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Mountain Valley Pipeline v. McCurdy: Supreme Court of Appeals of West Virginia Holds that Eminent Domain by Private Company Must be for Public Use

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On November 15, 2016, in **Mountain Valley Pipeline, LLC (“MVP”) v. McCurdy**, No. 15-0919 (September 2016 Term), the **Supreme Court of Appeals of West Virginia** (the “Court”) affirmed the Circuit Court of Monroe County’s grant of a declaratory judgment to Bryan and Doris McCurdy (the “McCurdys”), declaring that MVP had no right to enter upon the McCurdys’ property to conduct a survey for the placement of a natural gas pipeline MVP.

MVP is in the process of seeking approval from the Federal Energy Regulatory Commission (“FERC”) to construct a 300 mile natural gas pipeline from Wetzel County, West Virginia, to Pittsylvania County, Virginia. Although, MVP does not own the gas to be transported, 95 percent of the gas to be transported would be owned by affiliates of MVP. The purpose of the pipeline is to transport gas from the gas producing regions in northern West Virginia to the markets in the Mid-Atlantic and Southeast regions of the United States. MVP wanted to survey the McCurdys’ property as part of the application process to FERC and intended for the pipeline to cross their property.

Initially, the Court held that under the plain language of W. Va. Code § 54-1-3 (1931) (Repl. Vol. 2016), only a company invested with the power of eminent domain may “enter upon lands for the purpose of examining the same, surveying and laying out the lands...” Pursuant to W. Va. Code § 54-1-1 (1931) (Repl. Vol. 2016), a corporation, such as MVP, that is authorized to transact business in West Virginia “for any purpose of internal improvement for which private property may be taken or damaged *for public use*[,]... shall have the right of eminent domain...” The Court further noted that W. Va. Code § 54-1-2 (1931) (Repl. Vol. 2016), provides that the public use includes the construction of natural gas pipelines “*when for public use.*” Accordingly, if the proposed pipeline was for public use in West Virginia, then MVP had the power of eminent domain and could conduct the survey.

In affirming the circuit court’s determination that the proposed pipeline did not constitute a public use, the Court did not set forth a definitive statement of what constitutes a public use. Rather, the Court noted that MVP did not identify a single West Virginia consumer or entity that is not an affiliate of MVP, that would receive a benefit from the pipeline. In making the decision, the Court noted that: (1) MVP is not regulated as a utility in West Virginia; (2) 85 to 95 percent of the natural gas running through the pipeline would be owned by affiliates of MVP; (3) There were no current plans to supply any local distribution companies (“LDC”) with natural gas; and (4) any LDC would have to submit a tap request to MVP, which MVP retained the right to refuse under federal law. Since MVP did not show that the pipeline would benefit West Virginians, the case represented a private taking for a private use, which is prohibited.

Take Aways

In West Virginia, a private company that wants to exercise the power of eminent domain for a project must be able to show a public use. Although the Court did not define what a public use is, at a minimum, it must benefit

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West Virginians and must benefit more than just the parties involved in the project.

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