

**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.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This case presents the question whether a for-profit pipeline company that is pursuing a project that would not benefit the general public of West Virginia, would not be for public use under West Virginia law, and has not been authorized by any governmental entity—state or federal—can enter private property in West Virginia without the consent of the landowner under color of W. Va. Code § 54-1-1 et seq. The Circuit Court of Monroe County correctly concluded that it could not. This Court should affirm the ruling below.

Plaintiffs Brian and Doris McCurdy own 185 acres in Monroe County, West Virginia, near the town of Union (hereinafter, “the Property”). Appx. 178–179. More than thirty years ago, the McCurdys decided to make a life-changing move and purchased a home and five acres in Ms. McCurdy’s native Monroe County. Id. In 1986, the McCurdys purchased an approximately 80-acre parcel adjacent to their home, and in 1996 they purchased an additional 100-acres adjoining their property. Id. at 179. The McCurdys are private people and greatly value their right to the exclusive and quiet enjoyment of their property. Id. at 182. To that end, they have posted “no trespassing” signs on their property for as long as they have owned it. Id.

In January 2015, the McCurdys received a letter from Mountain Valley Pipeline’s field agent advising them that their property was in the proposed corridor for the planned Mountain Valley Pipeline (hereinafter, “the Pipeline”). Id. at 181–82. That was the first time the McCurdys had heard of the Pipeline. Id. at 182.

The Pipeline is a joint venture between affiliates of EQT Corporation, NextEra Energy, Inc., WGL Holdings, Inc., and Vega Energy Partners, Ltd., to construct a 294.1 mile pipeline to carry natural gas owned primarily by those entities from northern West Virginia to market in Pittsylvania County, Virginia. Id. at 301. Eighty-five (85) to ninety-five (95) percent of the

capacity of the Pipeline is committed to gas owned by corporate affiliates of Mountain Valley Pipeline. Id. at 5 (Finding of Fact No. 26). At trial, Mountain Valley Pipeline's sole witness could not identify a single West Virginian that would use the gas carried by the Pipeline (id. at 261), leading the circuit court to find that "the Pipeline does not provide interconnects for gas service to residential or business customers in West Virginia" and that "[i]t is possible that no West Virginians will ever have access to gas from the Pipeline." Id. at 4 (Findings of Fact Nos. 20 & 23). Moreover, although the Pipeline will interconnect with Columbia Gas's WB pipeline, Mountain Valley Pipeline's sole witness testified that Mountain Valley Pipeline could not know whether gas from its Pipeline flowing into the WB line was burned by West Virginians. Id. at 259. Accordingly, based on that testimony, the circuit court stated that it "cannot find that any West Virginia consumers would be served with gas that would flow through the Pipeline via the WB pipeline." Id. at 5 (Finding of Fact No. 25).

In February 2015, Mountain Valley Pipeline, through its agent, followed up on the January 2015 letter to the McCurdys with a telephone call requesting access to the Property to conduct surveys related to the construction of the Pipeline. Id. at 11 (Finding of Fact No. 11). Mountain Valley Pipeline's agent did not explain the scope or extent of the surveys, but did agree to provide maps of the Property to the McCurdys with an overlay of the Pipeline route. Id. Those maps revealed that the proposed route of the Pipeline would cross all three of the McCurdy's tracts, coming quite near to their barn and their residence. Id. at 2 (Finding of Fact No. 9); id. at 296–297. The proposed Pipeline route would also cross two areas that the McCurdys had identified as potential home sites because of their terrific mountain views, as well as two fields that the McCurdys use to grow hay for sale. Id. at 2 (Finding of Fact No. 9).

Because of the value they place on their privacy, the McCurdys declined to allow Mountain Valley Pipeline to survey the Property. Id. at 3 (Finding of Fact No. 12). In response, Mountain Valley Pipeline threatened to sue the McCurdys if they did not acquiesce to the surveys by March 9, 2015. Id. at 3 (Finding of Fact No. 15). Mountain Valley Pipeline asserted that it had the right to enter the Property under Chapter 54 of the West Virginia Code. Id. (Finding of Fact No. 16).

Faced with that threat of litigation, the McCurdys commenced this action on March 18, 2015, seeking a declaratory judgment that Mountain Valley Pipeline could not enter the Property under the color of W. Va. Code § 54-1-3 and seeking an injunction prohibiting Mountain Valley Pipeline from entering the Property. Id. at 14. Following an August 5, 2015 hearing on Plaintiffs' Renewed Motion for Expedited Hearing, For Declaratory Judgment, For Preliminary and Permanent Injunction, and For Consolidation of Hearing on Preliminary Injunction With Trial of the Merits, the Circuit Court of Monroe County declared that Mountain Valley Pipeline did not have the right to survey the Property without the McCurdys' consent and issued an injunction prohibiting Mountain Valley Pipeline from entering the Property. Id. at 12. The Court concluded that "W. Va. Code § 54-1-3 does not authorize Mountain Valley Pipeline or its representatives to enter Plaintiffs' property without Plaintiffs' permission because Mountain Valley Pipeline is not vested with eminent domain by Chapter 54 of the West Virginia Code because its proposed pipeline is not for public use." Id.

SUMMARY OF ARGUMENT

The Circuit Court of Monroe County's ruling in this action is correct on all counts. 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].” See Waynesburg Southern R. Co. v. Lemley, 154 W. Va. 728, 732, 178 S.E.2d 833, 836 (1970) (holding that to avail itself of powers granted by Chapter 54, an entity must show that it is authorized to do so). An entity is only invested with the power of eminent domain under Chapter 54 when its operations and facilities are “for public use.” West Virginia Code § 54-1-1 invests the power of eminent domain in governmental bodies and “every corporation heretofore or hereafter organized under the law 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). This Court 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). 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.” In other words, at every turn in the analysis, the West Virginia Legislature has conditioned the vestment of eminent domain on the existence of “public use.” 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.”

Mountain Valley Pipeline’s proposed Pipeline is not “for public use,” as this Court has interpreted that term. 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 the general public of West Virginia. That is, it cannot be exercised for the sole purposes 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. Accordingly, the Pipeline cannot be for public use unless it is for public use by West Virginians.

In Varner v. Martin, this Court set out the 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, 556 (1883). Moreover, this Court has made clear what is required for natural gas pipelines to be for public use under Varner. In Charleston Natural Gas Co. v. Low, this 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). In Swiger, this Court, 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 for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities.” 79 S.E. at 9.

The Pipeline is not for public use under those precedents. The general public does not have a fixed and definite right to gas in the Pipeline. As established at the August 5, 2015 hearing, there are no 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. Appx. at 258. Moreover, access to gas in the Pipeline is not independent of

Mountain Valley Pipeline's will. That is, Mountain Valley Pipeline retains the right to decline requests to install taps into the Pipeline. *Id.* at 262; 18 C.F.R. § 284.7(f). Because Mountain Valley Pipeline retains the right to grant or deny access to gas from the Pipeline, and because it does not serve West Virginians with gas along its entire line traversed, its Pipeline is not for public use. Consequently, Mountain Valley Pipeline is not vested with the power of eminent domain and does not have the authority to enter private property against the will of the landowner to conduct surveys.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rule 19 is appropriate in this case because it involves assignments of error in the application of settled law and involves a narrow issue of law. Because of the number of natural gas pipelines being contemplated by the industry, an opinion from the Court in this case is more appropriate than a memorandum decision.

ARGUMENT

I. STANDARD OF REVIEW

This Court should apply a de novo standard of review to the questions of law involving the interpretation of W. Va. Code § 54-1-1 et seq. presented by this case. Syll. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995). Factual findings made by a circuit court “shall not be set aside by a reviewing court ‘unless clearly erroneous.’” In Interest of Tiffany Marie S., 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996) (quoting W. Va. Rule of Civil Procedure 52(a)). As this Court has explained,

“A finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Board of Educ. v. Wirt, 192 W. Va. 568, 579 n. 14, 453 S.E.2d 402, 413 n. 14 (1994), quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746, 766 (1948). However, a reviewing court may not overturn a finding simply

because it would have decided the case differently, and it must affirm “[i]f the [circuit] court’s account of the evidence is plausible in light of the record viewed in its entirety[.]” In re Jonathan Michael D., 194 W. Va. 20, 25, 459 S.E.2d 131, 136 (1995), quoting Anderson v. Bessemer City, N.C., 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). Finally, “[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings[.]” 470 U.S. at 575, 105 S.Ct. at 1512, 84 L.Ed.2d at 529.

Id.

Mountain Valley Pipeline does not assign error to the circuit court’s placement of the burden of proof in this action. Nonetheless, in its presentation of the Standard of Review, Mountain Valley Pipeline asserted that “the circuit court erroneously placed the burden of proof on MVP to prove public use.” Petitioner’s Brief at 10. Mountain Valley Pipeline cites Lemley to support its assertion that the landowner bears the burden to prove that a particular project is not for public use, and contends that the McCurdys have conceded that point. Id. at 9. A fair reading of the colloquy in the transcript, however, shows that the McCurdys accepted the burden of proof in the proceeding generally, so as to entitle them to rebuttal argument, not necessarily that they bore the burden on the question of public use. Appx. at 284. Moreover, this Court stated in Lemley that an entity seeking to use statutory eminent domain powers “must show that it is an entity so authorized” under Chapter 54. 154 W. Va. at 732, 178 S.E.2d at 836. Elsewhere, this Court has stated, “Why should one whose title to land claimed by him is clear be required to assume any burden of proof against one who asserts a hostile superior right?” Gauley & S.R. Co. v. Vencill, 73 W. Va. 650, 80 S.E. 1103, 1106 (1914). Accordingly, it is not at all clear that the burden of proof is on the McCurdys. In all events, even if the burden were on the McCurdys and even if the circuit court erroneously placed it on Mountain Valley Pipeline, as contended in the opening brief, such an error would be harmless because the circuit court expressly stated that, “indeed the Plaintiffs have proven that the proposed pipeline is not for the

public use.” Appx. at 9 (Conclusion of Law 19). In other words, Plaintiffs would have satisfied any burden of proof placed on them by the law or the circuit court. Accordingly, any error related to the burden of proof was harmless and not grounds for reversal. McAllister v. Weirton Hosp. Co., 173 W. Va. 75, 80, 312 S.E.2d 738, 743 (1983) (citing W. Va. Rule of Civil Procedure 61).

II. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PIPELINE IS NOT FOR PUBLIC USE UNDER WEST VIRGINIA LAW

Based on the evidence presented at the August 5, 2015 hearing, the circuit court correctly concluded that “[t]he Pipeline is not for public use under West Virginia law.” Appx. at 9 (Conclusion of Law No. 18). It reached that conclusion applying this Court’s long-standing precedent on public use, especially as applied to natural gas pipelines. Id. at 9–10. To attack the well-reasoned conclusion of the circuit court, Mountain Valley Pipeline insists that the use of its Pipeline by a small class of natural gas shippers is sufficient public use and maintains that this Court’s long standing precedent is no longer good law. Mountain Valley Pipeline’s arguments are without merit.

As discussed below, the question of public use must be strictly construed against Mountain Valley Pipeline. Moreover, the State of West Virginia can only exercise or authorize the exercise of eminent domain for the benefit of West Virginians. Applying this Court’s established precedent, the Pipeline is not for public use. Use of the Pipeline by a small class of owners or lessees of natural gas interests is not sufficient to render the Pipeline for public use. Finally, this Court’s precedents remain good law and Mountain Valley Pipeline’s efforts to disparage them fail.

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A. The Question of Public Use Must Be Strictly Construed Against Mountain Valley Pipeline

As a threshold matter, the McCurdys note that the question of public use must be strictly construed against Mountain Valley Pipeline. That is because West Virginia’s eminent domain statutes—like W. Va. Code § 54-1-3—operate in derogation of fundamental private property rights protected under the West Virginia Constitution. State ex rel. Firestone Tire & Rubber Co. v. Ritchie, 153 W. Va. 132, 138, 168 S.E.2d 287, 290–91 (1969); State, by State Road Commission v. Bouchelle, 137 W. Va. 572, 576, 73 S.E.2d 432, 434 (1952); City of Mullens v. Union Power Co., 122 W. Va. 179, 7 S.E. 2d 870, 871–72 (1940); Fork Ridge Baptist Cemetery Ass’n v. Redd, 33 W. Va. 262, 10 S.E. 405 (1889); Adams v. Trustees of Town of Clarksburg, 23 W. Va. 203 (1883). There is no more fundamental property right than the right to exclude others from private property. College Sav. Bank v. Florida Prepaid Secondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”). Indeed, the right to exclude “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982). “In every case where one man has a right to exclude another from his land, the common law encircles it, if not [e]nclosed already, with an imaginary fence. And to break such imaginary fence, and enter the close of another, is a trespass” Haigh v. Bell, 41 W. Va. 19, 23 S.E. 666, 667 (1895).

Moreover, as the circuit court correctly concluded, “Courts in this State must carefully review claims of public use.” Appx. at 8 (Conclusion of Law No. 17) (citing Pittsburg, W. & K.R. Co. v. Benwood Iron-Works, 31 W. Va. 710, 8 S.E. 453, 467 (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.”)). The circuit court correctly recognized that, “[w]hen 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. Appx. at 8 (Conclusion of Law No. 16) (quoting Varner, 21 W. Va. at 555). Consequently, Mountain Valley Pipeline’s public use argument must be given close scrutiny, and the Court should give a narrow construction to what it means to be “for public use” for purposes of W. Va. Code § 54-1-1 et seq.

B. To Be “For Public Use” Under W. Va. Code § 54-1-1 et seq., The Pipeline Must Be For Use By West Virginians

The circuit court correctly concluded that “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.” Appx. at 7 (Conclusion of Law No. 9). It can hardly be contested that the power of eminent domain “cannot be extended [by a state] merely to promote the public uses of another state.” Columbus Waterworks Co. v. Long, 121 Ala. 245, 25 So. 702, 702 (Ala. 1899). In other words, “[i]t is true that no state is permitted to exercise or authorize the exercise of the power of eminent domain except for a public use within its own borders.” Adams v. Greenwich Water Co., 138 Conn. 205, 214–15, 83 A.2d 177, 182 (Conn. 1951). In Clark v. Gulf Power Co., the Florida Court of Appeals stated:

The sovereign’s power of eminent domain, whether exercised by it or delegated to another, is limited to the sphere of its control and within the jurisdiction of the sovereign. A state’s power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be condemned for the sole purpose of serving a public use in another state.

198 So. 2d 368, 371 (Fla. App. 1967). So fundamental is that principle in the law of eminent domain that the leading treatise in this area succinctly states that “[t]he public use for which

property may be taken is a public use within the state from which the power is derived.” Lewis on Eminent Domain § 310. That treatise has formed the basis for much of this Court’s eminent domain jurisprudence. See, e.g., Fleming v. Monongahela Ry. Co., 82 W. Va. 1, 95 S.E. 819, 822 (1918) (expressly agreeing with Lewis, even though the position taken was the minority position). Accordingly, the Pipeline will not be for public use unless it is used by the general public of West Virginia.

Nonetheless, Mountain Valley Pipeline insists that the trial court was incorrect in concluding that West Virginians must be able to use the gas in its Pipeline. Petitioner’s Brief at 19. The cases on which Mountain Valley Pipeline relies stand for the unremarkable position that an exercise of eminent domain can have a collateral benefit to residents of another state. They do not stand for the proposition that a state may authorize the exercise of eminent domain solely for use by residents of another state without sufficient use by the general public of the initial state. Thus, the circuit court conducted the correct inquiry as to whether the Pipeline is for the use of the general public of West Virginia.

C. The Pipeline Is Not For Public Use Under This Court’s Precedent

In a thorough discussion of the issue in Varner, this Court 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’ third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in another other way than by authorizing the condemnation of private property.

21 W. Va. at 556. Moreover, this Court has made clear what is required for natural gas pipelines to be for public use under Varner. In Low, this 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.” 44 S.E. at 414. In Swiger, this Court, 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 for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities.” 79 S.E. at 9.

Two additional cases confirm that gas service to the general public is essential to establish that a natural gas pipeline is for public use: United Fuel Gas Co. v. Public Serv. Commission, 95 W. Va. 415, 121 S.E. 281 (1924), and Hardman v. Cabot, 60 W. Va. 664, 55 S.E. 756 (1906). In United Fuel Gas, the Court concluded that a gas company with the power of eminent domain is obliged to serve West Virginians and may not deny West Virginia citizens access to gas in their pipeline. 121 S.E. at 283. In Hardman, the Court concluded that a gas pipeline served a public use because it distributed gas to private customers in the vicinity of the pipeline. 55 S.E. at 759.

The Pipeline in this case fails this Court’s established tests. The general public of West Virginia does not have a definite and fixed use of the Pipeline, the gas to be transmitted therein, or the property on which the Pipeline will be constructed. That is because (1) the Pipeline as proposed does not include any points at which natural gas will be delivered to West Virginians and (2) delivery of natural gas via the Pipeline is solely within the control of Mountain Valley Pipeline.

The circuit court concluded, based on the testimony that it heard and on its evaluation of the credibility of the witnesses, that “as currently planned, the Pipeline does not provide interconnects for gas service to residential or business customers in West Virginia.” Appx. at 4 (Finding of Fact No. 20). The circuit court further expressly found that “[i]t is possible that no West Virginians will ever have access to gas from the Pipeline.” Id. (Finding of Fact No. 23). Mountain Valley Pipeline did not assign error to the circuit court’s findings of fact in this regard. Nor could it sustain such an assignment, because those factual findings are not clearly erroneous. Rather, they are firmly supported by the record below. Mountain Valley Pipeline’s sole witness testified that there were no “taps” to allow access to the gas for use in West Virginia. Appx. at 258. Indeed, Mountain Valley Pipeline’s witness confirmed that it was possible that no “local distribution companies”¹ in West Virginia would ever receive gas from the pipeline. Id. at 260. Moreover, he could not identify a single West Virginian that would burn gas from the Pipeline. Id. at 261.

Not only will West Virginians not have use of the gas in the Pipeline as a matter of fact, but access to the gas is solely governed by Mountain Valley Pipeline. Varner requires that the public use must be

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[.]

21 W. Va. at 556. The circuit court found, based on the testimony and argument presented, that, “[a]lthough 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

¹ “Local distribution companies” distribute gas from transmission lines like the Pipeline locally to residential and business consumers. Appx. at 239.

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).” Appx. at 4 (Finding of Fact No. 19). The record and the federal regulations that will govern the Pipeline support that finding. Appx. at 257, 262; 18 C.F.R. § 284.7(f) (providing that a Pipeline is not required to provide “any transportation service . . . that would required the construction . . . of any new facilities”). Accordingly, the Pipeline cannot be for public use under West Virginia law.²

In an effort to escape that conclusion, Mountain Valley Pipeline insists (1) that gas will be consumed by West Virginians indirectly through Columbia’s WB pipeline and (2) that Mountain Valley Pipeline may reach agreements with local distribution companies in West Virginia in the future. Petitioner’s Brief at 11. With regard to the WB line, Mountain Valley Pipeline’s argument directly contradicts the factual findings of the circuit court to which Mountain Valley Pipeline did not assign error. The circuit court expressly found that

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.

Appx. at 5 (Finding of Fact No. 25). In other words, the circuit court expressly found that the record in this case does not support Mountain Valley Pipeline’s assertion that West Virginians

² This conclusion is consistent with the result in Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc., ___ S.W. 3d ___, 2015 WL 2437864 (Ky. Cr. App. May 22, 2015), wherein the Court of Appeals of Kentucky held that that a pipeline company did not have eminent domain power under Kentucky law because gas from the pipeline at issue would not reach Kentucky consumers. 2015 WL 2437864 at * 4.

will use gas from the Pipeline via the WB line. The circuit court’s finding on that point is supported by the record. Mountain Valley Pipeline’s sole witness testified that gas in the WB line was delivered to the Virginia and Washington , DC area, and that Columbia has “other interconnects off of that pipeline through West Virginia that that gas can meet the residents’ burn needs.” Appx. at 228–29. But the witness never identified a single local distribution company in West Virginia that used gas from the WB line. Nor could he identify what counties the WB line ran through. Appx. at 259. He also testified that Mountain Valley Pipeline would not know whether gas from the Pipeline would be burned by West Virginians whose local distribution company was supplied by the WB line. *Id.* Having heard the witness testify, and evaluating his credibility (Appx. at 1), the circuit court reasonably concluded that the evidence in this case is insufficient to find that any West Virginians will burn gas from the Pipeline via the WB line. Appx. at 5 (Finding of Fact No. 25); *id.* at 9 (Conclusion of Law No. 25). Mountain Valley Pipeline did not assign error to that finding, nor was that finding clearly erroneous. Consequently, Mountain Valley Pipeline’s argument that the Pipeline is for public use based on potential gas consumption by West Virginians via the WB line is without merit.

Moreover, even some West Virginians were to use gas from the Pipeline via local distribution companies along the WB line, that would be insufficient to constitute public use under *Swiger*. In that case, this Court held that, to be for public use, natural gas pipelines serve West Virginians with gas “along the entire line traversed” 79 S.E. at 9. Here, the interconnection between the Pipeline and the WB line is at milepost 77 of the Pipeline, leaving approximately 75 miles of the Pipeline in West Virginia without any interconnects for access to the gas. Appx. 284–85. Accordingly, as the circuit court concluded, “[e]ven if some West Virginia consumers 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." Appx. at 9 (Conclusion of Law No. 25).

With regard to Mountain Valley Pipeline's reliance on possible future agreements with West Virginia local distribution companies, those potential agreements are too speculative to render the Pipeline for public use. Mountain Valley Pipeline's sole witness knew next to nothing about negotiations between Mountain Valley Pipeline and West Virginia local distribution companies. He did not know what parameters Mountain Valley Pipeline would use to decide whether to grant a tap request to a local distribution company. Appx. at 257. He knew that Mountain Valley Pipeline was in discussions with Mountaineer Gas and suspected that Mountain Valley Pipeline had "talked to Columbia Gas. But beyond that, I – again, that's a business development area. And they don't really keep me fully informed of their daily activity." Appx. at 258–59. He admitted he did not specifically know the status of any negotiations with local distribution companies in West Virginia. Id. at 259. Moreover, Mountain Valley Pipeline's witness testified that it was possible that the Pipeline would be economically viable for Mountain Valley Pipeline even if no West Virginia local distribution companies ever tapped the Pipeline. Id. at 260. The basis for the witness's belief that future contracts with West Virginia local distribution companies were possible was the Field of Dreams theory – "if you build it, they will come." Id. at 232.

That testimony, combined with the fact that Mountain Valley Pipeline retains unilateral control over whether to grant a tap request to a local distribution company (18 C.F.R. § 284.7(f)), renders the mere potential for use of the gas by West Virginians insufficient to constitute public

use. Under Varner, public use must be fixed and definite and independent of the will of the entity that will hold title to the condemned property. 21 W. Va. at 556. Potential future use that is not necessary to the success of the Pipeline and that is wholly contingent on Mountain Valley Pipeline agreeing to access does not satisfy that test. Mountain Valley Pipeline may insist that it is “willing to serve all shippers and local distribution companies,” Petitioner’s Brief at 18, but its will is insufficient. Varner requires that public use be independent of the will of the condemnor. 21 W. Va. at 556. Under federal regulations, Mountain Valley Pipeline is “not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.” 18 C.F.R. § 284.7(f). In other words, no federal or state law requires Mountain Valley Pipeline to provide public use of the Pipeline. Accordingly, Mountain Valley Pipeline’s argument based on potential future agreements with West Virginia local distribution companies fails.

D. Use of the Pipeline By A Very Small Class of Natural Gas Owners—Most of Whom Own the Pipeline—Is Not Sufficient to Render the Pipeline for Public Use

Mountain Valley Pipeline insists that the circuit court erred in concluding that the Pipeline is not for public use because the Pipeline “will benefit mineral owners and producers of gas in West Virginia.” Petitioner’s Brief at 10. Of course, 95% of the gas to be shipped through the Pipeline is owned by corporate affiliates of Mountain Valley Pipeline. Appx. at 269. This Court has previously held a proposed road not to be for public use where the road “would accommodate only its builders and the other parties mentioned who have timber in the same section” Hench v. Pritt, 62 W. Va. 270, 57 S.E. 808, 810 (1907). Based on similar reasoning, the circuit court in this action concluded that

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.

Appx. at 10 (Conclusion of Law No. 26). That reasoning is sound.

Mountain Valley Pipeline claims that the Pipeline "will be an open access pipeline," but the evidentiary record and its legal citations fail to explain what it means by that or how that makes the Pipeline for public use. The following exchange occurred between Mountain Valley Pipeline's counsel and its sole witness:

Q This has been termed an open access pipeline. And I know there's been a good bit of talk about that here today. In your profession, what does that mean?

A That's a term given to pipelines, I believe, by the federal government, by the [Federal Energy Regulatory Commission]. And any person, any entity, typically a corporation or a gas company or a business can submit what we call a tap request to tap onto the pipeline. And then our commercial and business entities evaluate that and determine if they're economically viable to support that tap. And what I mean, economically viable, in a sense that they're not a bankrupt company, that they have credit to pay the bills.

Q Is that subject to FERC regulation?

A That is, yes.

Q And as I understand it, you have to provide that access in an open and nondiscriminatory fashion?

A Correct.

Appx. at 223. In its brief, Mountain Valley Pipeline states that's "open access" "mean[s] that gas shippers will have access to the pipeline in an open and nondiscriminatory fashion under FERC regulations." Petitioner's Brief at 10. Mountain Valley Pipeline does not cite any FERC regulations and the only such regulation discussed at trial undermines that testimony and shows that "open access" is not the same as "common carrier" as this Court has defined the latter term.

In Maslin v. B. & O. R.R. Co., 14 W. Va. 180, 188 (1878), this Court explained that, “[a]t common law a common carrier is one, who undertakes for hire to carry from place to place the goods of all persons indifferently.” A common carrier is “bound to . . . transport [from place to place the persons or the goods of those who choose to employ them], whenever called upon to do so, and can not decline to do so for a particular person at their pleasure.” Laurel Fork & Sand Hill R. Co. v. West Virginia Transp. Co., 25 W. Va. 324, 337 (1884). That is not the case with the Pipeline. As Mountain Valley Pipeline’s witness admitted in his testimony, Mountain Valley Pipeline retains the right to refuse tap requests to access the Pipeline. Appx. at 257, 262. Moreover, FERC’s regulations provide that Mountain Valley Pipeline “is not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.” 18 C.F.R. § 184.7(f). Accordingly, whatever “open access” may mean, it does not mean that the Pipeline is a common carrier.

That the Pipeline may have been available to shippers in “an open and nondiscriminatory fashion” does not mean that the Pipeline is a common carrier. Indeed, natural gas pipelines as contract carriers, not common carriers. Jennifer Skougard Horne, Getting From Here to There: Devising an Optimal Regulatory Model For CO2 Transport in a New Carbon Capture and Sequestration Industry, 30 J. Land Res. & Envtl. L. 357, 377 (2010). As one pipeline scholar has explained

Nondiscriminatory access requirements can come in different forms. For example, in natural gas, pipelines must offer nondiscriminatory access but operate as contract carriers. That means that the pipeline owner contracts in advance with a customer to provide access to a set amount of its capacity. In oil, pipelines operate under a system of prorating. In this system, even when the pipeline capacity is fully utilized, if another customer requires transport service, the pipeline is obliged to accommodate the new customer and adjust the capacity available to other customers accordingly.

Id. (internal footnotes omitted). See also id. at 393 (explaining that oil pipelines are common carriers because they must prorate their capacity, whereas natural gas pipelines are contract carriers because “once the pipeline is full, it is full”); Ass’d Gas Distributors v. F.E.R.C., 824 F.2d 981, 1002 (D.C. Cir. 1987) (holding that, with regard to natural gas pipelines, “a duty not to discriminate . . . is utterly different” from common carrier classification). Accordingly, FERC regulation of the Pipeline as “open access” does not render the Pipeline a common carrier under federal law.

Nor is the Pipeline a common carrier under state law. This Court has held that common carriers are subject to legislative control. Syll. Pt. 1, Laurel Fork & Sand Hill R.R. Co., 25 W. Va. at 324. As the circuit court found, and Mountain Valley Pipeline admitted, the gas transportation aspect of the Pipeline will not be subject to regulation by any West Virginia Agency. Appx. at 2 (Finding of Fact No. 4); id. at 262. Because it is not subject to state regulation, the Pipeline cannot be a common carrier under West Virginia law.

That “open access” is not synonymous with “common carrier” is important because, in each of the cases that Mountain Valley Pipeline cites to support its contention that the Pipeline is for public use because it provides open access to shippers, the pipeline at issue was a common carrier (or, at least a public utility), subject to state regulation. See Ralph Loyd Martin Revocable Trust v. Ark. Midstream Gas Servs. Corp., 377 S.W.3d 251, 257 (Ark. 2010) (noting that the pipeline operator had elected to operate the pipeline as a common carrier); Linder v. Ark. Midstream Gas Servs. Corp., 362 S.W.3d 889, 897 (Ark. 2010) (same); Smith v. Ark. Midstream Gas Servs. Corp., 377 S.W.3d 199, 205 (Ark. 2010) (same); Crawford Family Farm P’ship v. Transcanada Keystone Pipeline, L.P., 409 S.W.3d 908, 914 (Tex. Ct. App. 2013) (determining that pipeline at issue was common carrier); Iowa RCO Ass’n v. Illinois Commerce Comm’n, 409

N.E.2d 77, 80 (Ill. App. Ct. 1980) (pipeline was public utility); Mid-Am. Pipe Line Co. v. Missouri Pac. R. Co., 298 F. Supp. 1112, 1123 (D. Kan. 1969) (determining pipeline to be common carrier and regulated by state agency); Peck Iron & Metal Co. v. Colonial Pipeline Co., 146 S.E.2d 169, 172 (Va. 1966) (holding that oil pipeline was common carrier, making “public use of its facilities . . . guaranteed by its charter, the statutes of this State and the Interstate Commerce Act); Ohio Oil Co. v. Fowler, 100 So. 2d 128, 130 (Miss. 1958) (determining that oil pipeline was common carrier). If the Pipeline were a common carrier or public utility, the cases that Mountain Valley Pipeline cites might be more persuasive on the question of public use. Without that classification, however, Mountain Valley Pipeline cannot satisfy the Varner test for public use under West Virginia law. The Pipeline is not subject to any West Virginia regulation, and its use is not available to all shippers—only to those with whom it has contracted. Accordingly, the cases that Mountain Valley Pipeline cites are unavailing.

More fundamentally, however, the foreign precedent cited by Mountain Valley Pipeline is not persuasive because, in West Virginia, this Court’s precedent focuses the analysis on gas consumption rather than shipping to determine public use, and it does so for good reason. Under Varner, the “general public must have a definite and fixed use of the property to be condemned” 21 W. Va. at 556. Gas shippers are not the general public. Rather, they are a small class of entities privileged enough to own or lease natural gas interests. In this case, the class is particularly small—95% of the gas to be transported in the Pipeline is owned by affiliates of Mountain Valley Pipeline. Appx. at 270. In truth, this Pipeline is for the private use of those affiliates. “Evidence that all who wish to avail themselves of the proposed switch, branchroad, or lateral work can do so is not sufficient to show the use of the work will be for the benefit of the public.” Benwood Iron-Works, 31 W. Va. at 710, 8 S.E. at 454. When use is available only

to the builders of a project and resource owners in the same area, the use is not public. Hench, 57 S.E. at 810.

Mountain Valley Pipeline is correct when it asserts 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.” Petitioner’s Brief at 11 (quoting Lemley, 154 W. Va. at 736, 178 S.E.2d at 837–38). Here, the use of the Pipeline is private based on its character, not based on the number of users. As this Court recognized in Varner, when the power of eminent domain is being exercised by a private corporation that will then hold title to the property, “there is great danger” that, “unless carefully guarded,” private property may be taken for private use and gain. 21 W. Va. at 555. Accordingly, West Virginia courts must carefully review claims of public use. Benwood Iron Works, 8 S.E. at 467 (“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, 509 S.E.2d 569, 577 (1998) (holding that the question whether a proposed use of property is public or private is a judicial question). The right of eminent domain “is properly denied where an evasion of the constitutional inhibition against the taking of private property for purposes purely private is the chief inducement or incentive for the appropriation.” Vencill, 44 S.E. at 1106. Accordingly, to determine whether the proposed use is public or private, the Court must consider “the character of the business to be done and the manner of doing it.” Id. at 1107.

Here, the business to be done is the interstate transport of natural gas from a handful of producers in the northern part of West Virginia who will own the Pipeline to southern Virginia. Appx. at 160. As proposed, West Virginians will not have access to the natural gas as it flows

through eleven of our counties. The Pipeline is a purely private use of private property—the gain will be concentrated in the hands of the Pipeline operators and its affiliates who transport their natural gas to out-of-state consumers. In other words, the character of the use of the Pipeline will be private, not public. To conclude that the shippers of gas on the Pipeline are the “general public” of West Virginia would stretch that term beyond its breaking point. Because gas shippers do not constitute the general public, this Court focuses the public use analysis for natural gas pipelines on consumers. Swiger, 79 S.E. at 9; Low, 44 S.E. at 412. There is no reason for the Court to apply a different analysis in this case.

Contrary to Mountain Valley Pipeline’s contention, this Court has not held that the service of mineral producers and shippers is a public use. Petitioner’s Brief at 20. Mountain Valley Pipeline cites Lemley as support for its erroneous contention, but that case involved a railroad that this Court determined was for public use precisely because it offered service to more than just the mineral owners and shippers on its route. 154 W. Va. at 735, 178 S.E.2d at 837. The railroad in question maintained two stations for public use at which, although temporarily discontinued, the railroad was obligated by law to serve the public on request. Id. Evidence of those stations persuaded this Court that the railroad was for public use. Id. Consequently, Mountain Valley Pipeline is wrong each time it asserts in its brief that Lemley stands for the proposition that service only to mineral shippers can constitute public use in West Virginia. Petitioner’s Brief at 12, 20.

Finally, Mountain Valley Pipeline’s attempts to distinguish Bluegrass Pipeline do not hold water. In that case, the Court of Appeals of Kentucky held that a pipeline did not possess eminent domain power under Kentucky law because gas from the pipeline at issue would not reach Kentucky consumers. Bluegrass Pipeline Co., 2015 WL 2437864 at *4. Mountain Valley

Pipeline insists that Bluegrass Pipeline is not persuasive because the statutory term at issue in that case was “in public service” rather than “for public use.” Appellant’s Brief at 14. Although it is true that those terms are not co-extensive with one another in every context, in the context of eminent domain and pipelines there is sufficient overlap to conclude that if a failure to provide then general public with natural gas service means that a pipeline is not in public service then it is also not for public use. Mountain Valley Pipeline also contends that the fact that the pipeline at issue in the Kentucky case did not serve Kentucky gas shippers makes the case distinguishable. Petitioner’s Brief at 14. The Kentucky court’s reasoning, however, was in no way based on the source of the natural gas in the pipeline. Bluegrass Pipeline Co., 2015 WL 2437864 at *4. Rather, the Court focused solely on the identity of the gas consumers. Id.

E. Varner, Swiger, and This Court’s Other Precedents Are Still Good Law

Recognizing that its efforts to satisfy the public use test set out under this Court’s existing precedent fail, Mountain Valley Pipeline attempts to argue that Varner, Swiger, and the other cases relied on by the circuit court are “no longer controlling.” Petitioner’s Brief at 14. In making that argument, however, Mountain Valley Pipeline fails to cite a single precedent from this Court that overrules those cases.

Mountain Valley Pipeline maintains that the “‘fixed and definite’ use test” from Varner was “called into question” by this Court in Charleston Urban Renewal Auth., 203 W. Va. 528, 909 S.E.2d 569. Petitioners’ Brief at 15. That case involved urban blight, which is by any measure an expansion of the historic view of public use. This Court was careful in Charleston Urban Renewal Auth., however, to limit the scope of its decision, stating that

[t]his opinion addresses only the degree of deference to be given to determinations by public bodies . . . in their exercise of eminent domain. We do not address the exercise of eminent domain by private entities such as utilities that exercise the power of eminent domain pursuant to a legislative grant; nor do we

hold that such private entities are to be afforded the same degree of deference in their exercise of eminent domain that is afforded to eminent domain actions by public bodies.

203 W. Va. at 537 n. 6, 509 S.E.2d at 578 n. 6. Accordingly, Charleston Urban Renewal Auth. cannot be read to alter the analysis with regard to private entities like Mountain Valley Pipeline that seek to avail themselves of the eminent domain statutes.

Mountain Valley Pipeline also suggests that Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262, 10 S.E. 405 (1889)—on which the circuit relied to conclude that eminent domain statutes must be strictly construed—was implicitly overruled by W. Va. Dep't of Transp., Div. of Highways v. Contractor Enterprises, Inc., 223 W. Va. 98, 672 S.E.2d 234 (2008). Petitioner's Brief at 16. The latter case did not overrule Fork Ridge Baptist Cemetery Ass'n or suggest that eminent domain statutes should not be strictly construed. Rather, it acknowledged statutory changes governing eminent domain as applied to highways and pleading requirements and interpreted those statutes.

Mountain Valley Pipeline next points to amendments to W. Va. Code § 54-1-1 et seq. to wrongly suggest that older case law is no longer on point. The statute authorizing natural gas pipelines to take private property for public use appears to date back to at least 1885, however. Swiger, 79 S.E. at 4–5. W. Va. Code § 54-1-2(a)(3) still requires that natural gas pipelines be “for public use” in order for their operators to be vested with the power of eminent domain. Consequently, the public use tests in Swiger and Varner are still applicable.

Finally, Mountain Valley Pipeline insists that the Natural Gas Act, 15 U.S.C. § 717 et seq., a federal statute, somehow has some effect on what this Court has said “public use” means under West Virginia law. That argument is baseless. Whether the Natural Gas Act, under which Mountain Valley Pipeline has not received a Certificate of Public Convenience and Necessity,

would consider the Pipeline for public use under federal law has absolutely no bearing on the question of West Virginia law before this Court.

Mountain Valley Pipeline conflates the powers of the federal and state governments and erroneously contends that the standards governing “public use” and the exercise of eminent domain by the two distinct sovereigns are the same. West Virginia, as a sovereign state, possesses the power of eminent domain. W. Va. Bd. of Regents v. Fairmont, M. & P.R. Co., 155 W. Va. 864, 866, 189 S.E.2d 40, 43 (1972) (“The power of eminent domain is an inseparable incident of sovereignty.”). The Federal government possesses a concurrent power of eminent domain as an attribute of its own sovereignty. See, e.g., Goodpasture v. Tennessee Val. Auth., 434 F.2d 760, 763 (6th Cir. 1970). Federal eminent domain and state eminent domain coexist. Small v. Kemp, 727 P.2d 904, 908–09 (Kan. 1986).

Though the two distinct powers coexist, the conditions under which the powers can be exercised are not coextensive. Kohl v. U.S., 91 U.S. 367, 372 (1875) (noting the distinct spheres in which federal and state governments operate). As discussed above, a state can only exercise eminent domain for the benefit of its own citizens. Clark, 198 So. 2d at 371; Columbus Waterworks Co., 25 So. at 702 (holding that the power of eminent domain “cannot be extended [by a state] merely to promote the public uses of another state”). In other words, “no state is permitted to exercise or authorize the exercise of eminent domain except for a public use within its own borders.” Adams, 83 A.2d at 182. See also Lewis on Eminent Domain § 310 (“The public use for which property may be taken is a public use within the state from which the power is derived.”). Similarly, the federal government may only exercise or authorize the exercise of eminent domain for the use of the United States, *i.e.*, in the service of a clear federal power. Kohl, 91 U.S. at 372 (holding that the federal right of eminent domain “is a right which may be

exercised . . . so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution”); Alabama Power Co. v. Gulf Power Co., 283 F. 606, 611 n. 1 (D. Ala. 1922) (“[T]he United States cannot take property unless necessary for the use of the United States.”).

The Federal Energy Regulatory Commission regulates the interstate transportation of natural gas under the Natural Gas Act—which is an exercise of the federal government’s power to regulate interstate commerce. See, e.g., Federal Power Comm’n v. Natural Gas Pipeline Co. of Amer., 315 U.S. 575, 582 (1942). Accordingly, “the grant of the power of eminent domain provided by the Natural Gas Act is a regulation of interstate commerce by Congress” Thatcher v. Tennessee Gas Transmission Co., 280 F.2d 644, 648 (5th Cir. 1950).

A determination under the Natural Gas Act that a particular pipeline is in the public use is a determination involving federal eminent domain and would be an exercise of the federal government’s interstate commerce power. Such a determination would be irrelevant for the present case, however. Mountain Valley Pipeline seeks to avail itself of a West Virginia statute that governs state eminent domain. Unlike the federal government, West Virginia cannot vest the power of eminent domain in an entity solely on the basis of public use in interstate commerce. Rather, public use under West Virginia law is necessarily constrained to public use in West Virginia. Clark, 198 So. 2d at 371; Adams, 138 Conn. at 214–15; Columbus Waterworks Co., 25 So. at 702; Lewis on Eminent Domain § 310. Accordingly, the Natural Gas Act does not and cannot “supersede[]” the precedent of this Court as alleged by Mountain Valley Pipeline. Petitioner’s Brief at 16.

III. THE TRIAL COURT DID NOT ERR IN HOLDING THAT A PUBLIC USE MUST EXIST IN ORDER TO CONDUCT AN INVOLUNTARY SURVEY

The circuit court concluded “the issue of whether the [P]ipeline will be for a public use . . . is a prerequisite to exercise of the power of eminent domain.” Appx. at 7 (Conclusion of

Law No. 7). After close examination of the statutes at issue, the Court stated that, “[a]t every turn in the analysis, the West Virginia Legislature has conditioned the vestment of eminent domain on the existence of ‘public use.’” *Id.* As a result, the circuit court held that “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.’” *Id.* (Conclusion of Law No. 8).

Mountain Valley Pipeline has assigned error to the circuit court’s holding that survey access is contingent on the existence of public use. As explained below, however, the circuit court committed no error.

A. To Avail Itself of Survey Access Under W. Va. Code § 54-1-3, Mountain Valley Pipeline’s Project Must Be For Public Use

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

As discussed above, 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.*, 153 W. Va. at 138, 168 S.E.2d at 290–91; *State, by State Road Commission*, 137 W. Va. at 576, 73 S.E.2d at 434; *City of Mullens*, 7 S.E. 2d at 871–72; *Fork Ridge Baptist Cemetery Ass’n*, 33 W. Va. 262, 10 S.E. 405; *Trustees of Town of Clarksburg*, 23 W. Va. 203.

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 threshold question is whether the

particular company is “invested with the power of eminent domain under [Chapter 54].” W. Va. Code § 54-1-3. See also Lemley, 154 W. Va. at 732, 178 S.E.2d at 836 (holding that to avail itself of powers granted by Chapter 54, an entity must show that it is authorized to do so). West Virginia Code § 54-1-1 invests the power of eminent domain in governmental bodies and “every corporation heretofore or hereafter organized under the law 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.” W. Va. Code § 54-1-1 (emphasis added).

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.” W. Va. Code § 54-1-2(a)(3) (emphasis added). Moreover, this Court has held that a pipeline for transporting natural gas is an “internal improvement” when it is “for the public use.” Swiger, 79 S.E. at 7.

As the circuit court correctly observed, “[a]t every turn in the analysis” the term “for public use” arises. Appx. at 7 (Conclusion of Law No. 7). Accordingly, authorization to enter private property against the will of the property owner is conditioned on the existence of a public use. Because the Legislature repeatedly used the term “for public use” in W. Va. Code § 54-1-1 et seq., effect must be given to that term. Syll. Pt. 2, Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1970) (“Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”); Syll. Pt. 3, Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 530 S.E.2d 676 (1999) (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.”). The West Virginia Legislature used the phrase “for public use” in W. Va. Code §§

54-1-1 and 54-1-2(a)(3) for a reason, and the phrase must be given effect. To do that, the Court must ensure that the proposed project for which survey access is sought is “for public use.”

That approach is precisely the approach taken by the Court of Appeals of Kentucky in Bluegrass Pipeline. In that case, the statute at issue authorized the use of eminent domain by gas pipelines transporting gas products “in public service.” Bluegrass Pipeline, 2015 WL 2437864 at *4 (quoting KRS 278.502). The Bluegrass Pipeline court gave meaning to the phrase “in public service” in the statute by analyzing whether the pipeline at issue would meet that standard in determining whether the pipeline had the power of eminent domain. Id. A similar analysis should occur with regard to the question whether Mountain Valley Pipeline can conduct a survey without a landowner’s consent. That is, meaning should be given to the Legislature’s use of the term “for public use” by conducting an inquiry as to whether the Pipeline is for public use. Consequently, the circuit court did not err in concluding that whether Mountain Valley Pipeline could conduct its survey without the consent of the McCurdys turned on whether the Pipeline was for public use.

B. Public Use is Required Prior to Involuntary Survey Access Regardless of Whether the Survey Would Constitute a Taking

Mountain Valley Pipeline goes to great length to argue that the survey of the McCurdys’ property that it wants to conduct is not a taking. But whether it would constitute a taking or not is irrelevant because the statute plainly conditions the investiture of eminent domain on the existence of public use and involuntary survey access on the investiture of eminent domain. Thus, involuntary survey access is conditioned on public use, regardless of whether the survey would rise to the level of a constitutional taking of private property.

This case presents a statutory question, not a constitutional one. Under West Virginia law, a public use must exist before private property is taken from a landowner unwilling to

sell under the Constitution, but such a public use must also be established prior to an involuntary survey under the plain language of Chapter 54. In short, Mountain Valley Pipeline's takings argument is wholly irrelevant. Accordingly, this Court need not address whether the proposed survey would constitute a taking.

Even if the takings argument were relevant, the McCurdys would prevail. Article III, section 9, of the West Virginia Constitution provides that “[p]rivate property shall not be taken or damaged for public use, without just compensation” (Emphasis added.). As this Court observed in Richmond v. City of Hinton, “property is damaged within the meaning of both the Constitution and the common law when the corpus or an appurtenant right is affected.” 117 W. Va. 223, 185 S.E. 411, 412 (1936). Here, a survey without the McCurdys’ consent adversely affects the right appurtenant to their ownership of the Property to exclude others from their property. That right “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” Loretto, 458 U.S. at 435–36. The United States Supreme Court has described the right to exclude others from private property to be “[t]he hallmark of a protected property interest.” College Sav. Bank, 527 U.S. at 673. Moreover, this Court has held that “where one man has a right to exclude another from his land, the common law encircles it, if not [e]nclosed already, with an imaginary fence. And to break such imaginary fence, and enter the close of another, is a trespass” Haigh, 23 S.E. at 667.

An involuntary survey under W. Va. Code § 54-1-3 would unquestionably limit the McCurdys’ ability to exercise their right to exclude. Although that right may not be absolute, the limitation that would be placed on it by W. Va. Code § 54-1-3 would go beyond existing limitations on it. Mountain Valley Pipeline relies on Section 211 of Restatement (Second) of Torts, which provides that

[a] duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled.

Restatement (Second) of Torts § 211, cited in Petitioner’s Brief at 23–24. But even the Restatement recognizes that there are constitutional limitations on the legislature’s authority to authorize entry to private property, noting in the comments to Section 211 that “[t]he principles which determine the constitutionality imposing a duty or conferring an authority to enter land in the possession of another, are not within the scope of the Restatement of this Subject. This Section assumes that the particular statute or other legislative provision is constitutional.” Id. cmt. b.

An unauthorized entry onto private property without permission “is not a right to be assumed by anyone private citizen or public agency” and is subject to constitutional limitation. Robinson v. Ark. State Game & Fish Comm’n, 263 Ark. 462, 466, 565 S.W.2d 433, 435 (1978). Even if that entry is to perform a survey and is “admittedly slight and for a relatively short period of time” it remains “ a use of land inconsistent with the landowner’s right to control and enjoy his property in fee simple absolute.” Id. Thus, even if Mountain Valley Pipeline’s takings argument were relevant, the proposed survey in this case would amount to a taking or damaging of private property and, thus, would require the existence of a public use.

C. The Foreign Precedent Cited By Mountain Valley Pipeline is Not Persuasive

Mountain Valley Pipeline relies on cases decided in other states to support its argument that the public use analysis in this case is premature. But two of those cases were decided based on the specific provisions of those state’s statutes. Where this Court has spoken directly on the question, as it has here in Lemley, precedent from other jurisdictions is not persuasive. That is

particularly so where the statutes at issue in those cases do not tie the power of eminent domain so directly to public use as W. Va. Code § 54-1-1 et seq. does. Compare W. Va. Code § 54-1-1 (linking expressly the granting of eminent domain authority to “public use”) with Northville Dock Pipe Line Corp. v. Fanning, 21 N.Y.2d 616, 618 (1968) (citing the applicable New York statutes that do not link authority to survey to public use), and Walker v. Gateway Pipeline Co., 601 So. 2d 770, 973 (Ala. 1992) (citing the applicable Alabama statute that does not reference public use). Accordingly, Mountain Valley Pipeline’s citations to Northville Dock Pipe Line Corp. and Walker are unavailing.

Mountain Valley Pipeline’s reliance on Square Butte Elec. Coop. v. Dohn, 219 N.W.2d 877 (N.D. 1974) is equally unavailing, notwithstanding the fact that the statute at issue in that case linked surveys and eminent domain power to public use. The result in Square Butte Elec. Coop. not only fails to adequately protect private property rights, it also fails to give adequate meaning to all the terms in the relevant statute. Both are required by West Virginia law. Varner, 21 W. Va. at 556 (“The courts have . . . thrown around the owners of private property safeguards, which we should be careful not to permit to be broken down.”); Syll. Pt. 3, Meadows, 207 W. Va. at 203, 530 S.E.2d at 676 (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.”)

Moreover, rights of entry for survey purposes, like that in W. Va. Code s 54-1-3, are attributes of the state power of eminent domain. See, e.g., Oglethorpe Power Corp. v. Goss, 253 Ga. 644, 644, 322 S.E.2d 887, 889 (Ga. 1984); Lewis v. Texas Power & Light Co., 276 S.W.2d 950, 954 (Tex. Civ. App. 1955). Under West Virginia law, eminent domain must be justified by public use, and the question of public use is one for the courts. Baltimore & O. R. Co. v.

Pittsburgh, W. & K. R. Co., 17 W. Va. 812, 842 (1881) (“What is such public use, as will justify the exercise of the power of eminent domain, is a question for the courts.”).

Accordingly, this Court should not follow Square Butte Elec. Coop. Rather, if it is to look at authority from other states, it should look to the recent decision of the Court of Appeals of Kentucky in Bluegrass Pipeline. In that case, property owners brought a declaratory judgment action after the pipeline company sought to survey their properties for a natural gas pipeline. 2015 WL 2437864 at * 1. Similar to the way the statute at issue in this case vests eminent domain in gas pipelines that are “for public use,” the statute at issue in Bluegrass Pipeline vested eminent domain in gas pipelines “in public service.” Id. at *4. The Court of Appeals of Kentucky held that, “[i]f these [natural gas liquids] are not reaching Kentucky consumers, then Bluegrass and its pipeline cannot be said to be in the public service of Kentucky. We therefore affirm the circuit court’s judgment that Bluegrass does not possess the authority to condemn property through eminent domain.” Id. In other words, the Bluegrass Pipeline court gave meaning to the phrase “in public service” and concluded that the pipeline did not have eminent domain because would not serve Kentucky consumers. A similar analysis is required here. Effect must be given to the use of the term “for public use” in W. Va. Code §§ 54-1-1 and 54-1-2(a)(3). To conclude otherwise would rewrite the statute and inadequately safeguard private property rights.

D. Whether the Property Will be Damaged is Irrelevant, But The McCurdys Property Rights Will Be Cognizably Damaged

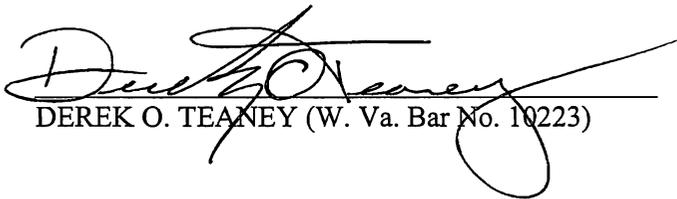
Mountain Valley Pipeline includes an argument about actual damages to the McCurdys’ Property, but does not connect the existence of actual damages to any alleged error by the circuit court. The McCurdys need not show actual damages in order to protect their right to exclude others from their private property.

In all events, the McCurdys respectfully submit that the record in this case would support a finding of actual damages if such a finding were required. Regarding damage to the McCurdys' hay crop, Mr. McCurdy did not testify that damage was possible, as Mountain Valley Pipeline contends. Rather, he testified that he "certainly feel[s] like [the survey] would" affect the profitability of his planned hay sale. Appx. at 186. Likewise, Mr. McCurdy testified that he felt that the survey would damage his use of his property for butterfly and turkey polt protection. Id. at 187. There was nothing conditional in his testimony, and Mountain Valley Pipeline misrepresents the record to suggest otherwise. Similarly, Mountain Valley Pipeline misrepresents its own witness's testimony when it claims that he testified that the Property "will not be damaged." Petitioner's Brief at 30. What Mountain Valley Pipeline's witness appears to have testified to was that the Property would not be "irreparably harmed or damaged." Id. at 244-45. Moreover, the survey would damage the McCurdys legal right to the quiet and exclusive enjoyment of the Property. "In every case where one man has a right to exclude another from his land, the common law encircles it, if not [e]nclosed already, with an imaginary fence. And to break such imaginary fence, and enter the close of another, is a trespass" Haigh, 41 W. Va. at ___, 23 S.E. at 667. Hence, an action for trespass would lie against Mountain Valley Pipeline if it were to conduct this survey without the McCurdys' permission.

CONCLUSION

For the foregoing reasons, the McCurdys respectfully request that the Court affirm the decision of the Monroe County Circuit Court.

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-----By Counsel-----


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**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.

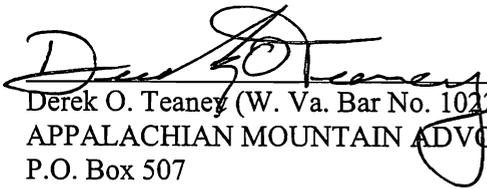
BRIAN C. MCCURDY and
DORIS W. MCCURDY,

Plaintiffs/Respondents.

CERTIFICATE OF SERVICE

I, Derek O. Teaney, hereby certify that on this ___th day of February, 2016, a true copy of the foregoing Respondents' Brief has been mailed to:

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