

Lawyer Insights

Expert Analysis: Legal Options For Pipeline Companies Stymied By Tree-Sitters

By Arthur E. Schmalz

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In recent years, pipeline opponents have increasingly used “tree-sitting” to obstruct natural gas infrastructure projects. The tactic involves individuals who climb trees slated for removal in a pipeline project, and stay there — sometimes for months, and often aided by family, friends or others — forcing project developers to take various countermeasures.

Last month, a Virginia federal district judge rejected a novel effort by Mountain Valley Pipeline LLC, or MVP, to join two unnamed tree-sitters as defendants in a Natural Gas Act eminent domain action to condemn pipeline easements over land in southwestern Virginia.¹ Although declining to join the tree-sitters as parties, the court stressed that the pipeline company has several other adequate remedies available to combat tree-sitter obstruction.

Perhaps most notable among them is the remedy of civil contempt, which MVP successfully pursued in three separate motions in the same case last year.

Tree-Sitters Have No Property Interest in the Land, Barring Joinder Under Rule 71.1

Presiding judge Elizabeth K. Dillon ruled that the tree-sitters were nonparties who had no property interest in the land at issue, and no legal claim of entitlement to occupy the trees.² Accordingly, she held that they were not proper parties under Federal Rule of Civil Procedure 71.1 (the rule governing federal court eminent domain proceedings), which only permits joinder of persons “who have or claim an interest in the property” at issue.³

Although the tree-sitters potentially could obtain an interest in the land through adverse possession if they remained in place for 15 years, that future possibility was simply too remote to satisfy Rule 71.1, in Dillon’s view.⁴

Nor Can Tree-Sitters Be Permissively Joined Under Rule 20

Dillon also rebuffed MVP’s effort to join the tree-sitters under the permissive joinder provisions of Federal Rule 20.⁵ Under that rule, the relief sought against a defendant to be joined must relate to the same transactions or occurrences involved in the underlying action, and involve a question of law or fact common to all defendants in the case.⁶

The court found the last element unsatisfied, because the only remaining legal issue in the case was the amount of just compensation to be awarded to the landowners.⁷ That issue, Dillon explained, was

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Law360 | September 6, 2019

unrelated to any claims against the tree-sitters who, having no interest in the property, have no right to any compensation award.⁸

MVP Has Other Available Remedies Against the Tree-Sitters

Despite its rejection of MVP's joinder motion, the court noted that the pipeline company "has other options for relief — under both state and federal law — that it can pursue."⁹ Those other options include "actions for trespass and/or interference with easements in Virginia state court, ... criminal charges for assault and battery, or ... contempt sanctions in this court, as [MVP] previously has [sought]," Dillon wrote.¹⁰

Implications and Practice Pointers

MVP's attempt to join the tree-sitters as defendants in a pending Natural Gas Act condemnation action appears to be the first time such an effort has been tried. Although it was unsuccessful, the court's ruling is unlikely to be a setback for MVP or any other pipeline companies seeking to curb tree-sitter obstruction, in light of other available remedies.

Civil contempt sanctions may be the most robust of those other remedies in situations where a pipeline company has obtained a preliminary injunction authorizing immediate pretrial entry and use of easements being condemned. Indeed, in three earlier decisions in the same case, Dillon held several tree-sitters, and landowners who aided them, in civil contempt of court.¹¹

In the first decision, she fined a landowner \$2,000 for assisting two tree-sitters on his property, and ordered the tree-sitters to vacate the trees and the easement areas before midnight the following day or else face arrest and fines of \$1000 per day of noncompliance.¹²

In the second ruling, the court fined two landowners \$2,000 for aiding tree-sitters on their property, and invited MVP to file a separate motion to recover attorney fees.¹³ But the court declined to find the tree-sitters in contempt, finding insufficient evidence that they had actual or constructive notice of the court's prior injunction decree.¹⁴

Within less than two weeks of that ruling, however, MVP cured the notice defect and persuaded Dillon to hold two tree-sitters (John "Ink" Doe and Jane Doe) in civil contempt of court, and fine them \$5,000 and \$1,000, respectively.¹⁵ The court further ordered them to stay outside the boundaries of MVP's easements, and reserved the right to order their arrest for any future violations.¹⁶

Dillon's previous rulings are a helpful road map for pursuing contempt sanctions against tree-sitters — and landowners in league with them — who interfere with an immediate possession preliminary injunction decree in a Natural Gas Act condemnation action. In general, to succeed on a contempt motion, the moving party must prove the following elements by clear and convincing evidence:

- (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;
- (2) that the decree was in the movant's 'favor';
- (3) that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and

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Law360 | September 6, 2019

(4) that [the] movant suffered harm as a result.¹⁷

In addition to establishing these elements, where contempt sanctions are sought against a nonparty, the movant must also establish that the nonparty worked in concert with a named party (such as a landowner in a pending condemnation action) to frustrate or avoid compliance with an injunction previously issued by the court.¹⁸

And where contempt sanctions are sought against a landowner for aiding and abetting violations of a prior court order by a nonparty tree-sitter, specific evidence of the landowner's assistance is critical.¹⁹ For example, in finding one landowner in contempt, Dillon cited evidence that he had helped tree-sitters climb trees on his land, provided food and drink to them and appeared in a video professing his support for their activities.²⁰

In this media-savvy age, it's not surprising that some of the individuals facing contempt sanctions tried to cast their activities in a sympathetic light, as a "form of civil disobedience intended to focus the public's attention or to express their opposition to the [MVP] project."²¹ Dillon, however, was unimpressed by that portrayal, observing that "those who disobey valid orders of a court should be prepared to face the consequences of doing so."²²

She bolstered that conclusion by quoting Justice Felix Frankfurter: "If one [person] can be allowed to determine for himself [or herself] what is law, every [person] can. That means first chaos, then tyranny."²³

Arthur E. Schmalz is a partner in the energy litigation practice group in the Washington, DC office of Hunton Andrews Kurth LLP. Art is an experienced commercial litigator. His practice focuses on federal and state court disputes involving business transactions, real estate acquisition and development, and natural gas pipeline-related matters. He can be reached at +1 202 955 1977 or aschmalz@HuntonAK.com.

Disclosure: Hunton Andrews Kurth has previously represented Mountain Valley Pipeline LLC, one of the parties to the case discussed in this article, in other matters.

Notes

¹ Memorandum Opinion, *Mountain Valley Pipeline LLC v. Easements to Construct and Maintain A Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke County, Franklin County, and Pittsylvania County, Virginia, et al.*, Civ. Action No. 7:17-cv-492-EKD (W.D. Va. Aug. 2, 2019) ("MVP Mem. Op."), available at <http://www.vawd.uscourts.gov/OPINIONS/DILLON/7.17cv492mvpveasement8.2.19.pdf>.

² MVP Mem. Op. at 8-10.

³ Fed. R. Civ. P. 71.1(c)(3).

⁴ MVP Mem. Op. at 7-8.

⁵ *Id.*, 10-13.

Expert Analysis: Legal Options For Pipeline Companies Stymied By Tree-Sitters

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Law360 | September 6, 2019

⁶ Fed. R. Civ. P. 20(a)(2).

⁷ MVP Mem. Op. at 12-13.

⁸ Id. at 13.

⁹ Id.

¹⁰ Id., 13, n.3.

¹¹ *Mountain Valley Pipeline LLC v. Easements to Construct, Operate, & Maintain a Natural Gas Pipeline*, No. 7:17-cv-00492-EKD, 2018 U.S. Dist. LEXIS 75780 (W.D. Va. May 4, 2018) (“MVP 5/4/18”); *Mountain Valley Pipeline LLC v. Easements to Construct, Operate, & Maintain a Natural Gas Pipeline*, No. 7:17-cv-00492-EKD, 2018 U.S. Dist. LEXIS 81337 (W.D. Va. May 15, 2018) (“MVP 5/15/18”); *Mountain Valley Pipeline LLC v. Easements to Construct, Operate, & Maintain a Natural Gas Pipeline*, No. 7:17-cv-00492-EKD, 2018 U.S. Dist. LEXIS 81337 (W.D. Va. May 28, 2018) (“MVP 5/28/18”).

¹² MVP 5/4/18, at *62-64.

¹³ MVP 5/15/18, at *62.

¹⁴ Id. at *58.

¹⁵ MVP 5/28/18, at *1-2, 7.

¹⁶ Id. at *7-8.

¹⁷ MVP 5/4/18, at *41.

¹⁸ Id. at *41, *56.

¹⁹ Id. at *49-50.

²⁰ Id.

²¹ MVP 5/15/18, at *61.

²² Id.

²³ Id. (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring)).

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