

V.

Defendant is an owner of the tract of land (the “Property”) which is the subject of this action. The Property is described in the documents which are attached to this Petition as Exhibit “C.” Blackfin brings this action to enforce its right to conduct surveys across the Property.

VI.

Blackfin has determined there is a public need to build and operate a pipeline to transport natural gas. The pipeline project will be located in Colorado, Austin, Waller, Harris, Montgomery, Liberty, Hardin and Jasper Counties, Texas. To determine the exact route and complete the design of the pipeline, Blackfin must conduct surveys and tests including, but not limited to, lineal surveys, archaeological surveys, and environmental inspections (“Surveys”). Blackfin cannot determine the exact route and complete the design of the pipeline project until the Surveys are completed.

VII.

Once a route is determined, Blackfin must acquire easements over private property. Blackfin cannot start building the pipeline until the necessary easements have been defined and located along the proposed route of the pipeline. Only after doing that can Blackfin complete the pipeline design and determine the exact acreage needed across the Property so Blackfin can offer just compensation for the easement over the Property.

VIII.

Blackfin needs immediate access of the lands across which the pipeline is planned to be routed for the purpose of making the Surveys including: the placement of stakes, line of sight clearing, geotechnical soil borings, environmental/archaeological and appraisal studies related to the routing of the Pipeline. An accurate legal description and plat are necessary for several reasons including: that during Blackfin’s negotiations with landowners for easement rights, they provide accurate descriptions of easement boundaries; they are to be attached as an exhibit to any documents recorded in the real property records; they allow Blackfin to obtain an appraisal report to determine the value of the landowner’s property and of the easements Blackfin seeks; and if in the event negotiations fail with one or more landowner, an accurate legal description and plat are necessary for Blackfin to send offer letters to the landowner(s) and to allow Blackfin to institute an eminent domain proceeding, if necessary.

Although § 181.004 of the Texas Utilities Code grants Blackfin the legal right to enter the Property and conduct Surveys, Blackfin has contacted or attempted to contact Defendant before entering the Property to seek Defendant’s voluntary agreement to allow Blackfin to enter the Property. As of the date of this filing, Blackfin has not been able to secure a grant of survey permission.

IX.

Unless Defendant is restrained from interfering with Blackfin’s right to go on to the Property, Blackfin will be unable to design and build the pipeline. The failure to timely build the

pipeline may result in Blackfin being unable to meet its obligations to deliver natural gas, thus subjecting Blackfin to potential liability and claims resulting from that failure. Blackfin's damages cannot be accurately measured as it would be impossible to measure the impact to Blackfin resulting from Defendant's interference with Blackfin's rights and the resulting failure to build the pipeline. Blackfin has no other remedy to obtain the information that the Surveys would provide. For those reasons, Blackfin will be irreparably harmed if Defendant continues to interfere with Blackfin's right to enter upon the Property to conduct the Surveys.

X.

This petition and application is verified by the affidavits attached as Exhibits "D" and "E."

XI.

Blackfin has a probable right of recovery in this matter as shown in the supporting brief below.

SUPPORTING BRIEF

In *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544 (Tex. App.—Houston [1st Dist.] 1982, no writ), the Appellate Court held that a TRO was proper to allow a pipeline company to enter upon a landowner's property to make a preliminary survey. The authority to enter upon land and make a preliminary survey was considered *ancillary* to the power of eminent domain. Additionally, in *Coastal Marine Serv. of Texas, Inc. v. City of Port Neches*, 11 S.W.3d 509, 514 (Tex. App.—Beaumont 2000, no pet.), the court held that a condemning authority has the right to seek a temporary injunction for access to a private landowner's tract for surveying purposes. See also *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 365 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (holding that the issuance of a temporary injunction for survey access preserves the *status quo* by recognizing the pipeline company's right to access and survey).

In the case of *Lewis v. Texas Power & Light Co.*, 276 S.W.2d 950 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.), a Temporary Injunction was issued to allow the TP&L Co. Engineers and Surveyors to go upon the 300 acre Lewis Farm to establish field notes for an easement right-of-way later to be condemned. The Court held that the statute giving power companies the right to enter upon, condemn and appropriate lands also granted authority to such companies to enter upon privately owned land for the purposes of making preliminary surveys with a view to later acquisition of easements rights for construction of its lines. Further, the Court in a good discussion of the law and equities pertaining to this matter held that the right of entry on private property in good faith for purposes of making preliminary survey and investigation with the view of condemnation is a necessary incident to the right to condemn.

The *Lewis* court stated:

".... the trial court no doubt weighed the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would arise from the granting or refusal of this temporary injunction, and found the equities to lie with Appellee (Power Company). There can be little if any doubt that Appellee under the facts shown in this record is entitled to

acquire easement rights over the Appellant’s land, either by voluntary conveyance or by condemnation. That being so, the injuries suffered by Appellant from the survey will be small compared with the injuries suffered by the Appellee and the public if Appellee were denied the right to proceed with its preliminary survey The continuing growth and development in recent years of the area it will serve through the contemplated transmission line are matters of common knowledge. It is the duty of the Appellee as a supplier of light and power to the public to make timely preparation to meet such increased demands on its facilities. It would be reprehensible of Appellee to wait until ‘brown-outs’ occur due to inadequate facilities before bestirring itself to expand and increase its plant and equipment to serve the public needs. In our opinion the trial court, after weighing the equities did not abuse its discretion in granting the temporary injunction.”

This rationale was followed by the Court in *Hicks v. Texas Municipal Power Agency*, 548 S.W.2d 949 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.). In *Hicks*, the condemning authority, an association of cities formed for the purpose of developing facilities to be used in generating and transmitting power, was seeking to enjoin certain landowners from interfering with their proposed survey of their property. The Court stated that even though the specific statutes granting the Appellee (Power Company) the right of eminent domain did not expressly grant the right to a preliminary survey prior to condemnation, its right to build necessarily implied the right to survey.

In *Puryear v. Red River Authority of Texas*, 383 S.W.2d 818 (Tex. Civ. App.—Amarillo 1964, writ ref’d n.r.e.), the Court held that the Authority, which was authorized by statute to make surveys and attend to other business of the Red River Authority of Texas (water conservation), was duly authorized to enter upon lands and conduct operations necessary in determining a feasible location for a dam site on a creek. The Court said that these operations were an “essential step” in determining the location of proposed dams, and that the term “survey” necessarily implied that the Authority could engage in these preliminary operations.

Further, the Courts in *Lewis* and *Puryear* stated that because the entries upon these private lands were authorized and did not constitute a “taking” under eminent domain law, no money deposit or payment to the landowner is required before entry upon the property.

PRAYER

WHEREFORE, PREMISES CONSIDERED, BLACKFIN prays as follows:

1. The Court issue a Temporary Restraining Order without notice to Defendant, restraining Defendant, Defendant’s agents, servants, employees or those in active concert with Defendant, or with actual knowledge of the Order, from taking any action to interfere with Blackfin, its agents, servants, employees, engineers, surveyors, and those persons hired or retained by them to perform those services, entering on the Property to conduct surveys, including all of the Surveys described in this Petition;
2. That Defendant be cited to appear for a Temporary Injunction Hearing, scheduled

for not less than three days from the date Defendant is served;

3. That, upon hearing, the Court enter a Temporary Injunction enjoining Defendant, Defendant's agents, servants, employees or those in active concert with Defendant, or with actual knowledge of this Court's Order, from taking any action to interfere with Blackfin, its agents, servants, employees, engineers, surveyors, and those persons hired or retained by them in the performance of surveys, including all of the Surveys described in this Petition, to determine the exact route and complete the design of the pipeline on the Property;
4. That upon final trial, a Permanent Injunction be entered enjoining Defendant and Defendant's agents, servants, employees, individuals in active concert with Defendant, and individuals with knowledge of this Court's Order from taking any action that would interfere with Blackfin, its agents, servants, employees, engineers, surveyors, and those persons hired or retained by them, entering on the Property for the purpose of conducting the Surveys and to determine the exact route and complete the design of the pipeline on the Property; and;
5. For such other and further relief, both special and general, at law and in equity, to which Blackfin may be justly entitled.

Respectfully submitted,

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By: /s/ John P. Baker

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