

WESTERN GAS SUPPLY CO.

IBLA 85-241

Decided May 8, 1985

Appeal from a decision of the District Manager, Grand Junction District, Colorado, Bureau of Land Management, granting natural gas pipeline right-of-way and dismissing protest of pipeline. C-38522.

Affirmed.

1. Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

The Department has discretionary authority to issue a natural gas pipeline right-of-way pursuant to 30 U.S.C. § 185 (1982). A decision to issue a right-of-way in the public interest to facilitate production of gas from Federal oil and gas leases and to dismiss the protest of a competing gas supplier will be affirmed in the absence of a showing of violation of relevant statutes or regulations.

APPEARANCES: Kenneth V. Reif, Esq., Denver, Colorado, for appellant; Frank G. Cooley, Esq., Meeker, Colorado, Lester D. Sitter, Esq., and Charles L. Kaiser, Esq., Denver, Colorado, for intervenor Gasco, Inc.; John C. Morrison, Esq., Alexandria, Virginia, for intervenor Beartooth Oil and Gas Company; Marla E. Mansfield, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Western Gas Supply Company (West Gas), a wholly owned subsidiary of the Public Service Company of Colorado (Public Service), has appealed from a decision of the District Manager, Grand Junction District, Colorado, Bureau of Land Management (BLM), dated December 10, 1984, offering a natural gas pipeline right-of-way C-38522, to Gasco, Inc., (Gasco), and dismissing appellant's protest to issuance of the right-of-way.

On June 14, 1984, Gasco filed an application for a 35-foot wide, 15.3-mile long natural gas pipeline right-of-way between the Beartooth Nos. 5-15 and 9-13 Federal gas wells and the "Loma area," near Fruita, Colorado, in Garfield and Mesa counties, Colorado, pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1982). Gasco

stated that the pipeline was needed in order to carry natural gas from the Beartooth wells, thereby promoting production on the Federal leases.

By letter dated September 25, 1984, appellant requested the District Manager not to issue right-of-way C-38522 because the proposed pipeline was an "unnecessary duplication of facilities" since appellant already had a natural gas pipeline right-of-way, C-05006, "originating and terminating at essentially the same locations as those proposed by [Gasco]." Appellant stated that its facilities have the "capacity to serve the natural gas consumers in the Fruita area, including the two major industrial customers (Pabco and Gary Western)."

By letter dated October 8, 1984, appellant further commented to the District Manager regarding Gasco's right-of-way application, contending that there was no demonstrated need for the pipeline because appellant's facilities are "adequate for the present and for all reasonable future growth projections." Appellant acknowledged that Beartooth will benefit from increased revenues from the sale of production and the Federal Government will benefit from the payment of royalties on that production, but asserted that the "ability to produce the wells \* \* \* is severely limited without a market for the natural gas." Appellant also submitted a letter, dated October 5, 1984, from West Gas to Public Service, outlining the economic cost of granting the right-of-way. Appellant stated that the loss of its sales to Pabco, Gary Western and others would result principally in lost revenues and, thus, lost "gross margin" (the difference between total revenues and costs), which would affect Public Service's customers through increased rates. Appellant projected increases in annual rates of up to \$ 33 per customer. Appellant concluded that savings to Pabco, Gary Western, and others are "more than offset by increased costs to others in the area."

On October 12, 1984, BLM prepared a supplemental environmental assessment (SEA), which considered the environmental impact of Gasco's proposed natural gas pipeline and a no-action alternative. The SEA stated, at page 4, that construction of the pipeline would "enable Gasco to supply natural gas to the area west of Fruita" and that "[i]t is anticipated that all or most gas sales by Gasco would replace gas sales of the current suppliers," Public Service and appellant. BLM stated that to the extent Gasco could supply natural gas at more competitive rates or in more consistent quantities, users would "directly benefit," but that "[r]evenue losses sustained by the current suppliers could have extensive secondary impacts" on their customers if the Colorado Public Utilities Commission (PUC) permitted an increase in rates. Id. at 5. BLM stated that the impact on Federal revenues "cannot be determined," but that it would "very likely be small" where existing natural gas production was merely "supplanted." Id. In a land report and decision record, the District Manager on October 15, 1984, approved the recommendation in the SEA that the right-of-way be granted, with appropriate stipulations.

By decision dated October 15, 1984, the District Manager issued a 30-year natural gas pipeline right-of-way to Gasco. On October 19, 1984, appellant filed an appeal from the October 1984 BLM decision granting the right-of-way.

In an order dated November 28, 1984, the Board set aside the October 15, 1984, BLM decision issuing the right-of-way to Gasco because the record before the Board failed to disclose that BLM had adjudicated appellant's protest and considered, in light of the protest, whether issuance of the right-of-way is consistent with the public interest. The Board remanded the case to BLM "with instructions to consider the objections raised by West Gas in light of the public interest."

In its December 1984 decision, BLM again issued right-of-way C-38522 to Gasco, and dismissed appellant's protest. BLM stated that it had considered "possible losses" to appellant in the SEA, but had concluded that such losses were "speculative" and dependent on review by PUC. BLM stated further that an applicant for a right-of-way was not required to demonstrate a "proven market" and that BLM did not have to determine "which utility served what customer," in adjudicating a right-of-way grant. Appellant has appealed from this decision and requested a stay of the decision pending resolution of the appeal. <sup>1/</sup>

In its statement of reasons for appeal, appellant contends that issuance of the right-of-way is not consistent with the public interest where there is no demonstrated need for the pipeline in the form of a market. Appellant alleges the market is already served by appellant and Public Service. Appellant also argues that granting the right-of-way would adversely affect appellant and Public Service through lost revenues, their customers through increased rates, and the general public through the impact on the land itself. Appellant concludes that these are all matters appropriate for BLM consideration. Appellant also states that the right-of-way application is insufficient in demonstrating need, economic feasibility, and expected public benefits; in discussing economic and environmental impacts; and in setting forth construction and rehabilitation plans.

Beartooth Oil and Gas Company (Beartooth) petitioned the Board for leave to intervene as an interested party. Beartooth asserts that it is an oil and gas producer and that construction of the pipeline will provide transportation for natural gas from wells drilled on Federal leases and thus enable Beartooth to commence production on those leases. Similarly, Gasco, as the holder of the right-of-way, filed a petition to intervene. Both petitioners opposed appellant's request to stay the effect of the decision granting the right-of-way pending a final decision on appeal.

In light of the potential prejudice to petitioners, on the one hand, from stay of the right-of-way grant, and appellant, on the other hand, from construction of the pipeline, the Board has afforded this matter expedited consideration. By order dated March 8, 1985, we granted the petitions of Beartooth and Gasco to intervene. Simultaneously, we ruled on the question of the stay. In deciding to deny the request for a stay of the right-of-way grant, the Board examined the extent to which consideration of the effect of a gas pipeline right-of-way upon competing suppliers and their customers must

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<sup>1/</sup> Under the relevant regulations, the automatic stay of 43 CFR 4.21(a) is not operative and decisions regarding pipeline rights-of-way remain effective pending appeal unless the Secretary rules otherwise. 43 CFR 2884.1(b).

be considered by BLM. In issuing this decision on the merits of the appeal from the grant of the right-of-way, we find it appropriate to refer to the germane paragraphs of our order of March 8, 1985.

[1] Section 28 of the Mineral Leasing Act, supra, provides broad discretion to the Secretary, or his delegated representative, BLM, in the granting of a natural gas pipeline right-of-way. Marathon Oil Co., 83 IBLA 137, 142 (1984). A right-of-way application may be denied where BLM determines that the right-of-way "would be inconsistent with the purpose to which the Federal lands involved have been committed, or would otherwise not be in the public interest." 43 CFR 2882.3(e). In considering whether BLM erred in issuing the right-of-way and dismissing appellant's protest that the pipeline was not in the public interest, the Board held in its order of March 8, 1985, as follows:

The scope of the inquiry required of BLM regarding the effects of a right-of-way prior to issuance has recently been examined in the context of a right-of-way to store water in a reservoir on Federal lands under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). In the Solicitor's Opinion, [90 I.D. 345 (1983)], cited by Beartooth and Gasco, the Solicitor of the Department has held that a distinction is properly drawn between the primary use of a right-of-way, i.e., the use to which the Federal lands are put, such as a water reservoir or a natural gas pipeline, and the secondary use, i.e., an activity made possible by or resulting from the primary use, such as the use to which the water or natural gas is put. 90 I.D. at 349. The Solicitor found four bases for concluding whether secondary effects are critical under the right-of-way statute: The administrative practice, judicial decisions, legislative history of the statute, and the interrelationship of the statutory provisions. 90 I.D. at 349-50. The Solicitor concluded that although evidence of secondary effects is not ordinarily required, it may be required where necessary to application of the statutory criteria for right-of-way issuance. 90 I.D. at 351-52.

Although the regulations contemplate adjudication of a pipeline right-of-way application on the basis of the public interest, see 43 CFR 2882.3(e), appellant has not cited any authority for determining the public interest in this context on the basis of protecting the competitive interest of a competing gas supplier (in this case, West Gas). The statute and regulations require that pipelines shall be operated as common carriers, accepting without discrimination all gas delivered to the pipeline except to the extent regulated under the Natural Gas Act, 15 U.S.C. § 717 (1982), or a state or municipal regulatory authority. 30 U.S.C. § 185(r) (1982); 43 CFR 2883.1-5. Notwithstanding the broad discretion of the Secretary over natural gas pipeline rights-of-way under 30 U.S.C. § 185 (1982), see Marathon Oil Co., supra, we find no basis for requiring the Department to deny the right of way on the basis of threatened adverse impact

to appellant and its customers. In the context of this case where production of gas from shut-in wells on Federal oil and gas leases is alleged to be dependent upon the pipeline, it has not been shown that the granting of the right-of-way is not in the public interest.

Consistent with the above order, we conclude that BLM properly issued right-of-way C-38522 to Gasco and dismissed appellant's protest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Edward W. Stuebing  
Administrative Judge.

