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Supreme Court of Texas.
Texas Rice Land Partners, Ltd. and Mike Latta
v.
Denbury Green Pipeline-Texas LLC.
No. 09-0901.

April 19, 2011.

Appearances:

Amy Warr of Alexander Dubose & Townsend, LLP, for Petitioner.
Lynne Liberato of Haynes and Boone, LLP, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. It's warm in here. I don't know if that had anything to do with the last argument, but we'll move on to the next and that argument is 09-0901, Texas Rice Land Partners, Ltd. and Mike Latta v. Denbury Green Pipeline-Texas, LLC from Jefferson County and the Ninth Court of Appeals District.

MARSHAL: May it please the Court, Ms. Warr will present argument for Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF AMY WARR ON BEHALF OF THE PETITIONER

ATTORNEY AMY WARR: May it please the Court. Denbury's Pipeline is private. It

checked the wrong box. We proved it, but Denbury wants this Court to put blinders on. It wants to be the sole arbiter of whether the statutory elements have been satisfied. That is not how our system works and it's not what the legislature intended. If the legislature had intended that, it could have written a much simpler statute. It could have written a statute that said carbon dioxide pipelines get the right of eminent domain if they accept regulation by the Railroad Commission. It didn't write a statute like that. It put requirements in there and just like the elements of an easement under the common law, the elements of this statute need to be proven.

JUSTICE EVA M. GUZMAN: Well let's talk about that proof. Would you require proof of actual contracts with another entity other than Denbury before the pipeline was built?

ATTORNEY AMY WARR: I don't think that would be required, Justice Guzman, but it would certainly be acceptable proof.

JUSTICE EVA M. GUZMAN: Well what if those contracts fall through? What if the status is conferred for public hire based on some contract that falls through later, then what?

ATTORNEY AMY WARR: Anything that happens later is not relevant because the condemnation will already have occurred. So it's not something that's going to be relitigated later. You have to decide at the time of the condemnation what the status is and if the proof that is presented by the parties shows contracts or shows meaningful, real negotiations, something that's not a sham, then that's going to be enough proof.

JUSTICE EVA M. GUZMAN: Well, you're concerned about gaming the system though. How difficult would it be to go out and get a few contracts because if they fall through once your status is granted, what difference does it make?

ATTORNEY AMY WARR: All we ask, Your Honor, is a forum in which we can challenge and test that kind of proof. If that's the proof that's offered by the pipeline company, then all we want is a chance to challenge it. We don't want to predetermine the outcome unlike Denbury, which does want to predetermine the outcome by simply saying we checked the boxes on our T4 form and that means it's true. Again, that's not the way it works. That's not the statute that the legislature--

JUSTICE EVA M. GUZMAN: You say that means it's true. Does the Railroad Commission not do anything to ascertain that this is a common carrier?

ATTORNEY AMY WARR: Your Honor, it's undisputed that the Railroad Commission does not look behind the T4 and that makes sense. Its function is regulatory. Its function is not to verify every pipeline application that comes in every day. It takes what the parties say is true. It puts those parties in the box that will tell it what kind of regulation or none to impose. Well, actually, it's never none because there's always safety. Every pipeline is subject to safe-

ty requirements, but that allows the Railroad Commission to satisfy its regulatory function. It doesn't have the function of deciding in the first instance whether this pipeline is going to be private or public if that's challenged in the condemnation action and that's--

JUSTICE DALE WAINWRIGHT: Ms. Warr, if I may jump in here. Form T4 in the middle has some language, note a natural gas pipeline permit will not specify whether the pipeline is a gas utility or a private line. The gas services division, gas utility audit section will make that determination and will notify the operator of its status. So what happens between the time the T4 is filed and this division, I assume that Railroad Commission determines or notifies, makes the determination and notifies the operator of its status?

ATTORNEY AMY WARR: Your Honor, that provision applies to gas, natural gas pipelines only, not to the other pipelines. I don't know the exact time period, but what I'm told is that and if you look in the statute for gas utilities, which is Chapter 121 of the Utilities Code, gas utilities have a lot of extra hoops to jump through. There are lots of, and also there are lots of exclusions and so what the gas utilities division does is it looks and sees if any of those exclusions are met and then it sends a letter to the or if they're apparent on the face of it and sends a letter to the pipeline owner saying are you sure you want to elect common carrier status because you're going to be regulated. So it works a little bit differently. That doesn't happen with carbon dioxide pipelines so that the way the Railroad Commission does things with gas pipelines is a little different.

CHIEF JUSTICE WALLACE B. JEFFERSON: If Denbury were to have proven conclusively that its future use of the pipeline is consistent with common carrier status, then why shouldn't we acknowledge that and grant that status?

ATTORNEY AMY WARR: If they had conclusively proven--

CHIEF JUSTICE WALLACE B. JEFFERSON: That the future use is going to be public use. It's not private and there's no dispute about that. Why wouldn't it be a common carrier?

ATTORNEY AMY WARR: If Denbury had conclusively proven that it was a common carrier and that it would actually have customers, then that's fine. We would accept that if it had been conclusively proven, but that isn't enough to get the pipeline company to the right of eminent domain.

JUSTICE EVA M. GUZMAN: What--I'm sorry, go ahead, finish your answer.

ATTORNEY AMY WARR: If they are common carrier under 002, 111.002, to condemn, they still have to show that the pipeline that is going to be constructed will be an actual common carrier pipeline because companies can have different types. Some companies frequently have some common carrier pipeline and some private lines.

JUSTICE EVA M. GUZMAN: Well that was may question. Why doesn't the agreement to be bound as a common carrier and to assume the responsibilities, the [inaudible] filings, etc., why isn't that sort of per se proof that you are a common carrier because you agreed to operate as a common carrier?

ATTORNEY AMY WARR: The legislature could have written it that way, but it didn't. It put two requirements. You have to agree to be regulated and you have to be tuned for the public for hire and the way--

JUSTICE EVA M. GUZMAN: Well doesn't the agreement to be regulated make you to and for the public for hire? I mean why would you otherwise be regulated?

ATTORNEY AMY WARR: Well, I think that's the point, Your Honor, because if it's interpreted as available, to and for the public for hire just means available, then it means exactly the same thing as is it going to be regulated which makes to or for the public hire superfluous. You have to interpret to or for the public hire is meaning something different and that means actual customers and--

JUSTICE EVA M. GUZMAN: At what point, actual points at the time of application, actual customers later in the process, what does that mean?

ATTORNEY AMY WARR: What the legislature said and we provided the statute at Tab 2 of our handout, under subsection 6 was to be a common carrier, you have to own, operate or manage a pipeline to or for the public for hire. So that is the present. And so it does include the future, I think, but at the time that it starts operating and so necessarily this is going to be a determination that happens before then because this has been in condemnation before the pipeline is ever built, but that doesn't mean it's impossible to prove. This Court has set standards for well-established standards for proving things in the future, such as for lost profits or for condemnation damages. So it's certainly not impossible and even if you say to or for the public hire just means available, then you still have to look at Section 111.003 because and that is on the second page of Tab 2 and if you, because that says if you are a pipeline, but is limited in its use to the wells of the owner and not part of a common carrier transportation system, then you're excluded from regulation and that's exactly what Denbury is. On Tab 1 of our handout is a picture of the pipeline. As you can see, it starts at Denbury carbon dioxide wells where it takes it out of the ground in Mississippi. It continues through Mississippi and Louisiana where interestingly it's a private line and then it comes into Texas and ends at Denbury's oil wells where it's pumped into the ground to bring out oil. That is a self-contained pipeline only for Denbury's use. That is exactly what Section 111.003 says is not regulated and that's an important. It's not like being in a penalty box. This can be an important provision for the industry to avoid regulation. So a pipeline company that has a common carrier line somewhere else can construct its own self-service, self-contained pipeline and avoid regulation.

JUSTICE DON R. WILLETT: Quick, factual question. Must this pipeline be exclusively used for carbon dioxide and nothing else?

ATTORNEY AMY WARR: Yes, yes, Your Honor. That's the evidence and I have it undisputed.

JUSTICE DEBRA H. LEHRMANN: Can't the Railroad Commission decide that there's some public use that comes up whereby that pipeline that has been is self-contained could at some point be used for public use?

ATTORNEY AMY WARR: I take that question as being in two parts, Your Honor. One could, if it was proven that at some time in the future it might be used for someone else could, would have applied and I think the answer to that is no because the statute says it's not and if, let's just say that right now, Denbury, undisputed, this is what the pipeline looks like. It's what it looked like back then. It's what it looks like now. Let's say they want to bill something over to somebody else and let's say somebody else comes up. Of course, there's no one else right now, but let's say sometime in the future it comes up. Well at that point, that little pipeline, they could get eminent domain for that because at that point, it wouldn't be self-contained anymore, but right now, this is a self-contained system and the legislature says in 111.003 that that's excluded from regulation.

JUSTICE EVA M. GUZMAN: There was a lot made about this manmade carbon dioxide and whether that would eventually be shipped through this pipeline and Denbury is not presently a manufacturer of manmade carbon dioxide. So when we get back to your proof issues, why isn't that enough? There are companies out there that produce manmade carbon dioxide. We don't. We're going to allow them to ship it through our pipeline. Why isn't that enough?

ATTORNEY AMY WARR: If that had been the proof at summary judgment, it may have been enough, but that was not the proof at summary judgment. At summary judgment, there's no one, there is no one the length of this pipeline who's producing manmade carbon dioxide and there's no evidence, there was no evidence at summary judgment that that would be happening anytime in the near future. It's a different nascent technology.

JUSTICE DAVID M. MEDINA: Is that the basis of Justice Gauntley's dissent that the record's not clear and what the use of the pipeline?

ATTORNEY AMY WARR: Well, Justice Gauntley said the record is clear that it's private or I think he actually said it was a question of fact. I'm not sure--

JUSTICE NATHAN L. HECHT: You've seen the Amicus brief that says they want to transport CO2 on the pipeline.

ATTORNEY AMY WARR: Your Honor, that's obviously not evidence in the case and I think we all know that it's not evidence. If that had been produced in the summary judgment and we had an opportunity to test its voracity and its credibility, then maybe it could have been I don't think as stated it's enough because it doesn't show who, even if you consider it to be evidence, it's not enough because it doesn't say that that company will own the carbon dioxide in the line. It could have been enough to say we're building that line now to get over 111.003, but that's not what it's saying. So it doesn't. It's not enough and it certainly wasn't evidence.

JUSTICE DON R. WILLETT: Is Denbury required by law to make the pipeline available to any party who's willing to pay the tariff or does it retain some measure of discretion over who it will or won't allow to [inaudible]?

ATTORNEY AMY WARR: It's required to give access to anyone.

JUSTICE NATHAN L. HECHT: Do you think there is a congruence between the phrase to or for the public for hire in the statute and the constitutional requirement that eminent domain be exercised for public use?

ATTORNEY AMY WARR: Well, Your Honor, they are different words and I think that's important and this Court looks to the plain language. The legislature could have used the word available. It could have used the words public use, but it didn't. It chose to or for the public for hire.

JUSTICE NATHAN L. HECHT: But do you think there can be the pipeline that is used that is owned to or operated to or for the public for hire that is not a public use?

ATTORNEY AMY WARR: Probably not. I think that to or for the public for hire is something more. It is something more than public use so I think that would [inaudible] for the public hire as we see it than it would be public use.

JUSTICE DON R. WILLETT: Very basic factual question. Are they one-way pipelines? Are they designed to move gas only one direction?

ATTORNEY AMY WARR: As far as I know, Your Honor. Absolutely. I don't know. Engineers can do anything, I'm told, so maybe they could construct a two-way pipeline. And it's important to note the abuse that could happen if Denbury's rule is adopted. Someone could construct essentially a pipeline to nowhere and that would have to be subsidized by landowners because they would have no opportunity to come in and prove that will it, in fact, be transporting that material. Someone could say I'm going to be follow T4 saying I'm going to be transporting carbon dioxide, but maybe they really intend to transport salt water and there's no condemnation authority for that, but if it can't be challenged by the landowner at condemnation, then what remedy does the landowner have?

There has to be a forum for landowners to contest the elements of the statute using proof and Denbury is the plaintiff in this instance and plaintiffs have to prove the elements of their cause of action. They can't be relieved of that and they can't prevent defendants from putting on proof. And that would be the result of the rule that Denbury advocates. Another bad result that could happen if Denbury's rule were adopted is that let's say I owned an oil well and a mile away across somebody else's property was my refinery. I could condemn that little one strip piece that no one's ever going to use and it's also self-contained self-service under 111.003, but if all I have to do is say I'm making it available, then I can condemn across that property and that landowner can't do anything to stop it. I don't think that that was the result that the legislature intended.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Warr. Are there any further questions? Thank you, the Court is ready to hear argument now from the Respondent.

MARSHAL: May it please the Court, Ms. Liberato will present argument for the Respondent.

ORAL ARGUMENT OF LYNNE LIBERATO ON BEHALF OF THE RESPONDENT

ATTORNEY LYNNE LIBERATO: Good morning, may it please the Court. It's a case of statutory construction and what Texas Rice is asking the Court to do is graft an additional requirement on the statute that would say that a pipeline has to show that there will be, as she says, as my colleague says, customers before the pipeline will even be built. Nowhere in the statute does it say that. What the statute says is that it will be to and for the public for use, not that a pipeline will be a common carrier if it shows it has the public or has a contract with the public. To and for the public use means that it is going to be available to other shippers to ship their CO2 on that pipeline.

JUSTICE EVA M. GUZMAN: To and for the public hire, where does a landowner challenge that status? Where do you get the right to challenge it and then what is your burden?

ATTORNEY LYNNE LIBERATO: The challenge would be and the District Court and what the landowner could do would be to file a suit for permanent injunction. But here's where the rub comes and that is what the standard of proof once you get before the Court? And it's going to be easy if the pipeline does what it should. It's going to be easy to overcome to prevail in a summary judgment because what the pipeline would have to show then is that it made its pipeline available for public use. Not that there are customers, but that it has filed the documents where the appropriate documents with the Railroad Commission and that in doing so, it agrees to make the pipeline available.

JUSTICE EVA M. GUZMAN: Is the Railroad Commission's approval of that T4 application, is that entitled to any deference or is that conclusive proof of anything?

ATTORNEY LYNNE LIBERATO: Well, the cases all say it's entitled to deference, but that doesn't mean that they are making a determination of whether it's a, they're not making a judicial determination or even administrative determination. It's just obviously they are going to know the Railroad Commission is going to know what does it take, what are the right papers to file. You file the T4. The pipeline files the T4. The pipeline files--

JUSTICE PHIL JOHNSON: But there's no argument about that here. We're not arguing about did they file the right papers. We're arguing about use.

ATTORNEY LYNNE LIBERATO: Correct.

JUSTICE PHIL JOHNSON: And if we look at 111.003, it says the provisions do not apply to pipelines that are limited in their use for the wells, etc., etc. Well, clearly, that's going to be something if we limit it to actual use, I'd have to, that's after you've already done the deal. You've already done the condemnation. You built the pipeline and you look at retrospective-ly and as the other side says, I mean, it's already done at that point. What can you do to undo it? So it seems as though there has to be some burden of proof under 111.003 that the pipeline in the future is going to be limited to the use of. It doesn't apply if it's limited to the use of the well station refineries of the owner. So it seems like that's a little different than available for hire. You actually go to the actual use. So is there a difference in the two sections in your mind and, if so, what?

ATTORNEY LYNNE LIBERATO: Well, there's a big difference between the two sections. .003 has to do with gathering lines and what that what it says is that it is possible for the lines to remain private even though they're connected ultimately to a common carrier and the distinction is that if those lines, if the pipeline declared those lines, did the things it needs to do in front of the Railroad Commission to make those lines common carriers, then they're not private anymore.

JUSTICE PHIL JOHNSON: But this doesn't say only. It says that are not part of the pipeline transportation system.

ATTORNEY LYNNE LIBERATO: Correct.

JUSTICE PHIL JOHNSON: As I understand this line is the transportation system that we're talking about here.

ATTORNEY LYNNE LIBERATO: But the key point and you've zeroed in on exactly the important thing here and that is what makes a pipeline part of the transportation system? What makes the pipeline a part of the transportation system is it's willingness to become a common carrier, to do the things it takes to be a common carrier.

JUSTICE PHIL JOHNSON: So in this case though we have one line.

ATTORNEY LYNNE LIBERATO: Correct.

JUSTICE PHIL JOHNSON: And 003 says limited in their use, that one line limited in its use.

ATTORNEY LYNNE LIBERATO: Right.

JUSTICE PHIL JOHNSON: So that doesn't say for hire or so it seems like that someone's going to have the burden of proof on that and it comes back to a matter of proof in the trial court as you agree, as both parties agree.

ATTORNEY LYNNE LIBERATO: I agree and our burden of proof is to show that we did the necessary things to become a common carrier and those necessary things are to file the appropriate--

JUSTICE PHIL JOHNSON: That doesn't address the use the language use in 003.

ATTORNEY LYNNE LIBERATO: Correct. Except 003 doesn't apply to a common carrier. That's the difference. That's the difference. 003 assumes it is a private pipeline and it takes it out of being, the pipeline is taken out of 003 if it's part of the transportation system. Part of the transportation system is being a common carrier. There's another way to think about it just as a practical matter and this is in some ways seems counterintuitive, but if I can explain, I think it won't be and that is with pipelines, you have to build them before they will come and by that I mean that producers of CO2 or even in an oil field that a producer would be trying to get more oil out of there, they will not develop those oil fields. They will not develop the CO2 unless there's a pipeline and so it has to be a pipeline first. Who in this case, who's the only one that could build a pipeline. It is Denbury Green and that is because it has a source of natural CO2 that it can ship on the pipeline to these oil fields.

JUSTICE EVA M. GUZMAN: Well that's sort of the policy concern though is that Denbury appears to have a strong interest in getting this all way the Brazoria County.

ATTORNEY LYNNE LIBERATO: Absolutely true.

JUSTICE EVA M. GUZMAN: And there doesn't appear to be any strong evidence to support that it has customers and so from a policy standpoint, what is to stop a company from just checking the box, I'm a common carrier. That's it and then they get to condemn private land.

ATTORNEY LYNNE LIBERATO: Right absolutely and it's because if it weren't that way, there would be no infrastructure. There would be no pipelines because once it checks the box, it's more than checking a box. The pipeline has created a covenant in effect with any other potential shipper with the Texas Railroad Commission, where it says we are going to

ship anybody's CO2 indiscriminately, being on the same basis as our oil, the same cost, the same priority and so we are giving up our significant property right. What happens, Judge Guzman, is it's kind of a deal, if you will. The legislature has created a deal in which it says, all right, pipeline, in return for giving up your control over your pipeline, we are going to allow you to condemn land and we are going to have a mechanism through condemnation to set a reasonable market price is what it is.

CHIEF JUSTICE WALLACE B. JEFFERSON: But it's conceivable then that the condemnation can happen, the box is checked and it is never, in fact, used as a common carrier, right if there are no contracts?

ATTORNEY LYNNE LIBERATO: That's possible, but the overriding public interest. That's not going to happen here, Judge, but the override, I know you look at it more broadly, but the overriding interest is the pipeline won't be built in the first place and what the legislature has done through this statute is made it so there is a motivation for a pipeline company to build the infrastructure.

JUSTICE NATHAN L. HECHT: But suppose you have two facilities that are not far apart and the owner wants to connect them with a pipeline and the landowners in the middle won't agree, won't negotiate and so he says fine, we'll be a common carrier. Nobody's going to use it anyway. We don't care if we're regulated or not, but we do need to condemn the easement between here and there and we'll tell them we're a common carrier. We'll do anything as long as we can condemn everybody's property. Your view doesn't seem to impede that.

ATTORNEY LYNNE LIBERATO: Well, there's several parts of that. One is the practical part and one is the legal part. If I may say, the practical part is that the other pipelines can hook up to that pipeline by being a common carrier they agree you're going to be able to connect. These are going to be in oil-rich areas and so it's going to be likely that there's going to be other pipelines that are going to connect to that pipeline so it's going to be very unusual, really an outlier to have a short pipeline like that, but the legal--

JUSTICE NATHAN L. HECHT: But it seems to me if that's true, all you have to do is prove it. It seems to me if that's true, all you have to do is prove it and you don't have, it doesn't deprive us of the infrastructure. It just means you got to show you're really going to open this up to the public.

ATTORNEY LYNNE LIBERATO: Well, you do say you're going to open it up to the public.

JUSTICE NATHAN L. HECHT: But the public doesn't want it.

ATTORNEY LYNNE LIBERATO: Well, but the public may want it, but the fact of the matter is that there won't be an infrastructure because pipeline companies won't build pipelines

and they cannot go to court. We talked about what the burden of proof is. Is the burden of proof to show you will have customers. We can't show we have customers ahead of time because you don't have customers for a pipeline until the pipeline is built.

JUSTICE PHIL JOHNSON: You're involved in a courthouse anyway in an eminent domain proceeding and it seems like all this would do is add a burden of proof, a reasonable probability that someone will use that in the future and so how much more of a burden is it to simply add that to you where you're already in the courthouse on the eminent domain proceeding.

ATTORNEY LYNNE LIBERATO: Well, because for a couple of reasons, Judge. One, I don't know how you show somebody else is probably going to use it unless you show you have customers.

JUSTICE EVA M. GUZMAN: Well don't you show there's a market for it, a demand, a need, something that's not being served, a product that you would. There are other ways besides Smith Company is going to purchase this carbon dioxide. You could do market analysis. I mean, what about that as evidence that there is an intent and a need and a demand and then a supply source?

ATTORNEY LYNNE LIBERATO: Well I think there are two parts to that. Number one is because the legislature has already determined all that. That the legislature has said that there is a need and at the end of the bill, where the CO2 pipeline common carrier statutes was added, it says there is a need for these pipelines because we need to be able to transport CO2 in order to develop our oil resources, but the second reason is that what that would mean then is that that a pipeline for any pipeline would have to go to court, would have to go through the legal process of showing that and what it would end up causing and I have to tell you, I think that one of the Amicus puts this really well, that delay would, in effect, kill the pipeline and kill the customers.

JUSTICE EVA M. GUZMAN: Is this a unique circumstance though where the company happens to own all of the known reserves, I think, from reading the briefs quickly of carbon dioxide and they happen to need one more segment. Is that a unique circumstance where this type of proof would not overly burden the industry or is this fairly typical?

ATTORNEY LYNNE LIBERATO: It is one of our affiliates. It's not Denbury Green, but accepting that, it is not unique in this sense because somebody has to have the money and the motivation to build the pipeline in the first place. So if you don't as here have somebody with the resources to get out there and get up in front of this, then the pipeline is not going to be built. So it's not unusual for the company or in this case the company's affiliates that would have those resources because, again, when we were talking about other customers, the other customers are going to have a tough time. They're not going to exist.

JUSTICE EVA M. GUZMAN: Is it unusual that they're the only shipper of carbon dioxide in a particular geographic area? Of the raw product, if you will?

ATTORNEY LYNNE LIBERATO: Right. No, no, what's happening right now and this is just as cool as it can be is that this is the anthropogenic manmade carbon dioxide and what's going on and this is the Law Review articles is like a win-win situation where companies outside of Denbury Green are developing a process where they take the CO₂ by-product, take the carbon dioxide out of it from emissions from any coal-firing plant, purify it, put it in the pipeline, ship it to where the oil fields are and resurrect oil fields that otherwise we couldn't get the oil out of so CO₂ is used in tertiary recovery, enhanced recovery, another way of putting it, enhanced recovery of the oil. So the win-win on this, it's such a great thing and so good that we have our pipeline in place and can do this it's because not only is the CO₂ going to be used to get more oil out of the ground, but it's also going to be used to reduce carbon emissions.

JUSTICE DAVID M. MEDINA: Where does a private property owner win?

ATTORNEY LYNNE LIBERATO: I'm sorry, Judge?

JUSTICE DAVID M. MEDINA: In that scenario, where does a private property owner win? How do they win? You said win-win.

ATTORNEY LYNNE LIBERATO: They win in that they get a fair market value for their property, but the win-win sort of the tradeoff if you will is that Texas and the oil industry gets an infrastructure. The pipelines give up their private use of their line in return for the power of eminent domain. The landowner gets fair market value. So if there are times and this is one of them where property rights take a second place to public use.

JUSTICE NATHAN L. HECHT: Do you think the statute imports the constitutional limitation or is the statutory limitation different?

ATTORNEY LYNNE LIBERATO: The statutory limitation would be public use and excuse me, the constitutional limitation and statutory would be public use and the legislature, excuse me, Justice, determine this is a public use.

JUSTICE NATHAN L. HECHT: So if a pipeline is operated to or for the public for hire, that would be a public use under the constitution in every situation you think?

ATTORNEY LYNNE LIBERATO: If they make available, yes, Your Honor, that's right, absolutely.

JUSTICE NATHAN L. HECHT: And if it were a public use under the constitution, it would be to or for the public's [inaudible]. In other words, the two match?

ATTORNEY LYNNE LIBERATO: The two match. The thing I have to point out and where public use comes in here and I don't mind hitting it head-on because this is a constitutional use, they have not raged the constitutionality of the statute, but, again, I want to answer your question.

JUSTICE NATHAN L. HECHT: I'm assuming the statute is constitutional, but then it can enlarge the constitutional eminent domain, right?

ATTORNEY LYNNE LIBERATO: That's right, that's right, to add an additional qualification.

JUSTICE NATHAN L. HECHT: The landowner is entitled compensation under the constitution. No statute can take it away from him.

ATTORNEY LYNNE LIBERATO: And does not here. And does not here. They can go into the condemnation process and one thing the Court may not be aware, but probably knows, I don't, I mean I know and that is this pipeline is already built and that's how the condemnation process works, that the challenge in the condemnation process by the landowner is to what the amount of money they're going to be paid, how much the commissioners that are charged with making that decision.

CHIEF JUSTICE WALLACE B. JEFFERSON: You started out saying this is a matter of statutory interpretation and that the Petitioners were trying to include in the statute words that aren't there, but you continually come back to saying under this statute, it's a common carrier if it's made available for public use, but that term is not in the statute, so where does that fit in? Where do you find the implied availability doctrine?

ATTORNEY LYNNE LIBERATO: Right, right, right. Well because that's what the law has been for years that that's what this means. Whether it's an old case like that was in front of this court which was the Dallas Housing Authority v. Higginbotham, that talked about public use and it's easy to remember that case because they term public use as a promiscuous open that the public use is open and promiscuous but their point being that or this Court's point I think it was, I want to say 1940 actually the point was that it made it available to in that case it was public housing, but that the property was made available to the public, not that there had to be an ultimate showing that the public would use it. So it's there. It's in every other Court of Appeals case that has addressed this. Vardeman, China-Nome which they use, it says that if it's available and just the language of the statute. I would say does it use the word available that for us available is an easier to understand or is for me an easier-to-understand term, but to and for the public for hire, to or for.

CHIEF JUSTICE WALLACE B. JEFFERSON: Could the state then do the same thing in condemning private property and in the condemnation process say that we will make in the

future this land, this 100 acres that we're condemning available for public use, is that enough?

ATTORNEY LYNNE LIBERATO: I think absolutely not unless, the question then would be is there a statute and I think that's the difference here that we have a statute that the Court's interpreting and--

JUSTICE NATHAN L. HECHT: If you can't do that under the constitution, you can't do it under any statute.

ATTORNEY LYNNE LIBERATO: Under the constitution, that's right. I apologize. I didn't understand the distinction you were talking about the constitution, but that's right, that's right.

JUSTICE NATHAN L. HECHT: If you don't think the state could do that, it wouldn't make any difference if they had a statute. They still can't do it.

ATTORNEY LYNNE LIBERATO: If it's unconstitutional, that's absolutely true.

CHIEF JUSTICE WALLACE B. JEFFERSON: So what would be constitutional about that?

ATTORNEY LYNNE LIBERATO: About, sorry, Judge.

CHIEF JUSTICE WALLACE B. JEFFERSON: On the state of Texas and I'm condemning 100 acres of private land and saying that we will make this land available in the future for public use. Is that permissible under the constitution?

ATTORNEY LYNNE LIBERATO: I think it could be. I think that's where the landowner would raise a constitutional challenge and make the decision and then raise whether it was a public use or not.

JUSTICE DON R. WILLETT: Does the phrase common carrier imply necessarily imply moving product through the pipeline that's owned by other parties?

ATTORNEY LYNNE LIBERATO: Yes, yes, well, in this sense, you can ship your own or your affiliate's product, here's CO2 and that indiscriminately, you have to ship anyone else's. In other words, charge him the same price, the same commission.

JUSTICE DON R. WILLETT: But if you buy a bunch of gas for your own use that you're going to use for yourself. You may buy some of that gas from a lot of other third parties, but you're going to use it all for yourself. You transport it through your pipeline. Are you acting as a common carrier in that situation?

ATTORNEY LYNNE LIBERATO: Well, it depends on whether is the pipeline you have de-

clared yourself done the things that are necessary to be a common carrier. I don't think what goes through makes a difference. I think it's the effect on what might ultimately go through and that effect is whether it's your own or somebody else's that it is shipped on the same price and the same priority and the same conditions, but, Judge, I'm not sure I answered your question.

JUSTICE DON R. WILLET: Well I was just wondering, I mean if putting in the oil, if Exxon builds a crude oil pipeline that terminates at their own refinery, is it a common carrier if other, if third parties sell crude to Exxon that is transported in Exxon's pipeline--

ATTORNEY LYNNE LIBERATO: Does it become a common carrier--

JUSTICE DON R. WILLET: Right.

ATTORNEY LYNNE LIBERATO: --because they--

JUSTICE DON R. WILLET: Exxon is the end-user of all this stuff, now may have bought what went through the pipeline from some other people, but is that sufficient to bestow a common carrier status?

ATTORNEY LYNNE LIBERATO: I think the answer to that is yes, but honestly, I'm not sure. I think the answer would be yes because I think when you start shipping other peoples' products on your already-built pipeline that you become a common carrier. The distinction here, at least for our purposes right now, is what do you do to preserve the, to make sure there's an infrastructure so that the pipeline will be built in the first place. Obviously it's going to be a lot easier to show you have customers, but quite frankly, under the statute, you don't ever need to show you have customers.

JUSTICE DALE WAINWRIGHT: Thank you, Chief. The Petitioner's brief I think makes the point that Denbury's pipeline is private as it goes through the states of Mississippi and Louisiana and when it hits the eastward boundary of Texas heading west, it becomes, the argument is it's public. It becomes a common carrier. What should we make of that? Is that uncommon or should that not get our attention at all?

ATTORNEY LYNNE LIBERATO: Judge, I'm so glad you asked that question because the law is different in Louisiana and Mississippi. They're oil-producing states and it is so important to them to have the infrastructure that we're talking about that the pipeline doesn't even have to be a common carrier. So it would be as if here all we had to do is build our pipeline, agree to build our pipeline and not ship anybody else's product on it and still have the power of eminent domain.

JUSTICE PHIL JOHNSON: Yeah, but then what you just said in Mississippi and Louisiana, it can be condemned for a private economic use.

ATTORNEY LYNNE LIBERATO: That's exactly right.

JUSTICE PHIL JOHNSON: Thank you.

ATTORNEY LYNNE LIBERATO: You do not have to be a common carrier there.

JUSTICE PHIL JOHNSON: No public use, just in private use.

ATTORNEY LYNNE LIBERATO: But in those states, they view an inherent public use benefit to building the infrastructure.

JUSTICE DALE WAINWRIGHT: Didn't in *Kelo v. New London*, didn't the US Supreme Court focus quite a bit on who owned the land, not the fact that it was going to have parks and regentrify the city and all that. The fact that it was a private, at least quasi private owner raise questions. Now the US Supreme Court affirmed the taking there, but there's a very strong dissent and we have a statute in Texas now that limits or purports to limit the ability to take for public use. Does that raise concern with your constitutional position? I know you say the constitutional argument was not raised.

ATTORNEY LYNNE LIBERATO: Fair enough. Actually it does just the opposite because in Proposition 11, what it says is that any taking of private property must be by government or entities granted the power of eminent domain under the law so there's a carve-out under the constitutional provision that was enacted, voted on, as a response to *Kelo* and there was a carve-out for that and the same thing is true in the government code that was enacted after that and that is it says that private property cannot be taken to confer a private benefit or economic development, which is *Kelo*, that it also says that this section does not affect the authority of an entity authorized by law to take private property through eminent domain. So there's carve-outs both places. I'm sorry, I'm enjoying answering the questions, but I want to be respectful of the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor. Are there any other questions? Thank you, Ms. Liberato.

ATTORNEY LYNNE LIBERATO: Thank you, Your Honor.

REBUTTAL ARGUMENT OF AMY WARR ON BEHALF OF PETITIONER

ATTORNEY AMY WARR: May it please the Court. The Court needs to go back to the language of the statute. It's true, Louisiana and Mississippi are different and Texas could have gone that route, but it didn't. Texas didn't give the right of eminent domain away for free. It requires these elements. It requires to and for the public for hire and it excludes self-service, self-contained pipelines and I believe I heard opposing counsel say that 003 does not apply to

a common carrier and I guess my question would be, what's it doing in this statute if it doesn't apply to a common carrier?

That's not what it says. The statute says it can't be a part of a common carrier pipeline. Now it's not limited by its text to gathering lines, but I think that would be a common use of it although certainly not exclusive. But what that means is if you have a little line over here that's part of your common carrier pipeline, then it's going to be regulated just like everything else. But if you have this whole pipeline that's a part, that's self-contained, self-vice, it's not regulated and that is a very useful safe harbor for the industry and I feel sorry for the pipeline companies out there who are playing by the rules because I think they are likely to be at a competitive disadvantage created by the companies like Denbury who are gaming the system trying to get something for nothing, trying to make it so they can get the right of eminent domain without satisfying the statute.

JUSTICE PHIL JOHNSON: Of course, the landowner still is entitled to a trial to determine the value of the property so they're going to be compensated, jury trial there, but let me go to my question. If what you say is correct and we send it back, number one, this pipeline is already built so that's somewhat, as I understand, that's somewhat a problem, but in the future why would a pipeline company knowing if they can't buy the right-of-way from the landowner even start construction because they know they're going to hit a lawsuit with the attendant delays, discovery and all of that, why would they even undertake to start a pipeline until they had all the property bought and everything litigated out. It seems like that's a problem for the construction of the pipeline.

ATTORNEY AMY WARR: Your Honor, I find it very odd that the pipeline companies are complaining of being dragged into court because they are the plaintiffs. They sued my client, the landowner.

JUSTICE PHIL JOHNSON: But there's a difference between just proving up the value of the land and proving up the value of the land and that you are a public pipeline or public carrier, common carrier.

ATTORNEY AMY WARR: That's part of the proof in every, that can be challenged in every condemnation case. That's the landowner's right. The landowner doesn't just have to say, okay, you can have my property. Give me the money, the fair market value. The landowner can contest the right to condemn just as if my neighbor was trying to get a prescriptive easement across my property, my neighbor would have to prove the elements of the cause of action. Here, the pipeline company has to prove that it has the power of condemnation under the statute. Many companies use private pipelines. It's not true that if you don't give them eminent domain, they can't construct pipelines. In fact, the Amici, one of the Amici in this case, Air Products, has a private pipeline and we were able to find that documentation at the Railroad Commission and submit it to the Court.

JUSTICE DALE WAINWRIGHT: Generally, it will be a whole lot harder though won't it?

ATTORNEY AMY WARR: Some pipeline companies are actually willing to pay a premium for not having to be regulated by the Railroad Commission. This is, it's a company-specific and I think situation-specific decision. So we shouldn't take away the ability of pipeline companies to get private status and we shouldn't eliminate the distinction that the legislature made between private and public lines.

JUSTICE DON R. WILLETT: Does Denbury qualify as a common carrier, the same question I asked Ms. Liberato, does it qualify as a common carrier if it buys gas or if some other third parties uses it all for its own purposes?

ATTORNEY AMY WARR: No, it doesn't. Under 002 or 003 and under 002, it has to be somebody else's gas in the line and that's another reason why that Air Products situation--

JUSTICE DON R. WILLETT: Gas being delivered to another location.

ATTORNEY AMY WARR: That's right. Air Products says we want to ship, we want our carbon dioxide to eventually be in the Denbury line. Well it's not clear from that whether they're going to sell it to Denbury or whether it's going to be theirs and it is Denbury's business plan to buy up all this gas.

JUSTICE DALE WAINWRIGHT: So you're only a common carrier if you lease pipeline space for others product to be transported, not if you buy it and transport it?

ATTORNEY AMY WARR: Yes, Your Honor, and you have to look at 003, Justice Willett, in your example because that would be a self-contained system and there have been vertically integrated oil companies in Texas that have production, transportation and refinery on a single system and the legislature has said you don't have to be regulated. So we want to preserve that statutory distinction. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Warr. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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