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HISTORY OF THE FIGHT – The Eminent Domain Issues in the 2019 Legislative Session

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EMINENT DOMAIN LEGISLATION and LITIGATION

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I. BACKGROUND

Eminent domain is the exercise of the sovereign power to take property for public use without the consent of the owner. The process has been around at least since the time of the Romans and has been the subject of scholarly dissertations at least since 1625.[1] All of the American colonies and territories exercised the power of eminent domain and continued to do so when they became states as did the American territories before they became states.[2]

The last speech I made about this topic I said that it was not unusual for right of way issues to be the subject of one or two bills every legislative session but that it was unusual for right of way issues to generate hundreds of bills or amendments spread out over ten years and an array of different committees.

Many of those bills were generated by the *Kelo*[3] case, which held that private property could be condemned by a city in order to turn it over to developers to build a shopping complex. The issues raised by the *Kelo* case were finally addressed by a Constitutional amendment[4] and a major eminent domain reform bill in 2011.[5] Unfortunately, it appears that the volume of the complaints about eminent domain has not been reduced. The dust had hardly settled on those enactments

[1] Nichols on Eminent Domain, §1.12, citing Hugo Grotius *De Jure Belli et Pacis.*
[2] *Id*. at §1.14.
[3] *Kelo v City of New London, Conn., 545 U.S. 469, (2005).*
[4] Tex. Const. art I, § 17.
[5] USE OF EMINENT DOMAIN AUTHORITY, Acts 2011, 82nd R.S., ch. 81 (S.B. 18), General and Special Laws of Texas, eff. Sept. 1, 2011 (amending sections of the Education Code, Government Code, Local Government Code, Property Code, Transportation Code, and Water Code).

when the TransCanada pipeline controversy in East Texas became a national political news story. Moreover, the Texas Supreme Court issued the *Denbury*[6] opinion which reached a result substantially different from that reached by Texas courts for at least the last 25 years. The *Denbury* opinion gave rise to both litigation and legislation which is still being dealt with today.

II. LITIGATION

A. The Effect of the *Denbury* Litigation

Denbury sought to condemn land owned by Texas Rice Land Partners to lay a CO_2 pipeline. Texas Rice refused to grant *Denbury* access to its land to conduct a survey. *Denbury* obtained an injunction restraining Texas Rice from interfering with *Denbury's* survey rights. Texas Rice challenged *Denbury's* status as a common carrier in the injunction proceeding.

The common carrier definition for CO_2 pipelines contained in the Natural Resources Code provides that an entity is a common carrier if it:

> 6) owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public for hire, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter; or

Denbury had submitted itself to regulation by the Railroad Commission of Texas (RCT) by obtaining a T-4 permit to operate a CO_2 pipeline. The issue in the case was whether *Denbury's* common carrier status was established as a matter of law[7] by its regulatory status or whether any landowner can litigate that status as a fact issue. The Beaumont Court of Appeals held that

[6] *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017), as revised on denial of reh'g (Apr. 7, 2017).

[7] See*, e.g.*, *Vardeman v. Mustang Pipeline Co.,* 51 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied), *Anderson v. TECO Pipeline Co.,* 985 S.W.2d 559 (Tex. App.—San Antonio 1998, pet. denied).

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