



JW | Energy e-Alert

An important Energy law update from the law firm of Jackson Walker.

May 29, 2013

Offices

Austin

100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas

901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth

777 Main Street
Suite 2100
Fort Worth, TX 76102

Houston

1401 McKinney Street
Suite 1900
Houston, TX 77010

San Angelo

301 W. Beaugard
Avenue
Suite 200
San Angelo, TX 76903

San Antonio

112 E. Pecan Street
Suite 2400
San Antonio, TX 78205

Texarkana

6004 Summerfield Drive
Texarkana, TX 75503

Resources

**JW Energy Practice
Area**

JW Energy Attorneys

**JW Energy
Publications**

Contact JW

www.jw.com

Texas Ninth Court of Appeals Issues Contrasting Opinions Addressing Pipeline Condemnation Authority

By **Brad Anderson** and **Benjamin Rhem**

Recently, the Texas Court of Appeals for the Ninth District at Beaumont issued two contrasting opinions which provide guidance for the application of the Texas Supreme Court's 2012 decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas LLC*.

On May 23, 2013, the Court of Appeals for the Ninth District of Texas decided *Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd.*, NO. 09-12-00563-CV—affirming the lower court's denial of a temporary injunction to Crosstex NGL Pipeline, L.P. ("Crosstex") which was sought to prevent Reins Road Farms-1, Ltd. ("RRF") from interfering with its attempt to survey RRF's property prior to constructing a natural gas liquid ("NGL") pipeline.

In 2011, Crosstex obtained a T-4 permit to operate an NGL pipeline. When Crosstex attempted to survey the land of RRF prior to condemning a pipeline easement, RRF refused to allow Crosstex access to its property. Crosstex subsequently filed suit seeking a declaratory judgment and temporary injunction that would allow it, as a common carrier, to access and survey RRF's property. The trial court determined that Crosstex was not a "common carrier" under Texas Natural Resources Code § 111.002(1) because it found that natural gas liquids are not encompassed by the definition of "crude petroleum." Furthermore, the trial court determined that the NGL pipeline would only be used by Crosstex to support its own or its affiliates' needs and therefore was not a common-carrier "for the public for hire."

In reviewing the denial of the injunctive order, the Ninth Court of Appeals was strictly limited to determining whether the trial court had abused its discretion. The Court upheld the trial court's decision, holding:

(1) the trial court's determination that a pipeline used to transport NGLs is not the same as a pipeline used to transport crude petroleum was a reasonable conclusion; and
(2) there was evidence to support the trial court's conclusion that the line would not be operated as a common carrier.

The Ninth Court of Appeals upheld the trial court's determination that "common carrier," as defined in Section 111.002(1) of the Natural Resources Code, does not apply to NGL pipelines, because NGLs "are not encompassed by the common definitions that apply to the term 'crude petroleum.'" This decision takes a very narrow view of what constitutes "crude petroleum." In previous Texas cases, "oil products" were specifically included in the broad definition of "crude petroleum." See *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d at 312; *Bullock v. Shell Pipeline Corp.*, 671 S.W.2d 715, 719 (Tex. App.—Austin 1984, writ ref'd n.r.e.). This determination also presents a significant deviation from the Railroad Commission's current practice

of regulating NGL pipelines as common carriers.

The Court's decision also is significant in that it expands the scope of the Supreme Court's decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012), in two distinct ways. The *Denbury* test was narrowly tailored to apply only to a very limited set of facts, as described by the Court: "We accordingly hold that for a person *intending to build a CO2 pipeline* to qualify as a common carrier *under Section 111.002(6)*, a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."¹ For more information on the *Denbury* decision [CLICK HERE](#).

First, the Ninth Court of Appeals stated, "we are not persuaded the [Denbury] Court's reasoning concerning the process of obtaining a T-4 permit applies only to carbon dioxide lines," despite the fact that the Supreme Court specifically stated that its decision was limited to carbon dioxide pipelines. See *Denbury*, 363 S.W.3d at 202. While many commentators have indicated their belief that a *Denbury*-like analysis would be applied outside of CO2 pipelines, if this decision is upheld, it opens the door to applying the *Denbury* test to all pipelines, including crude oil and possibly natural gas pipelines.

Second, the Court did acknowledge that a NGL line could meet the definition of a common carrier under section 2.105 of the Texas Business Organizations Code. However, it continued to expand the scope of the *Denbury* decision by applying the *Denbury* test to determine whether Crosstex transported NGLs as a "common carrier" under section 2.105 of the Business Organizations Code. Again, the *Denbury* decision was limited to persons claiming common carrier status under section 111.002(6) of the Natural Resources Code.

Finally, this decision also provides insight into how courts may apply the *Denbury* test moving forward. There was evidence presented that Crosstex had met the *Denbury* test. Crosstex had received a T-4 permit from the Commission, had solicited bids from unaffiliated shippers under a public tariff, and had reached an agreement with a third party shipper. Nevertheless, the Court, applying the abuse of discretion standard, upheld the trial court's determination "that Crosstex would probably be using the pipeline's entire capacity to transport its own natural gas liquids to Crosstex affiliates," as reasonable.

In these ways, this decision expands the *Denbury* analysis to pipelines other than carbon dioxide pipelines and to common carriers under Texas Business Organizations Code 2.105. It also applied the *Denbury* standards to determine common carrier status to find that it was not an abuse of discretion to conclude that a pipeline owner which, in all probability, only carries its own product does not qualify as a common carrier.

In re Texas Rice Land Partners, Ltd., James E. Holland, and David C. Holland

The same day, the Court also decided *In re Texas Rice Land Partners, Ltd., James E. Holland, and David C. Holland*, NO. 09-12-00484-CV (Tex.App. May 23, 2013). In this case, the same landowners who successfully challenged *Denbury*'s eminent domain powers were seeking a writ of mandamus from the court of appeals to prevent TransCanada Keystone Pipeline, L.P. ("Keystone") from taking possession of their land following a special commissioner's hearing. The preliminary facts of the case were straight forward: Keystone filed a condemnation petition, held a special commissioner's hearing, deposited the award and requisite bonds, and sought a writ of possession. After multiple hearings, the trial court granted the writ of possession—holding that the Section 21.021 of the Texas Property Code allowed for pre-suit possession without an ultimate resolution on Keystone's right to condemn.

Relying on the Texas Supreme Court's ruling in *Texas Rice Land*

Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192 (Tex. 2012), the landowners argued that Keystone could not take possession of their property without first proving that it was a common carrier entitled to exercise the power of eminent domain. In a curious diversion from its holding in *Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd.*, the Ninth District Court of Appeals held that *Denbury* was limited to carbon dioxide common carriers and inapplicable in this case. That said, the Court went on to hold that "there must be some evidence in the record that reasonably supports [Keystone's] assertion that it is an 'entity with eminent domain authority,' and that it was error for the trial court to refrain from making such a preliminary finding." Because Keystone had submitted affidavits to the trial court detailing that it would be transporting third-party crude petroleum—and because the landowners had offered no counter evidence to the trial court—the Ninth District Court of Appeals found there was undisputed evidence supporting Keystone's contention that it was a common carrier vested with the power of eminent domain. The landowner's writ of mandamus was denied.

The Court required Keystone to provide some evidence that it was an entity with "eminent domain authority" before it could take possession of the property. Although the Court did not couch it in these terms, it is appropriate for the Court to require a condemnor to provide evidence that it has the power of eminent domain, when a challenge is presented that the proceeding is void because the condemnor has no such power, before it may take possession of the property.

¹ *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 202 (Tex. 2012) (emphasis added).

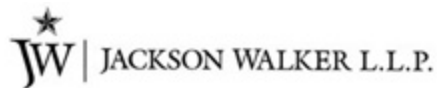
If you have any questions regarding Jackson Walker's pipeline practice, please contact **Michael P. Pearson** (713.752.4311 or mpearson@jw.com), **Amy Baird** (713.752.4525 or abaird@jw.com) or **Tré Fischer** (713.752.4530 or tfischer@jw.com).

If you have any questions regarding Jackson Walker's condemnation practice, please contact **Robert Neblett** (512.236.2020 or rneblett@jw.com) or **Sue Ayers** (512-236-2336 or sayers@jw.com).

Check out our newly designed and easy-to-navigate Energy web page at www.jw.com/energy.

*If you wish to be added to this e-Alert listing, please **SIGN UP HERE**. If you wish to follow the JW Energy group on Twitter, please **CLICK HERE**.*

Austin Dallas Fort Worth Houston San Angelo San Antonio Texarkana



Energy e-Alert is published by the law firm of Jackson Walker L.L.P. to inform readers of relevant information in energy law and related areas. It is not intended nor should it be used as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations. For more information, please call 1.866.922.5559 or visit us at www.jw.com.

[Click here to unsubscribe your e-mail address](#)
901 Main Street, Suite 6000 | Dallas, Texas 75202