

# COMMENTARY



## Debating 'Public Use' and Its Worth to Landowners

In order for eminent domain laws, sometimes called "condemnation," to be used to take private citizens' land for a project, the project must be for a "public use."



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I write to caution that the broadening of the definition of "public use" in our eminent domain laws will do severe collateral damage to the principles of free markets and private property rights, particularly if the expansion of "public use" is not tempered by requiring private free market property value determinations.

If a 42-inch transmission pipeline to North Carolina is determined to be a "public use" for which eminent domain can be used (like any other type of projects) there is more than one effect. The first, obvious effect is that eminent domain takes from the landowner and gives to the company the right to use the property, even though the landowner does not want it to happen.

A second, less realized effect is that the determination of how much the landowner will

be paid is taken out of the private free market. In a private enterprise free market purchase of the use of land, the value paid for the land is the amount the land is worth to the buyer for the buyer's use, and not the amount the land was worth to the seller.

On the other hand, if a farmer owns land the state wants for a road, the state uses eminent domain proceedings. Clearly a road is a "public use." It is available for use by all citizens of the state, and it will benefit many of them directly, and many more indirectly. It is actually owned by the state (and the state's only income to purchase the land is its collection of taxes). Giving the farmer only his pasture value for this true "public use" is reasonable. The value of the land to the seller, the farmer, is determined, and the farmer is paid that amount, the pasture value, as "just compensation."

But what if Exxon wants to build a gas station/convenience store beside the road? Should the farmer sell his acreage to Exxon for what it was worth to the farmer, the seller, as a pasture? Of course not. In this private, free market transaction, the farmer will negotiate to be paid what the acreage is now going to be worth to Exxon, the buyer, as a commercial gas station/convenience store. If Exxon

cannot get the farmer to agree to Exxon's price, or if the farmer does not want to sell because the farmer likes his pasture better than money, then Exxon can talk to neighboring farmers.

But if Exxon is given the right of eminent domain because such a gas station is seen as an expansion of business and infrastructure and it is seen as creating jobs and increasing property taxes (a frequent justification for expanding the definition of "public use" to justify more eminent domain), the farmer ought to be given the value of his land to Exxon for Exxon's commercial use, rather than what it was worth to the farmer as a pasture.

It is said that the pipelines are needed in order to benefit the West Virginians who are mineral owners. But when the driller purchased leases from the mineral owners, the amount paid to the mineral owners whose gas is being produced was negotiated in a private enterprise free market. And the mineral owners negotiated as large a signing bonus and as high a royalty as they could get in order to get what the lease was worth to the drillers/lease buyers.

The rights of way for these new, huge, 42-inch pipelines out of the Marcellus Shale region will not be owned by the

state, but by a private for-profit company. Most of the gas will be used not by local homeowners, or even by local businesses. Much of the gas will be used by for-profit private enterprise businesses or, at best, by privately owned electric utility companies with regulated, guaranteed profits. Billions and billions of dollars worth of gas will pass through the pipelines.

So if the farmers are to have unwanted pipelines placed across their land, they should not be given the low price of what the pasture was worth to the farmer as a pasture. They should be given what the value of having the pipeline across the farmer's land is worth to the pipeline company and their gas buyers.

West Virginians have little experience with the dollar amounts at stake. I know of one well pad with nine horizontal Marcellus Shale wells that will produce well over one-quarter billion dollars worth of gas during the life of the wells — that's just one pad. I would bet if the landowners were offered what the pipeline was truly worth to the pipeline company and its customers (either up front for the value of the pipeline over the years, or as a yearly payment) the pipeline companies would not need eminent domain.

I do not say my friends are

wrong when they say building these pipelines at all is a bad idea, because it enables us as a society to avoid increasing energy efficiency and to avoid turning to renewables, and instead enables continued climate change. Pipelines enable value-added industries to locate in other states and not here. Pipelines can leak and even sometimes explode, and their compressor stations cause tremendous noise and other types of pollution. But if eminent domain is allowed because the Legislature or the courts deem these pipelines a "public use," then West Virginia landowners should be required to be paid the private free market property value of the rights of way to the buyer pipeline companies and their customers and not the seller's pasture value.

Texas, where the mineral owners are politically dominant, are rich. West Virginians are poor because we cede too often and too much to the drillers and pipeline companies out of our company town history and culture. Requiring payment to sellers of the value to the buyer in eminent domain proceedings is one step West Virginia should take to change that.

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