

GAS COMPANY OF NEW MEXICO

IBLA 84-136

Decided September 3, 1985

Appeal from decisions of the Albuquerque District Office, Bureau of Land Management, fixing rental charges for oil and gas pipeline rights-of-way. NM 35781 et al.

Set aside and remanded.

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

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

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

An oil and gas lease issued pursuant to the Act of February 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such

activities constitute "commercial operations" and are permissible only after obtaining a right-of-way under sec. 28.

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

No authority exists in either sec. 28 of the Act of February 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

4. Appraisals -- Oil and Gas: Pipelines: Rights-of-Ways -- Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Oil and Gas Pipelines

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

APPEARANCES: Cameron R. Graham, Esq., vice president, Gas Company of New Mexico, Albuquerque, New Mexico; Gayle E. Manges, Esq., Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Gas Company of New Mexico (GCNM) has appealed from 16 decisions of the Albuquerque District Office, Bureau of Land Management (BLM), dated October 4, 5, and 11, 1983, fixing rental charges for remedial rights-of-way granted to appellant. The rights-of-way at issue were granted in 1982 pursuant to section 28 of the Act of February 25, 1920, as amended, 30 U.S.C. § 185 (1982), and acknowledge the presence of existing natural gas pipelines, the oldest of which appears to have been installed in the 1940's.

[1] In fixing the charges both for appellant's past use and future use of the rights-of-way, BLM used the industry "going rate" for rights-of-way on private lands. In Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (1983), reaffirmed and clarified, 83 IBLA 204 (1984), inconsistency in BLM's methods of appraisal prompted the Board to set aside various BLM decisions using the going rate method and remand those decisions to BLM to allow it to develop an acceptable method for arriving at the fair market rental value for its rights-of-way. Among the state offices to which cases were remanded for subsequent application of a consistent going rate appraisal method was the New Mexico State Office. Consistent with Northwest

Pipeline Corp., *supra*, the instant decisions must be set aside and remanded. ^{1/} Upon development of such a method, the decisions appealed by GCNM should be reviewed by the Albuquerque District Office and appropriate action taken.

In its statement of reasons, GCNM raises three issues that require our discussion, regardless of the appraisal method BLM adopts. Its first contention is that the rights of a lessee under the Mineral Leasing Act include not only the right to use the surface of the leasehold but also the right to lay pipe for transportation of oil and gas production. GCNM argues that this right is conveyed to it by contract when it purchases natural gas from producers for distribution. The present appeal, GCNM maintains, is caused in part by BLM's "back use charge on natural gas gathering lines [^{2/}] laid under the producer's federal lease" (Statement of Reasons, Dec. 12, 1983, at 2).

Section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1982), provides in part: "(a) Grant of authority Rights-of-way through any Federal lands may be granted by the Secretary of the Interior * * * for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or any refined product produced therefrom." In June 1980, the Solicitor had occasion to examine this statute to determine whether a regulation defining the term "pipeline" to include all production facilities beyond the well head conflicted with section 28, as initially enacted in 1920, and as subsequently amended in 1973. ^{3/} The Solicitor concluded in the affirmative in an opinion concurred in by the Secretary. Solicitor's Opinion, M-36921 (June 19, 1980) 87 I.D. 291. ^{4/}

[^{2/}] This opinion made the following points. A lease grants to the lessee no rights in lands outside the subdivisions described in the lease. Frances R. Reay, 60 I.D. 366 (1949). Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease "commercial" facilities ^{5/} may be constructed only after an

^{1/} Instruction Memorandum 84-490, Change 1, was issued on Nov. 28, 1984, by the Director, BLM, setting forth procedures for the period prior to development of new appraisal standards. Instruction Memorandum 84-490, Change 2, followed on Mar. 15, 1985.

^{2/} Gathering lines are pipes used to transport oil or gas from the lease to the main pipeline in the area. In the case of oil, the lines run from lease tanks to a central pump station at the beginning of the main pipeline. In the case of gas, the flow is continuous from the well head to the ultimate consumer. Williams and Myers, Oil and Gas Law, Manual of Terms at 366 (1984).

^{3/} Act of Nov. 16, 1973, P.L. 93-153, § 101, 87 Stat. 576.

^{4/} This opinion was clarified by a subsequent opinion, M-36948 (Feb. 25, 1983), stating that the casual use of Federal land by an oil and gas lessee would not require issuance of a right-of-way.

^{5/} A lessee or operator engages in commercial operations when it constructs or operates facilities to serve production from outside its lease or unit, regardless of whether such facilities also serve production from his own lease or unit. Moreover, all operations on a lease conducted by a party who is neither the lessee nor the operator are included in the definition of "commercial operations." 87 I.D. 303.

appropriate right-of-way has been granted. Depending on the nature of the facility, the right-of-way would be granted pursuant to either section 28 or Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982). Section 28, however, does not apply to certain on-lease production facilities ^{6/} which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill.

It is clear from a reading of appellant's arguments on appeal that GCNM has both on-lease gathering lines and general transportation facilities across Federal lands. Thus, GCNM admits that it has constructed "[e]xtensive gathering and transmission lines * * * in this region, across federal lands, as necessary for the production of gas from the San Juan Basin in northwest New Mexico." GCNM argues, however, that it was entitled to place its lines over the public lands as it had acquired such rights from the Federal lessees. This contention, however, is clearly fallacious.

First of all, regardless of what rights the lessees might have to construct gathering and other productive facilities within a specific lease, ^{7/} such lessees never had such rights off-lease. See, e.g., Frances R. Reay, supra. Yet, it is clear that appellant's contract with the producers operating on Federal leases purported to grant such rights. Thus, it was provided that:

Insofar as it may lawfully do so without impairing its own similar rights, Seller hereby grants and assigns to Buyer an easement and right-of-way on, over and across all the Subject Lands (and any adjoining land in which Seller may have an oil and gas leasehold interest) for Buyer's purposes of installing, constructing, maintaining, repairing, inspecting and removing, from time to time as Buyer deems necessary, pipelines, measuring equipment and any other facilities useful in the performance of this agreement, together with the right of free ingress and egress to and from said lands for Buyer's personnel and equipment. [Emphasis supplied].

This provision purported to grant appellant rights not only on the specific lease which was producing but on adjoining leases as well.

In any event, the right to construct gathering lines within the leased premises is a right running only to the oil and gas lessee or the approved

^{6/} The Solicitor defined "production facilities" to include a lessee's storage tanks and processing equipment, oil and gas pipelines upstream from any of a lessee's storage tanks or processing equipment (or, in the case of gas, upstream from the point of delivery) and pipelines and equipment (such as water disposal lines and gas or water injection lines) which are used in the production process for purposes other than carrying oil or gas downstream from the well head. See also 43 CFR 2880.0-5(k).

^{7/} It should be noted that for purposes of this issue, Federal lands included within an approved unit agreement are treated as an individual lease. See Solicitor's Opinion, M-36921, supra at 292 n.3.

operator. It is not a right assignable independent of the leasehold itself. Moreover, under 30 U.S.C. § 187a (1982), all assignments of interests under a lease are subject to the approval of the Secretary. It would, therefore, be inconsistent with the Mineral Leasing Act generally if the rights of the lessee or approved operator to construct and operate facilities on the leasehold could, itself, be independently assigned without Secretarial approval.

We note that a similar conclusion was reached in the Solicitor's Opinion. Therein, it was noted:

Oil and gas leases do not authorize parties other than the lessee or operator to own and operate on-lease facilities; nor do they authorize a lessee or operator to construct and operate facilities to serve production from outside his lease or unit, regardless of whether such facilities also serve production from his own lease or unit. Such commercial operations can be authorized only by an appropriate right-of-way grant.

87 I.D. at 303. Consistent with this Solicitor's Opinion which was, as we have previously pointed out, expressly approved by the Secretary, we hold that the construction of pipelines either for transportation or gathering purposes on a Federal lease by an individual other than the lessee or operator is authorized only upon the acquisition of a right-of-way grant pursuant to section 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1982). Accordingly, GCNM's construction and use of pipelines on Federal land without possession of a right-of-way issued under section 28 was in the nature of a trespass and GCNM is properly required to remedy the situation by obtaining a right-of-way and compensating the Government for its past unauthorized use.

Appellant's second assignment of error is the contention that BLM's assessment of back use charges for the 6-year period prior to the instant decisions is contrary to the public interest and discriminates unfairly against New Mexico consumers. GCNM also calls our attention to 43 CFR 2802.5, addressing rights-of-way issued under FLPMA, which states in part:

(a) An applicant filing for a right-of-way within 4 years from the effective date of this subpart for an unauthorized right-of-way that existed on public land prior to October 21, 1976, is not:

* * * * *

(2) Required to pay rental fees for the period of unauthorized land use.

It asks that similar treatment be afforded to holders of rights-of-way issued pursuant to the Mineral Leasing Act.

[3] We find no authority in either section 28 or in the regulations issued thereunder to support such a request. To the contrary, section 28(1) of the Mineral Leasing Act, 30 U.S.C. § 185(1) (1982), requires that the holder of a right-of-way pay annually in advance the fair market rental value of the right-of-way, as determined by the Secretary or agency head. The

applicable regulation, 43 CFR 2883.1-2, requires a section 28 right-of-way holder to make rental payments in accordance with 43 CFR 2803.1-2, which in turn requires an annual payment of the fair market rental value as determined by the authorized officer.

Insofar as the particular regulation cited by appellant is concerned, an explanation for FLPMA's "amnesty" provision exempting all unauthorized users from back rental charges is suggested by the preamble to the twice-amended 43 CFR 2802.5:

Section 2802.5

The comments on this section expressed the feeling that the changes made by the proposed rulemaking were not fair or equitable to those applicants who obtain the right to use the public lands for right-of-way purposes prior to such use. This special procedure, including the changes made by the proposed rulemaking, is provided as an incentive for those pre-Federal Land Policy and Management Act unauthorized users to file their applications within a four-year period after the effective date of the regulations. The hoped-for filing would reduce the number of unauthorized uses and place the right-of-way users in a rental paying status. The special procedure is only applicable to pre-Federal Land Policy and Management Act unauthorized users, and if applications are not filed prior to July 31, 1984, then those uses, as well as all others, will be treated as a trespass. [Emphasis added.]

47 FR 38804 (Sept. 2, 1982). Apparently, the presence of a number of unauthorized uses motivated the Department to promulgate 43 CFR 2802.5. Regardless of the efficacy of this regulation, it is, by its express terms, limited only to rights-of-way within the purview of FLPMA and does not cover rights-of-way issued under the Mineral Leasing Act. In the absence of a duly promulgated regulation authorizing an exemption of back rental fees for oil and gas pipelines, BLM's decision in this regard must be affirmed. 8/

In appellant's final argument on appeal, GCNM asserts that the Department's method of valuation overstates the value of the right-of-way when compared to rights-of-way purchased on private land. Thus, appellant notes that a private right-of-way, purchased in perpetuity at the then-going rate, gives the grantor the value of the perpetual right-of-way at the time of purchase. Under BLM's method, however, the going rate is recomputed every

8/ In any event, the statutory basis for the promulgation of 43 CFR 2802.5 is certainly open to question, since with certain exceptions, not relevant herein, rights-of-way may only be granted for fair market value. See 43 U.S.C. § 1764(g) (1982). Indeed, 43 CFR 2802.5, in effect, appeared to authorize future trespass for 4 more years during which the Government would receive no compensation whatever. The application of this regulation, however, is not involved in the instant case as it arises under 43 CFR Subpart 2880, and there is, therefore, no need to inquire further as to the regulation's statutory basis.

5 years, and eventually, if the price of land increases, a BLM right-of-way holder will pay more for its right-of-way, GCNM contends, than for a fee simple interest in the land. ^{9/}

In the instant appeals, BLM calculated annual payments using a different going rate valuation for back use charges and future use charges. GCNM objects to this method, charging that it is internally inconsistent and results in an inflated valuation.

[4] Appellant's generalized objection to BLM's practice of reappraising the going rate every 5 years is answered by Northwest Pipeline Corp., 65 IBLA 245, 253 (1982). Therein, the Board set forth those factors that cause BLM to reduce by 30 percent the industry's going rate for rights-of-way on private lands in arriving at BLM's going rate:

- A. Tenure.
- B. Right to reappraise every five years.
- C. Annual payments.
- D. More restrictive land rehabilitation requirements in some cases.
- E. Right of revocation.
- F. Right to require changes in line if land is needed for a public project.
- G. Right to authorize other grants over the same right-of-way (some private rights-of-way are comparable in this respect).
- H. Longer time delay in some cases.
- I. Archeological inventory and environmental review requirements.
- J. Reimbursement of administrative costs. [Emphasis added.]

Our review of each file reveals a worksheet setting forth BLM's calculations in arriving at its going rate. In setting future use charges, BLM has in each instance reduced by 30 percent the industry going rate for rights-of-way

^{9/} Of course, appellant's argument is really beside the point. Any long term lease, barring dramatic inflationary increases, will, over the course of the lease, require payments from the lessee greater than the original fee value of the land. Thus, a 20-year lease, based on an initial rate of return of 10 percent of the property's present value will, if one assumes the existence of merely moderate inflation during the term of the lease, result in total payments greater than the initial value of the fee title.

on private land. Thus, the limitation identified by appellant, BLM's right to reappraise, has been acknowledged by the Department and has contributed to the below industry going rate charged to appellant.

No such reduction has been granted in calculating the going rate for back use charges. This action is not error, however, because appellant did not suffer the limitations identified above during its period of unauthorized use. Indeed, since appellant failed to obtain proper authorization for its past use, it cannot claim that its use was in any way inferior to rights granted by private parties at that time. Moreover, although BLM is assessing appellant for 6 years of back use, case file exhibits reveal that appellant's (or its predecessor-in-interest) pipelines have occupied the subject lands for decades in numerous cases. Appellant's argument seems to be that, having successfully occupied the land without authorization, BLM is forestalled from attempting to obtain any compensation for this past use. In fact, BLM is required to obtain such compensation and could not, consistent with its obligations to obtain fair market value for the use of public resources, presently approve appellant's continued use of the rights-of-way in the absence of compensation for the past, unauthorized use.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Albuquerque District Office are set aside and remanded for action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

R. W. Mullen
Administrative Judge

