

15-0919

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

BRYAN C. MCCURDY and DORIS W. MCCURDY,  
Plaintiffs,

v.

Case No. 15-C-19

MOUNTAIN VALLEY PIPELINE, LLC,  
Defendant.

FILED IN MONROE COUNTY  
CIRCUIT COURT  
2015 AUG 20 PM 1:09

ORDER GRANTING PERMANENT INJUNCTION

On August 5, 2015, the Parties appeared before the Court, by Counsel, and presented evidence and argument on the motion currently pending before the Court. For the following reasons, and in accordance with its ruling from the bench at the conclusion of the August 5, 2015 proceeding, the Court hereby **GRANTS** Plaintiffs' Renewed Motion for Expedited Hearing, for Preliminary and Permanent Injunction, For Declaratory Judgment, and For Consolidation of Hearing on Preliminary Injunction With Trial on the Merits.

**FINDINGS OF FACT**

Having heard the testimony of the witnesses presented, reviewed the exhibits entered into evidence, and considered the credibility of the witnesses, the Court hereby **FINDS** the following facts:

1. Defendant Mountain Valley Pipeline, LLC, is a Joint Venture between affiliates of EQT Corporation, NextEra Energy, Inc., WGL Holdings, Inc., Vega Energy Partners, Ltd., EQT Midstream Partners, LP, and NextEra US Gas Assets, LLC. Plaintiffs' Ex. 6.

2. Defendant is seeking federal approval to construct a 294.1-mile-long natural gas pipeline to transport gas from northern West Virginia to southern Virginia known as the Mountain Valley Pipeline (hereinafter, "the Pipeline"). Id.

3. Although Defendant has begun the “pre-filing” process with the Federal Energy Regulatory Commission under the Natural Gas Act, it has not yet filed its formal application for a Certificate of Public Convenience and Necessity.

4. Defendant’s pipeline is not regulated as a utility by any West Virginia agency.

5. Plaintiffs Bryan and Doris McCurdy own approximately 185 acres in Monroe County, West Virginia, near Union (hereinafter, “the Property”). The Property consists of three tracts. Plaintiffs acquired the first of the three tracts, on which their residence is located, in 1984. In 1986, Plaintiffs acquired the second tract. They acquired the third tract in 1996. Plaintiffs have lived on the Property since 1984.

6. Plaintiffs use propane to heat their home, for cooking, and to power an emergency back-up generator. Natural gas is not available in their area because of economic reasons based on the low population density of the area. If presented with the opportunity, Plaintiffs would convert their propane appliances to use natural gas.

7. Because of safety issues involving high-pressure pipelines like Defendant’s proposed Pipeline, Plaintiffs cannot tap directly into the Pipeline on their property. Rather, a local distribution company would have to gain permission from Defendant to access the gas in the Pipeline and then provide the gas to Plaintiffs.

8. In January 2015, Plaintiffs received a letter from an agent of Defendant, through which they learned that their Property is along one of the proposed routes of the pipeline.

9. The proposed route of the Pipeline would cross all three of Plaintiffs’ tracts, coming quite near to their barn and their residence. It would also cross two areas that Plaintiffs had identified as potential home sites because of their terrific mountain views, as well as two fields that Plaintiffs use to grow hay for sale.

10. Plaintiffs' Property lies on the Pipeline's Proposed Route "Alt. 110", which enters Monroe County, West Virginia, near Talcott, WV, and crosses into Virginia near Waiteville, WV. Plaintiffs' Ex. 5.

11. In early February 2015, Defendant, through its agent, telephoned Plaintiffs to request access to the Property to conduct surveys related to the construction of the Pipeline. Defendant's agent did not provide Plaintiffs with details about the scope or extent of the surveys, but did agree to provide maps of the Property to Plaintiffs with an overlay of the Pipeline route. Plaintiffs' Exs. 1 & 2. Plaintiffs declined Defendant's request to enter the Property.

12. Plaintiffs declined to allow the survey because they greatly value their privacy and the quiet and exclusive enjoyment of their home and the Property.

13. The Plaintiffs testified that if Defendant's surveyors were to trample the hay growing in the survey corridor, the economic value of Plaintiffs' second hay harvest of 2015 would be reduced or eliminated.

14. The proposed surveys would further burden Plaintiffs because, although the Defendant's surveyors offered to work with the Plaintiffs' schedules, the Plaintiffs would nonetheless have to take time out of their schedules to accompany the surveying crews during the course of the surveys.

15. On February 24, 2015, Defendant sent a letter to Plaintiffs threatening litigation against them if they did not acquiesce to Defendant's request for access to the Property to conduct the surveys by March 9, 2015. Plaintiffs' Ex. 3.

16. In its February 24, 2015 letter, Defendant asserted that it had the right to enter the Property under Chapter 54 of the West Virginia Code. Id.

17. At the August 5, 2015 trial in this action, Defendant presented the testimony of its Senior Vice President for Engineering and Construction, Shawn Posey.

18. The primary purpose of the Pipeline is to transport natural gas from northern West Virginia to a “pool” operated by Transco in Pittsylvania County, Virginia.

19. Although local distribution companies can submit “tap requests” to Defendant to connect to the Pipeline to serve residential and business consumers, Defendant retains the right to refuse such requests. Mr. Posey testified about that right to refuse, and such a right to refuse is consistent with federal regulations governing natural gas pipelines. 18 C.F.R. § 284.7(f).

20. At the time of trial in this action, Defendant had no agreements to provide natural gas from the Pipeline to local distribution companies in West Virginia. In other words, as currently planned, the Pipeline does not provide interconnects for gas service to residential or business customers in West Virginia.

21. Mr. Posey testified that he believed that Defendant’s “business development group” was in discussions with local distribution companies in West Virginia, but could not identify the parameters by which Defendant would evaluate any “tap requests” from those local distribution companies.

22. Mr. Posey further testified that it was his belief that Defendant would at some undefined point in the future provide connections to local distribution companies in West Virginia, but he also acknowledged that it was possible that no such connections would ever be constructed.

23. It is possible that no West Virginians will ever have access to gas from the Pipeline.

24. As currently designed, the Pipeline only has two interconnections for the delivery of natural gas: one at the Transco pool in Pittsylvania County, Virginia, and one with Columbia

Gas's WB pipeline in West Virginia, approximately 77 miles from the starting point of the Pipeline.

25. Columbia Gas's WB pipeline is a natural gas transportation pipeline like Defendant's proposed Pipeline. Although Mr. Posey testified that some local distribution companies in West Virginia may interconnect with the WB pipeline, the locations of those interconnections and the number, if any, of residential or business customers served by such interconnections are unclear on this evidentiary record. Accordingly, the Court cannot find that any West Virginia consumers would be served with gas that would flow through the Pipeline via the WB pipeline.

26. Although Defendant will not itself own the gas transported in the Pipeline, Mr. Posey testified that eighty-five (85) to ninety-five (95) percent of the capacity of the Pipeline is committed to gas owned by corporate affiliates of Defendant, leaving only fifteen percent of the capacity of the pipeline available to shippers not affiliated with Defendant.

27. Defendant must survey the properties in the Pipeline's proposed path for the presence of endangered species such as the Indiana bat in connection with its Federal Energy Regulatory Commission permit. Indiana bat surveys must be completed during certain times of year, and the survey window for Indiana bats in 2015 closes on August 15, 2015. Defendant has a significant number of Indiana bat surveys to complete. Based on Mr. Posey's testimony, those surveys would not be complete by August 15, 2015, even if Defendant gained access to Plaintiffs' Property prior to that date. Defendant, therefore, will have to complete Indiana bat surveys in 2016 or later.

### **CONCLUSIONS OF LAW**

1. Chapter 54 of the West Virginia Code governs eminent domain. W. Va. Code § 54-1-3 provides, in relevant part, that:

Any incorporated company or body politic, invested with the power of eminent domain under this chapter, by its officers, servants and agents may enter upon lands for the purpose of examining the same, surveying and laying out the lands, ways and easements which it desires to appropriate, provided no injury be done to the owner or possessor of the land . . . .

2. Chapter 54 of the West Virginia Code must be strictly construed because West Virginia's eminent domain statutes operate in derogation of private property rights protected under the West Virginia Constitution. State ex rel. Firestone Tire & Rubber Co. v. Ritchie, 153 W. Va. 132, 138 (1969); State, by State Road Commission v. Bouchelle, 137 W. Va. 572, 576 (1952); City of Mullens v. Union Power Co., 122 W. Va. 179, 7 S.E.2d 870, 871 (1940); Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262, 10 S.E. 405, 407 (1889); Adams v. Trustees of Town of Clarksburg, 23 W. Va. 203 (1883).

3. To determine whether W. Va. Code § 54-1-3 authorizes a particular company to enter private property against the will of the property owner, the Court must first determine whether that particular company is "invested with the power of eminent domain under [Chapter 54]." Id. See also Waynesburg Southern R. Co. v. Lemley, 154 W. Va. 728, 732 (1970) (holding that to avail itself of powers granted by Chapter 54, an entity must show that it is authorized to do so).

4. West Virginia Code § 54-1-1 invests the power of eminent domain in governmental bodies and "every corporation heretofore or hereafter organized under the laws of, or authorized to transact business in, the State, for any purpose of internal improvement for which private property may be taken or damaged for public use as authorized in section two of this article."

(Emphasis added.)

5. The West Virginia Supreme Court of Appeals has held that a pipeline for transporting natural gas is an "internal improvement" when it is "for the public use." Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557, 79 S.E. 3, 7 (1913).

6. West Virginia Code § 54-1-2(a)(3) provides that eminent domain may be used for the construction, maintenance, and operation of pipelines transporting natural gas “when for public use.”

7. At every turn in the analysis, the West Virginia Legislature has conditioned the vestment of eminent domain on the existence of “public use.” Therefore, contrary to the Defendant’s argument, the issue of whether the pipeline will be for a public use is not premature, and is a prerequisite to exercise of the power of eminent domain.

8. Accordingly, an entity is only “invested with eminent domain” for purposes of W. Va. Code § 54-1-3, and, hence, authorized to enter private property against the will of the property owner, when that entity’s proposed project is “for public use.”

9. The State of West Virginia can only exercise the right of eminent domain, or authorize the exercise of that right, for the use and benefit of West Virginians. That is, it cannot be exercised for the sole purpose of serving a public use in another state. See, e.g., Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. App. 1967); Lewis on Eminent Domain § 310.

10. Accordingly, the Pipeline cannot be for public use unless it is for public use by West Virginians.

11. In Varner v. Martin, the West Virginia Supreme Court of Appeals set out three elements required for public use in West Virginia:

First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; and third, it must be impossible, or very difficult at least, to secure the

same public uses and purposes otherwise than by authorizing the condemnation of private property.

21 W. Va. 534, 1883 WL 3202 at \*15 (1883).

12. Defendant's proposed Pipeline is not for the public use because it fails the first element in the Varner test. Thus, the Court does not address the second or third elements of that test.

13. The West Virginia Supreme Court of Appeals has made clear what is required for natural gas pipelines to be for public use under Varner.

14. In Charleston Natural Gas Co. v. Low, the Court held that the proposed pipeline at issue was for public use because the "purpose to which the property is to be devoted is supplying gas to the city of Charleston, all of whose citizens have a fixed and beneficial use, clearly shown to be a public use." 52 W. Va. 662, 44 S.E. 410, 414 (1901).

15. In Carnegie Natural Gas Co. v. Swiger, the West Virginia Supreme Court of Appeals, in considering whether a gas pipeline was for public use, stated that "[p]ipe line companies organize for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and the reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities." 72 W. Va. 557, 79 S.E. 3, 9 (1913).

16. When the power of eminent domain is being exercised by a private corporation, "there is great danger" that, "unless carefully guarded," private property may be taken for private use and gain. Varner, 1883 WL 3202 at \*15. See also Gauley & S.R. Co. v. Vencill, 73 W. Va. 650, 80 S.E. 1103, 1106 (1914) (noting the importance of the "constitutional inhibition against the taking of private property for purposes purely private"). Cf. W. Va. Code § 54-1-2(a)(11) (prohibiting "public use" from being construed to mean "primarily for private economic development).

17. Courts in this State must carefully review claims of public use. Benwood Iron Works, 8 S.E. 453, 467 (W. Va. 1888) ("The mere declaration in a petition that the property is to be

appropriated to public use does not make it so” because corporations “must not, for their own gain and profit, be permitted to take private property for private use.”); Charleston Urban Renewal Auth. v. Courtland Co., 203 W. Va. 528, 536 (1998) (holding that the question whether a proposed use of property is public or private is a judicial question).

18. The Pipeline is not for public use under West Virginia law.

19. On the basis of the entirety of the evidence, the Defendants have failed to carry their burden of proving that the proposed pipeline is for a public use, and indeed the Plaintiffs have proven that the proposed pipeline is not for the public use.

20. The general public does not have a fixed and definite right to the gas in the Pipeline.

21. There are no current agreements or commitments to provide any interconnects in West Virginia to local distribution companies to provide gas service in West Virginia to residential or business customers.

22. Moreover, access to gas in the Pipeline is not independent of the Defendant’s will.

23. According to the testimony of Mr. Posey, and under applicable federal regulations, Defendant retains the right to decline requests to install taps into the Pipeline. 18 C.F.R. § 284.7(f).

24. Moreover, the Pipeline fails the test under Swiger because it does not provide gas service to customers along its entire length.

25. Even if some West Virginia consumer were to burn gas that travelled through the Pipeline as a result of the interconnect with the WB line, a fact that the evidentiary record is insufficient in the Court’s view to support, that would not be enough to satisfy the Swiger test because customers along the majority of the length of the Pipeline in West Virginia do not have access to gas service from the Pipeline.

26. The Pipeline cannot be considered “for public use” on the basis of its use by gas shippers. Gas shippers do not constitute the general public of West Virginia, as required by Varner. Moreover, nearly all of the gas in the Pipeline will belong to affiliates of MVP, making the danger great that Defendant’s project is solely for private use and private gain, the use of eminent domain for which is prohibited under the statutes and the West Virginia Constitution.

27. “A declaratory judgment action is a proper procedural means for adjudicating the legal rights of parties to an existing controversy that involves the construction and application of a statute.” City of Bridgeport v. Matheny, 223 W. Va. 445, 450 (2009) (citing W. Va. Code §§ 55-13-1 & 55-13-2). Here, there is an extant controversy over the construction and application of W. Va. Code § 54-1-3.

28. This declaratory judgment action is justiciable because it involves the claim of a legal right—the right to exclude others from private property—claimed by the Plaintiffs and denied by Defendant. Trail v. Hawley, 163 W. Va. 626, 628 (1979).

29. The four factors “a circuit court should consider . . . in ascertaining whether a declaratory judgment action should be heard” are:

- (1) whether the claim involves uncertain and contingent events that may not occur at all;
- (2) whether the claim is dependent upon the facts;<sup>1</sup>
- (3) whether there is adverseness among the parties; and
- (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest.

Hustead on Behalf of Adkins v. Ashland Oil, Inc., 197 W. Va. 55, 62 (1996) (internal footnote omitted).

30. Those factors are met here. First, no uncertain or contingent events are necessary to support the claim—Defendant sought access to Plaintiffs’ private property and threatened to sue to obtain that access. Second, the factual issues are not complicated and the Court can resolve

them under W. Va. Code § 55-13-9. Third, there can be no question as to the irreconcilable conflict between the parties. Fourth, a declaration in this case will conclusively resolve the controversy over whether Defendants can enter Plaintiffs' property under W. Va. Code § 54-1-3.

31. “[T]he power to grant . . . a permanent injunction, whether preventative or mandatory in character, ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case[.]” Weatherholt v. Weatherholt, \_\_\_ W. Va. \_\_\_, 769 S.E.2d 872, 876 (2015) (quoting Syl. pt. 11, Stuart v. Realty Corp., 141 W. Va. 627, 92 S.E. 2d 891 (1956)).

32. Here, Plaintiffs would suffer irreparable harm if Defendant were permitted to enter the Property against their will. The statute, as the Court has construed it, does not authorize Defendant to conduct its proposed surveys without Plaintiffs' consent until such time as it is able to establish that it has the right of eminent domain by virtue of showing a public use of the pipeline. Entry without permission would constitute a trespass and would irreparably infringe on Plaintiffs right to exclude others from their private property and their right to the quiet and exclusive enjoyment of their property. Plaintiffs would have to take time out of their schedules to accompany Defendant's survey crews. Moreover, the survey could jeopardize Plaintiffs' intended second hay harvest in 2015.

33. Because the Court is granting Plaintiffs' motion to consolidate the preliminary injunction hearing with a trial on the merits, Plaintiffs have more than a likelihood of success on the merits—they have succeeded on the merits.

34. Defendant will suffer minimal harm as a result of the injunction. Defendant is already behind schedule in conducting its surveys and has admitted that it will have to wait until next summer in all events to complete certain endangered species studies. Moreover, Defendant may

ultimately be able to conduct the surveys if it were to obtain a certificate from the Federal Energy Regulatory Commission and the attendant right of federal eminent domain. McCurdy v. Mountain Valley Pipeline, LLC, Civ. No. 1:15-cv-3833, 2015 WL 4497407 at \*4 (S.D. W. Va. July 23, 2015).

35. The public interest favors an injunction here to prevent a private business from entering the private property of West Virginians under a statute that grants it no such right.

36. Accordingly, the facts and circumstances of this case favor the issuance of an injunction.

### CONCLUSION

Based on the foregoing, the Court hereby **GRANTS** Plaintiffs' Renewed Motion for Expedited Hearing, For Declaratory Judgment, For Preliminary and Permanent Injunction, and For Consolidation of Hearing on Preliminary Injunction With Trial on the Merits. The Court hereby **DECLARES** that W. Va. Code § 54-1-3 does not authorize Defendant or its representatives to enter Plaintiffs' property without Plaintiffs' permission because Defendant is not vested with eminent domain by Chapter 54 of the West Virginia Code because its proposed pipeline is not for public use. Moreover, the Court hereby **ENJOINS** Defendant from entering the Property under color of Chapter 54 of the West Virginia Code without the express permission of Plaintiffs.

The objection of any party aggrieved by the entry of this Order is hereby noted and preserved.

The Clerk of the Court is **DIRECTED** to forward a certified copy of this Order to all counsel of record. This is a final order and the Circuit Clerk is directed to remove this case from the active docket of the Court.

**ENTERED:** August 19, 2015.

  

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**ROBERT A. IRONS, CIRCUIT JUDGE**

A TRUE COPY  
ATTEST  
  
Clerk, Circuit Court  
Monroe Co., W.Va.