TEXAS RICE LAND PARTNERS, LTD. V. DENBURY GREEN PIPELINE-TEXAS, LLC: A PROBABILITY OF FUTURE USE BY THE PUBLIC AS A KEY TO EXERCISING EMINENT DOMAIN

I. INTRODUCTION .................................................. 90
II. FACTS AND HOLDING ........................................... 92
III. BACKGROUND .................................................... 95
   A. NEBRASKA'S STATE COMMON CARRIER STATUTE
      GRANTS PRIVATE COMPANIES THE POWER OF
      EMINENT DOMAIN ........................................... 95
   B. KELO v. CITY OF NEW LONDON, CONNECTICUT:
      THE UNITED STATES SUPREME COURT BROADLY
      INTERPRETS PUBLIC USE TO INCLUDE ECONOMIC
      DEVELOPMENT FOR THE PURPOSES OF GRANTING
      THE POWER OF EMINENT DOMAIN ....................... 97
   C. EXXON MOBIL PIPELINE CO. v. UNION PACIFIC
      RAILROAD CO.: LOUISIANA ADOPTS A BROAD
      INTERPRETATION OF PUBLIC USE IN THE
      CONTEXT OF PIPELINE COMPANIES' USE OF
      EMINENT DOMAIN ........................................... 98
   D. LINDER v. ARKANSAS MIDSTREAM GAS SERVICES
      CORP.: ARKANSAS EMPHASIZES THE PUBLIC'S
      RIGHT TO ACCESS THE PIPELINE IN
      DETERMINING WHAT CONSTITUTES PUBLIC USE
      AND PLACES THE BURDEN OF PROOF ON
      LANDOWNERS ............................................... 100
IV. ANALYSIS ......................................................... 101
   A. TEXAS'S FOCUS ON WHETHER THE PIPELINE
      WILL ACTUALLY BE USED AS A COMMON
      CARRIER RATHER THAN ON THE ECONOMIC
      DEVELOPMENT BENEFITS IT MAY BRING ............... 102
   B. THE TEXAS REQUIREMENT FOR A LIKELIHOOD OF
      THE PUBLIC ACTUALLY USING THE PIPELINE IN
      ADDITION TO THE OWNER .................................. 104
      1. Rejecting the Notion that Condemning
         Property to Be Exclusively Used by a
         Private Entity Is a Sufficient Public Use to
         Satisfy the State's Constitutional
         Requirements ........................................... 104
2. Refusing to Overlook the Rule of Statutory  
Construction to Strictly Construe Statutory  
Provisions Dealing with Eminent Domain  .... 105
3. Placing the Burden on Private Companies  
to Prove Public Use  ...................... 106
C. TEXAS’S LANDOWNER PROTECTION AND THE  
INSUFFICIENCY OF A MERE RIGHT OF THE PUBLIC  
to Use a Carrier’s Services  .................. 107
D. NEBRASKA’S LEGAL CONSISTENCY WITH TEXAN  
STANDARDS  .................................. 109
1. The Supreme Court of Nebraska’s Long  
Existing and Inadvertent Gap  ................ 109
2. Nebraska’s Policy of Protecting Landowner  
Rights Disfavors a Gap Allowing the  
Exercise of Eminent Domain Without  
Actually Serving the Public  ................ 110
3. The Supreme Court of Texas’s Standard  
Can Fill the Gap in Nebraska and Protect  
Private Landowners  ......................... 111
V. CONCLUSION  .................................. 112

I. INTRODUCTION

Determining what constitutes public use for purposes of eminent  
domain has been a perplexing quandary for courts interpreting the  
term.¹ Eminent domain law is unique in its application for private  
natural resource developers and pipeline companies that often receive  
legislative grants to operate as common carriers in order to use emi-  
nent domain like a state authority.² Private entities, such as pipeline  
companies, can use these state common carrier statutes (“SCC statu-  
utes”) if they prove they will use private land for a public use.³ Ne-  
braska and several other states have passed SCC statutes, and  
private landowners in some of those states have subsequently chal-

1. See Daniel B. Kelly, The “Public Use” Requirement in Eminent Domain Law: A  
Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1, 2  
(2006) (noting that legal commentators and courts have failed to provide a compelling  
interpretation of the term public use despite numerous attempts at doing so, especially  
in circumstances where use of eminent domain would benefit a private party).
651, 652-53 (2008) (stating that in many resource-rich areas of the country, a proverbial  
“knock on the door” is more likely to come from mining, oil, or gas company representa-  
tives than from government officials and most takings associated with natural resources  
are a more direct form of private land transfers).
3. See 29A C.J.S. Eminent Domain § 44 (2012) (noting that private entities trans-  
porting oil or gas by pipeline, even for profit, are not precluded from using eminent  
domain).

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC,\footnote{Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 194 (Tex. 2012).} the Supreme Court of Texas reviewed the use of eminent domain by a pipeline company, Denbury Green (“Denbury”).\footnote{Texas Rice Land, 363 S.W.3d at 195-96; see also id. at 204 (determining that mere compliance with statute requiring pipeline company to complete a one page form is insufficient for a private entity to gain unchallengeable power of eminent domain).} Denbury complied with the basic procedure for attaining the status of common carrier, which meant filling-out a one-page permit application with the Railroad Commission of Texas.\footnote{Id. at 196, 203.} A group of landowners (“landowners”) challenged Denbury’s common carrier status because Denbury had no prospective customers intending to use its pipeline; rather, the company would only be transporting its own product to an affiliate’s refinery.\footnote{Id. at 195.} Ultimately, the Supreme Court of Texas reversed the Texas Court of Appeal’s decision to uphold Denbury’s status as a common carrier.\footnote{Id. at 194-95.} The court determined that the overarching constitutional requirement that land only be taken for public use controlled despite the Texas Legislature’s granting the authority to a private entity to use eminent domain.\footnote{Id. at 202.} The court held that in order to qualify as a common carrier, Denbury needed to demonstrate a reasonable probability that customers other than the pipeline owner itself or an affiliate would use the pipeline at some point in the future.\footnote{See infra notes 17-47 and accompanying text.}

This Note begins with a review of the facts and holding of Texas Rice Land.\footnote{See infra notes 48-87 and accompanying text.} Next, this Note will discuss precedent from several jurisdictions that consider what circumstances pipeline companies may use eminent domain.\footnote{This Note will then establish that Supreme
Court of Texas’s decision in Texas Rice Land correctly rejected broad definitions of public use and appropriately placed the burden of demonstrating public use on the pipeline companies seeking to use eminent domain to create rights-of-way.\textsuperscript{15} Ultimately, this Note will demonstrate that when Nebraska’s yet-to-be challenged SCC statute face judicial review, Nebraska courts should adopt Texas’s reasoning in Texas Rice Land.\textsuperscript{16}

II. FACTS AND HOLDING

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC,\textsuperscript{17} a pipeline company received a common carrier permit from the Railroad Commission of Texas and sought to use eminent domain to gain an easement for laying pipeline over privately-owned land.\textsuperscript{18} Denbury Resources, Inc. was a publicly traded corporation that owned Denbury Operating Company, which owned all the interest of two subsidiaries, Denbury Green Pipeline-Texas, LLC and Denbury Onshore, LLC.\textsuperscript{19} Denbury Resources and its affiliate companies (“Denbury”) share officers and offices in Plano, Texas.\textsuperscript{20}

Denbury engaged in tertiary oil recovery, a type of enhanced oil recovery operation that involved pumping carbon dioxide (“CO$_2$”) into existing wells to increase oil production.\textsuperscript{21} Denbury applied for a permit with the Railroad Commission in March 2008 to build a CO$_2$ pipeline in Texas as a common carrier.\textsuperscript{22} The intended pipeline was a continuation of another pipeline originating from a Denbury-owned naturally occurring CO$_2$ reserve in Mississippi, traveling across Louisiana to the Texas border.\textsuperscript{23} Denbury’s section of the pipeline was to run from the Texas-Louisiana border to Denbury’s tertiary recovery fields in Texas.\textsuperscript{24}

The single-page permit application required the applicant to indicate whether the pipeline would be operated as a common carrier or as a private pipeline.\textsuperscript{25} Pursuant to section 111.002(6) of the Texas Nat-

\begin{itemize}
\item[15.] See infra notes 88-173 and accompanying text.
\item[16.] See infra notes 169-99 and accompanying text.
\item[17.] 363 S.W.3d 192 (Tex. 2012).
\item[18.] Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 196 (Tex. 2012).
\item[19.] Texas Rice Land, 363 S.W.3d. at 195.
\item[20.] Id.
\item[21.] Id.
\item[22.] Id.
\item[23.] See id. (noting that the pipeline expansion was from the Texas-Louisiana border connecting with a pipeline from one of Denbury’s CO$_2$ reserves in Mississippi).
\item[24.] Id.
\item[25.] Id. at 195-96.
\end{itemize}
ural Resources Code.\textsuperscript{26} Denbury indicated the pipeline would be operated as a common carrier and that its pipeline would transport gas "owned by others, but transported for a fee."\textsuperscript{27} In a July 2008 letter, the Railroad Commission verified the completion of Denbury's application and approval for common carrier status to operate its CO$_2$ pipeline.\textsuperscript{28} The Railroad Commission conducted the process for approving the permit without public hearing and without notifying landowners about the proposed pipeline route.\textsuperscript{29}

When Denbury tried to survey land along the intended pipeline route to prepare for condemning pipeline easements, Texas Rice Land Partners, Ltd., and a farmer (collectively "Texas Rice") denied Denbury entry, which led Denbury to sue for injunctive relief.\textsuperscript{30} The trial court granted summary judgment to Denbury on a cross motion, determining that Denbury was a common carrier under section 111.002(6) and had the authority of eminent domain pursuant to section 111.019 of the Texas Natural Resources Code\textsuperscript{31} as a common carrier.\textsuperscript{32} The trial court ordered Texas Rice to refrain from interfering with Denbury's surveying of the pipeline route and also from harassing or interfering with Denbury's agents.\textsuperscript{33}

Texas Rice then appealed to the Court of Appeals of Texas, Beaumont.\textsuperscript{34} The Court of Appeals affirmed the trial court's decision, concluding that Denbury had proven its common carrier status as a

\textsuperscript{26} Tex. Nat. Res. Code Ann. § 111.002 (West 2011). Section 111.002(6) states in part the following:

A person is a common carrier subject to the provisions of this chapter if it owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide ... 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.

\textit{Id.}

\textsuperscript{27} Texas Rice Land, 363 S.W.3d at 196.

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Tex. Nat. Res. Code Ann. § 111.019 (West 2011). Section 111.019 states in part:

(a) Common carriers have the right and power of eminent domain.

(b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, 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.

\textit{Id.}

\textsuperscript{32} Texas Rice Land, 363 S.W.3d at 196.

\textsuperscript{33} Id.

\textsuperscript{34} Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 296 S.W.3d 877, 878 (Tex. App. 2009).
matter of law. The court noted that Denbury would make the pipeline accessible to the public as soon as the pipeline was built. Relying on a more expansive view of public use, the court noted that merely making the pipeline available to the public was sufficient to constitute public use, even if the public does not actually exercise that right.

The dissent in the Texas Court of Appeals decision in *Texas Rice* questioned how Denbury’s self-serving declaration that it was a common carrier pipeline made the use of land a public use when the transportation services offered were for profit. The dissent rejected Denbury’s argument that it automatically became a common carrier that could use eminent domain by agreeing to the Railroad Commission’s regulation, reasoning that the Texas Constitution does not allow the use of eminent domain for private use, even if the private use is regulated.

Texas Rice then appealed to the Supreme Court of Texas, which reversed the lower courts’ decisions, determining that even when the Legislature granted Denbury the right and authority to use eminent domain, the overarching constitutional rule that property cannot be taken for private use controlled the case. The Supreme Court of Texas held that the Railroad Commission’s grant of a permit to operate a pipeline as common carrier did not conclusively establish Denbury’s standing as a common carrier with the conferred power of eminent domain. The court further found that Denbury had not shown it was entitled common carrier status because the pipeline was for private use rather than for public use as required by the Texas Constitution. The court reasoned that, because the Railroad Commission did not have a procedure to investigate and verify whether the pipeline would serve the public, the statute did not resolve the core constitutional concern of the pipeline being for public use rather than private use. The court further reasoned that the Legislature could not have intended to prevent the landowner from challenging the per-

36. Id.
37. Id.
38. See id. at 882-83 (Gaultney, J., dissenting) (noting private carriers choose with whom to contract and are able to make individualized decisions about the terms of transportation).
39. See id. at 883 (noting that the Texas Constitution does not except regulated private use from the public use requirement).
41. Id. at 198.
42. Id. at 202-03. The court explained the use of eminent domain cannot survive constitutional scrutiny if the taking is for private use. Id. at 200.
43. Id. at 200, 202.
mit holder’s power of eminent domain. Finally, the court determined that Denbury would use the pipeline privately because it would only transport privately owned CO₂ to and from locations owned by Denbury and merely making the pipeline available to the public was insufficient to establish public use.

III. BACKGROUND

A. NEBRASKA’S STATE COMMON CARRIER STATUTE GRANTS PRIVATE COMPANIES THE POWER OF EMINENT DOMA"N

Like the United States Constitution, the Nebraska Constitution requires that no property be taken for public use without just compensation. Nebraska Revised Statute section 75-501 designates as a common carrier any person who transports, stores, or conveys gas or liquid by pipeline for hire in intrastate commerce in Nebraska. Furthermore, section 57-1101 gives all entities seeking to transport oil, petroleum, or gases by pipeline across Nebraska for interstate commerce or for intrastate commerce the right to secure rights-of-way or other real estate interests necessary to lay such pipelines. Section 57-1101 creates an exception for major oil pipelines, which must go through the more rigorous requirement of either applying under the Major Oil Pipeline Siting Act or receiving route approval from the governor. Economic development is not included as a valid public purpose for the use of eminent domain, but public or private projects that make a major part of the property available to the public or for use as a pipeline receive an exception from this exclusion.

In City of Bayard v. North Central Gas Co., the Supreme Court of Nebraska determined an entity is a private carrier and not a common carrier if the entity does not extend its services to the public and

44. Id. at 200.
45. Id. at 200-01.
46. Compare U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”), with Neb. Const. art. I, § 21 (“The property of no person shall be taken or damaged for public use without just compensation therefor.”).
49. Neb. Rev. Stat. §§ 57-1401 to -1413 (Supp. 2012) (requiring that entities with pipelines exceeding six inch interior diameters complete an application for approval of its route, including disclosure of all the pertinent information about the route, the pipeline owner, and notice to the community affected by the pipeline route).
50. See id. § 57-1101 (explaining the possible approval options for major oil pipelines).
51. See Neb. Rev. Stat. § 76-710.04(1)-(3)(a) (Supp. 2012) (stating, inter alia, that the rule against taking primarily for economic development does not affect the use of eminent domain for use as pipeline, transmission line, power line, aqueducts, and other similar uses).
52. 83 N.W.2d 861 (Neb. 1957).
transports commodities for hire as its purpose.\footnote{City of Bayard v. N. Cent. Gas Co., 83 N.W.2d 861, 868 (Neb. 1957) [hereinafter North Central].} In \textit{North Central}, the City of Bayard filed a complaint with the Nebraska Railway Commission (the "Commission") against a Wyoming corporation ("North Central") that was an intrastate carrier of natural gas.\footnote{\textit{North Central}, 83 N.W.2d at 862.} The complaint alleged that North Central was a common carrier subject to the regulations and rates of the Commission, thereby requiring North Central to serve the city with natural gas.\footnote{\textit{Id.} at 863.} North Central denied the allegation, noting that it owned and maintained its own pipelines, never engaged in the wholesale or resale of gas by others, and never held itself out as a common carrier.\footnote{\textit{Id.} at 868.} The Commission determined that North Central was a common carrier subject to Commission regulation and was required to provide Bayard with gas.\footnote{\textit{Id.}}

North Central then appealed to the Supreme Court of Nebraska, which reversed the Commission's finding that North Central was a common carrier.\footnote{147 N.W.2d 784 (Neb. 1967).} The court reversed because North Central never publicly advertised or conducted itself as an entity that carried gas for hire, nor could the public justifiably believe the nature of North Central's business indicated it was a common carrier.\footnote{\textit{Id.} at 788.}

In \textit{Burger v. City of Beatrice},\footnote{Burger v. City of Beatrice, 147 N.W.2d 784 (Neb. 1967).} the Supreme Court of Nebraska determined that a city's use of eminent domain to secure easements onto the landowners' land was invalid because it was a private use rather than a public one.\footnote{\textit{Id.} at 787.} In \textit{Burger}, a landowner sought to enjoin a city ("Beatrice") from using eminent domain to secure easements to install water wells and extract subterranean groundwater.\footnote{\textit{Id.} at 788.} The increased water production was to provide two private fertilizer plants outside Beatrice's corporate limits.\footnote{See \textit{id.} at 788, 791 (stating that a municipality acts in a governmental capacity when it engages in distribution and production water for its residents, which is what
poration, or even a private corporation required to serve the public, the court indicated that the taking would have been for a public use. However, the water was in the sole control of the two private fertilizer companies for their private business for profit, which could not justify encroachment on the landowners’ constitutional rights. The court noted that, although Beatrice was growing and may eventually need increased water capacity, the public interest was merely incidental to the private interest involved. The court stated that when there is merely a public interest, such as increased business or more jobs, rather than a public use, eminent domain powers are unavailable. While the court noted that the construction of the wells would furnish some jobs and increase business in the area, that interest is not a public purpose sufficient to exercise eminent domain.

B. **Keo v. City of New London, Connecticut**: The United States Supreme Court Broadly Interprets Public Use to Include Economic Development for the Purposes of Granting the Power of Eminent Domain

In *Keo v. City of New London, Connecticut*, the United States Supreme Court held that for purposes of the public use portion of the Fifth Amendment Takings Clause, economic development was sufficient to justify the exercise of eminent domain. In *Keo*, private landowners (collectively “Keo”), whose land had been condemned, sued the City of New London for authorizing invocation of eminent domain by a private, nonprofit entity that formed to assist the city’s economic development. The New London Superior Court granted partial relief to *Keo*, granting a permanent injunction that prohibited taking some of the properties and allowed the taking of other properties. The parties then cross appealed to the Supreme Court of Connecticut, which held that all the takings were permissible, reasoning that it from acting in a voluntary, proprietary capacity with all the liabilities of private utilities).

65. *See id.* at 790 (noting that, in the instant case, the water was not being sold to a public service corporation, nor to a private company that had a duty to serve the public).

66. *Id.* at 791.

67. *Id.* at 791-92.

68. *See id.* at 790 (rejecting a broader definition of public use as merely public advantage that would increase business, employment, and tax revenue).

69. *Id.* at 791.

70. 545 U.S. 469 (2005).

71. U.S. CONST. amend. V.


73. *Keo*, 545 U.S. at 473, 475.

74. *Id.* at 475-76.
that economic development was sufficient public use to allow the use of eminent domain.\textsuperscript{75}

Kelo petitioned the United States Supreme Court, which granted certiorari to determine whether a city satisfies the Fifth Amendment's \textit{public use} requirement when the city uses its power of eminent domain to take property for economic development.\textsuperscript{76} The Court determined that the use of eminent domain for economic development was within the meaning of Fifth Amendment's \textit{public use} requirement.\textsuperscript{77} The Court reasoned that the land was not being taken solely for the benefit of private parties, but was following a broad economic development plan and would benefit the general public.\textsuperscript{78} In reaching this conclusion, the Court noted that public ownership is not the only method of promoting the public interest, but rather, promoting a public purpose is often better served through private enterprise rather than a government agency or department.\textsuperscript{79} The Court also determined its rationale was in agreement with prior decisions that upheld the use of eminent domain for private mining and agricultural purposes because of the importance of those industries to the general welfare of the affected States.\textsuperscript{80}

C. \textit{Exxon Mobil Pipeline Co. v. Union Pacific Railroad Co.}: Louisiana Adopts a Broad Interpretation of Public Use in the Context of Pipeline Companies' Use of Eminent Domain

In \textit{Exxon Mobil Pipeline Co. v. Union Pacific Railroad Co.},\textsuperscript{81} the Supreme Court of Louisiana found that a private pipeline company's creation of a servitude to use a road on railroad land for servicing its

\textsuperscript{75} Id. at 476.
\textsuperscript{76} Id. at 477.
\textsuperscript{77} Id. at 484.
\textsuperscript{78} See id. (determining that taking private property for economic development does not unduly blur line between public and private use). Many states have reacted to the Court's decision in \textit{Kelo} by passing statutes that exclude economic development as valid public use for purposes of eminent domain. See, e.g., Mich. Constr. art. X, § 2 (prohibiting the taking of private property for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues); Neb. Rev. Stat. § 76-710.04 (Supp. 2012) (prohibiting condemnor from using eminent domain if the purpose of the taking is primarily for economic development); S.D. Codified Laws § 11-7-22.1 (Supp. 2012) (prohibiting use of eminent domain for transfer to any private person, nongovernmental entity, or other public-private business entity or to enhance tax revenue).
\textsuperscript{79} Kelo, 545 U.S. at 486.
\textsuperscript{80} See id. at 484 (noting cases involving the use of eminent domain as mining and agricultural purposes as an example of there being very little to distinguish economic development from other public purposes).
\textsuperscript{81} 35 So. 3d 192 (La. 2010).
pipeline satisfied the state's public use requirement. In *Exxon Mobil*, a pipeline company designated as a common carrier with the power to expropriate private property pursuant to Louisiana Revised Statutes section 45:254 petitioned for the expropriation of land owned by the railroad to set up a road for servicing its pipeline. The district court reasoned that Exxon Mobil was not permitted to expropriate Union Pacific's property because only Exxon Mobil employees would be allowed to use the service road. The district court determined Exxon Mobil failed to prove a public and necessary purpose for the expropriation. Exxon Mobil then appealed to the Court of Appeals of Louisiana, which affirmed and held the district court was correct to focus on the public's access to the condemned property when determining if the expropriation was for public use.

Exxon Mobil petitioned to the Supreme Court of Louisiana, arguing that the lower courts erred in focusing on whether the public would have actual access in determining whether the pipeline was for public use. The Supreme Court of Louisiana reversed the lower courts, holding that direct public use is not the sole factor in determining whether a taking constitutes public use. The court reasoned that although the private access road was not accessible to the general public, the road permitted the pipeline company to deliver petroleum to end customers, which resulted in benefits to the general public. The court noted that, although Louisiana precedent was arguably divergent, later cases interpreted public use more broadly to include any taking that results in advantages to the general public. In accepting the broader definition of public use, the court rejected the notion that the public must have the right to actually use the property that is taken.

82. Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co., 35 So. 3d 192, 199 (La. 2010).
83. Exxon Mobil, 35 So. 3d at 196.
84. Id. at 195.
85. Id.
86. Id. at 195-96.
87. Id. at 197.
88. Id. at 197, 202.
89. Id. at 199.
90. See id. (noting that, despite previous restrictive language, Louisiana precedent has not adopted a narrow definition of public use).
91. See id. at 198-99 (stating that actual use by the public is not the standard to determine public use).
D. LINDER v. ARKANSAS MIDSTREAM GAS SERVICES CORP.: ARKANSAS EMPHASIZES THE PUBLIC’S RIGHT TO ACCESS THE PIPELINE IN DETERMINING WHAT CONSTITUTES PUBLIC USE AND PLACES THE BURDEN OF PROOF ON LANDOWNERS

In Linder v. Arkansas Midstream Gas Services Corp.,92 the Supreme Court of Arkansas concluded that if a pipeline company chooses to operate as a common carrier and takes private property for public use, it must give the public the right to use the pipeline, even if only a few individuals actually have occasion to use it.93 In Linder, a pipeline company ("Midstream") filed petitions to use eminent domain in Cleburne County Circuit Court to create easements on landowners’ ("Linder") property after unsuccessful attempts to negotiate easements onto the land.94 The circuit court determined that Midstream had the authority to exercise eminent domain to maintain a pipeline across Linder’s property.95 The court found that Arkansas Code Annotated section 23-15-10196 granted Midstream the authority to proceed with an eminent domain action.97

Linder then petitioned to the Supreme Court of Arkansas, which granted certiorari to determine the constitutionality of Arkansas Code Annotated section 23-15-101.98 Linder argued that the statute violated Article 2, section 22 of the Arkansas Constitution99 by allowing a private, for-profit company to use eminent domain to take private land for its private use.100 The court noted that landowners have the heavy burden to prove that the use of eminent domain was not for public use.101 The court determined that the taking was for public use within the meaning of the statute because the pipeline elected to operate as a common carrier, meaning that it would give the public equal right to access the pipeline, although only a few individuals would have occasion to actually use the pipeline.102 The court reasoned that whether the taking was for public or private use was determined by the extent of the public’s right to use it, not the extent to which the public actually exercises or has occasion to exercise that right.103

92. 362 S.W.3d 889 (Ark. 2010).
94. Linder, 362 S.W.3d at 891.
95. Id. at 892.
97. Linder, 362 S.W.3d at 892.
98. Id. at 890, 892.
100. Linder, 362 S.W.3d at 893.
101. Id. at 894.
102. Id. at 897.
103. Id.
IV. ANALYSIS

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, the Supreme Court of Texas refused to classify Denbury Green Pipeline-Texas, LLC’s (“Denbury”) pipeline as a common carrier pipeline, relying on the overarching rule in Texas’s Constitution that a taking must be for a public use. The Texas court made its decision despite Denbury’s compliance with a state statute granting private entities the power to use eminent domain when acting as a common carrier (“SCC statute”). In Texas Rice Land, the court determined that the Texas Railroad Commission’s grant of a common carrier permit to Denbury was insufficient to conclusively establish that Denbury had the power of eminent domain. The court adopted a standard that more closely safeguards private property rights, requiring a probability that the pipeline will serve the public by transporting gas for customers who will either retain ownership of the gas or sell it to parties besides the pipeline owner.

This Analysis will first argue that the Supreme Court of Texas properly adopted a narrower definition of public use than the United States Supreme Court adopted in regards to eminent domain by private entities. Second, this Analysis will argue that the Texas court correctly defined public use more narrowly than Louisiana and gave less deference to private pipeline companies’ ability to use eminent domain. Third, this Analysis will show that Texas’s court was right to reject Arkansas’s definition of public use for common carrier pipelines, which focuses only on the actual right of the public to use the pipeline. Finally, this Analysis provides strong evidence that Nebraska, a state with an unchallenged SCC statute, should adopt the Texas Rice Land holding and rationale in the event that the state’s SCC statute is challenged.

104. 363 S.W.3d 192 (Tex. 2012).
106. Texas Rice Land, 363 S.W.3d at 195, 204.
107. Id. at 198-99.
108. See id. at 202, 204 (explaining the burden to demonstrate public use).
109. See infra notes 113-29 and accompanying text.
110. See infra notes 130-47 and accompanying text.
111. See infra notes 148-65 and accompanying text.
112. See infra notes 166-96 and accompanying text.
A. Texas's Focus on Whether the Pipeline Will Actually Be Used as a Common Carrier Rather Than on the Economic Development Benefits It May Bring

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, the Supreme Court of Texas properly interpreted public use more narrowly than the United States Supreme Court did. In Kelo v. City of New London, Connecticut, the United States Supreme Court held that the taking of private property for transfer to another private entity for the purpose of economic development was within the scope of public use under the United States Constitution. The Supreme Court rejected the requirement that the general public be able to literally use or access the property that has been taken in order for eminent domain to constitute a public use. Instead the Court deferred to the city's judgment of how to enact its plan of economic development, conceding that the increased jobs and tax revenues resulting from the private developer's use of the land satisfied a broader understanding of public use. The Court stated that promoting economic development is indistinguishable from other recognized public purposes.

In a dissenting opinion, Justice O'Connor noted that under the broad holding of majority, a private pipeline company could use the power of eminent domain if its pipeline would potentially result in benefits to the community such as job creation and increased tax revenue. Furthermore, in another dissenting opinion, Justice Thomas noted that the majority's holding that economic development was a valid public use could support the use of eminent domain when there is merely a vague expectation of increased tax revenue and jobs. Justice Thomas also noted the majority's opinion was suspiciously advantageous to the private developer exercising eminent domain.

114. See infra notes 115-29 and accompanying text.
117. Kelo, 545 U.S. at 482 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
118. Id. at 474, 480.
119. Id. at 484.
120. See id. at 501 (O'Connor, J., dissenting) (noting the majority opinion expands the traditional definition of public use to include nearly any private use that a government entity predicts will increase jobs, tax revenue, or possibly even aesthetic pleasure, effectively making nearly any taking constitutional).
121. Id. at 506 (Thomas, J., dissenting).
122. Id.
The Supreme Court of Texas rejected the rationale expressed by the Kelo majority. Implicitly agreeing with the critiques of Justices O'Connor and Thomas, the Supreme Court of Texas refused to deprive landowners of their property rights in the name of vague expectations of economic development. The court in Texas Rice Land properly required something more than the potential for job creation and tax revenue before eminent domain was granted to a private party, instead requiring that the pipeline company show something more concrete. The Texas court required that before a private pipeline company was given the power of the state to deprive private landowners of their property, such a company would have to show that their pipeline reasonably likely to serve customers other than the pipeline owner itself. The purpose of the holding was to assure that use of eminent domain benefit members of the public rather than only the private party seeking to exercise it. Texas Rice Land stands for a proposition that Kelo overlooks: private land rights are important. While economic development is important, such development should

123. See Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 194 n.3 (Tex. 2012) (noting that the constitutional rule against taking private property for private use includes the taking of private property for the primary purpose of economic development and increasing tax revenues pursuant to Tex. Const. art. 1, § 17(b)).

124. See Texas Rice Land, 363 S.W.3d at 204 & n.37 (quoting Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co., 35 So. 3d 192, 199 (La. 2010)) (noting that Texas rejects a standard of public use that allows the use of eminent domain for a taking that merely results in advantages to the public at large, instead enacting a scheme more protective of landowners' rights).

125. Compare Kelo, 545 U.S. at 487-88 (majority opinion) (rejecting a requirement that the condemning entity demonstrate a reasonable certainty that increased tax revenue, new jobs, or other benefits to the public expected from the taking actually accrue), with Texas Rice Land, 363 S.W.3d at 202 (requiring a pipeline owner, upon challenge by landowner, to demonstrate a reasonable probability that it will actually serve the public by transporting a product for at least one future customer other than itself or a party that will sell it to the pipeline owner).

126. Compare Kelo, 545 U.S. at 487-88 (rejecting a requirement of reasonable certainty that expected benefits actually accrue), with Texas Rice Land, 363 S.W.3d at 201-02 (requiring the pipeline company to present reasonable probability of a future customer upon challenge from a landowner, thus preventing the pipeline owner from using eminent domain despite knowing that it will be the only beneficiary of the pipeline).

127. See Texas Rice Land, 363 S.W.3d at 200-02 (noting that when a private pipeline company exclusively uses a pipeline, or when a pipeline company or its affiliate will be only user of products being transported, such use is insufficient to show taking will be for public use).

128. Compare Kelo, 545 U.S. at 521-22 (Thomas, J., dissenting) (commenting on the majority's perversion of the Framers' intent by including economic development as a valid public use, noting that it will encourage individuals with disproportionate influence and politically powerful individuals in the community to take land from private landowners), with Texas Rice Land, 363 S.W.3d at 204 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. IX, § 124 (C.B. McPherson ed., Hackett Publishing Co. 1980) (1690)) (noting that protection of private property rights is the "great chief end of government").
only trump private land rights if the private company seeking to exercise it can concretely show that its products or services will actually be used by the public.\textsuperscript{129}

B. The Texas Requirement for a Likelihood of the Public Actually Using the Pipeline in Addition to the Owner

1. Rejecting the Notion that Condemning Property to Be Exclusively Used by a Private Entity Is a Sufficient Public Use to Satisfy the State’s Constitutional Requirements

In its decision in \textit{Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC},\textsuperscript{130} the Supreme Court of Texas correctly gave less deference to the pipeline company’s use of eminent domain in construing public use than Louisiana’s interpretation in its \textit{Exxon Mobil Pipeline Co. v. Union Pacific Railroad Co.}\textsuperscript{131} decision.\textsuperscript{132} In \textit{Exxon Mobil}, the Supreme Court of Louisiana determined that any use of eminent domain to take land for a use that results in advantages to the general public will suffice to constitute a public purpose.\textsuperscript{133} The court relied on Louisiana precedent defining public use broadly, including cases describing public use similarly to the United States Supreme Court’s decision in \textit{Kelo v. City of New London, Connecticut},\textsuperscript{134} which included economic development as a valid public use.\textsuperscript{135} The court in \textit{Exxon Mobil} ruled that the pipeline access road sufficiently met the requirements for public use because the pipeline would result in benefits to the general public, although the road would be used exclusively by the company to inspect and maintain the pipeline.\textsuperscript{136} The court in \textit{Texas Rice Land} appropriately declined the Louisiana stan-

\textsuperscript{129} See \textit{Texas Rice Land}, 363 S.W.3d at 204 (noting that although pipeline development is important to the state’s rapidly increasing energy needs, freedom and economic dynamism require strong protection of individual property rights).

\textsuperscript{130} 363 S.W.3d 192 (Tex. 2012).

\textsuperscript{131} 35 So. 3d 192 (La. 2010).

\textsuperscript{132} Compare \textit{Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co.}, 35 So. 3d 192, 199 (La. 2010) (deciding the pipeline served a public purpose simply by placing more gas into the stream of commerce), \textit{with Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC}, 363 S.W.3d 192, 201 (Tex. 2012) (determining that merely making the pipeline available to the public to transport its gas is insufficient to show public use).

\textsuperscript{133} \textit{Exxon Mobil}, 35 So. 3d at 199.

\textsuperscript{134} 545 U.S. 469 (2005).

\textsuperscript{135} See \textit{Exxon Mobil}, 35 So. 3d at 198-99 (noting that, like a railroad, the pipeline would enlarge the public’s resources and increase productivity of the community, such that the public need not be supplied directly from the gas pipeline because the pipeline serves a public purpose by placing more gas into stream of commerce); \textit{see also} \textit{Kelo v. City of New London, Conn.}, 545 U.S. 469, 484 (2005) (noting that promotion of economic development is a traditional and long accepted government function).

\textsuperscript{136} \textit{Exxon Mobil}, 35 So. 3d at 199.
dard by determining a pipeline company that builds a pipeline for the company's exclusive use cannot use the power of eminent domain because such a taking would clearly be private use rather than public use.\textsuperscript{137} The court in \textit{Texas Rice Land} correctly held that the pipeline company must demonstrate, with reasonable probability, that the pipeline will serve customers other than the pipeline owner or its affiliates before it can secure rights-of-way by eminent domain.\textsuperscript{138}

2. Refusing to Overlook the Rule of Statutory Construction to Strictly Construe Statutory Provisions Dealing with Eminent Domain

After reviewing Louisiana's conflicting precedent, the \textit{Exxon Mobil} court failed to construe public use narrowly.\textsuperscript{139} While the court in \textit{Exxon Mobil} stated that eminent domain statutes were to be strictly construed because they were essentially extensions of state constitutional provisions, the court did not abide by this principle when construing the Louisiana Constitution's eminent domain provision.\textsuperscript{140} Like the Supreme Court of Louisiana, the Supreme Court of Texas in \textit{Texas Rice Land} also explained that statutes pertaining to eminent domain are strictly construed in favor of the landowner.\textsuperscript{141} Unlike the Louisiana court, however, the \textit{Texas Rice Land} court properly adhered to its enunciated rule of statutory construction refusing to overlook the strong interest private landowners have in defeating condemnation of their land by private pipeline companies which could not show

\textsuperscript{137} \textit{Compare} Tex. Const. art. 1, § 17(b) (rejecting economic development and generating tax revenues as sufficient to constitute public use), and \textit{Texas Rice Land}, 363 S.W.3d at 200 (determining that a private company may not condemn private land to build a pipeline when that pipeline will be used exclusively by that company because such use does not constitute any benefit to the general public and accordingly does not constitute public use), \textit{with Exxon Mobil}, 35 So. 3d at 199 (determining that a private company may condemn private land to build a road that will be used only by the company because such use will provide benefits to the general public and accordingly constitutes a valid public use).

\textsuperscript{138} \textit{Compare Exxon Mobil}, 35 So. 3d at 199 (rejecting the requirement that direct use by the public is required to prove public purpose and focusing on the delivery of petroleum to end users, which results in advantages to the public at large), \textit{with Texas Rice Land}, 363 S.W.3d at 202 (holding that to qualify as a common carrier with the authority to use eminent domain a pipeline company must demonstrate a reasonable probability that it will serve the public by transporting gas for at least one customer).

\textsuperscript{139} \textit{See infra} notes 81-91 and accompanying text; \textit{see also Exxon Mobil}, 35 So. 3d at 197, 199 (noting the term public purpose is not defined as narrowly as some past cases held, but that any allocation resulting in advantages to public at large would suffice).

\textsuperscript{140} \textit{See Exxon Mobil}, 35 So. 3d at 203-04 (Knoll, J., dissenting) (stating that the majority's analysis did not reflect a strict construction of eminent domain statutory provisions).

\textsuperscript{141} \textit{Compare id.} at 197 (majority opinion) (noting that eminent domain statutes are strictly construed), \textit{with Texas Rice Land}, 363 S.W.3d at 198 (interpreting the legislative grant of eminent domain to be narrowly construed in favor of the landowner).
valid public use of their pipeline.\textsuperscript{142} That is, the Supreme Court of Texas realized arbitrary declarations by the State Legislature, or one an executive agency, was insufficient to declare a private use a public one.\textsuperscript{143}

3. \textit{Placing the Burden on Private Companies to Prove Public Use}

The court in \textit{Texas Rice Land} appropriately determined that the burden of proving its common carrier status is on the pipeline owner once a landowner raises a challenge to it, further demonstrating the additional protection that Texas gives to landowners compared to Louisiana.\textsuperscript{144} The Louisiana court placed the burden on the private landowner to prove that the entity legislatively authorized to use eminent domain has exercised its broad discretion arbitrarily or capriciously, or that it has done so in bad faith.\textsuperscript{145} In his dissenting opinion in \textit{Exxon Mobil}, Justice Knoll determined that the majority’s decision to shift the burden to prove the necessity of the expropriation on the landowner fails to reflect an appropriate balance between landowners’ constitutional rights with a common carrier pipeline’s statutory right to use eminent domain.\textsuperscript{146} In line with Justice Knoll’s dissent in \textit{Exxon Mobil}, the Supreme Court of Texas refused Louisiana’s misplaced burden in eminent domain cases because the Texas court required pipeline companies to meet the common carrier standard by proving a reasonable probability future customers would use the pipeline.\textsuperscript{147}

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\textsuperscript{142} Compare \textit{Exxon Mobil}, 35 So. 3d at 197, 200 (announcing the rule of construction that eminent domain statutes must be strictly construed but not strictly construing an eminent domain statute as evidenced by requiring the landowner to prove the expropriator did not act in good faith), \textit{with Texas Rice Land}, 363 S.W.3d at 198, 202 (announcing that eminent domain statutes must be strictly construed in favor of the landowner, and then strictly construing an eminent domain statute in favor of private landowners).
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\textsuperscript{143} See \textit{Texas Rice Land}, 363 S.W.3d at 202 (determining that mere fiat by the Legislature do not make private use a public one).
\textsuperscript{144} See infra notes 145-47 and accompanying text.
\textsuperscript{145} \textit{Exxon Mobil}, 363 S.W.3d at 200.
\textsuperscript{146} \textit{Id.} at 203 (Knoll, J., dissenting) (noting power of eminent domain—or expropriation—is a derogation of the fundamental right to private property ownership and an owner who is divested of such property should be given every opportunity to protect his property interest).
\textsuperscript{147} Compare \textit{Exxon Mobil}, 35 So. 3d at 203 (majority opinion) (interpreting the majority’s broad interpretation of public use as placing the burden of proof on landowner rather than the entity seeking to use eminent domain, which does not reflect a proper balance between the common carrier’s authority and the landowner’s constitutional right to property), \textit{with Texas Rice Land}, 363 S.W.3d at 202 (placing burden of proving common carrier status on pipeline company when it is challenged by a landowner). 
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C. Texas's Landowner Protection and the Insufficiency of a Mere Right of the Public to Use a Carrier's Services

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, the Supreme Court of Texas properly rejected Denbury's argument that public use is the mere right of the public to use and access the pipeline. In contrast, the Supreme Court of Arkansas's decision in Linder v. Arkansas Midstream Gas Services Corp. ruled that whether a taking is for public or private use is determined by the extent of the public's right to use it. Moreover, the court in Linder stated that the public does not need to use the pipeline to constitute public use, but must simply have the right to use it. In Linder, the landowners challenging the pipeline company's use of eminent domain claimed that there would be very few individuals, if any, besides the pipeline owner who would have occasion to use it and that it was a private taking impermissible under the Arkansas Constitution. The court ruled that, despite there only being a small group of individuals who may use the pipeline, the test for public use is based on the extent of the public's right to use it, and not the extent the public actually exercises that right.

In sharp contrast to the Arkansas decision, the court in Texas Rice Land determined that pipeline companies must show more than the public's mere right to use the pipeline to be classified as a common carrier. The Texas court properly decided that an ephemeral right to use was not substantial enough to constitute public use under the state's constitution. Instead, the Texas court applied a stricter test than the Supreme Court of Arkansas in Linder, holding that there

149. See infra notes 150-65 and accompanying text.
150. 362 S.W.3d 889 (Ark. 2010).
152. See Linder, 362 S.W.3d at 897 (stating that the public's right to use the pipeline constitutes public use, regardless of whether the public actually uses it).
153. Id. at 897.
154. Id.
155. See Texas Rice Land, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 201-02 (Tex. 2012) (rejecting Denbury's argument giving public equal right to use the pipeline was sufficient demonstration of public use without showing a probability of future customers).
156. Compare Linder, 362 S.W.3d at 897 (ruuling that a pipeline company's giving the public a mere right to use pipeline, even if only small number of individuals might have occasion to use it, constitutes public use), with Texas Rice Land, 363 S.W.3d at 201-02 (analogyizing Denbury's status as a common carrier to an oil company declaring itself a common carrier simply as a ruse to use eminent domain, knowing that no other party will use the pipeline).
must be a reasonable probability that the pipeline would serve the public in the future.\textsuperscript{157}

The Supreme Court of Texas also implemented a protective filter on pipeline companies using eminent domain by subjecting the statutory grant of common carrier status to greater scrutiny than the Supreme Court of Arkansas did in \textit{Linder}.\textsuperscript{158} The court in \textit{Texas Rice Land} indicated that, although statutes plainly grant pipeline companies the powers of eminent domain, authority is specially scrutinized by courts.\textsuperscript{159} The court in \textit{Linder} claimed to strictly construe eminent domain statutes in favor of the landowner, but it noted the constitutionality of all statutes is presumed and the burden of proving otherwise is on the party challenging the statute.\textsuperscript{160} In \textit{Linder}, the court stated that the landowner carries a heavy burden to prove that the exercise of eminent domain was not for public use, contradicting the previously-mentioned rule of construction that the court will strictly construe eminent domain statutes in favor of the landowner.\textsuperscript{161} This rule of construction also contradicts the constitutional principle that the \textit{Linder} court recognized in its opinion, which states that private property rights are of paramount importance.\textsuperscript{162} Unlike the court in \textit{Linder}, the Supreme Court of Texas provides a robust protection by placing the burden of proving common carrier status on the pipeline company rather than on the landowner.\textsuperscript{163} The court in \textit{Texas Rice Land} determined that upon a landowners challenge, the burden falls on the pipeline company to demonstrate its common carrier status

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\textsuperscript{157} \textit{Compare Linder}, 362 S.W.3d at 897 (stating that when the pipeline company elected to operate as common carrier, it was entitled to use eminent domain to secure easement and was obliged to make pipeline available to anyone who might have occasion to use it), \textit{with Texas Rice Land}, 362 S.W.3d at 202 (concluding Denbury was not entitled to common carrier status merely because it received a common carrier permit, filed required tariff, and made the pipeline available to any third party to transport gas without showing possible future customers).

\textsuperscript{158} \textit{See infra} notes 159-65 and accompanying text.

\textsuperscript{159} \textit{See Texas Rice Land,} 363 S.W.3d at 194-95, 197-98 (noting that statutes grant private pipeline companies the power of eminent domain, but that power is subject to strict scrutiny in light of overarching constitutional principles favoring landowners against the entity seeking to exercise eminent domain).

\textsuperscript{160} \textit{Linder,} 362 S.W.3d at 894.

\textsuperscript{161} \textit{See id.} (noting that the court will strictly construe eminent domain statutes in favor of landowner immediately after holding landowner bears a heavy burden to prove taking was not for public use).

\textsuperscript{162} \textit{See id.} at 893 (stating the “right of property is before and higher than any constitutional sanction”).

\textsuperscript{163} \textit{Compare id.} at 894 (stating that the landowner bears burden to prove taking of his or her land was not for public use), \textit{with Texas Rice Land,} 363 S.W.3d at 202 (noting that once a landowner challenges a pipeline company’s status as a common carrier with right to use eminent domain, the burden of proving its common carrier status falls on the pipeline company).
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before it may exercise eminent domain. The court in Texas Rice Land placed the burden of proof on the pipeline company seeking to secure rights of way across private land, thereby reflecting the importance of the right to private property.

D. NEBRASKA'S LEGAL CONSISTENCY WITH TEXAN STANDARDS

1. The Supreme Court of Nebraska's Long Existing and Inadvertent Gap

In City of Bayard v. North Central Gas Co., the Supreme Court of Nebraska’s ruling that the pipeline company (“North Central”) was not a common carrier inadvertently left a considerable gap in its protection of landowners. The court determined that because North Central did not hold itself out to the public to be a common carrier, it was not a common carrier. This ruling inadvertently suggests that North Central would have been a common carrier with the right to use eminent domain to acquire easements if it had merely declared itself a common carrier. This implied standard is reflected in the court’s language, which stated that common carriers are those that are simply ready to carry products for hire, indicating that the pipeline need not actually transport product to be considered common carriers. Such reasoning would lead to a standard similar to the one articulated in Linder v. Arkansas Midstream Gas Services Corp., in which a pipeline company gained the power to exercise eminent domain after the company merely granted a public right to use the company's pipeline without potential users actually existing. This was the very unfairness that Texas sought to prevent in Texas Rice Land Partners.

165. See id. at 202, 204 (citing Dolan v. City of Tigard, 512 U.S. 374, 392 (1994)) (noting that landownership is a keystone right and protecting private property rights is an important duty of government).
166. 83 N.W.2d 861 (Neb. 1957).
167. See infra notes 168-72 and accompanying text.
169. See North Central, 83 N.W.2d at 867-68 (stating that an entity needs to hold itself out to the public as transporting products for hire to be considered a common carrier).
170. See id. (quoting State ex rel. Winnett v. Union Stock Yards Co. of Omaha, 115 N.W. 627, 631 (Neb. 1908)) (stating that common carrier holds itself out as ready to transport for hire commodities that are in its line of business).
171. 362 S.W.3d 889 (Ark. 2010).
172. Compare Linder v. Ark. Midstream Gas Servs. Corp., 363 S.W.3d 889, 897 (Ark. 2010) (stating that public use depends merely on the pipeline giving the public the right to use the pipeline, not on the extent to which it actually exercises that right), with North Central, 83 N.W.2d at 867-68 (stating that a common carrier is an entity that holds itself out to the public as transporting goods for hire).
LTD. v. DENBURY GREEN PIPELINE-Texas, LLC by requiring that the pipeline company show a probability of a future customer before being given the power to use eminent domain under its state common carrier statute ("SCC statute").

2. Nebraska's Policy of Protecting Landowner Rights Disfavors a Gap Allowing the Exercise of Eminent Domain Without Actually Serving the Public

The Nebraska Constitution and statutes, as well as the Supreme Court of Nebraska's holding in Burger v. City of Beatrice, indicate that a gap in the SCC statute such as the one in North Central would be contrary to Nebraska's policy of protecting landowners' property rights. First, the Nebraska Constitution indicates that protection of property is one of the central purposes of government. It also states that all citizens have a right to ownership, possession, and enjoyment of property. The Legislature also favors a policy of providing increased protection of property rights. Specifically, the Legislature amended section 57-1101 in 2012 to protect landowners by requiring pipeline companies to complete an application under the Major Oil Pipeline Siting Act, which is designed to protect property rights before such companies may exercise the power of eminent domain. The application process requires that the pipeline company disclose to the public pertinent information about the route and provide an opportunity for the public to ask questions.

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174. See Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 201 (Tex. 2012) (rejecting the argument that an entity can be classified as a common carrier merely by making its services available to the public, even if there are no realistic possibility of customers).
175. 147 N.W.2d 784 (Neb. 1967).
176. See infra notes 177-90 and accompanying text.
177. See Neb. Const. art. I, § 1 (stating that the governments are established by the people to secure of rights and protect property).
178. See Neb. Const. art. I, § 25 (stating that the right of all citizens of the United States to acquire, possess, enjoy, and convey property in Nebraska is protected).
179. See infra notes 180-83 and accompanying text.
182. See id. § 57-1402 (1)(a) (stating that one of the purposes of the Major Oil Pipeline Siting Act is to ensure the protection of landowners' property rights).
183. See id. § 57-1405 (requiring that the major oil pipeline company to submit all pertinent information about the management, route, and impact of the intended pipeline to the Public Service Commission); see also id. § 57-1407 (requiring the pipeline company to hold a public hearing, give notice of the public hearing in newspapers of general circulation in every county affected by the pipeline, give notice of the hearing to municipal governments, and provide information to the Public Service Commission within sixty days of filing its application).
Like the court in *Texas Rice Land*, the Supreme Court of Nebraska has also indicated that, in contrast to states such as Louisiana, landowners are entitled to greater protection in eminent domain actions. In *Burger*, the court declined to extend the definition of public use to a taking that only furnishes employment and increases business. By rejecting the broader definition of public use in *Burger*, the court implicitly rejected the rationale of the United States Supreme Court in *Kelo v. City of New London, Connecticut* and the Supreme Court of Louisiana in *Exxon Mobil Pipeline Co. v. Union Pacific Railroad Co.*, which determined that public use included use that resulted in benefits to the general public. The Nebraska court determined that such an expansion of the definition public use would have made the use of eminent domain nearly limitless to private enterprises and would undermine the constitutional guarantees of ownership, possession, and enjoyment of property. Instead, the court indicated that for the intended water wells to be a public use, some of the water extracted needed to be provided directly to Beatrice's citizens or to a private agency that provides water to the public.

3. The Supreme Court of Texas's Standard Can Fill the Gap in Nebraska and Protect Private Landowners

In *Texas Rice Land*, the Supreme Court of Texas provided a standard that, if applied in Nebraska, would both fill the gap in the Nebraska's SCC statute left by the Supreme Court of Nebraska in *North Central*, as well as reflect Nebraska's policy of favoring landowners in eminent domain actions. First, requiring a pipeline company to actually transport oil or other products for customers other than itself to merit common carrier classification would fill the gap left by the *North Central* decision, which suggested merely declaring oneself as a com-

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184. Compare Burger v. City of Beatrice, 147 N.W.2d 784 (Neb. 1967) (rejecting the notion that increased business and employment is sufficient to constitute public use for the purpose of eminent domain), with Texas Rice Land, 383 S.W.3d at 204 n.37 (noting that takings that result in advantages to the general public are not sufficient for the purposes of eminent domain).
185. *Burger*, 147 N.W.2d at 791.
187. 35 So. 3d 192 (La. 2010).
188. Compare *Kelo v. City of New London, Conn.*, 545 U.S. 469, 484 (2005) (determining that economic development is a valid public use for purposes of eminent domain), and Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co., 35 So. 3d 192, 199 (La. 2010) (allowing takings that merely result in advantages to the general public), with Burger, 147 N.W.2d at 791 (noting that increased jobs, business, and tax revenue is insufficient to constitute public use under the Nebraska Constitution).
189. *Burger*, 147 N.W.2d at 791.
190. See id. at 792 (ruling that the use of eminent domain was for the benefit of two private fertilizer companies rather than for the inhabitants of Beatrice).
191. See infra notes 192-96 and accompanying text.
mon carrier was sufficient to use eminent domain.\textsuperscript{192} Furthermore, by placing the burden of proving its status on the pipeline company seeking to exercise eminent domain, as the Supreme Court of Texas did in \textit{Texas Rice Land}, the Nebraska court would reflect Nebraska's constitutional policy of protecting landowners.\textsuperscript{193} As noted by the court in \textit{Texas Rice Land}, while the legislature can delegate the power of eminent domain to certain private entities, the constitutional rule that takings must be for a public use controls eminent domain actions.\textsuperscript{194} Such a standard would also reflect the stated purpose of Nebraska's Major Oil Pipeline Siting Act.\textsuperscript{195} In its decision in \textit{Burger}, Supreme Court of Nebraska indicated encroachment on landowners' rights to ownership, possession, and enjoyment of their property should not be permitted by allowing private entities to use eminent domain for their exclusive use, paralleling the Supreme Court of Texas's goal in \textit{Texas Rice Land}.\textsuperscript{196}

\section*{V. CONCLUSION}

In \textit{Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC},\textsuperscript{197} the Supreme Court of Texas properly ruled that a pipeline company that sought to exercise the use of eminent domain must do more than transport only its own product to one of its other facilities or to those of its affiliates.\textsuperscript{198} The Texas court determined that pipeline companies must demonstrate a reasonable probability of customers other than itself, or an affiliate, will use the pipeline and appropriately placed the burden of proving such use on the private pipeline company.\textsuperscript{199} The Texas court properly held that a statute

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  \item[192.] Compare \textit{North Central}, 83 N.W.2d at 867-68 (stating that an entity need only hold itself out to the public as transporting products for hire to be considered a common carrier), \textit{with Texas Rice Land}, 363 S.W.3d at 202 (requiring that the pipeline company show a reasonable probability of future service to a customer in order to be classified as a common carrier with the power of eminent domain).
  \item[193.] \textit{See Texas Rice Land}, 363 S.W.3d at 202 (placing the burden of proving its status as a common carrier on the pipeline company once challenged by the landowner); \textit{see also Neb. Const. art. I, § 25} (stating that the rights of all citizens of the United States to acquire, possess, enjoy, and convey property in Nebraska are protected).
  \item[194.] \textit{Texas Rice Land}, 363 S.W.3d at 194-95.
  \item[195.] \textit{See Neb. Rev. Stat. § 57-1402(1)(a)} (stating that one of the purposes of the Major Oil Pipeline Siting Act is to ensure the protection of landowners' property rights).
  \item[196.] Compare \textit{Burger}, 147 N.W.2d at 791 (noting that the private fertilizer companies' use of the water for their private purpose unduly encroaches on the landowner's rights to possession, ownership, use, and enjoyment of his property), \textit{with Texas Rice Land}, 363 S.W.3d at 204 (determining that using eminent domain to acquire easements for private purposes is contrary to the Texas Constitution).
  \item[197.] 363 S.W.3d 192 (Tex. 2012).
  \item[198.] \textit{Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC}, 363 S.W.3d 192, 200 (Tex. 2012).
  \item[199.] \textit{Texas Rice Land}, 363 S.W.3d at 202.
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that grants a private entity the power of eminent domain without such restrictions is unconstitutional under the Texas Constitution.200

This Note has shown that the court in Texas Rice Land appropriately rejected an economic development type standard used in Kelo v. City of New London, Connecticut201 by the United States Supreme Court.202 Moreover, the Texas court also correctly used reasoning that is more protective of landowners’ rights than the Supreme Court of Louisiana did in Exxon Mobil Pipeline Co. v. Union Pacific Railroad Co.,203 which interpreted public use much more broadly.204 Texas also correctly rejected a simple right-to-use standard used by the Supreme Court of Arkansas.205 Finally, this Analysis has provided strong evidence that Nebraska should adopt the Texas Rice Land holding and rationale in the event that the state’s SCC statute is challenged, as doing so would fill the gap in its SCC statute favor Nebraska’s broader policy of protecting landowners’ rights.206

The Supreme Court of Texas’ decision in Texas Rice Land has interesting implications for a jurisdiction such as Nebraska, which legislatively grants pipelines transporting crude oil, petroleum, gases and other products through the state the power of eminent domain.207 While Texas’ requirement for a pipeline’s process for becoming a common carrier with the power of eminent domain was filling-out a one-page application, Nebraska’s requirements for major oil pipelines are much more rigorous, requiring precise information about the pipeline, along with public hearings.208 However, Nebraska Revised Statute section 57-1101209 seems to allow major oil pipelines, such as the Keystone XL Pipeline, to bypass the application process through the Public Service Commission if the Governor of Nebraska approves the route, which opens up the door for judicial scrutiny of whether the

200. Id. at 204 (quoting John Locke, Second Treatise of Government ch. IX, § 124 (C.B. McPherson ed., Hackett Publishing Co. 1980) (1690)) (noting that protection of private property rights is the “great chief end of government”).
201. 545 U.S. 469 (2005).
202. See supra notes 113-29 and accompanying text.
203. 35 So. 3d 192 (La. 2010).
204. See supra notes 130-47 and accompanying text.
205. See supra notes 148-65 and accompanying text.
206. See supra notes 166-96 and accompanying text.
207. See Neb. Rev. Stat. § 57-1101 (Supp. 2012) (granting the power of eminent domain to pipeline companies except major oil pipelines, which must receive approval from either the Governor or must apply for application from Public Service Commission under procedure of Major Oil Pipeline Citing Act).
208. See Neb. Rev. Stat. § 57-1404 (Supp. 2012) (defining major oil pipelines as those exceeding six inches in diameter and transporting petroleum, petroleum components, products, or wastes, including crude oil or any fraction of crude oil within Nebraska;); see also id. §§ 57-1405, -1407 (prescribing the process for major oil pipelines to exercise eminent domain).
209. Id. § 57-1101.
pipeline's use of eminent domain is for public use under the Nebraska Constitution. In the likely event that landowners challenge the SCC statute of Nebraska, or any other jurisdiction, at some point in the future, the Supreme Court of Nebraska should adopt the standard enunciated in Texas Rice Land, which properly balances the rights of private landowners with broad ranging policy concerns such as economic development.

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