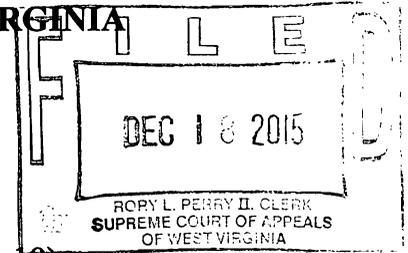


**IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 15-0919

Appeal from a Final Order of the
Circuit Court of Monroe County (Case No. 15-C-19)



MOUNTAIN VALLEY PIPELINE, LLC,

Defendant/Petitioner,

v.

BRIAN C. MCCURDY and
DORIS W. MCCURDY,

Plaintiffs/Respondents.

PETITIONER'S BRIEF

Charles S. Piccirillo
(W. Va. Bar No. 2902)
Counsel of Record
K. Brian Adkins
(W. Va. Bar No. 9621)
SHAFFER & SHAFFER, PLLC
P.O. Box 38
Madison, WV 25130-0038
(304) 369-0511
cpiccirillo@shafferlaw.net
badkins@shafferlaw.net

Counsel for Petitioner

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I. ASSIGNMENTS OF ERROR

1. The circuit court erred in ruling that the proposed pipeline is not for a public use and erred in denying entry for surveying.

2. The circuit court erred in ruling that entry for surveying requires a finding of public use.

II. STATEMENT OF THE CASE

Defendant/Petitioner, Mountain Valley Pipeline, LLC (“MVP”), is seeking approval from the Federal Energy Regulatory Commission (“FERC”) to construct and operate a 300-mile natural gas transmission line from Wetzel County, West Virginia, to Pittsylvania County, Virginia. (Appx. 301.) The estimated cost to construct the pipeline is approximately \$3 billion. On October 27, 2014, MVP submitted a request to FERC to initiate the pre-filing process that will lead to an application for issuance of a Certificate of Public Convenience and Necessity for the pipeline. (Appx. 19.) MVP has since filed its application for the certificate. FERC Docket No. CP16-10.

Plaintiffs/Respondents, Bryan and Doris McCurdy (the “McCurdys”), own 185 acres of property in Monroe County, along the proposed route for the pipeline. (Appx. 18, 179.) To obtain an unconditional FERC certificate, MVP must complete and submit surveys and environmental studies for the property in the proposed route. The purpose of this work is to identify and address routing issues so that a final, workable location may be approved by FERC. (Appx. 298.)

In February 2015, MVP’s agent telephoned the McCurdys and requested access to their property to conduct the surveys, but the McCurdys declined to grant

access. (Appx. 18, 183.) On February 24, 2015, MVP sent a letter to the McCurdys notifying them of MVP's intention to take legal action to obtain access to the property pursuant to West Virginia Code § 54-1-3. (Appx. 298.) The statute provides:

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; but no company or body politic, under the authority of this section, shall throw open fences or inclosures on any land, or construct its works through or upon the same, or in anywise injure the property of the owner or possessor, without his consent, until it shall have obtained the right so to do in the manner provided in this chapter.

W. Va. Code § 54-1-3.

On March 18, 2015, the McCurdys filed suit against MVP in the Circuit Court of Monroe County seeking a declaratory judgment that MVP has no right to enter their property for surveying. On March 27, 2015, MVP removed the suit to federal court and filed an answer. Ultimately, the federal court determined that the amount in controversy was less than \$75,000 and that it lacked subject matter jurisdiction. The federal court therefore remanded the case to the circuit court for further proceedings.

On July 24, 2015, the McCurdys filed a Renewed Motion for Expedited Hearing for Declaratory Judgment, for Preliminary and Permanent Injunction, and for Consolidation of the Hearing on Preliminary Injunction with Trial on the Merits. MVP filed a response to the motion, and the McCurdys filed a reply.

An evidentiary hearing on the McCurdys' motion was held on August 5, 2015. (Appx. 154.) At the hearing, Ms. McCurdy testified that she and her husband own three tracts of land, which they purchased in 1984, 1986, and 1996. (Appx. 179.) Although Ms. McCurdy said she does not believe that a survey will cause her or her property any irreparable harm, she expressed the opinion that an entry "would not be in the public use as stated in the statute." (Appx. 180.)

Mr. McCurdy testified that he has placed no trespassing signs on the property. (Appx. 182.) He further testified that a survey may affect the sale of hay if the hay were trampled or damaged. (Appx. 186.) He also testified that the survey could affect turkey polt and butterfly migration on the property. (Appx. 186-87.) Mr. McCurdy said, "I feel that I have the right to the exclusive and quiet enjoyment of my property." (Appx. 182.) He admitted, however, that he does not have an absolute right to exclude everyone from his property in all circumstances. (Appx. 199.)

In addition to this testimony, the McCurdys introduced some of MVP's filings with FERC as to the purpose and need for the pipeline. According to the filings, the purpose of the pipeline is to deliver natural gas from the Marcellus and Utica production areas in West Virginia to the Transco 165 compressor station in Pittsylvania County, Virginia. (Appx. 301.) The pipeline will "provide timely, cost-effective access to the growing demand for natural gas for use by local distribution companies, industrial users and power generation in the Mid-Atlantic and southeastern markets, as well as potential markets in the Appalachian region." (*Id.*) In addition to supplying gas to the Mid-Atlantic and Southeast, "potential delivery points along the Proposed Route could

supply markets in West Virginia and Virginia that are either underserved by natural gas or would be developed as a result of increased natural gas availability.” (*Id.*) The filings further explain:

MVP will bring clean-burning, domestically-produced natural gas supplies from the prolific Marcellus and Utica shale regions and supply it to the demand markets in order to support the growing demand for clean-burning natural gas, provide increased supply diversity, and improve supply reliability to these growing markets. MVP may also support additional uses of natural gas in south central West Virginia and southwest Virginia by providing an open access pipeline that can facilitate interconnects and subsequent economic development associated with having access to affordable natural gas supplies, as these areas currently have limited interstate pipeline capacity.

(Appx. 302.)

At the hearing, MVP called Shawn Posey, project manager for MVP. Mr. Posey testified that 90% of landowners along the route in West Virginia have allowed access to their property for surveying. (Appx. 222.) The McCurdys are among those landowners who did not.

A primary purpose of the pipeline is to move gas from the producing regions in West Virginia to the markets in the Mid-Atlantic and Southeast. (Appx. 301.) Currently there is no direct north-south route available to West Virginia producers and shippers of gas. (Appx. 239.) Almost all gas transported on the pipeline will be produced in West Virginia. (Appx. 226-27.) The pipeline will provide needed capacity for additional development of natural gas in West Virginia. (Appx. 239.)

MVP will not own the gas that is transported on the pipeline. (Appx. 224.)

It is simply a pipeline company. It must provide access to shippers in a nondiscriminatory manner and subject to FERC regulations. (Appx. 223.)

The pipeline currently has two main delivery points. One in the Transco pipeline in Pittsylvania County, Virginia. (Appx. 227.) The Transco pipeline serves the entire East Coast. (Appx. 225-26.) The other main delivery point will be the Columbia WB pipeline near Charleston. (Appx. 227.) The WB pipeline runs through West Virginia and connects with local distribution companies in West Virginia. (Appx. 227-28, 239-40, 259.) As a result, it will be possible for a shipper on the MVP pipeline to sell gas to a local distribution company served by the WB line. (Appx. 259.) In addition, the pipeline has committed to deliver gas directly to a local distribution company, Roanoke Gas Company, in Virginia. (Appx. 247-48, 256.)

The pipeline may also deliver gas directly to local distribution companies in West Virginia. Mr. Posey testified that this business “will develop over time.” (Appx. 228.) He said that MVP “fully expect[s] usage to develop in West Virginia.” (Appx. 231.) MVP has already reached an agreement to provide gas to a local distribution company in Virginia. (Appx. 247-48.) Although there is currently no agreement to provide gas directly to local distribution companies in West Virginia, negotiations are ongoing. (Appx. 248, 258-59.)

There is no absolute right for local distribution companies or consumers along the route to access the pipeline. (Appx. 223, 256-57, 261-62.) MVP has the right to reject such “tap” requests depending on the circumstances. (Appx. 262.) From a

safety standpoint, it is not advisable to have individual taps. (Appx. 257.) For this reason, access is provided to local distribution companies as opposed to individual consumers. (Appx. 257-58.)

The survey work on the McCurdys' property will take four or five days to complete. (Appx. 243.) The work includes surveying 150 feet on either side of the center line of the proposed route, looking for endangered species, and making a cultural survey. (Appx. 241-42.) Mr. Posey testified that the McCurdys' property will not be damaged by the surveying. (Appx. 244-45.) No trucks or large equipment will be used – just people on foot with some shovels. (Appx. 247.)

FERC can issue a conditional certificate that is contingent upon surveying at a later time. (Appx. 246.) However, if the property is not surveyed first, MVP may encounter conditions requiring significant route adjustments. (*Id.*) Because of the steep terrain, a rerouting around just one property may not be feasible. Rather, MVP may need to reroute to a different ridge. (Appx. 246-47.) This would affect not only the objecting landowner, but other landowners along the rerouted section. (*Id.*)

On August 19, 2015, the circuit court entered an Order Granting Permanent Injunction. The circuit court held that an entity may enter property for surveying under West Virginia Code § 54-1-3 only where the entity's proposed project is for a public use. (Appx. 7.) The circuit court further concluded that the general public does not have a "fixed and definite" right to the gas in the pipeline, and therefore, it is not for public use under West Virginia law. (Appx. 9.) In the order, the circuit court declared that West

Virginia Code § 54-1-3 does not authorize MVP to enter the McCurdys' property without their permission and enjoined MVP from entering the property. (Appx. 12.)

On September 18, 2015, MVP filed a timely notice of appeal from the final order of the circuit court.

III. SUMMARY OF ARGUMENT

In order for MVP to have a right of entry under § 54-1-3, the circuit court held that MVP must prove that the pipeline will be for a public use. (Appx. 7.) Under the circuit court's view, a pipeline is not for a public use unless it delivers gas to West Virginia consumers "along its entire length." (Appx. 9). It is not enough that the pipeline allows shippers and producers in West Virginia to develop and market their gas. (Appx. 10.) Rather, the gas must be for the "fixed and definite" use of West Virginia consumers along the pipeline. (Appx. 8-9).

As MVP shows below, the circuit court's test does not represent the current understanding of public use in West Virginia or other states. An interstate pipeline that facilitates the production and transportation of gas from this state is a public use, even if the gas is not delivered to consumers in this state.

Moreover, the evidence shows that this pipeline does, in fact, have the potential to serve consumers in West Virginia. First, MVP may reach agreements with local distribution companies for access to the pipeline. (Appx. 227-28, 231, 248, 258-59.) While MVP does not currently have any agreements with local distribution companies in West Virginia, it does have an agreement with a local distribution company in Virginia. (Appx. 247-48.) Second, the MVP pipeline will deliver gas to the WB

pipeline. (Appx. 227, 259.) As a result, shippers in the MVP pipeline may sell to local distribution companies served by the WB pipeline. (Appx. 227-28, 239-40, 259.) Thus, consumers in West Virginia may indirectly receive gas from the MVP pipeline. (*Id.*)

Finally, MVP is not seeking authority from the Court to construct this pipeline. FERC will decide whether the pipeline should be built, and FERC will not approve the pipeline unless it serves a “public convenience and necessity.” 15 U.S.C. § 717f(c). The precise question before the Court is whether MVP can conduct surveys of the proposed route. Under West Virginia Code § 54-1-3, internal improvement companies like MVP have the right to conduct surveys for potential projects, and it is universally recognized that such surveys do not take or damage property. Therefore, to uphold MVP’s right of entry, the Court does not have to reach the question of whether the pipeline will be for a public use, although this pipeline surely will be.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As this Court has never addressed the question of whether an interstate pipeline company has the right of entry for surveying under West Virginia Code § 54-1-3, and as the circuit court applied an outdated line of cases to determine a public use, the Court should permit oral argument under Rule 20 to fully explore the fundamentally important issues in this case.

V. ARGUMENT

A. STANDARD OF REVIEW

Where the issue on appeal from the circuit court is a question of law or involves the interpretation of a statute, this Court applies a *de novo* standard of review. *Feliciano v. McClung*, 210 W. Va. 162, 164, 556 S.E.2d 807, 809 (2001). And where ostensible findings of fact involve applying the law or making legal judgments that exceed ordinary factual determinations, they are likewise subject to *de novo* review. *Cole v. Fairchild*, 198 W. Va. 736, 741, 482 S.E.2d 913, 918 (1996) (citing *Appalachian Power Co. v. State Tax Dept. of W. Va.*, 195 W. Va. 573, 582 n.5, 466 S.E.2d 424, 433 n.5 (1995)). Moreover, when this Court is presented with an interrelationship between factual and legal conclusions, the Court's review is "plenary." *Id.* In other words, "mixed questions of law and fact, like pure questions of law . . . are most often reviewed *de novo*." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 213, 470 S.E.2d 162, 167 (1996) (quoting *Appalachian Power*, 195 W. Va. at 582 n.5, 466 S.E.2d at 433 n.5).

The burden is on the landowner to prove that the project is not for a public use. *Waynesburg S. R. Co. v. Lemley*, 154 W. Va. 728, 735, 178 S.E.2d 833, 837 (1970); *Pittsburgh & W. Va. Gas Co. v. Cutright*, 83 W. Va. 42, 97 S.E. 686, 688 (1918). In *Waynesburg S. R. Co.*, the railroad company was held to have a *prima facie* right to exercise the power of eminent domain under the applicable statutes. 154 W. Va. at 734-35, 178 S.E.2d at 837. Therefore, the burden was on the landowner to prove otherwise. *Id.* The McCurdys admitted on the record that they have the burden of proof on this

issue. (Appx. 284.) Nevertheless, the circuit court erroneously placed the burden of proof on MVP to prove public use. (Appx. 9.)

B. THE PIPELINE IS FOR A PUBLIC USE
(ASSIGNMENT OF ERROR 1)

1. *The Pipeline Will Be a Public Convenience and Necessity*

The proposed pipeline plainly satisfies any requirement that it be for a public use. The FERC filings relied upon by the McCurdys explain that the proposed pipeline will “provide timely, cost-effective access to the growing demand for natural gas for use by local distribution companies, industrial users and power generation in the Mid-Atlantic and southeastern markets, as well as potential markets in the Appalachian region.” (Appx. 301.) The proposed pipeline will help move gas from producing regions in West Virginia and other states to markets in the East. (*Id.*) Thus, the pipeline will benefit both producers and consumers of natural gas.

The proposed pipeline will be an open access pipeline, meaning that gas shippers will have access to the pipeline in an open and nondiscriminatory fashion under FERC regulations. (Appx. 223.) This will benefit mineral owners and producers of gas in West Virginia. (Appx. 239.) In fact, 95% of the gas being shipped will be produced in West Virginia. (Appx. 227.) Counsel for the McCurdys acknowledged in comments to FERC that the pipeline “allow[s] for the production of 2.0 billion cubic feet of gas per day that would not otherwise have a direct route to market” and that “[w]ithout the pipeline to move the gas from the production areas, the drilling would not likely be

economical and would not occur.” Cmts. of Appalachian Mountain Advocates, et al., FERC Docket No. PF15-3, entry 2015617-5044, at 23.

Additionally, some of the gas being transported through the pipeline will ultimately be used in West Virginia in two ways. First, gas from the pipeline is delivered to Columbia’s WB pipeline, and gas from the WB pipeline is delivered to local distribution companies in West Virginia. (Appx. 227-28, 239-40, 259.) Second, while MVP does not currently have any agreements to deliver gas directly to local distribution companies in West Virginia, it is likely that there will be such agreements in the future. (Appx. 227-28, 231, 247-48, 258-59.)

This Court has noted that, in cases dealing with gas and power lines, “without exception, we have found a public use present.” *Handley v. Cook*, 162 W. Va. 629, 632, 252 S.E.2d 147, 148 (1979). “[C]ondemnations of rights-of-way to provide energy have consistently been considered by this Court as serving a public use.” *Id.* at 632, 252 S.E.2d at 149. “[I]t is the nature of the use rather than the number of persons served which is the paramount consideration.” *Id.* at 633, 252 S.E.2d at 149; *see Waynesburg S. R. Co.*, 154 W. Va. at 736, 178 S.E.2d at 837-38 (“It has been held and it continues to be a sound proposition of the law that whether a use is public or private is to be determined by the character of such use and not by the number of persons who avail themselves of the use.”). Therefore, a proposed project can be a public use even though it serves only one customer. *Handley*, 162 W. Va. at 632, 252 S.E.2d at 148. For purposes of determining public use, “no distinction is made between residential and commercial users.” *Id.* at 633, 252 S.E.2d at 149. Nor is a distinction made between

consumers and producers and shippers. *See Waynesburg S. R. Co.*, 154 W. Va. at 736, 178 S.E.2d at 838 (holding that railroad's service of coal producers and shippers was a public use).

The circuit court determined that the proposed pipeline will not be for a public use because it is not guaranteed to deliver natural gas to West Virginia consumers. (Appx. 9.) The circuit court reasoned that MVP has not yet entered an agreement to deliver gas directly to a local distribution company in West Virginia. (*Id.*) This reasoning overlooks the importance of the pipeline to the numerous shippers, producers, and mineral owners in West Virginia, all of whom have an interest in getting their gas to market. To comply with federal regulations, MVP must offer, subject to applicable requirements, transportation services on a non-discriminatory basis at FERC tariff rates to all natural gas shippers. (Appx. 223-25.)

Courts have found the public use requirement satisfied where the proposed utility project will provide open access to shippers. The Supreme Court of Arkansas considered the issue in a series of related cases. *See Ralph Loyd Martin Revocable Trust v. Ark. Midstream Gas Servs. Corp.*, 377 S.W.3d 251 (Ark. 2010); *Linder v. Ark. Midstream Gas Servs. Corp.*, 362 S.W.3d 889 (Ark. 2010); *Smith v. Arkansas Midstream Gas Servs. Corp.*, 377 S.W.3d 199 (Ark. 2010). In those cases, there were several working interest holders who owned the gas to be transported through the proposed pipeline, and there were multiple royalty owners who would receive royalties from the sale of gas transported through the proposed pipeline. *Ralph Loyd Martin*, 377 S.W.3d at 256; *Linder*, 362 S.W.2d at 897; *Smith*, 377 S.W.3d at 205. The pipeline was to be an

equal access pipeline, meaning that any shipper would have a right to use it. *Ralph Loyd Martin*, 377 S.W.3d at 256-57; *Linder*, 362 S.W.2d at 897; *Smith*, 377 S.W.3d at 205.

The court held that “[t]he right of members of the public to *transport* natural gas, whether currently or in the future, determines the character of the usage.” *Linder*, 362 S.W.3d at 897 (emphasis added). The court found that “it makes no difference that only ‘a collection of a few individuals’ may have occasion to use the pipeline after its completion.” *Ralph Loyd Martin*, 377 S.W.3d at 257. “‘If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small.’” *Id.* (quoting *Ozark Coal Co. v. Penn. Anthracite R. Co.*, 134 S.W. 634, 636 (Ark. 1911)). The court held that the proposed pipeline was a public use based on the fact that all shippers would have access to it, without any analysis of who would have a right to consume the gas transported through the pipeline. *See Ralph Loyd Martin*, 377 S.W.3d at 258; *Linder*, 362 S.W.2d at 898; *Smith*, 377 S.W.3d at 205-06.

Decisions of other courts are in line with these Arkansas cases. *See Crawford Family Farm P’ship v. Transcanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 924 (Tex. Ct. App. 2013); *Iowa RCO Ass’n v. Illinois Commerce Comm’n*, 409 N.E.2d 77, 80 (Ill. App. Ct. 1980); *Mid-Am. Pipe Line Co. v. Missouri Pac. R. Co.*, 298 F. Supp. 1112, 1123 (D. Kan. 1969); *Peck Iron & Metal Co. v. Colonial Pipeline Co.*, 146 S.E.2d 169, 172 (Va. 1966); *Ohio Oil Co. v. Fowler*, 100 So.2d 128, 131 (Miss. 1958). The McCurdys have not cited a single case holding that open access to shippers fails to satisfy the public use requirement, and MVP is aware of no such case.

The recent decision in *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, No. 2014-CA-000517-MR, 2015 WL 2437864 (Ky. Ct. App. May 22, 2015), does not support the McCurdys. The evidence in *Bluegrass Pipeline* showed that the proposed pipeline would transport natural gas liquids “from the Marcellus and Utica shale formations in Pennsylvania, West Virginia, and Ohio, to the Gulf of Mexico.” *Id.* at *1. In other words, not only would the pipeline not serve Kentucky consumers, it would not serve Kentucky shippers either. The court found that the applicable Kentucky statute only granted the power of condemnation to entities providing public utilities regulated by the Kentucky Public Service Commission. *Id.* at *4. Since the proposed pipeline would only have passed through Kentucky without delivering any natural gas liquids there, it would not be subject to regulation by the Public Service Commission. *Id.* As the *Bluegrass Pipeline* court was presented with a markedly different statute and very different facts from those presented here, that case is not instructive.

2. *The Fixed and Definite Use Test Applied by the Circuit Court Is Not Controlling*

The circuit court’s determination that public use requires a fixed and definite use by West Virginia consumers is based on several older cases that are no longer controlling. (Appx. 7-9.) The “fixed and definite” use test articulated in the 1883 case of *Varner v. Martin*, 21 W. Va. 534, 535 (1883), has not been applied by the Supreme Court of Appeals for more than a century – not since the 1913 decision in *Carnegie Natural Gas Co. v. Swiger*, 72 W. Va. 557, 79 S.E. 3, 9 (1913). Under *Swiger*,

the Court held that “[p]ipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed.” *Id.*

The circuit court applied its version of the test and held that the pipeline was not a public use because it would not supply gas to all West Virginia consumers along the entire length of the pipeline. (Appx. 9.) Therefore, it was not enough that the pipeline may supply gas to West Virginia consumers “because customers along the majority of the length of the Pipeline in West Virginia do not have access to gas service from the Pipeline.” (Appx. 9.) The fact that the pipeline allows shippers and producers in West Virginia to develop and market their gas was inconsequential to the circuit court because “[g]as shippers do not constitute the general public of West Virginia.” (Appx. 10.) Moreover, the circuit court inexplicably shifted the burden of proof on the issue of public use from the McCurdys to MVP. See *Standard of Review, supra*, at 9.

This Court’s recent decisions analyzing public use do not follow this test. See, e.g., *W. Va. Dept. of Transp. v. Contractor Enters., Inc.*, 223 W. Va. 98, 672 S.E.2d 234 (2008); *Retail Designs, Inc. v. W. Va. Div. of Hwys.*, 213 W. Va. 494, 583 S.E.2d 449 (2003); *Charleston Urban Renewal Auth. v. Courtland Co.*, 203 W. Va. 528, 509 S.E.2d 569 (1998). In fact, this Court has called into question the continued validity of the older cases, such as *Swiger*, that apply the “fixed and definite” use test. In *Charleston Urban Renewal*, 203 W. Va. at 536, 509 S.E.2d at 577, the Court referenced *Swiger* and stated that “[t]here was a time when this Court’s cases took a more narrow view of what could constitute a ‘public use.’” *Id.* However, the Court determined that “what may constitute

a ‘public use’ has broadened over time.” *Id.* Thus, the Court found that a use that would not meet the “narrow definitions” of “public use” in cases such as *Swiger* nevertheless constituted a public use under West Virginia law. *Id.* See also *Contractor Enters.*, 223 W. Va. at 102, 672 S.E.2d at 238 (refusing to follow *Fork Ridge Baptist Cemetery Ass’n v. Redd*, 33 W. Va. 262, 10 S.E. 405 (1889) on the issue of public use).

The cases relied upon by the circuit court have also been superseded by state and federal statutes. Since the *Swiger* case was decided in 1913, § 54-1-2 has been amended no less than five times (Acts 1915, c. 22; Acts 1949, c. 59; Acts 1962, c. 19; Acts 1979, c. 50; Acts 2006, c. 96), and § 54-1-3 has also been amended (Code 1923, c. 52, § 5). The 1962 amendments added a requirement that gas must be transported or stored “by gas public utilities selling natural gas at retail in West Virginia,” but that language was later removed and does not appear in the current version of the statute. Additionally, the federal Natural Gas Act was enacted in 1938. In doing so, Congress specifically declared that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest.” 15 U.S.C. § 717(a). FERC will only issue a certificate for the pipeline if it finds that the pipeline serves a “public convenience and necessity.” 15 U.S.C. § 717f(c). Moreover, federal decisions hold that the public use requirement is satisfied so long as the project “is rationally related to a conceivable public purpose.” *E.g.*, *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

3. *In any Event, the Pipeline Would Satisfy the Fixed and Definite Use Test*

Even if the fixed and definite use test were still good law, this pipeline would meet the test. In *Swiger*, among a number of other arguments, a landowner contended that a pipeline for which property was condemned was not a public use. The Court disagreed, holding that the pipeline *was* for a public use and that the rights of the public to use the pipeline were fixed and definite. 72 W. Va. 557, 79 S.E. at 9. The Court reasoned that because pipeline companies were granted the power of eminent domain, the legislature “necessarily imposed upon them, as public service corporations the right and duty of performing a public service.” *Id.* The Court went on to state:

Pipe lines for transporting oil must carry oil, as railroads must carry passengers and freight, at reasonable rates, if such rates are not fixed by statute. Pipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. Are not the rights of the public so fixed sufficiently definite to answer the requirements of the law? We think so. The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation.

Id. The landowner also argued:

[F]ew persons are or will be served in West Virginia by the proposed pipe line; that most of the gas is and will be transported into Pennsylvania; that the petitioner is a corporation under the laws of Pennsylvania, and that its principal business is to produce gas and transport it into that state, and that the sovereign right of eminent domain is properly limited to the service of the people of the state where the power is invoked.

Id. at 557, 79 S.E. at 10. The Court rejected these arguments, stating:

True, but few at present are being served by the particular line in question, but [the pipeline company] avers and proves its willingness to serve all persons applying, subject to its proper rules and regulations. It avers and proves that it has fixed reasonable prices and rates for such service. If the petitioner is serving the people of West Virginia with gas, and all who apply, as it avers and proves, it cannot be denied the right of eminent domain because it serves the people in another state into which its pipe lines go. There is not a particle of evidence in the case showing or tending to show that petitioner has ever neglected its duty toward the people of this state. That but few are shown to be taking gas from the particular line sought to be extended through defendant's land is of little consequence. The petitioner is seeking business.

Id. Thus, the Court affirmed the circuit court's ruling in favor of the pipeline company.

In *Brooke Elec. Co. v. Beall*, 96 W. Va. 637, 123 S.E. 587, 588-89 (1924), the landowner contended that proposed power lines for transporting electricity out of West Virginia to Pennsylvania were not a public use. The Court held that the power lines were a public use because the company had indicated it was willing to serve customers within West Virginia that may apply for service. *Id.* at 589. The Court cited *Swiger* for recognizing as a public use "pipe lines used for the transportation of natural gas out of the state, though only a small portion of the gas along said line is used by the citizens of this state." *Id.*

Here, as in *Swiger*, MVP has proven that it is willing to serve all shippers and local distribution companies subject to applicable requirements. As in *Swiger*, the pipeline is for a public use. Therefore, even if the "fixed and definite use" test articulated

in *Varner*, *Swiger*, and the other cases cited by the McCurdys were still good law, then MVP's proposed pipeline will satisfy that test.

The circuit court's conclusion that a state can only exercise eminent domain for the benefit of its own citizens is irrelevant and incorrect. (Appx. 7.) First, the statute at issue here is not an exercise of eminent domain, and it does not take the McCurdys' property. See cases cited *infra* at 23-25. Second, the public use requirement does not require that the use be exclusively for citizens of the state through which the project passes. In *Oxendine v. Public Service Co. of Indiana, Inc.*, 423 N.E.2d 612, 617 (Ind. Ct. App. 1980), (noting that "the legislature has expressly granted the power of eminent domain to [the utility] to furnish electricity to the 'public' not to Indiana residents alone"); see also *Square Butte Elec. Coop. v. Dohn*, 219 N.W.2d 877, 881-82 (N.D. 1974) (discussing electric cooperative's assertion that limiting a state's exercise of eminent domain to serve the citizens of that state "cannot be accepted as the modern view"). Likewise, West Virginia Code § 54-1-2 refers to "public uses," not to uses solely by West Virginians. Had the legislature wanted to require intrastate use, it could have done so, as it did for coal pipelines. See W. Va. Code § 54-1-2(a)(12) (specifically requiring "[t]hat the common carrier engages in some intrastate activity in this state, if there is any reasonable demand therefor"). As to natural gas pipelines, the legislature chose not to impose any intrastate requirement.

In any event, MVP's proposed pipeline will benefit West Virginians. To the extent the circuit court found otherwise, the finding is clearly erroneous. The pipeline will directly benefit shippers and producers in West Virginia, and it will thus indirectly

benefit mineral owners here. (Appx. 223-27, 239.) And this Court has held that the service of mineral producers and shippers is a public use. *See Waynesburg S. R. Co.*, 154 W. Va. at 736, 178 S.E.2d at 838. Additionally, it is likely that some of the gas being transported through the pipeline will be consumed by West Virginians. This will occur indirectly through delivery to Columbia's WB pipeline, as gas in that pipeline is currently being delivered to local distribution companies in West Virginia. (Appx. 227-28, 239-40, 259.) It is also likely that MVP will enter into agreements in the future to deliver gas directly to local distribution companies in West Virginia. (Appx. 227-28, 231, 247-48, 258-59.) These facts compel the conclusion the pipeline is for a public use, even under the outdated test applied by the circuit court. There is no basis for the circuit court's conclusion that the pipeline would not be for a *sufficient* public use even if some of the gas is consumed in West Virginia. (Appx. at 9.) The nature of the use, not the number of consumers, controls.

C. SURVEYING DOES NOT TAKE OR DAMAGE PROPERTY OR REQUIRE A FINDING OF PUBLIC USE (ASSIGNMENT OF ERROR 2)

1. *The Right of Entry for Surveying Does Not Take or Damage Property*

While MVP's pipeline will be for a public use, the narrower question presented in this appeal is whether a determination that the pipeline will be for a public use must be made before MVP can survey proposed routes for the pipeline. The circuit court interpreted West Virginia Code § 54-1-3 as requiring such a finding. (Appx. 7.) Actually, however, a company need only show that it is invested with the power of

eminent domain in order to have a right to survey. The Court does not have to find that MVP's proposed project is for a public use – although this one certainly is.

Section 54-1-3 states that a company “invested with the power of eminent domain under this chapter . . . may enter upon lands for the purpose of examining the same, surveying and laying out the lands.” Section 54-1-1 grants the power of eminent domain to a company organized or authorized to transact business “for any purpose of internal improvement for which private property may be taken or damaged for public use as authorized in [§ 54-1-2].”

Section 54-1-2 is a lengthy section defining the public uses for which property may be taken or damaged. These public uses include gas pipelines and other projects “when for public use.” § 54-1-2(a)(3). Although the wording of the statute is somewhat circular, everyone agrees that property can only be taken or damaged for a public use. U.S. Const. amend. V; W. Va. Const., art. 3, § 9. The question is whether a company that is only surveying for a pipeline must show that the pipeline will be for a public use.

MVP submits that it does not need any finding that its pipeline will be for a public use in order to survey a proposed route. A determination of public use is only required if there is a taking or damaging of property. As cases from across the country show, surveying is not a taking or damaging of property, and it does not require a finding that the proposed project will be for a public use.

Entries for surveying do not take or damage property, and they do not violate a landowner's right to exclude. *See Board of County Comm'rs of Cnty. of San*

Miguel v. Roberts, 159 P.3d 800, 805-06 (Colo. Ct. App. 2006) (holding that entry on land by a maximum of five individuals to survey as many as seventeen times over a three week period did not constitute a taking); *City of Melvindale v. Trenton Warehouse Co.*, 506 N.W.2d 540, 541 (Mich. Ct. App. 1993) (holding that the requirement of a public purpose did not apply to entry to make surveys, measurements, examinations, tests, soundings, and borings because there was no taking); *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1984) (“[C]ourts have recognized a basic conceptual difference between a preliminary entry and a constitutionally compensable taking or damaging of property and have held that because the former is not a variety of the latter, it does not require adherence to condemnation procedures or constitutional provisions for just compensation.”); *Cleveland Bakers Union Local No. 19 Pension Fund v. State, Dept. of Admin. Servs.-Pub. Works*, 443 N.E.2d 999, 1002 (Ohio Ct. App. 1981) (holding that entry to conduct a survey, sounding, appraisal or examination did not constitute a taking); *Duke Power Co. v. Herndon*, 217 S.E.2d 82, 84 (N.C. Ct. App. 1975) (holding that entry to survey did not constitute a taking); *Lewis v. Texas Power & Light Co.*, 276 S.W.2d 950, 956 (Tex. Civ. App. 1955) (holding that entry to make necessary explorations for location was not a taking); *State v. Simons*, 40 So. 662, 662 (Ala. 1906) (holding that entry to examine and survey was not a taking); *Town of Clinton v. Schrempp*, No. CV044000684, 2005 WL 407716, at *5 (Conn. Super. Ct. Jan. 14, 2005) (“An overwhelming majority of courts have held that authorizing an inspection and tests on land does not deprive the owner of his private use and possession”). In fact, § 54-1-3 states that “no injury” shall be done to the property during the inspection.

Recently, in *Klemic v. Dominion Transmission, Inc.*, No. 3:14-CV-00041, 2015 WL 5772220 (W.D. Va. Sept. 30, 2015), the United States District Court for Western District of Virginia dismissed the landowners' suit challenging the pipeline company's rights under a survey statute, holding that the statute does not take or damage property or violate the landowners' right to exclude. *Id.* at *13-15, 17.

While a landowner generally has a right to exclude, the courts recognize the state has an equally fundamental right to regulate. “[N]either property rights nor contract rights are absolute Equally fundamental with the private right is that of the public to regulate it in the common interest.” *Nebbia v. People of N.Y.*, 291 U.S. 502, 523 (1934). The *Restatement (Second) of Torts* lists numerous circumstances in which a person has the right to enter the land of another. These examples, which “are not intended to be exclusive,” include:

- the use of navigable waters;
- entry to bypass an impassable section of a public highway;
- entry to avert a public disaster;
- entry to prevent serious harm to the actor or his land or chattels;
- entry to reclaim goods;
- entry to abate a private nuisance;
- entry to abate a public nuisance;
- entry to make or assist in an arrest or to prevent a crime;
- entry to execute civil process; and
- entry pursuant to legislative duty or authority.

Restatement (Second) of Torts, Intro. Note & §§ 193-211 (1965). Nearly a hundred years before this *Restatement*, a leading constitutional treatise stated:

No constitutional principle . . . is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of a survey and other incipient proceedings, with a view to judging and determining whether the public needs require the appropriation or not, and, if so, what the proper location shall be; and the party acting under this statutory authority would neither be bound to make compensation for the temporary possession, nor be liable to action of trespass.

Thomas M. Cooley, *Constitutional Limitations* 560 (1868).

The Supreme Court of the United States has held that the right of a landowner to exclude persons from his property must yield to the state's police power. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). The police power is "extensive, elastic and constantly expanding in its scope to meet the new and increasing demands for its exercise for the benefit of society." *Farley v. Graney*, 146 W. Va. 22, 35, 119 S.E.2d 833, 841 (1960). "All citizens hold property subject to the proper exercise of the police power for the common good." *Buda v. Town of Masontown*, 217 W. Va. 284, 285, 617 S.E.2d 831, 832 (2005) (quoting *Kingmill Valley Pub. Serv. Dist. v. Riverview Estates Mobile Home Park, Inc.*, 182 W. Va. 116, 117, 386 S.E.2d 483, 484 (1989)).

In *Pruneyard*, a California constitution provision required the owners of the shopping center to permit activists to distribute leaflets on the property. The Court held that this requirement was a proper exercise of the state's "well established" police power. 447 U.S. at 81. The Court found no unconstitutional taking, even though the shopping center was unable to exclude the activists from its property. *Id.* at 82-83. The Court

reasoned that the entry would not “unreasonably impair the value or use” of the property as a shopping center and that the landowner could take steps to “minimize any interference with its commercial functions.” *Id.*

Likewise, in *Montana Co. v. St. Louis Min. & Milling Co.*, 152 U.S. 160 (1894), the Court upheld a state statute that authorized a person claiming ownership to inspect and survey mining properties. The Court found that surveying is not a taking because there is only “a temporary and limited interruption of the [landowner’s] exclusive use.” *Id.* at 169.

Authorizing entry on property for surveying is not the same as taking or damaging property under the power of eminent domain. MVP does not need to invoke the power of eminent domain to justify an entry that does not result in a taking or damaging of property. Depending on the results of the surveys, the McCurdys’ property may never be taken or damaged. If and when eminent domain becomes necessary, the power may be exercised under federal law.

Decisions of courts in other jurisdictions also support the conclusion that MVP does not need a finding that its proposed project is for a public use prior to entering for surveying. In *Northville Dock Pipe Line Corp. v. Fanning*, 237 N.E.2d 220, 222 (N.Y. 1968), the court expressly held that a pipeline company was not required to prove that the contemplated pipeline would serve a public use before the company could proceed with exploratory surveying necessary to select the most advantageous route. The court explained:

It is well established . . . that a corporation such as the appellant must be acting for a ‘public use’ when it seeks to exercise its condemnation powers. The question involved in this appeal is whether such a corporation is required to prove that a contemplated pipe line will serve a public use even before that corporation can proceed with an exploratory survey deemed necessary for purposes of selecting ‘the most advantageous route’ within the meaning of [the right of entry statute].

Id. at 221. The court determined that “petitioner will be better prepared to demonstrate that the line will serve a public use after the survey has been completed.” *Id.* at 222.

After the surveys have been conducted, “respondents may oppose the condemnation on this same ground – no public use.” *Id.* But the lower courts “erred in requiring the petitioner to prematurely establish that its line will serve a public use.” *Id.*

The Supreme Court of North Dakota reached the same conclusion in *Square Butte*, 219 N.W.2d 877. In that case, an electric cooperative sued to obtain an order permitting it to enter onto private lands for surveying under a statute authorizing such entries. *Id.* at 880. Landowners responded that the cooperative was required to establish that the project was a public use, and according to the landowners, the cooperative could not make that showing. *Id.* The court disagreed that any showing of public use was required, stating:

Because we believe that a determination of this issue [of public use] is premature at this time, a condemnation action having not been commenced, and that it is better to delay a determination of what constitutes a public use until that issue has been more extensively briefed and considered by the trial court in conjunction with the condemnation action itself, we shall not attempt to determine this issue at this time.

Id. at 882.

Landowners made a similar argument in *Walker v. Gateway Pipeline Co.*, 601 So.2d 970, 971 (Ala. 1992), where a pipeline company that had not yet received a FERC certificate sought to enter onto private land for the purpose of conducting archaeological and environmental surveys. A representative of the pipeline company testified that the company “was in the process of applying to the FERC for a permit under § 7(c) of the Natural Gas Act, and that environmental and archaeological assessments were required as a prerequisite to obtaining a certificate of public convenience and necessity from the FERC.” *Id.* Additionally, “the assessments were relevant to the selection of a pipeline route.” *Id.* at 971-72.

A state statute permitted “pipeline and other corporations having rights and powers to condemn” to “cause such examinations and surveys for their proposed . . . pipelines . . . as may be necessary to the selection of the most advantageous routes and sites; and for such purpose, may . . . enter upon the lands and waters of any person.” *Id.* at 974. Another statute stated: “[c]orporations formed for the purpose of constructing, operating or maintaining . . . pipelines or any other work of internal improvement or public utility may exercise the power of eminent domain in the manner provided by law.” *Id.* at 973.

The landowner contended that a certificate from the state public service commission was necessary prior to entry for surveying because the pertinent statute referred to a “person empowered to condemn,” and in order to be empowered to condemn, the pipeline company must hold a certificate from the state public service commission. *Id.* at 976. The landowner made a similar argument with respect to the

Natural Gas Act, contending that the pipeline company was required to have a FERC certificate before it could enter for surveying. *Id.* at 975.

The Supreme Court of Alabama rejected this argument. “It is illogical to suppose that the FERC certificate that the examinations and surveys were conducted to acquire was a prerequisite to entering property for the purpose of conducting the examinations and surveys in the first place.” *Id.* at 975. “Although a FERC certificate may have been a prerequisite to construction of pipeline facilities, such a certificate was not a prerequisite to pre-condemnation entries for the purpose of survey and examination.” *Id.* Central to the court’s conclusion was the fact that the proceeding in question was not a condemnation proceeding, but only an injunction action seeking temporary entry for surveying. *Id.* See also *Carlisle v. Dep’t of Pub. Utilities*, 234 N.E.2d 752, 754 (Mass. 1968) (“The validity of the preliminary survey order under [the right of entry statute] is not contingent upon previous grant of power to make a taking. An application under [the statute] is distinct from an application for eminent domain authorization”); *Rockies Express Pipeline, LLC v. Billings*, No. 2:07-CV-982, 2007 WL 3125320, at *2 (S.D. Ohio Oct. 23, 2007).

It is important that the pipeline be located over a geologically and environmentally appropriate route. That route should be determined before condemnations, not during them. Relocations will not only be costly, they will adversely affect landowners. Landowners in the original path will be required to defend condemnation proceedings that later prove unnecessary, and landowners in the new path

will face condemnation proceedings that were not anticipated. As the Court of Appeals of Tennessee has explained:

If companies with the power of eminent domain cannot temporarily access properties along the proposed route of a linear construction project to perform the examinations and surveys necessary to site the project, they will likely be forced to file condemnation complaints much earlier in the process and against a much greater number of properties. Such a process would create clouds on the titles of large numbers of properties for long periods of time before the company, the courts, and the appropriate governmental regulatory agencies have even determined which properties will ultimately be needed for the construction of the final project.

Midwestern Gas Transmission Co. v. Baker, No. M2005-00802-COA-R3-CV, 2006 WL 461042, at *15 (Tenn. Ct. App. Jan. 11, 2006).

MVP is unaware of a single case in which a court held that establishment of a public use was a prerequisite to the exercise of a statutory right of entry for surveying, and the McCurdys have not cited any such case. The reasoning of the *Northville Dock*, *Square Butte*, and *Walker* cases is sound, and the Court should follow those decisions.

2. *The Landowners Did Not Prove that Their Property Will Be Damaged by Surveying*

The McCurdys did not prove – and the circuit court did not find – that surveying under the statute will actually damage the McCurdys’ property. Mr. McCurdy testified that the surveys *could* affect the sale of hay if the hay were trampled or damaged. (Appx. 186.) He also testified that the survey *could* affect turkey polt and butterfly migration on the property. (Appx. 186-87.) But damage to hay and disturbance to wildlife were only *possible*. (Appx. 200.) In contrast, Mr. Posey testified that the

McCurdys' property will not be damaged. (Appx. 244-45.) The surveys would be limited to people on foot with surveying equipment and hand shovels. (Appx. 247.)

Moreover, the statute itself states in conducting the surveys that "no injury [shall] be done to the owner." W. Va. Code § 54-1-3. No company shall "throw open fences . . . or construct its works . . . or in anywise injure the property of the owner." *Id.* If damages were to occur, MVP would fully compensate the landowners.

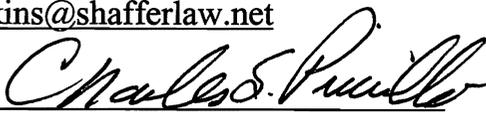
VI. CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court and enter final judgment declaring that MVP has the right to enter upon the McCurdys' land for surveying under West Virginia Code § 54-1-3.

MOUNTAIN VALLEY PIPELINE, INC.

By Counsel

Charles S. Piccirillo
(W. Va. Bar No. 2902)
Counsel of Record
K. Brian Adkins
(W. Va. Bar No. 9621)
SHAFFER & SHAFFER, PLLC
P.O. Box 38
Madison, WV 25130-0038
(304) 369-0511
cpiccirillo@shafferlaw.net
badkins@shafferlaw.net

By 
Charles S. Piccirillo

Counsel for Petitioner

**IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 15-0919

Appeal from a Final Order of the
Circuit Court of Monroe County (Case No. 15-C-19)

MOUNTAIN VALLEY PIPELINE, LLC,

Defendant/Petitioner,

v.

BRIAN C. MCCURDY and
DORIS W. MCCURDY,

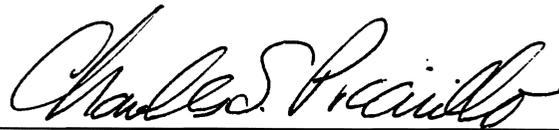
Plaintiffs/Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2015, a true copy of

the foregoing Petitioner's Brief has been mailed to:

Derek O. Teaney, Esq.
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901
Counsel for Plaintiffs



Charles S. Piccirillo
(W. Va. State Bar I.D.: 2902)
Shaffer & Shaffer, PLLC
P.O. Box 38
Madison, West Virginia 25130-0038
(304) 369-0511
cpiccirillo@shafferlaw.net