



February 22, 2022

The Supreme Court of Texas
c/o Mr. Blake Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 20-0567, *Hlavinka, et al. v. HSC Pipeline Partnership, LLC*, on appeal from the First Court of Appeals, Houston, Texas, Cause No. 01-19-00092-CV

**LETTER BRIEF OF AMICUS CURIAE
TEXAS LAND & MINERAL OWNERS ASSOCIATION**

To the Honorable Justices of the Supreme Court of the State of Texas:

Amici Curiae Texas Land & Mineral Owners Association (“TLMA”) submits this letter brief in support of Petitioners Terrance J. Hlavinka, Kenneth Hlavinka, Tres Bayou Farms, LP, and Terrance Hlavinka Cattle Company (collectively referred to herein as “Hlavinka”) in the above-captioned cause.

In particular, TLMA takes issue with the Court of Appeals holding that “section 2.105 [of the Texas Business Organizations Code] provides an independent grant of eminent domain authority.” 605 S.W.3d 819, 829 (Tex. App.—Houston [1st Dist.] 2020). Neither proper statutory interpretation, nor caselaw, nor logic, nor public policy support this conclusion.

The Court of Appeal’s reasoning behind its interpretation of Section 2.105 seems to be largely based on a cursory review of its previous opinion in *ExxonMobil Pipeline Co. v. Bell*, 84 S.W.3d 800, 803–04 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). 605 S.W.3d at 828 (“This court has *previously held* that section 2.105’s predecessor, article 2.01(B)(3)(b) of the Texas Business Corporations Act, provides an independent grant of eminent domain authority.” (emphasis added)). While *Bell*

does cite to the business organization statute, this most certainly was not the holding of that case, and was at the very most dicta. The only issue in *Bell* was the “unable to agree” condemnation requirement, which was decided by the substituted *Hubenak* opinion while the case was on appeal. 84 S.W.3d at 803 (citing *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2002), *aff’d in part, rev’d in part* 141 S.W.3d 172 (Tex. 2004)) (“The only point of error is whether the trial court’s order dismissing ExxonMobil’s condemnation, which was premised on the since-withdrawn opinion and is inconsistent with the substituted opinion, should be reversed.”). The entirety of the basis, discussion, analysis and rationale from *Bell* concerning common carrier eminent domain authority is as follows:

ExxonMobil, as a common carrier, is accorded the power of eminent domain. See TEX. BUS. CORP. Act Ann. art. 2.01(B)(3)(b) (Vernon Supp. 2001).

605 S.W.3d at 803–04. That is it.

The other cases relied on by the Court of Appeals are not instructive on the issue either. The Beaumont Court of Appeals in *Reins Road Farms* acknowledged that the pipeline company had raised an argument that it was a common carrier under Section 2.105, but the Court did not take up or decide the issue. *Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-I, Ltd.*, 404 S.W.3d 754, 760 (Tex. App.—Beaumont 2013, no pet.) (considering whether ultimately the pipeline “would be operated for the public’s use” because landowner “d[id] not argue that a natural-gas-liquids pipeline could never be a common carrier line”). The Fourteenth Court of Appeals opinion in *Woods* is perhaps the most supportive of HSC’s position. *Phillips Pipeline Co. v. Woods*, 610 S.W.2d 204 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.). *Woods* accepts that the definition of a common carrier is extended beyond crude oil pipelines by the business organizations statute without any real analysis or examination. *Id.* at 206. Although this case was decided over forty years ago, it has only been cited for this proposition once—by the First Court of Appeals in *Hlavinka*.

The one case to actually explore the issue concluded that Section 2.105 is not an independent grant of authority. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 457 S.W.3d 115, 119–20 (Tex. App.—Beaumont 2015), *rev’d on other grounds*, 510 S.W.3d 909 (Tex. 2017). Examining both Texas Business



Organizations Code Section 2.105 and Texas Natural Resources Code Sections 111.019 and 111.002, the court reasoned as follows:

Thus, to have the right of eminent domain conferred by Chapter 111, as referenced in section 2.105, an entity must still meet Chapter 111's common carrier requirement. Accordingly, section 2.105 is not an independent basis for exercising eminent domain authority. *See R.R. Comm'n of Tex. v. Moran Utils. Co.*, 728 S.W.2d 764, 767 (Tex. 1987) (“A statute must be harmonized with other relevant statutes, if possible.”); *see also Howlett v. Tarrant Cnty.*, 301 S.W.3d 840, 846 (Tex. App.—Fort Worth 2009, pet. denied) (“If the statutes share a common purpose or object, they must be harmonized.”).

Id. On appeal, this Court did not ultimately determine whether Section 2.105 is an independent grant of eminent domain authority for a common carrier because it held Denbury Green is a common carrier under Chapter 111 of the Natural Resources Code. 510 S.W.3d at n.6. The Court should adopt the Beaumont Court of Appeal's reasoning on the interpretation of Texas Business Organizations Code Section 2.105.

Turning to the text of the statutes at issue, Texas Business Organizations Code Section 2.105 provides:

In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquified minerals, or other mineral solutions has all the rights and powers conferred on a common carrier by Sections 111.019–111.022, Natural Resources Code.

Section 2.105 specifically refers to Sections 111.019 through 111.022 of the Texas Natural Resources Code. Texas Natural Resources Code Section 111.019(a) provides that “Common carriers have the right and power of eminent domain.” Texas Natural Resources Code Section 111.002 defines who qualifies as a common carrier, including 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 to or for the public for hire, or engages in the business of transporting crude petroleum by



pipeline.” TEX. NAT. RES. CODE § 111.002(1).¹ Thus, to harmonize these two provisions, Section 2.105 should be interpreted as a recognition of the power of eminent domain granted to certain business entities as common carriers under the

¹ In totality, Texas Natural Resources Code Section 111.002 provides:

- A person is a common carrier subject to the provisions of this chapter if it:
- (1) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportations 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;
 - (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;
 - (5) owns, operates, or manages, wholly or partially, pipelines for the transportation for hire of coal in whatever form or of any mixture of substances including coal in whatever form;
 - (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
 - (7) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of feedstock for carbon gasification, the products of carbon gasification, or the derivative products of carbon gasification, in whatever form, to or for the public for hire, but only if the 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.



Texas Natural Resources Code. *See Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Electric, LLC*, 324 S.W.3d 95, 107 (Tex. 2010) (quoting TEX. GOV'T CODE § 311.026(a) (“If a general provision conflicts with a special or local provision, the provisions shall be construed if possible, so that effect is given to both.”)).

When construing legislation, Courts should “always consider the statute as whole rather than its isolated provisions.” *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Section 2.105 is located in Subchapter B entitled “Powers of Domestic Entities.” TEX. BUS. ORG. CODE, Ch. 2. Section 2.105 should be interpreted as recognizing that one of the powers a business entity may have is the power of eminent domain that common carriers have under Sections 111.019 of the Texas Natural Resources Code. The title of Section 2.105 is “Additional Powers of Certain Pipeline Businesses,” the qualifiers “additional” and “certain” indicating that it applies only to those common carriers that otherwise have been granted eminent domain power, such as the power recognized in Texas Natural Resources Code Sections 111.002 and 111.019. Furthermore, nothing in Section 2.105 defines what a common carrier is. The statute that does define a common carrier is Texas Natural Resources Code Section 111.002 (“A person is a common carrier subject to the provisions of this chapter if . . .”).² *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (“If a statute uses a term with a particular meaning or assigns a particular meaning to a term, we are bound by the statutory usage.”). Finally, in the same subchapter, Section 2.113 entitled “limitation on powers” provides that the subchapter “Powers of Domestic Entities” does not authorize a business entity “to exercise a power in a manner inconsistent with a limitation on the purposes or powers of the entity contained in its governing documents, this code, or other laws of this state.” TEX. BUS. ORG. CODE § 2.113(a). To allow pipeline companies to contravene the common carrier provisions of the Texas Natural Resources Code would be to “exercise a power inconsistent” with existing law.

Contrary to the language of the statutes, the Court of Appeal’s opinion “effectively grants HSC all of the benefits of eminent domain with none of the statutorily-imposed burdens, and undermines the Railroad Commission’s authority to regulate Texas Pipelines.” Hlavinka’s Reply to HSC’s Response to their Petition for Review at 2. The Texas Natural Resources Code provides that the Texas Railroad Commission “has jurisdiction over all common carrier pipelines defined in

² *See id.*



Section 111.002 of this code in Texas” and “persons owning or operating pipelines in Texas.” TEX. NAT. RES. CODE § 81.051. It would be non-sensical to interpret the statutes as providing that even though all pipelines are governed by the Texas Railroad Commission, which provides specific rules for common carrier pipelines, the Business Organization Code in one singular provision undoes and broadens the definition of common carrier pipelines, does away with the requirement that common carriers act “to or for the public for hire,” and opens the gates for pipelines to act as common carriers outside the provisions of the Texas Natural Resources Code. Indicating the specious nature of its position, HSC in this case filed a T-4 for its pipeline with the Texas Railroad Commission, even though it now claims it has independent authority as a common carrier under the Texas Business Organizations Act.

HSC’s interpretation would give, for example, a brine pipeline the “rights and powers conferred on a common carrier by Sections 111.019–111.022,” but none of the other obligations, such as publication of tariffs (Section 111.014), transportation without discrimination (Section 111.015), limiting discrimination between shippers (section 111.016), and equal compensation for like service (section 111.017). Statutes should not be interpreted to create an injustice. TEX. GOV’T CODE § 312.006 (“[Statutes] shall be liberally construed to achieve their purpose and to promote justice.”). Furthermore, this interpretation goes against the mandate that statutes granting eminent domain authority are strictly construed in favor of the landowner and against the government or entity. *See Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLP*, 363 S.W.3d 192, 198 (Tex. 2012).

The legislative history of the statutory predecessors to Texas Business Organization Code Section 2.105 and Texas Natural Resources Code Sections 111.002 and 111.019 also suggests that Section 2.105 is not intended as an independent grant of eminent domain authority. Although the statutes have gone through numerous changes over the last century, the long and short of it is that the Natural Resources Code/its predecessor was enacted to bring pipelines under the regulation of the Texas Railroad Commission, and the Business Organization Code/its predecessor was amended to remove its separate condemnation provision and to provide a reference back to the powers enumerated in the Natural Resources Code.

The predecessor statute to Section 2.105 first appeared in 1899 and 1915, and did provide corporations the right to condemn for the purpose of transporting “oil



and gas, salt, brine and other mineral solutions” and “also sand and clay for the manufacture and sale of clay products.”³ However, in 1917, the Legislature enacted legislation “Regulating Pipelines,” describing common carriers who are subject to the regulation of the Texas Railroad Commission, a predecessor to Texas Natural Resources Code Sections 111.002 & 111.019.⁴ Immediately thereafter, the business statute was amended to incorporate the Common Carrier Act (*i.e.*, the NRC provisions) into the description of common carrier pipeline companies.⁵ In 1925, the business organization statute specifically enacted “Art. 1497. Right of Condemnation,” which provided that certain pipeline operators had the ability to condemn.⁶ However, notably, in 1955, the Legislature repealed Articles 1495–1507, including the “right of condemnation” provision. The Texas Business Corporation Act instead replaced these provisions with something more similar to what is in the BOC today, prohibiting an oil production business from also being an oil pipeline business and providing that “any corporation engaged as a common carrier in the pipeline business for transporting oil, oil, products, gas, salt brine, fuller’s earth, sand, clay, liquified minerals or other mineral solutions, shall have all of the rights and powers conferred by Articles 6020 and 6022, Revised Civil Statutes, 1925 [predecessor to NRC].⁷ In 1977, the Legislature codified the Texas Natural Resources Code, including Section 111.002.⁸ In 2003, the Legislature codified Texas Business Organization Code, including Section 2.105.

Relevant to our current analysis, at one point, the predecessor business organizations statute specifically had a separate provision allowing condemnation. This provision was repealed in 1955. Although a vestige of the previous statute remains, admittedly causing some confusion, the important point is that Section 2.105 should only be read to confer only those “rights and powers” that are “conferred on a common carrier by Sections 111.019–111.022, Natural Resources Code.” TEX. BUS. ORG. CODE § 2.105.

³ Act approved May 15, 1899, 26th Leg., R.S., ch. 117 (S.B. 332), §1, 1889 Tex. Gen. Laws 202; Act approved Apr. 7, 1915, 34th Leg., R.S. ch. 152 (H.B. 93), §1, 1915 Tex. Gen. Laws 259.

⁴ Common Carrier Act, 35th Leg. R.S., ch. 30, 1917 Tex. Gen. Laws 48, 49; Act approved Feb. 20, 1917, 35th Leg. R.S., ch. 30 (S.B. 68), §1, 1917 (Tex. Gen. Laws 48).

⁵ Acts of March 31, 1919, 36th Leg. R.S. ch. 146, §1, 1919 Tex. Gen. Laws 272, 272–73.

⁶ Act approved April 1, 1925, 39th Leg., R.S. (S.B. 84), §1.

⁷ Act approved Apr. 15, 1955, 54th Leg., R.S., ch. 64 (H.B. 16), Art. 2.01(b)(3), 1955 Tex. Gen. Laws 64.

⁸ TEX. NAT. RES. CODE, 65th Leg., R.S., ch. 871, art. 2, 1977 Tex. Gen. Laws 2345, 2692.



When dealing with statutes allowing the taking of private property—a constitutional issue—stricter construction and more thorough and thoughtful examination is required than that undertaken by the Court of Appeals in its interpretation of Texas Business Organization Code Section 2.105. Given the disagreement between the Beaumont Court of Appeals and the Houston First District Court of Appeals, the issue is ripe for review. TLMA respectfully urge the Court to rule in favor of Hlavinka and take this opportunity to confirm that a single provision from Business Organizations Code does not create an end run around the Texas Natural Resources Code and common carrier regulations and well-established jurisprudence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, the undersigned certifies that this filing complies with the word limits of Rule 9.4(i)(2)(D) because, exclusive of the parts exempted by Rule 9.4(i)(1), it contains 2,816 words.

/s/ Nicholas P. Laurent _____

Nicholas P. Laurent



CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2022, a true and correct copy of the foregoing Amicus Curiae Letter Brief of the Texas Land & Mineral Owners Association was served on all parties of record indicated below in accordance with the Texas Rules of Appellate Procedure through electronic service by the electronic filing manager.

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APPENDIX

The Texas Land & Mineral Owners Association (“TLMA”) is a statewide advocacy association whose members are farmers, ranchers, and royalty owners. TLMA advocates for a business and legal environment that promotes the production of oil and gas in a manner that respects the property rights of landowners. TLMA has an interest in this case because the Court of Appeals opinion could allow the proliferation of pipeline condemnations in Texas without true public purpose.

The fees and costs for this brief were paid entirely by Texas Land & Mineral Owners Association. None of the parties to this case will contribute to paying that fee. TEX. R. APP. P. 11(c).



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