

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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Supreme Court of Appeals of West Virginia Sides with Landowners in Eminent Domain/Pipeline Decision

On November 15, 2016, the Supreme Court of Appeals of West Virginia in *Mountain Valley Pipeline, LLC v. McCurdy* (W. Va. No. 15-0919, Nov. 15, 2016), held that a private company may not enter private land for the purposes of surveying in preparation for an eminent domain action unless that company establishes that it is entitled to assert eminent domain over the private property.

Mountain Valley Pipeline retained surveyors to survey certain private property in Monroe County, West Virginia, over which it intended to build a natural gas pipeline to transport natural gas from Wetzel County, West Virginia, to Pittsylvania County, Virginia. Mountain Valley Pipeline intended to condemn the private property pursuant to West Virginia's eminent domain statute, which allows condemnation by a private company if the land is going to be used for a "public use," and claimed that the surveying work was necessary to prepare for the construction of the pipeline. The McCurdys, who owned some of the property, sought an injunction to prevent the surveyors from entering their land, which the Circuit Court of Monroe County, West Virginia, granted.

Writing for the West Virginia Supreme Court, Justice Robin Davis found that an individual may not enter onto private property to survey for the purpose of eminent domain unless the condemned property was going to be put to a "public use" as defined by West Virginia law. As used in the eminent domain context, West Virginia law requires that the "public use" be "use" by residents and entities inside West Virginia's boundaries. As Mountain Valley Pipeline had not presented any evidence indicating that any residents or entities (other than itself and associated affiliates) would benefit from the construction of the pipeline to be constructed, representatives of Mountain Valley Pipeline were not permitted to enter the McCurdys' land for the purpose of surveying that land in preparation for condemnation.

Justice Allen H. Loughry II agreed with the majority in a concurring opinion and indicated that, although Mountain Valley "promised the possible opportunity for West Virginia citizens to have access to potential tap-in points," absent a "fixed and definite right to the gas in the Pipeline[,] the proposed pipeline was not for "public use." Justice Loughry clearly indicated, however, that his opinion would change in the event that West Virginia residents were given the opportunity to tap into and purchase gas from the pipeline.

Finally, Chief Justice Menis E. Ketchum II issued a dissenting opinion indicating that the majority's constrained definition of "public use" as only referring to West Virginia residents failed to consider that the pipeline also actually benefitted West Virginia landowners, from whose property the gas travelling through the pipeline was extracted in the northern part of the state. Specifically, Chief Justice Ketchum

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reasoned that the proposed pipeline would offer numerous benefits to the general public of West Virginia, including but not limited to: (a) royalties paid to landowners for gas extracted from their property; (b) enhancing the West Virginia economy which is largely dependent on gas production by creating jobs for producers and residents of the state; and (c) the ability for West Virginia to realize large amounts of money by way of severance tax on the natural gas extracted from West Virginia properties. Chief Justice Ketchum concluded that although he personally does not believe that private companies should be permitted to take private property for public use, it is clear the West Virginia Legislature, through W. Va. Code §§ 54-1-1, 2(a)(3) and 3, has provided for such a taking in Mountain Valley Pipeline's case.

It is important to note that in the Opinion, Justice Robin Davis recognized that although the interpretation of state law favored the McCurdys in this case, Mountain Valley Pipeline had recourse to use Federal Eminent Domain laws to achieve its goals related to the pipeline as soon as its application for a Federal Energy Regulatory Commission (FERC) Certificate of Public Convenience and Necessity is approved and delivered to Mountain Valley Pipeline by the Commission.

If you would like additional information about this important development, please contact Mychal S. Schulz at (681) 265-1363 or mschulz@babstcalland.com or W. Brian Nickerson at (681) 205-8957 or bnickerson@babstcalland.com.