

WESTERN SLOPE GAS CO. (On Reconsideration)

IBLA 78-597

Decided October 15, 1979

Motion for reconsideration of the Board's decision in Western Slope Gas Co., 40 IBLA 280 (1979), and appeal of the decision of the Colorado State Office, Bureau of Land Management, granting right-of-way C-23293 RW.

Motion denied, appeal dismissed.

1. Rules of Practice: Appeals: Reconsideration

Reconsideration of a decision of this Board is permitted only in extraordinary circumstances. A motion to reconsider will be denied when it is premised on the same arguments as those which were fully considered prior to the Board's decision, in the absence of compelling reasons.

2. Administrative Procedure: Administrative Review -- Rules of Practice: Generally -- Rules of Practice: Appeals: Motions -- Rules of Practice: Appeals: Reconsideration

The right to administrative relief is a privilege afforded by law to persons who consider themselves interested or aggrieved. The burden is upon the interested person to act affirmatively to protect perceived interests. Such a person is not entitled to wait until all other interested persons act, to speculate on the outcome, and then, if the decision is adverse, to seek to reopen the matter on his or her own behalf, when that person has been afforded notice of all the proceedings.

## 3. Res Judicata -- Rules of Practice: Appeals: Reconsideration

In the absence of compelling legal and equitable reasons supporting reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will operate to bar consideration of a new appeal arising from a later proceeding involving the same claim, the same parties, and the same issues.

APPEARANCES: Janet M. Clouse, Assistant Attorney General, Natural Resources Section, State of Colorado, and Timothy J. Flanagan, Esq., Kelly, Stansfield & O'Donnell, Denver, Colorado, for Western Slope Gas Company.

## OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Colorado (hereinafter the State) has filed a motion for reconsideration of our decision in Western Slope Gas Co., 40 IBLA 280 (1979), on behalf of the Colorado State Historic Preservation Officer, Arthur C. Townsend, the Colorado State Historical Society, and the Colorado Office of the State Archeologist. That decision held that BLM was not required under the terms of the National Historic Preservation Act (NHPA), as amended, 16 U.S.C. § 470-470b, 470c-470n (1976), to precondition the grant of a right-of-way to Western Slope Gas Company (Western Slope) on the completion of a cultural resources survey on private lands traversed by Western Slope's proposed West-East Intertie pipeline. It also held, however, that BLM, as a matter of discretion, could precondition its grant of a right-of-way on the performance by Western Slope of actions to protect known historic sites and/or survey specified areas located on private lands. The State also has appealed the granting of the right-of-way by BLM on May 4, 1979, following the Board's remand of the above case. On June 5, 1979, BLM suspended the right-of-way grant to Western Slope pursuant to 43 CFR 4.21(a) pending the outcome of this appeal.

In its brief in support of these actions, the State consolidated its arguments stating that the issues of law for both are identical. The State argues that this Board erroneously concluded that the West-East Intertie is a Federal undertaking under NHPA and related regulations only for that portion of the pipeline which crosses Federal land. It contends that inasmuch as a Federal right-of-way is necessary for completion of the pipeline, BLM must evaluate the impact of the entire pipeline on cultural resources on both Federal and non-Federal lands. The State also contends that the Board's holding that BLM as a matter of discretion could require a cultural survey on non-Federal lands was improper. It argues again that such a survey is

required by law. In addition, the State asserts that BLM abused its discretion in granting the right-of-way because the conditions imposed by BLM on the grant would leave the identification of cultural resources to unqualified personnel.

Western Slope answers these arguments by claiming that the State: (1) has waived its right to challenge the Board's decision in Western Slope Gas Co., supra, by failing to participate in the earlier proceedings in this case; (2) is barred from collateral attack upon the Board's decision under the doctrine of res judicata; and (3) has raised no new issues in these actions. In addition, Western Slope contends that the right-of-way grant complies with all mandatory legal requirements.

Motion for Reconsideration

[1, 2] Under Departmental regulations, reconsideration of a decision is permitted "only in extraordinary circumstances where, in the judgment of the Director [of the Office of Hearings and Appeals] or an Appeals Board, sufficient reason appears therefor." 43 CFR 4.21(c). We do not find that the State has identified "extraordinary circumstances" which would warrant reconsideration of our decision. The State's arguments in support of its motion are the same as those considered by this Board in granting Western Slope's appeal, with one exception. That exception is a charge that the Board erred in relying on the definition of "undertaking" set forth in the 1974 regulations of the Advisory Council on Historic Preservation rather than the revised definition in regulations effective March 1, 1979. 1/

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1/ The relevant part of the definition in the 1974 and current regulations, respectively, reads as follows:

"(c) 'Undertaking' means any Federal action, activity, or program, or the approval, sanction, assistance, or support of any other action, activity or program, including but not limited to:

\* \* \* \* \*

"(2) New and continuing projects and program activities: \* \* \* involving a Federal lease, permit, license, certificate, or other entitlement for use."

36 CFR 800.3(c) (1978)

"(c) 'Undertaking' means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are:

\* \* \* \* \*

"(3) carried out pursuant to a Federal lease, permit, license, certificate, approval or other form of entitlement or permission \* \* \* ." 36 CFR 800.2(c) (44 FR 6073, January 30, 1979).

This change in the definition does not change our analysis or our conclusion in Western Slope Gas Co., supra, that only the portion of the West-East Intertie pipeline crossing Federal land is an undertaking under NHPA. Only that portion of the pipeline in the Federal right-of-way is being "carried out pursuant to a Federal \* \* \* permit."

Furthermore, the State of Colorado participated in the evaluation of Western Slope's right-of-way application and made its views known to BLM as to the required extent of the cultural resources survey prior to the BLM decision. See Western Slope Gas Co., supra, at 281-82. Under principles set forth by this Board in California Association of Four Wheel Drive Clubs, 30 IBLA 383, 386-87 (1977), the State was an adverse party as to Western Slope in the appeal proceedings. Indeed, were this not the case, the State would have no standing to appeal the issuance of the permit. See 43 CFR 4.410. Western Slope served the State with a copy of its initial Notice of Appeal and all subsequent documents, yet the State chose not to answer. By doing so, the State of Colorado has, in effect, waived its right to complain and its Motion for Reconsideration must be dismissed. As the Court of Appeals for the District of Columbia has noted:

The right to administrative relief is a privilege afforded by law to persons who consider themselves interested or aggrieved. \* \* \* The burden \* \* \* is \* \* \* upon an interested person to act affirmatively to protect himself. \* \* \* Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into the court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286-87, (D.C. Cir.), cert. denied, 305 U.S. 625 (1938). See Nader v. Nuclear Regulatory Commission, 513 F.2d 1045, 1054 (D.C. Cir. 1975); Easton Utilities Comm. v. AEC, 424 F.2d 847, 851-52 (D.C. Cir. 1970). 2/ Moreover we

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2/ In response to Western Slope's motion to dismiss the motion for reconsideration, the State argued that there had been no waiver, citing 43 CFR 4.414. Its rationale focused on that portion of the regulation which reads: "Failure to answer will not result in default \* \* \*." We note that State of Colorado has taken this regulation out of context and misinterpreted it. The complete regulation deals with proceedings on appeal. The "no default" provision simply means that an appeal will be reviewed on its merits regardless of whether an answer is filed by parties adverse to the appellant. In other words, an appellant may not prevail merely because an adverse party does not file an answer. To accept the State's view would create the "impossible situation" described above.

would note that Western Slope contends that projected construction costs have risen from \$14,750,000 from the originally scheduled date of commencement of construction to an estimated \$19,495,000 by December 1978. Thus, the State's refusal to participate during our original consideration of this matter cannot be said to have been without cost to appellant.

#### Appeal of Right-of-Way Grant

[3] In its appeal of the right-of-way granted to Western Slope, the State claims that issuance of the right-of-way without requiring a cultural resource survey on non-Federal lands is contrary to law. As noted previously, the State makes the same arguments to support this appeal as it did in its motion for reconsideration. We can only conclude that this appeal is, in effect, a relitigation of our decision in Western Slope Gas Co., supra. It involves the same right-of-way, same parties, and same issues. The Board has held on numerous occasions that in the absence of compelling legal and equitable reasons supporting reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will operate to bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues. Donald W. Coyer, 36 IBLA 181 (1978); Dallas C. Qualman, 36 IBLA 119 (1978); Pekka K. Merikallio, 30 IBLA 157 (1977); Ben Cohen, 21 IBLA 330 (1975); United States v. Blythe, 16 IBLA 94, 101 (1974), aff'd, Blythe v. Kleppe, Civ. No. 77-1446 (10th Cir., Nov. 16, 1977). The State's appeal of the right-of-way grant must be dismissed on the principle of res judicata.

Even if this were not the case, we would still dismiss this appeal. The State's only additional ground for appealing is a claim that BLM abused its discretion because conditions attached to the right-of-way "do not require that a qualified archaeologist be on site at all times." (Emphasis supplied.) The State cites section 8111.4.41 of the BLM Manual to support its assertion, but that section contains no such requirement. The State correctly notes that the section specifies that evaluation and inventory of cultural resources must be done by professional cultural resource personnel. Special stipulation No. 2 to Western Slope's right-of-way grant specifically deals with the protection of cultural resources. It states in part that in order "[t]o mitigate cultural resource values and impacts \* \* \*, the grantee shall engage the services of a qualified professional archeologist (and a historian, when appropriate) acceptable to [BLM]," and clearly requires site monitoring by that individual.

Additionally, we note that in his "DECISION RECORD/RATIONALE," signed on May 4, 1979, the Colorado State Director, BLM, specifically noted that the BLM CSO Historian had reached an agreement with Western

Slope as regards the location of the pipeline through the Thornburgh Battlefield, a National Register property located on private lands, which mitigated any possible adverse effects. Appellant has provided no evidence that any other such sites or areas with a high likelihood of containing such sites are affected by the route of the pipeline across private lands. Thus, appellant has shown no error in the action of the BLM State Office.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for reconsideration is denied and the appeal of the right-of-way grant is dismissed.

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James L. Burski  
Administrative Judge

I concur:

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Douglas E. Henriques  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

In our prior determination in this case, Western Slope Gas Co., 40 IBLA 280 (1979), we directed that BLM consider in the exercise of discretion under the Mineral Leasing Act whether the right-of-way should be conditioned upon further stipulations applicable to private lands. I would prefer that the record in this case reflect a more considered determination of the factors involved. Nevertheless, as there was much evidence in the record and input from many sources, including the State of Colorado, I cannot find that the action taken in issuing the right-of-way was arbitrary or capricious for reasons offered by the State in its present motions before this Board.

I agree that there is no basis for recognizing the State's challenge to the issuance of the right-of-way in this case at this time. There was no violation of the law. Furthermore, the State has not shown that it is entitled to any equitable relief here. In weighing the most basic equitable concepts here, the State falls far short. It has not acted diligently and vigilantly and Western Slope's costs have been greatly increased by the administrative delays already incurred. Furthermore, under stipulations in the grant, the grantee is required to obey all Federal and State laws. Therefore, it would appear that the State is not without a remedy as to lands which are outside Federal jurisdiction.

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Joan B. Thompson  
Administrative Judge

