying text.

339. See *supra* notes 325-27 and accompanying text.

340. See *generally* INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36 (explaining that a pipeline company's claims of common carrier status must be “aggressively and thoroughly investigate[d]” to “ensure that there is a reasonable probability the pipeline will be for ‘public use’”).

The *Denbury* decision indicates that the Texas Supreme Court recognizes the state's movement towards the original, stricter public use meaning; thus, it would be unlikely that the court envisioned that its decision would create a remedy for landowners in theory but, in reality, continue to allow the unchecked use of eminent domain for private purposes due to the method employed.<sup>341</sup> It is important, however, that the method implemented be one that equally advances the interests of both the pipeline companies and the private landowners.<sup>342</sup>

## 2. State Office of Administrative Hearings

Another suggestion is to transfer the oversight of common carrier status to the State Office of Administrative Hearings (SOAH).<sup>343</sup> SOAH is a neutral, independent forum where contested cases originating in Texas administrative agencies are heard and adjudicated separate and apart from the agency where the conflict arose.<sup>344</sup> Since its creation in 1991, SOAH's jurisdiction has grown to include a large number of administrative agencies throughout Texas.<sup>345</sup> The most significant characteristic of SOAH is its sovereignty from any of its forwarding agencies.<sup>346</sup>

The largest proponents of this proposal are landowners because of SOAH's independent role.<sup>347</sup> Landowners are concerned that the Commission is not an unbiased forum to adjudicate common carrier status questions.<sup>348</sup> In SOAH, a neutral and detached administrative law judge presides over the hearings without any influence or supervision from an "officer, employee, or agent of another state agency who performs investigative, prosecutorial, or advisory functions for the other agency."<sup>349</sup> The employees of SOAH, including administrative law judges, are civil servants who are not elected to their positions, relieving them of responsibility to any group or industry.<sup>350</sup>

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341. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012).

342. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 31 ("[A] balance must be struck in protecting the rights of Texas property owners while also not hindering economic growth for such a vital industry for the state.").

343. See, e.g., Leslie Moore Mira, *Regulation & the Environment: Oil Pipeline Wars Breaking Out in Texas*, PLATTS: BARREL (Dec. 17, 2012, 8:56 AM), [http://blogs.platts.com/2012/12/17/texas\\_pipelines/](http://blogs.platts.com/2012/12/17/texas_pipelines/).

344. TEX. GOV'T CODE ANN. § 2003.021 (West 2008); Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 119, 126-30 (2005).

345. Beal, *supra* note 344, at 128 & n.37 (listing the administrative agencies that conduct hearings on contested matters at SOAH).

346. *Id.* at 128-29.

347. See Mira, *supra* note 343.

348. See *id.*

349. TEX. GOV'T CODE ANN. § 2003.041(c) (West 2008).

350. See Mira, *supra* note 343.

Landowners are concerned that allowing the Commission to have authority over common carrier status would subject the procedure to bias because elected commissioners supervise the Commission.<sup>351</sup> Political contributions obtained for campaigns have the potential to influence the commissioners who may also exert this influence on other agency employees.<sup>352</sup> Even if there is no real influence on the Commission's staff, there is a perception of bias in favor of the regulated entities in the eyes of the public.<sup>353</sup> In fact, the House Committee on Land and Resource Management addressed this issue in its report to the 83rd Legislature.<sup>354</sup> The legislative report contains portions of the most current Sunset Advisory Commission Report (Sunset Report), which expresses concern over the conflicts of interest caused by political contributions to commissioners from regulated entities.<sup>355</sup> Although the Sunset Report does not directly address common carrier status concerns, it recommends that contested gas utility and enforcement cases be conducted by SOAH "to ensure fair and impartial treatment of all the parties to a case."<sup>356</sup> The rationale is the same for assigning contested common carrier matters to SOAH.<sup>357</sup>

The Commission and pipeline companies, however, resist this proposal on the grounds that it is ineffective and involves additional costs and time.<sup>358</sup> Although contested gas utility cases were moved from the Commission to SOAH briefly between 2001 and 2003, the Commission claims that there was no improvement in the fairness or efficiency of the process.<sup>359</sup> The Commission recently addressed the perceived and actual conflicts that concern the public by separating staff associated with a party status from staff involved in the administrative hearing decision-making process.<sup>360</sup> The Texas Independent Producers and Royalty Owners Association (TIPRO) believes the department reconfigurations are sufficient to address fairness and conflict concerns, thus rendering a move of the contested utility cases to SOAH unnecessary.<sup>361</sup> Even though the Commission's recent changes probably are

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351. *See id.*

352. *See* INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 34.

353. SUNSET ADVISORY COMM., STAFF REPORT WITH COMMISSION DECISIONS: RAILROAD COMMISSION OF TEXAS 15-16 (Jan. 2013) [hereinafter SUNSET REPORT], *available at* [http://www.sunset.state.tx.us/83rd/RC/RC\\_DEC.pdf](http://www.sunset.state.tx.us/83rd/RC/RC_DEC.pdf).

354. INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 1, 34-35.

355. *See id.* (quoting SUNSET REPORT, *supra* note 353, at 12-19). The Texas Legislature created the Sunset Advisory Commission in 1977 to review the policies and programs of all the State's agencies to discover waste and whether changes or total elimination of the agency are needed. SUNSET ADVISORY COMM'N, <http://www.sunset.state.tx.us/> (last visited Apr. 13, 2013). The Sunset Commission makes recommendations to the legislature after it reviews the agency and receives public input. *Id.*

356. SUNSET REPORT, *supra* note 353, at 15-16.

357. *See* INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 34-35.

358. *See id.* at 35-36; SUNSET REPORT, *supra* note 353, at 20h-i.

359. *See* SUNSET REPORT, *supra* note 353, at 20h-i.

360. *See* INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 34-35.

361. *Sunset Advisory Commission Hearing 12/19/2012: Testimony of Teddy Carter, VP Government Affairs*, TEX. INDEP. PRODUCERS & ROYALTY OWNERS ASS'N 1 (Dec. 2012), <http://www.tipro.org>

not enough to assuage the perceived bias and conflicts in the eyes of the public, they may be addressed through additional changes to the Commission, as discussed in the next Section.<sup>362</sup> Moreover, SOAH judges issue proposals for decision—which the forwarding agency may accept, reverse, or modify under certain circumstances—after conducting the hearing.<sup>363</sup> Although the Commission could only alter the decision in certain instances and would be required to document its reason for changing the decision, the final assessment still rests with the Commission.<sup>364</sup> Because the Commission is perceived to be a biased agency influenced by its regulated entities, would the public have increased confidence in a process that still gives the final common carrier status determination to the Commission?<sup>365</sup> For this reason, even if common carrier status oversight is moved to SOAH, the Commission’s perceived bias and conflicts of interest are still present.<sup>366</sup> Consequently, changes to the Commission’s procedures and structure are needed to address the source of the perceived conflict of interest whether common carrier status oversight remains with the Commission or is moved to SOAH.<sup>367</sup>

The Commission has staff, attorneys, and hearing examiners with expertise and experience dealing with pipeline and energy issues that are pertinent to the adjudication of common carrier disputes.<sup>368</sup> SOAH would need to gain experience in this area of law before it could efficiently and effectively decide such cases.<sup>369</sup> Additionally, the Commission already has procedures in place to hear contested matters and will continue to utilize its hearing process for other contested matters it has authority over.<sup>370</sup> Moving common carrier oversight to SOAH would create redundancy within the administrative process by moving the process from an experienced agency with processes and staff in place to an entity that would need additional staff and experience to be effective

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[hereinafter *Testimony of Teddy Carter*] (follow “Newsroom: Archived Industry Articles” hyperlink; then follow “TIPRO Testifies before Sunset Advisory Commission on proposed changes for the RRC” hyperlink) (“TIPRO is a statewide oil and natural gas trade association representing over 2,500 members. TIPRO’s membership includes small family-owned companies, the largest publicly traded independents, and large and small royalty owners, mineral estates, and trusts.”).

362. See *infra* Part VII.A.3.

363. See SUNSET REPORT, *supra* note 353, at 19 (“The Commission could reverse or modify a decision only if the judge did not properly apply or interpret applicable law, Commission rules, written policies, or prior administrative decisions; the judge relied on a prior administrative decision that is incorrect or should be changed; or the Commission finds a technical error in a finding of fact that should be changed. If the Commission does make a change, the reason for such change should be clearly documented and must still be based on evidence in the record.”).

364. See *id.*

365. See *generally id.* at 13-14 (discussing the Commission’s perceived bias and conflicts of interest in the eyes of the public).

366. See *generally id.* at 19 (stating that the Commission would have an opportunity to change the SOAH judge’s proposal for decision).

367. See *supra* notes 365-66 and accompanying text.

368. INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 355.

369. See SUNSET REPORT, *supra* note 353, at 20i.

370. See *id.* at 20h.

and efficient in adjudicating common carrier disputes.<sup>371</sup> The Sunset Commission estimates that the state will experience no fiscal impact because the savings from reducing staff at the Commission will equal the costs of adding staff at SOAH and paying SOAH to hold the hearings.<sup>372</sup> If the Sunset Commission is correct about the unchanged costs, there is no real benefit to moving common carrier status oversight to SOAH when the Commission already possesses most of the necessary components.

Common carrier status bestows the immense power of eminent domain, and it needs to be done by a fair and unbiased procedure with thorough investigation; however, the Commission can attain a fair and unbiased procedure if the legislature makes additional changes to divest the Commission of its perceived bias and conflicts of interest.<sup>373</sup> The benefits of moving the process to SOAH—an independent, fair, and neutral process—can be obtained by directly addressing the cause of the perceived bias within the Commission instead of creating an additional, unnecessary process to avoid the problem.<sup>374</sup>

### 3. *Railroad Commission of Texas*

The Commission enjoys one of the most influential and essential functions amongst Texas's agencies because of its ability to shape and monitor the quickly expanding oil and gas industry.<sup>375</sup> The Commission possesses vast expertise and knowledge of the oil and gas industry along with the ability to implement the necessary procedures and oversee the expanding industry's needs.<sup>376</sup> The Commission already holds the authority for clerical registration of common carrier pipelines and has effective procedures in place for hearing other contested matters.<sup>377</sup> For the most efficient and effective adjudication of common carrier status issues, the Commission should be given exclusive authority to conduct the common carrier application review process.<sup>378</sup>

Currently, the Commission ensures that over 156,000 miles of Texas's 270,000-mile extensive network of pipeline systems—the largest state network in the nation—are designed, constructed, operated, and maintained safely.<sup>379</sup>

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371. See *infra* Part VII.A.3.

372. See SUNSET REPORT, *supra* note 353, at 19.

373. See generally INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 34-35 (explaining that contested gas utility cases are not the same as common carrier status disputes because the latter involves the power of eminent domain).

374. See generally *Testimony of Teddy Carter*, *supra* note 361 (“[A]ctions resulting from the Sunset process should be geared towards evaluating and improving the functions of the [Commission].”).

375. See Kate Galbraith, *Texas Railroad Commission Takes Steps to Modernize*, TEX. TRIBUNE (Jan. 25, 2013), <http://www.texastribune.org/2013/01/25/texas-railroad-commission-takes-steps-modernize/>.

376. See SUNSET REPORT, *supra* note 353, at 20h.

377. See *id.*

378. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 33 (testimony of Phil Gamble with the Texas Gas Processors Association).

379. SELF-EVALUATION REPORT, *supra* note 11, at 9-10.

The Commission's expertise also includes regulating and supervising the oil and gas industry from the early stages of exploration all the way through the production and transportation stages.<sup>380</sup> The Commission's expansive experience with pipelines makes it the logical body to handle the permitting process by which common carrier status is obtained.<sup>381</sup> The current process, however, is insufficient and should be enhanced to allow the Commission to investigate and receive evidence from both pipeline companies and landowners regarding the intended or actual use of the pipeline.<sup>382</sup> Currently, the Commission has procedures in place for a thorough application review process with an opportunity for a hearing.<sup>383</sup> The Surface Mining Regulation Division (SMRD) within the Commission currently oversees the process for coal mining applications.<sup>384</sup> The SMRD consists of administrative and technical review of the application to investigate the mining operation's compliance with applicable regulations and laws.<sup>385</sup> The application and technical analysis is handed over to the Office of General Counsel, which conducts the Commission's contested cases process and appoints a Hearings Examiner.<sup>386</sup> Notice of the application is then given to affected parties and the public, and interested persons are given the opportunity to provide comments on the application.<sup>387</sup> A hearing is then held if an interested party requests one or if the Hearings Examiner decides that a hearing is warranted after review of the comments.<sup>388</sup> The remainder of the process follows the Commission's contested case process currently in place.<sup>389</sup>

Contested cases involving "oil and gas; gas utilities; pipeline safety; LPG, CNG, and LNG fuel safety; and surface mining matters" are handled by the Commission's Hearings Section.<sup>390</sup> The Hearings Section consists of a director, eight attorney-examiners, and three technical examiners.<sup>391</sup> Presiding examiners—who may be commissioners, directors, or employees designated as examiners—conduct hearings with broad authority to achieve necessary functions of the hearing such as receiving evidence and calling and examining witnesses.<sup>392</sup> The presiding examiners issue proposals for decisions, which include a recommended order based on findings of fact and conclusions of

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380. *Id.* at 8.

381. *See* SUNSET REPORT, *supra* note 353, at 20h.

382. *See* INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 34.

383. *See About the Office of the General Counsel*, *supra* note 324 (describing the permitting process for a Coal Mining Permit Application).

384. SELF-EVALUATION REPORT, *supra* note 11, at 108-09.

385. *Id.*

386. *See id.* at 109.

387. *See id.* at 108-09.

388. *See id.* at 109.

389. *See id.* at 108-09.

390. *About the Office of the General Counsel*, *supra* note 324.

391. *Id.*

392. 16 TEX. ADMIN. CODE § 1.121(b)(4)-(5) (2012) (R.R. Comm'n of Tex., Presiding Officer).



law.<sup>393</sup> The Commission's hearing procedures are largely similar to those of a civil bench trial, with both sides and intervenors being permitted to offer evidence.<sup>394</sup> Once a presiding examiner issues a proposal for decision or proposed order, it "may be amended pursuant to exceptions, replies, or briefs submitted by the parties."<sup>395</sup> The Commission holds the ultimate authority to decline or accept the proposal for decision, either in whole or in part, or it may remand the case to the same or a different examiner for further consideration.<sup>396</sup> Oral arguments before the Commission are allowed on the discretion of the Commission before the decision becomes final.<sup>397</sup> Once a decision is final, it is appealable.<sup>398</sup> The existing procedures, applied to common carrier applications, would allow the Commission to perform common carrier application review with relative ease.<sup>399</sup>

Common carrier application reviews would not need to follow the exact same procedure as the coal mining applications, but it is a good model.<sup>400</sup> The procedure employed by the Commission should implement a staff review of the evidence submitted with the application to ensure that the pipeline will be operated for public use.<sup>401</sup> The *Denbury* decision and Texas's increased protections for landowners against eminent domain abuse require the procedure employed to give notice of the application to any affected landowner and the public and to provide an opportunity for a hearing.<sup>402</sup> These procedures are essential to allow a landowner to prevent a pipeline company from utilizing eminent domain power for private use.<sup>403</sup> With its unique knowledge of the oil and gas industry, and its already existing procedures for application review and contested case adjudication, the Commission should be the agency that oversees common carrier application review.<sup>404</sup> This method would provide the most certainty to landowners, with the least burden to pipeline companies.<sup>405</sup> There is not a mandatory hearing in every instance, yet the application and its evidence are reviewed and reported to the landowner.<sup>406</sup> Landowners are also

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393. ADMIN. § 1.121(b)(11) (R.R. Comm'n of Tex., Presiding Officer).

394. *Id.* § 1.128 (R.R. Comm'n of Tex., Hearing Procedures).

395. *Id.* § 1.141 (R.R. Comm'n of Tex., Proposals for Decision).

396. *Id.* (R.R. Comm'n of Tex., Commission Action).

397. *Id.* § 1.144 (R.R. Comm'n of Tex., Oral Arguments Before the Commission).

398. *Id.* § 1.151 (R.R. Comm'n of Tex., Administrative Finality).

399. See SUNSET REPORT, *supra* note 353, at 20h (Commission's response to the SUNSET REPORT).

400. See *supra* notes 384-89 and accompanying text.

401. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36. For a discussion of the need for a legislative framework for the evidence that is sufficient to show that a pipeline will be operated to or for the public for hire, see *supra* Part VII.B.

402. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex. LLC*, 363 S.W.3d 192, 204 (Tex. 2012); *supra* discussion Part V.A-D.

403. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36.

404. See generally Neeley, *supra* note 312 (suggesting that the procedures at the Commission be enhanced to meet the *Denbury* decision's requirements).

405. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 33.

406. See *supra* notes 386-88 and accompanying text.

afforded the opportunity to review the evidence the pipeline company submits to determine whether they wish to request a hearing or not.<sup>407</sup> This way, the protection of eminent domain use does not fall completely on the landowner but, instead, is first investigated by the Commission.<sup>408</sup> Additionally, the SMRD application review process sets time limits for the steps in the process, which could be implemented in common carrier application review to provide more certainty to pipeline companies and to allow the process to be done in a timely manner.<sup>409</sup> On appeal, the Commission's decision would be afforded deference due to its expertise, which would provide greater certainty in the decision process.<sup>410</sup> Transferring common carrier oversight to a different forum would not result in a more effective or efficient adjudication of common carrier disputes.<sup>411</sup> The Commission's existing procedures would effectively investigate and adjudicate common carrier status issues.<sup>412</sup> Instead, a transfer of common carrier oversight to SOAH or district courts would be unnecessary and inefficient.<sup>413</sup>

*B. Framework for Sufficient Evidence to Show "Reasonable Probability"*

Certainty is essential to allow the energy industry to continue to expand in Texas.<sup>414</sup> Time delays and inconsistent opinions present a large obstacle to the completion of a pipeline project.<sup>415</sup> The legislature should adopt guidelines that set out standards for "establishing what evidence constitutes a 'reasonable probability' that a pipeline company applying for common carrier status will serve the public."<sup>416</sup> Without a basic standard for acceptable evidence, the Commission will struggle to decide whether the pipeline company has presented enough evidence to show that it is a common carrier, and uncertainty will persist over what evidence is enough.<sup>417</sup>

An evidence standard would facilitate the Commission's investigation into the application's veracity and would allow the staff evaluation to be completed in a timely manner.<sup>418</sup> A standard also protects landowners from the

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407. See *supra* notes 398-406 and accompanying text.

408. See Hall, *supra* note 19.

409. See SELF-EVALUATION REPORT, *supra* note 11, at 108-09.

410. See *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 202 (Tex. 2012) (explaining that the Commission's grant of common carrier status would be *prima facie* valid).

411. See *Testimony of Teddy Carter*, *supra* note 361.

412. See generally Neeley, *supra* note 312.

413. See discussion *supra* Parts VII.A.1-2.

414. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 32.

415. Gutting, *supra* note 330.

416. INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36.

417. See generally *id.* at 32-33 (explaining that the legislature or the agency with common carrier oversight needs to clarify acceptable evidence to establish common carrier status).

418. See generally *id.* ("[T]his process needs to be as simple and streamlined as possible to prevent valuable pipeline projects from getting stuck in legal limbo.").

Commission granting common carrier status to an entity that has no evidence of operating to transport for an unaffiliated third party, as was the situation prior to the *Denbury* decision.<sup>419</sup> Although it may be difficult to know what types of evidence are the most reliable or the most determinative to indicate that a pipeline will operate as a common carrier, the legislature can detail the base evidence that will be sufficient.<sup>420</sup> Thus, most pipeline companies will be saved from a contested case because they are able to meet the standard and because the landowners are satisfied with this evidence.

While completed contracts with unaffiliated third parties would not be required, mere declaration by the company that they are available to transport products for third parties would not be enough.<sup>421</sup> The legislature, however, should stipulate that a drafted contract between the pipeline company and an unaffiliated third party to transport product for the third party is sufficient evidence to establish a reasonable probability that the pipeline will be operated to or for the public for hire.<sup>422</sup> The contract is clear evidence that the pipeline operator intends to transport product for a third party.<sup>423</sup> Likewise, identification of potential third-party customers in publications about the pipeline should be considered sufficient evidence.<sup>424</sup> When a third party is mentioned in a publication by name, it shows more than ability to transport to or for the public for hire, but rather, an intention to do so.<sup>425</sup> The evidentiary standards the legislature elects to implement should resemble the *Denbury* decision's determination that a pipeline company is not a common carrier when it is "offering the use of the pipeline to non-existent takers."<sup>426</sup> Regardless of the evidentiary standard chosen, the legislature's implementation of the standard is essential to a predictable and timely common carrier application review by the Commission.<sup>427</sup>

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419. See generally Neeley, *supra* note 312 (discussing the need for guidance as to what evidence is sufficient to show a reasonable probability that the pipeline is a common carrier).

420. See generally INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 32-33 (explaining that the legislature needs to explain what types of evidence are sufficient to prove common carrier status).

421. See Neeley, *supra* note 312 (explaining that the *Denbury* decision required more evidence than mere availability to third parties but that the standard also requires only a reasonable probability that the pipeline will transport product to or for the public for hire at some point after construction).

422. Patrick R. Byrd & Lara D. Pringle, *Texas Court Makes Proving Common-Carrier Status More Difficult: Attorneys Warn, "You'd Better Do More Than Check the Box,"* 239 PIPELINE & GAS J., January 2012, at 1, 3, available at <http://www.pipelineandgasjournal.com/texas-court-makes-proving-common-carrier-status-more-difficult?>.

423. *Id.*

424. *See id.*

425. *See id.*

426. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 202 (Tex. 2012).

427. *See* Neeley, *supra* note 312.

*C. Changes to the Texas Railroad Commission to Remove Perceived Conflicts*

For the common carrier application review process at the Commission—or even at SOAH—to protect landowners from eminent domain abuse, changes must be made to the Commission.<sup>428</sup> The perceived conflicts and bias at the Commission, which form the basis of the argument to move common carrier oversight to other entities, are better addressed directly, rather than by creating additional steps to circumvent the problem.<sup>429</sup> The main cause of the perceived bias is monetary contributions to commissioners' campaigns, specifically, by regulated entities.<sup>430</sup>

Three elected commissioners head the Commission and serve staggered six-year terms.<sup>431</sup> As elected officials, the commissioners depend on campaign contributions to be able to run for office.<sup>432</sup> The concern is that regulated entities will make campaign contributions to the commissioners, perhaps influencing the commissioners in their decisions or creating a perceived bias in the Commission.<sup>433</sup> Commissioners accept campaign contributions throughout their entire term, raising the concern that regulated entities could make contributions in a way that may influence a commissioner, such as before a hearing in the Commission.<sup>434</sup> While these concerns are valid, they can be addressed through reforms to the agency.<sup>435</sup> Entrusted with important decisions that affect the constitutional rights of the public, the Commission's decisions must be neutral and made in the best interests of the public.<sup>436</sup>

First, the problem of campaign contributions must be addressed.<sup>437</sup> The most effective method to reduce the influence that may be exerted over a commissioner is to reduce the receipt of contributions to a year and a half around the election.<sup>438</sup> Under this system, a well-timed contribution by a regulated entity meant to influence a commissioner is substantially less likely.<sup>439</sup> The reform would improve the public's perception of the agency because the commissioners would not appear to be perpetual politicians,

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428. See generally SUNSET REPORT, *supra* note 353, at 20h (discussing that the Commission's industry expertise and current hearing processes make it the ideal location for common carrier status oversight).

429. See *Testimony of Teddy Carter*, *supra* note 361.

430. See SUNSET REPORT, *supra* note 353, at 13-14.

431. *Id.* at 12-13.

432. *Id.*

433. *Id.*

434. *Id.*

435. See *id.*; *Testimony of Teddy Carter*, *supra* note 361.

436. See SUNSET REPORT, *supra* note 353, at 12-13.

437. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 32-33; SUNSET REPORT, *supra* note 353, at 12-13.

438. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 13, 14-18.

439. See SUNSET REPORT, *supra* note 353, at 13-14 (“[I]t was hard to fully divorce contributions from decisions with tens of thousands of dollars donated every month.”).

continually aiming for more campaign contributions.<sup>440</sup> The public could view this as a motivation for many of its decisions, especially because energy companies have more money to contribute than individuals.<sup>441</sup> Instead, the public would perceive the commissioners as making regulatory decisions presumably in the public's interest.<sup>442</sup> Whether an unlimited time frame for campaign contributions influences the commissioners is not determinative as to whether reforms are needed.<sup>443</sup> Perceived bias and conflict is especially a problem for the Commission when it has authority to affect the public's constitutional rights.<sup>444</sup> Commissioners serve staggered terms, which means that one commissioner may be authorized to receive contributions when another cannot.<sup>445</sup> Although this still allows for contributions to be perceived as influencing the decision, the reduction in time to a year and a half greatly reduces the opportunity for this to occur.<sup>446</sup> Moreover, additional reforms should be implemented to further address donations made to influence decisions.<sup>447</sup>

Commissioners should be prohibited from knowingly receiving campaign contributions from an entity with a contested case before the Commission.<sup>448</sup> The loophole left by the commissioners' staggered terms could be closed by this reform, which would vastly improve the public's perception of the Commission.<sup>449</sup> The prohibition would take effect when the contested case is set for a hearing and continue until thirty days after the hearing.<sup>450</sup> The reform, however, would require the Commission to keep a list of upcoming and currently contested cases in order to keep track of the time frames.<sup>451</sup> The record keeping needed at the Commission to enact this reform would be slight in comparison with the more favorable perception it would receive.<sup>452</sup> To increase the transparency of the Commission, the Commission should post a list of each commissioner's campaign contributors on its website so that the public

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440. *See id.* at 12-13.

441. *See id.*

442. *See id.* at 12-14 (explaining that the continual campaign contributions "make it difficult to assure the public that the Commission's regulatory decisions are made solely in the public's interest, not simply in favor of large donors").

443. *See generally id.* at 13-14 (stating that the public may view monthly political contributions to coincide with decisions that favor the oil and gas industry).

444. *See* INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36.

445. *See* SUNSET REPORT, *supra* note 353, at 13-14.

446. *See id.*

447. *See generally id.* at 14-15 (providing suggested reforms to address the perceived bias at the Commission).

448. *See id.* at 18.

449. *See id.* at 18-19.

450. *See id.*

451. *See id.*

452. *See generally id.* at 14-15 (stating that the Sunset Report's recommended changes are intended to limit the appearance of conflicts).

has easier access to the information.<sup>453</sup> Because the commissioners' campaign contributions are the principal reason for the public's perception of bias and conflicts of interest, the Commission can dispel these concerns through a policy limiting the contributions' effects on commissioners and disclosing the contributions they do receive.<sup>454</sup>

The Commission would also benefit from a formal recusal policy to reduce the appearance of bias because of a commissioner's personal or financial interest in a contested matter.<sup>455</sup> Currently, commissioners occasionally recuse themselves voluntarily, but there is no mandatory recusal policy.<sup>456</sup> The Sunset Report suggests that a policy similar to the one employed by the Public Utility Commission would be effective.<sup>457</sup> The Public Utility Commission prohibits a commissioner from sitting in a proceeding or deciding an issue if the commissioner's impartiality is questionable; the commissioner or a relative has a financial or any other interest in the matter; or the commissioner or a relative served as counsel, advisor, or witness in the matter.<sup>458</sup> The Commission should adopt the same recusal policy for its commissioners to further reduce the appearance of bias and conflicts of interest at the Commission.<sup>459</sup> The recusal policy addresses the potential influence that a regulated entity may exert over a commissioner by making a large donation during the year and a half the commissioner may accept donations in anticipation of future favorable outcomes.<sup>460</sup> A final suggestion is that automatic resignation should be required of a commissioner who becomes a candidate for any elected office.<sup>461</sup> When a commissioner campaigns for another office while serving as commissioner, conflicts arise from campaign contributions, and the commissioner's attention to the current position suffers.<sup>462</sup> A commissioner, however, would not be required to resign if the campaign for a different elected office occurs during the last year of a commissioner's term or is for reelection as commissioner.<sup>463</sup> When a commissioner cannot campaign for a different elected office while in office, regulated entities cannot influence commissioners by making campaign contributions to the other campaign in the hope of favorable treatment in a matter before the commissioner.<sup>464</sup> Thus, all of the recommended policies, interpreted together, form a comprehensive policy of

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453. *See id.* (explaining that the information is already available from the Texas Ethics Commission).

454. *See id.*

455. *See id.* at 15.

456. *See id.*

457. *See id.*

458. 16 TEX. ADMIN. CODE § 22.3(d) (2012) (Pub. Util. Comm'n of Tex., Standards of Conduct).

459. *See* SUNSET REPORT, *supra* note 353, at 15.

460. *See id.*

461. *See id.* at 5.

462. *See id.*

463. *See id.*

464. *See id.*

increased transparency and a reduced perception of conflicts and bias at the Commission.

Many of the reforms of the Commission discussed above were introduced in Senate Bill 655 (Sunset Bill) during the 82nd legislative session.<sup>465</sup> The Sunset Bill—named for the Sunset Report that recommended the changes<sup>466</sup>—included the limited time frame for campaign contributions to commissioners, an automatic resignation upon running for another elected office, and a provision for a commissioner’s disclosure of the reasons for a voluntary recusal.<sup>467</sup> The Sunset Bill, however, failed to pass in the legislature.<sup>468</sup> The main reason for the Sunset Bill’s failure to pass was the disagreement over whether the Commission should be headed by three commissioners or just one commissioner.<sup>469</sup> Those against changing the structure of the Commission were concerned with unintended consequences of the change, such as the Commission losing its authority to regulate activities under some federal programs and statutes.<sup>470</sup> The concern was that if the state loses authority to administer many of the federal programs it now regulates, the industry would not be able to operate in the same capacity.<sup>471</sup> Although the debate over the number of commissioners is likely to continue, the changes introduced in the Sunset Bill and discussed in this Comment need to be implemented for the Commission to effectively operate as a fair and unbiased agency.<sup>472</sup>

The reduction in opportunities for undue influence to affect a commissioner’s decision and the increase in transparency would vastly improve the public’s perception of the Commission.<sup>473</sup> The Commission’s perceived bias and conflicts of interest cannot continue if there is to be an effective and meaningful adjudication of constitutional rights.<sup>474</sup> Landowners require a neutral and fair investigation into a pipeline’s authority to exercise eminent domain.<sup>475</sup> The appearance of conflicts and influence from regulated entities

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465. Tex. S.B. 655, 82d Leg., R.S. (2011).

466. *Playing the Name Game at the “Railroad” Commission*, RECHARGE TEX. (June 2, 2011), <http://recharge texas.com/playing-the-name-game-at-the-railroad-commission/>.

467. Tex. S.B. 655, 82d Leg., R.S. (2011).

468. *82nd Legislative Session—TIPRO Post Session Summary*, TEX. INDEP. PRODUCERS & ROYALTY OWNERS ASS’N 1 (2011), <http://www.tipro.org> (follow “Issues: Texas Legislature” hyperlink; then follow “82nd Legislature—What passed, what didn’t?” hyperlink).

469. *Id.*

470. Jim Magill, *Texas Oil, Gas Groups Divided Over TRC Changes Bill*, PLATTS (Apr. 7, 2011, 5:43 AM), <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/Natural Gas/8761626> (expressing concern that the Commission may lose “authority to regulate in-ground injections under the federal Environmental Protection Agency’s Underground Injection Control [UIC] program”).

471. *Id.* (“A loss of state authority over the UIC program could have ‘a tremendous impact on the industry’s ability to operate.’”).

472. See SUNSET REPORT, *supra* note 353, at 14-15.

473. See *id.*

474. See INTERIM REPORT TO THE 83RD TEXAS LEGISLATURE, *supra* note 313, at 36.

475. See *id.*

within the Commission is not an immutable condition.<sup>476</sup> Implementation of the above-suggested reforms directly addresses the perceived bias of the Commission, rendering steps to bypass the Commission for common carrier oversight unnecessary.

#### VIII. CONCLUSION: HARMONIZING PROPERTY RIGHTS WITH ENERGY DEVELOPMENT

Pipelines are an essential component of the expansion of energy production throughout Texas.<sup>477</sup> They will become increasingly crucial as the state's energy development continues to grow.<sup>478</sup> Despite the importance of constructing pipelines, private property rights are important to Texans and must be protected.<sup>479</sup> Texas's eminent domain reforms illustrate that property rights and energy development are not mutually exclusive.<sup>480</sup> A delicate balance, in which both pipeline companies and landowners respect the existence of one another, is attainable. The *Denbury* decision paved the way for a reform of the common carrier application process—rejecting just checking a box on a form as sufficient.<sup>481</sup>

The legislature needs to give the Commission authority to conduct common carrier application review.<sup>482</sup> The application process needs to provide notice to the landowners and public affected, an investigation into the evidence, and an opportunity for a hearing.<sup>483</sup> Most importantly, the investigation into whether the pipeline will truly be operated as a common carrier needs to be done by the state—through the Commission—and not put on the shoulders of the landowner.<sup>484</sup> Combined with reforms to address the perceived bias at the Commission and an evidentiary standard to prove common carrier status, the proposed application process is a broad reform, overlapping to provide meaningful protections to landowners, but it is also a predictable and timely process for the pipeline companies.<sup>485</sup>

Due to the importance of this issue, the 83rd Texas Legislature is expected to address at least some of the issues presented by the *Denbury* decision.<sup>486</sup> The TransCanada Keystone XL pipeline is underway in Texas, and the law's

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476. See generally SUNSET REPORT, *supra* note 353, at 14-15 (discussing the reforms that will reduce the appearance of bias and conflicts in the Commission).

477. See *supra* Part II.B.

478. See *supra* Part II.B.

479. See *supra* Part VI.

480. See *supra* Part VI.A-D.

481. See *supra* Part VI.A-D.

482. See *supra* Part VI.A-D.

483. See *supra* Part VII.A.3.

484. See *supra* Part VII.A.3.

485. See *supra* Part VII.A.3.

486. Connelly, *supra* note 1.



uncertainty is a hindrance to TransCanada and landowners like Julia Trigg Crawford.<sup>487</sup> Undoubtedly, Julia Trigg Crawford's assessment of the common carrier application process was accurate—the procedure in place was woefully inadequate.<sup>488</sup> The current process, however, is far from ideal. Currently, the common carrier application process suffers from uncertainty and creates obstacles for both landowners and pipeline companies.<sup>489</sup> Julia Trigg Crawford is forced to fight for her rights while TransCanada faces delays and uncertainty.<sup>490</sup> As energy production in Texas continues, more pipeline companies and landowners will experience the same obstacles as the Keystone XL pipeline if the uncertainties created by the *Denbury* decision are not addressed. The Texas Supreme Court has made it clear—checking a box on a form is simply not enough.<sup>491</sup> Now, it is the Texas Legislature's turn to finish the job and implement the proposed changes to balance energy production and property rights.

#### APPENDIX

This Appendix contains the T-4 application form utilized by the Commission as the sole evidence of a pipeline company's compliance with common carrier requirements.<sup>492</sup> Before the *Denbury* decision, the law only required pipeline companies to place an "x" in the box corresponding to the common carrier designation, and as long as they fulfilled the other clerical requirements of Chapter 111 of the Natural Resources Code, they were granted common carrier status. Because the process in place after the *Denbury* decision does not give the public a viable opportunity to challenge a pipeline company's common carrier designation, merely placing an "x" in the box remains the primary method by which pipeline companies receive common carrier status.<sup>493</sup>

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487. *What Is the Keystone XL Pipeline?*, *supra* note 6.

488. *See supra* Part I.

489. *See supra* Part VII.

490. *See supra* Part I.

491. *See supra* Part VI.D.

492. *See* Form T-4, *supra* note 151.

493. *See supra* Part V.A.1.



## INSTRUCTIONS - Form T-4

1. Operator. The individual or organization responsible for daily operation, maintenance, safety and emergency response functions on the pipeline. The Operator must also have Form P-5 Organization Report on file with the Commission's Oil and Gas Division prior to the issuance of the T-4 permit.
2. The Economic Operator (line 3, if different from the Operator (line 1) is the individual or organization responsible to the Commission for reporting the transmission of gas or liquids through the pipeline(s). Economic Operator must also have a Form P-5 Organization Report on file with the Commission's Oil & Gas Division prior to the issuance of the T-4 Permit if different entity than the Operator.
3. Operator must file a Form T-4 for each classification of pipeline(s) and/or gathering system(s); i.e., interstate, or intrastate, gas or liquid, or common carrier or private.
4. Operator (applicant) will file a revised Form T-4 as often as necessary to show the true status of each pipeline or gathering system subject to permit indicating therein any modification in the physical installation made whether such modifications relates to extension, abandonment, or transfer of lines. If no changes are made, annual certification that the pipeline or gathering system subject to permit was in no way modified during the year, must be filed by the 15th of the refiling month showing the status of each pipeline or gathering system as of the 1st of that month.
5. This application will not be processed if it is not completely and/or properly filled out with an entire, clear and detailed plat (U.S.G.S. 7.5 minute Quad Map -Scale 1"=2000'), obtainable from the U.S.G.S. website <http://store.usgs.gov/> or Texas Natural Resources Information System website <http://www.tnris.state.tx.us/> showing the size of line or an overview map (24" x 24" / 1" = 20 miles or less) and digital data.

## DEFINITIONS

1. Abandoned Line. A line is considered to be abandoned when it is not in current use, the operator or owner does not plan to use it in future operations, and line has been cleared of all hydrocarbons. A line does not have to be removed or stripped of pumping or compressor equipment in order to be abandoned. The Commission should be notified by letter immediately when line is abandoned.
2. Liquid. Any substance that exists in liquid phase in the pipeline under current operating conditions.

## Questions?

For Operators A through L, please call (512) 463-7090

For Operators M through Z, please call (512) 463-6519

Please mail completed form to:

RAILROAD COMMISSION OF TEXAS  
PIPELINE SAFETY DIVISION, PERMITS SECTION  
P.O. BOX 12967  
AUSTIN TX 78711-2967