

ARNELL OIL CO.

IBLA 85-635

Decided January 30, 1987

Appeal from a decision of the Platte River Resource Area Manager, Bureau of Land Management, denying a request that the route approved for crude oil pipeline right-of-way W-88682 be reconsidered.

Vacated and remanded.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the decision within 30 days of service of the decision sought to be reviewed.

2. Secretary of the Interior -- Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Applications -- Rights-of-Way: Oil and Gas Pipelines

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

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

Where, following issuance of a right-of-way grant for a crude oil pipeline across lands embraced by a Federal oil and gas lease, the lessee requests reconsideration of that grant complaining that the grant will interfere with present and future operations on its lease, and

the record indicates the lessee was not provided notice prior to right-of-way issuance, its rights were not adequately considered, and certain questions concerning route selection were not adequately addressed by BLM, the BLM decision denying reconsideration will be vacated, the right-of-way grant set aside, and the case remanded.

APPEARANCES: Lawrence P. Terrell, Esq. and Mary E. Walta, Esq., Denver, Colorado, for appellant; Patricia F. Schiff, Esq., Schaumburg, Illinois, for Pure Transportation Company; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

Arnell Oil Company (Arnell), record titleholder and operator of Federal oil and gas lease C-036770, appeals the March 12, 1985, decision of the Platte River Resource Area Manager, Bureau of Land Management (BLM), denying Arnell's request that BLM reconsider the route of crude oil pipeline right-of-way W-88682, granted to Pure Transportation Company (Pure), on January 22, 1985. Arnell claims that the pipeline will interfere with current and future operations on lease C-036770. <sup>1/</sup> Arnell was assigned the lease in 1974 by Donald E. Arnell (Mr. Arnell), its president, who acquired the lease in 1971.

On August 4, 1984, Pure filed right-of-way application W-88682 for the installation of three buried 6-inch crude oil pipelines and a 5-acre processing station, to be located in secs. 2, 3, and 11, T. 33 N., R. 83 W., Natrona County, Wyoming. By decision dated January 4, 1985, BLM rejected Pure's application in part, and offered a right-of-way under the same serial number for alternative pipeline and station site locations. That alternative routed the pipeline through portions of secs. 2, 3, 11, 12, and 13 of T. 33 N., R. 83 W., and located the processing station in sec. 3 of T. 33 N., R. 83 W. In that decision BLM explained its reasons for altering the route for the right-of-way as follows:

The pipelines route applied for are in conflict with environmental considerations and decisions found in the approved Natrona Management Framework Plan relating to right-of-way placement and location, and with Executive Order 11990, Protection of Wetlands [42 FR 26961 (May 25, 1977)] and Executive Order 11988, Floodplain Management [42 FR 26951 (May 25, 1977)]. The applied-for station site location is in conflict with environmental considerations and local planning decisions, and is not in the best

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<sup>1/</sup> The lease comprises 840 acres, located in secs. 11 and 12, T. 33 N., R. 83 W., Natrona County, Wyoming, in what is commonly known as the Poison Spider Field. The initial lease was issued on July 24, 1920, under the serial number "Douglas 025922," but that number was subsequently changed to C-036770. The current lease is an exchange lease issued on April 1, 1951.

public interest because mitigation of significant impacts could not be accomplished. The enclosed right-of-way W-88682 is offered for alternative pipelines and station site locations consistent with environmental considerations, BLM and local planning, and the above-referenced Executive Orders.

Pure's representative informed BLM that Pure would not appeal the altered right-of-way since "it meets [Pure's] basic criteria so far as location-elevation goes" (Memorandum to File, January 8, 1985). On January 22, 1985, BLM granted the right-of-way which is the subject of this appeal.

Arnell asserts that it had no knowledge that Pure had applied for a right-of-way which would affect the lands embraced in its lease until its pumper encountered personnel from BLM and Pure staking the route of the right-of-way on January 22, 1985. On February 6, 1985, Mr. Arnell visited the Platte River Resource Area Office to express his objections to the right-of-way grant. According to BLM's memorandum to the file of that date:

He assert[ed] that the approved alignment will interfere with development of his [oil and gas] lease in Sec. 11, as he plans wells there in the future. He said that having to construct flow lines from those future wells into his main field in Sec. 12, he'd have to cross Pure's line and that created problems for him.

The memorandum recounted that Mr. Arnell suggested that the line be relocated so as not to cross the lease or to locate it where an abandoned right-of-way existed with pipe in the ground. BLM explained that the oil and gas lease did not give him the right to request the relocation, "and that his case for development interference is not valid as pipeline [crossings] occur all the time with no complaints by other parties" (Feb. 6, 1985, Memorandum to the File). More importantly, BLM advised him

that if he really feels he wants to object to Pure's approved [right-of-way], he should send it in writing with his reasons outlined, plus include a copy of his [oil and gas] lease for review by us. We would then determine if he has rights, not usually in an [oil and gas] lease, pertaining to surface use of public land [within] the lease.

(Feb. 6, 1985, Memorandum to the File).

By letter dated February 15, 1985, Mr. Arnell addressed his concerns to the Platte River Resource Area Manager, formally requesting that BLM reconsider the route it had granted for the pipeline right-of-way and proposing an alternative route (Statement of Reasons (SOR), Exh. 3). Mr. Arnell pointed out that the approved right-of-way ran north-south through sec. 11 between Arnell's G-4 and G-15 wells, and the new pipelines, being 48 to 60 inches deep, would be near Arnell's wells and possibly on top of Arnell's flow lines, some of which were 5 to 7 feet deep. Moreover, Arnell stated that the right-of-way would be underneath or near Hot Springs County Rural Electric Association power lines. Mr. Arnell expressed his disagreement with BLM's selection of the alternate route:

First, the Bureau apparently has a "joint or multiple" use preference, when possible. The intent was for Pure to share the right-of-way with Hot Springs County REA. Second, the Bureau thinks that a more direct route through Section 11 will go through a "marshy/wet" area. We do not agree with either of these reasons. If the pipeline is actually put in the same area or path as REA's power line or Arnell's power line, the pipeline will literally be right on top of our wells and flowlines as discussed earlier. If the pipeline is moved enough to miss our wells and flowlines, it will be a long way from the approved right-of-way and is really a separate right-of-way. Further, the idea of putting a pipeline underneath a high voltage (14,000 volts) power line is somewhat questionable. Besides the obvious danger during construction, there is always the possibility of electrolysis to the pipeline because of the close proximity to the high voltage lines?

The only "marshy/wet" area in Section 11 that might cause any problems for the proposed pipeline is Union Oil's discharge water from their operations at the South Casper Creek Field. Union Oil is producing some 20,000 to 25,000 BWPD which enters Section 11 in the NW 1/2 of the NW 1/4. The water meanders southeast for a little ways then goes pretty much southwest until it enters the Poison Spider Creek in Section 15. There does not appear to be any real problem in picking a route that would take the proposed pipeline to the center of Section 11 and then diagonally southeast to Section 13.

(SOR, Exh. 3 at 3).

By letter dated March 12, 1985, BLM responded to Arnell's objections. BLM noted that the alternative route proposed by Arnell "is very similar to the original route proposed by [Pure]." BLM's letter offered the following reasons for issuing a right-of-way grant which departed from the route Pure originally requested:

[Pure's] proposed route was considered during analysis and processing of the right-of-way application in accordance with the National Environmental Policy Act of 1969, the Mineral Leasing Act of 1920, as amended, and the regulations contained in 43 CFR Group 2800. The proposed route was determined to be unacceptable because it was in conflict with environmental considerations and decisions found in the approved Natrona Management Framework Plan relating to right-of-way placement and location, and with Executive Order 11990, Protection of Wetlands, and Executive Order 11988, Floodplain Management. Placement and alignment of the subsequently approved pipeline right-of-way fully considered compatibility with ongoing operations to extract and remove oil and gas deposits embraced within oil and gas lease C-036770, with due consideration given the necessity of federal surface for oil and gas lease operations.

Additionally, BLM addressed Arnell's fundamental objection to the right-of-way issued to Pure, that it would interfere with Arnell's future development of lease C-036770, with reference to the rights reserved to the United States in the lease itself:

Oil and gas lease C-036770, Section 3 (a) and (b) reserves to the lessor (United States of America, through the Bureau of Land Management) the right to permit for joint or several use easements or rights-of-way through, or in the lands leased, as well as reserving the right to lease, sell, or otherwise dispose of the surface or any of the lands embraced within the lease which are owned by the United States, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein. Consideration for lessees [sic] enjoyment of oil and gas lease rights has been ensured by placement of the pipeline outside the normal area usually necessary for existing well production or workover operations, and outside the area which may potentially be embraced by a 2-1/2 acre spacing order of the State of Wyoming in the event Arnell Oil Company undertakes secondary recovery operations in the future.

On April 11, 1985, counsel for Arnell filed a letter dated April 10, 1985, with BLM, stating: "We hereby protest the BLM's position reflected in your March 12 letter and request that you reconsider the site selected for this pipeline right-of-way." (Emphasis added.) Arnell's letter provides a very detailed critique of BLM's determination that Pure's proposed right-of-way route was unacceptable because it was in conflict with the Natrona Management Framework Plan (Natrona MFP) and Executive Orders 11990 and 11988, and further elaborated upon Arnell's position that the right-of-way would involve unnecessary interference with its lease development and operations.

By letter dated April 19, 1985, BLM informed counsel for Arnell that it deemed the April 11, 1985, protest as untimely since the right-of-way was granted on January 22, 1985. Moreover, it stated that Arnell enjoyed a right of appeal for 30 days after BLM issued the right-of-way, and that time limit had also expired.

Subsequently, on May 10, 1985, Arnell filed a statement of reasons with the Board in support of what it stated was its appeal from the March 12, 1985, BLM decision. This statement reiterates to some degree the arguments previously made in Arnell's April 10, 1985, letter, and offers three arguments for overturning BLM's decision to issue the contested right-of-way: (1) BLM failed to make a reasoned analysis of the factors involved, especially those relative to existing and future operations on Arnell's lease; (2) BLM offers no reason for its determination that it is necessary or appropriate to route the right-of-way within the boundary anchors of Arnell's G-15 and G-16 wells, through an area of currently active operations and future operations, when alternative routes are available; and (3) the surface of the lands affected by the right-of-way is necessary for the extraction and removal of the oil

and gas therein, and may not be leased, sold or otherwise disposed of under section 3(b) of the lease. 2/

On June 10, 1985, counsel for BLM filed with the Board a motion to dismiss Arnell's appeal for lack of jurisdiction and for failure to file a timely notice of appeal. BLM characterizes the February 15, 1985, letter from Mr. Arnell to the Platte River Resource Area as a "citizen's letter," which appears to "contain a citizen's helpful suggestions," but is "in no way \* \* \* labeled or purports to be either a protest or an appeal" (Motion at 2). BLM maintains that Arnell did not file a protest of the right-of-way under 43 CFR 4.450-2, since a protest under that regulation must be in response to a proposed action. Moreover, according to BLM, Arnell failed to file a notice of appeal within 30 days of BLM's issuance of the subject right-of-way, in accordance with 43 CFR 4.411. Finally, BLM argues, even if the 30-day appeal period began to run on February 6, 1985, when Arnell first had personal notice of the issuance of the right-of-way, Arnell should have filed an appeal by March 6, 1985. Counsel for BLM did not respond to Arnell's substantive arguments.

On June 10, 1985, Pure filed an answer with the Board, in which it also requests that Arnell's appeal be dismissed as untimely. Pure argues that neither Arnell's February 15, 1985, letter nor its April 10, 1985, letter constituted a "notice of appeal" of BLM's issuance of the right-of-way. In addition, Pure states that while it initially applied for a route which was similar to the alternative suggested by Arnell, Pure found the original route unacceptable, having begun construction on the right-of-way as granted.

In its consolidated reply, Arnell requests that the motions to dismiss be denied. Arnell states that it was never notified of the right-of-way application or its issuance, and became aware of those facts only when its personnel encountered BLM employees in the area of its lease operations.

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2/ On May 23, 1985, Arnell filed a Petition for Stay of Grant of Right-of-Way with the Secretary of the Interior, pursuant to 43 CFR 2804.1(b). Therein, Arnell represented that to the best of its knowledge Pure would begin construction of the right-of-way on June 1, 1985. Arnell argued that a stay pending resolution of its appeal was necessary for the preservation of its right to conduct operations without interference on its leasehold, and that a relocation of the right-of-way would not harm Pure. On June 6, 1985, Arnell filed with the Secretary a Petition for Emergency Stay of Grant of Right-of-Way, asserting that Pure had commenced construction of the pipeline by disturbing the surface of Arnell's leasehold. On June 12, 1985, the Secretary referred both Petitions to the Director, Office of Hearings and Appeals, for his "immediate" attention. By order dated June 14, 1985, the Director denied both Petitions, concluding that "there is little likelihood of success by Arnell on the merits of its appeal," and that he could not "find that the balance of hardships tip sharply in favor of Arnell where Arnell's concerns relate in large part to alleged disruptions of potential future operations on its leasehold."

Thus, Arnell argues that it cannot be faulted for not filing a protest of a completed action under 43 CFR 4.450-2. According to Arnell, its February 15, 1985, letter constitutes a notice of appeal, being directed to the Area Manager, as instructed. This letter, Arnell argues, meets the jurisdictional requirements set forth at 43 CFR 4.411.

[1] First, we will consider the motions to dismiss Arnell's appeal. Both BLM and Pure, in apparent reaction to the use of the term "protest" in Arnell's April 10, 1985, letter, assert that Arnell's "protest" does not meet the criteria of 43 CFR 4.450-2, which provides:

Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action will be taken thereon as is deemed to be appropriate in the circumstances. [Emphasis added.]

We agree that neither of Arnell's letters, dated February 15 and April 10, 1985, qualifies as a timely protest, since, obviously, each was filed after the right-of-way was issued on January 22, 1985. See Willamette Logging Communications, 86 IBLA 77 (1985).

A more meaningful question, however, is whether either of those letters constituted a timely notice of appeal. The pertinent regulation, 43 CFR 4.411(a), provides:

(a) A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication.

We must point out two relevant facts which are minimized by both Pure and BLM in their analysis of the procedural issues involved in Arnell's appeal. First, Arnell was not given any notice of the right-of-way application or BLM's alternative nor offered the opportunity to comment thereon prior to right-of-way issuance. <sup>3/</sup> Second, it was not served with a copy of

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<sup>3/</sup> Regulation 43 CFR 2882.3(b) sets forth notice procedures to be observed by BLM upon receipt of a Mineral Leasing Act right-of-way application:

"Upon receipt of an application for a right-of-way grant, the authorized officer shall publish a notice of the application in the Federal Register and an announcement in a newspaper or newspapers having general circulation in the vicinity of the Federal lands affected, or, if in the opinion of the authorized officer, the pipeline impacts are of a minor nature, the notice of application may be waived or published only in a newspaper having general circulation in the area or areas in the vicinity of the affected Federal lands.

the right-of-way grant at the time of its issuance. The record shows that Arnell was not fully aware of the right-of-way grant until February 6, 1985, when Mr. Arnell obtained a copy at BLM's office (Arnell's Consolidated Reply at 2-3). During that February 6, 1985, visit, Mr. Arnell was not informed of any appeal rights but was told by BLM that "if he really feels he wants to object to Pure's approved ROW, he should send it in writing with his reasons outlined \* \* \* for review by us." (Emphasis added.) Arnell then submitted to BLM its proposed alternative, as well as objections to the right-of-way actually issued.

BLM did not consider Arnell's submission to be an appeal; rather, in accordance with its statement to Arnell, it reviewed Arnell's submissions and then by letter dated March 12, 1985, rejected Arnell's proposed alternative. Arnell filed a "protest" of that "decision" on April 11, 1985. While Arnell's letter uses the term "protest" rather than "appeal," this Board does not require precise use of those terms. For example, in Goldie Skodras, 72 IBLA 120 (1983), a "protest" had been filed after the issuance of an oil and gas lease. The Board noted that technically a protest was improper because a protest is an objection "to any action proposed to be taken" under 43 CFR 4.450-2. But the Board ruled that BLM should have treated the protest as an appeal. Id. at 122; see also Howard H. Vinson, 90 IBLA 280, 282 (1986).

BLM asserts that while no specific words need be used to take an appeal, there must be manifested some intention to ask for review of the decision by a higher authority. BLM points out that neither the February 15, 1985, letter nor the April 10, 1985, letter is addressed to the Board. BLM's analysis ignores the language of 43 CFR 4.411(a), which provides that "[a] person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal." See San Juan

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Fn. 3 (continued)

The notice shall contain a description of the pipeline systems as required in § 2882.2-3(a) (2) and (3) of this title, together with such other information as the authorized officer considers pertinent. The notice shall state where the application and related documents are available for interested persons to review."

This regulation definitely requires Federal Register publication of a "notice of application" and newspaper publication of an "announcement," unless BLM determines the pipeline impacts are of a minor nature. In that case the "notice of application" (which is only to be published in the Federal Register) "may be waived or published only" in a local newspaper. Does an "announcement" still have to be published in a local newspaper? We do not know; the regulation is less than clear.

There is no indication in the record that any action was taken in this case pursuant to this regulation. However, we are unable to determine what notice, if any, was required by it. The regulation aside, we can safely say BLM did not provide direct notice to Arnell, although we note, in contrast, BLM contacted an individual holding a Federal grazing lease on the affected lands and specifically solicited his comments prior to the issuance of the right-of-way. (Arnell's Consolidated Reply, Exh. B).

Coal Co., 83 IBLA 379 (1984). The April 10, 1985, letter, while styled a protest, complies with 43 CFR 4.411(a), being filed in the office of the officer making the decision within 30 days of service of the March 12, 1985, BLM letter. <sup>4/</sup>

We find BLM's March 12, 1985, letter was, in fact, a decision from which Arnell was entitled to appeal and from which it did take a timely appeal. Accordingly, we deny the motions to dismiss Arnell's appeal. We now turn to the question of whether BLM properly denied Arnell's request that the route for that right-of-way be reconsidered.

Approval of a right-of-way application for a crude oil pipeline is within the discretion of the Secretary of the Interior. 30 U.S.C. § 185(a) (1982). A BLM decision rejecting an application for a right-of-way will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown. E.g., Western Gas Supply Co., 86 IBLA 258 (1985); Marathon Oil Co., 83 IBLA 137 (1984); Fuel Resources Development Co., 59 IBLA 378 (1981). In this case, following the preparation of an environmental assessment report (EAR), compiled to evaluate Pure's proposed right-of-way, BLM selected an alternative route that was not opposed by Pure. Arnell, however, charges that BLM's decision to issue the alternative right-of-way was not premised upon a reasoned analysis of the relevant factors involved, made with due regard for the public interest, and, therefore, should have been reconsidered by BLM.

In its April 10, 1985, letter, Arnell argues that (1) BLM's Alternative A in the EAR, which is, in fact, the route of the January 22, 1985, right-of-way grant, fails to take into account the unnecessary interference with Arnell's lease operations and development, and that (2) BLM's EAR is deficient in its analysis of the Natrona MFP, and Executive Orders 11990 and 11988, which deal with wetlands protection and floodplain management, respectively.

[2, 3] Arnell charges that the issued right-of-way will interfere with its current and future operation's under lease C-036770. In its March 12, 1985, letter to Arnell, BLM cites sections 3(a) and (b) of the lease as

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<sup>4/</sup> BLM argues that Arnell had 30 days from issuance of the right-of-way to appeal or even if the appeal period could be considered to have commenced at the time Arnell received actual notice of the right-of-way grant, Feb. 6, 1985, appeal was required within 30 days of that date. Clearly, 43 CFR 4.411 allows 30 days from service of the BLM decision in which to appeal, not 30 days from date of the decision. BLM did not send a copy of the right-of-way grant to Arnell. Although the Board has held that the appeal period may commence upon actual notice of a decision (Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (1984)), when Arnell sought a copy of the right-of-way grant on Feb. 6, 1985, BLM did not provide an appeal right but stated that objections could be filed with it for its review. BLM's argument must be rejected.

reserving to the lessor broad rights which are inconsistent with Arnell's request for an alternative right-of-way which would not affect its lease. Those sections provide:

(a) Rights reserved -- Easements and rights-of-way. -- The right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in the act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) Disposition of surface. -- The right to lease, sell, or otherwise dispose of the surface of any of the lands embraced within this lease which are owned by the United States under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein. [Emphasis in original.]

Arnell maintains that the Government's right to grant rights-of-way through its lease is a qualified one, which must be evaluated in terms of whether the surface involved in the right-of-way is "necessary for the use of the lessee in the extraction and removal of the oil and gas therein" under section 3(b) of the lease. Moreover, Arnell contends BLM's failure to address Arnell's rights under the lease was erroneous under Fuel Resources Development, Inc., supra, which requires a reasoned analysis of the relevant factors.

In its March 12, 1985, letter, BLM explained to Arnell that "[p]lacement and alignment of the subsequently approved pipeline right-of-way fully considered compatibility with ongoing operations to extract and remove oil and gas deposits embraced within oil and gas lease C-36770, with due consideration given the necessity of federal surface for oil and gas lease operations." However, the EAR simply states that "[a]uthorized uses of the federal lands affected by the proposed or alternative actions are," inter alia, oil and gas lease C-036770. (EAR at 12). Further, the EAR states in a section entitled "Consultation and Coordination" that Pure employees participated in discussions during BLM's processing of the right-of-way application and that a grazing lessee of Federal lands involved was consulted (EAR at 11). By contrast, BLM did not inform Arnell of the right-of-way application of the alternative proposed in the EAR.

In Penroc Oil Corp., 84 IBLA 36 (1984), this Board discussed the broad powers of the Secretary over oil and gas leasing, as opposed to the oil and gas lessee's rights, which are "quite narrow." 84 IBLA at 40. The Board recognized the "plenary authority [of the Secretary] over oil and gas leasing \* \* \*," but characterized the rights of an oil and gas lessee in the following fashion:

Notwithstanding the restricted nature of the Federal leasehold and the plenary power of the Secretary over leasing Federal

lands, we conclude that a Federal oil and gas lessee must derive certain rights from the Mineral Leasing Act of 1920, any valid regulations promulgated thereunder, and the terms of the lease itself. See generally Union Oil Company of California v. Morton, [512 F.2d 743, 747 (9th Cir. 1975)]; Sun Oil Co. v. United States, [572 F.2d 786 (Ct. Cl. 1978)]. Moreover, once the Secretary has leased the land he may not deny or extinguish the rights of the Federal oil and gas lessee under the valid oil and gas lease. Clearly, the Secretary's power and authority to obliterate, diminish, and/or interfere with vested rights is not absolute. See Sun Oil Co. v. United States, *supra* at 802.

84 IBLA at 40.

Arnell asserts that while section 3(a) and (b) of lease C-036770 reserves to the lessor "[t]he right to permit for joint or several use easements or rights-of-way \* \* \* as may be necessary or appropriate," that reservation is limited to the surface lands in the lease which are "not necessary for the use of the lessee in the extraction and removal of the oil and gas therein." First, Arnell challenges the right-of-way grant on the basis that it is not "necessary or appropriate to route the right-of-way within the boundary anchors of Arnell's G-15 and G-16 wells and through an area of currently active operations as well as possible future operations when alternative routes are available" (SOR at 7). Arnell argues that section 3(a) imposes an obligation upon BLM to give preference to a location where there is already an existing right-of-way, and that there is an abandoned right-of-way, with pipe already buried, on another lease. Moreover, argues Arnell, BLM has already moved the stakes 150 yards west of where the January 22, 1985, right-of-way grant is located, in response to discovering lines in that location.

As to the interference to its lease which the issued right-of-way will cause, Arnell states that construction of the pipelines will be at a depth of 4 to 5 feet, while Arnell's flow lines are at a depth of 5 to 7 feet. "In some places the pipeline would be located near existing wells and directly on top of the flow lines. The location of the pipeline in the producing area at a depth of only 4-5 feet will interfere with present and secondary recovery operations and, as a result, subject Arnell to potential financial loss" (SOR at 8). Arnell concludes that the "surface covered by the right-of-way is necessary to its present and future operation and the grant of the right-of-way impinges upon its rights to extract and remove oil and gas" (SOR at 8).

Arnell maintains that BLM has overlooked the continuing, long-term adverse impact that the pipeline would have on Arnell's operations. Arnell described the adverse impact as follows:

First of all, you should be aware that the BLM has placed stakes for the pipeline route so close as to actually be within the boundaries of the well anchors for Arnell's G-15 and G-16 Wells. Obviously, locating the pipeline this close to Arnell's wells creates an unnecessary danger to the pipeline, the wells, and persons working on any of the facilities.

Second, your letter appears to misconstrue the nature of the impediment created by the planned pipeline. Your letter suggests that no problem exists because the pipeline will be placed outside the normal areas for production and workover operations on existing wells and outside the area which may potentially be embraced by a 2-1/2 acre well spacing order for possible secondary recovery operations in the future. However, the problem is not that the pipeline will necessarily block physical access directly to new or future drillsites themselves. The problem is that the BLM-selected pipeline route lies in an area of currently active operations and smack in the middle of the area of possible future operations. The activity will be especially intense if, as is likely in the long term of the pipeline right-of-way grant, secondary recovery operations are undertaken, since those operations would involve numerous wells drilled in a close pattern. The constant traffic of heavy equipment, trucks, and well rigs pounding over the pipeline and the probable need to lay numerous well flow lines crossing the pipeline raise a long-term operational and safety concern and threaten to diminish significantly the value of Arnell's leasehold.

(SOR, Exh. 2 at 6).

As we observed in Penroc Oil Corp., supra at 41, a lessee's "rights vary with the terms of the lease, and the provisions of the applicable statutes and Departmental regulations. Therefore, the lessee[s] rights can only be determined on a case-by-case basis." In this case, section 1 of the lease grants the lessee

the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits \* \* \* in or under the [specified] tracts of land \* \* \* together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, pumping stations or other structures necessary to the full enjoyment thereof. [Emphasis added.]

As indicated above, the United States expressly reserved, in section 3(a), the

right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased \* \* \* as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in the act \* \* \* and for other public purposes.

In section 3(b) it also reserved the "right to lease, sell, or otherwise dispose of the surface of any of the lands \* \* \* insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein."

It is thus clear that BLM's exercise of the right reserved in section 3(b) involves a determination that the surface affected is not "necessary for the use of the lessee in the extraction and removal of the oil and gas." The terms of the lease make it less clear that its right under section 3(a) is similarly qualified, since there is no language corresponding to that quoted from section 3(b). In Penroc, however, we found that these lease provisions gave the lessee "the right \* \* \* to prevent threatened occupancy and use of the surface or subsurface that is inconsistent with the dominant use of the land," i.e., in the language of section 2(p) of the lease, "the use of the land for the purpose of this lease." Id. at 41. The language of section 1, in any event, grants the right "to construct and maintain all works \* \* \* necessary to the full enjoyment of" the "exclusive right \* \* \* to drill for \* \* \* the oil and gas deposits," and it is these rights concerning which "the Secretary's power and authority to obliterate, diminish and/or interfere \* \* \* is not absolute." Id. at 40.

We find that BLM failed to provide any notice to Arnell (see note 3, supra) and also failed to consider adequately whether granting a right-of-way would diminish and/or interfere with Arnell's rights under lease C-036770. While BLM's March 12, 1985, decision attempted to refute Arnell's claim of interference, Arnell has submitted detailed arguments in support of its claim that the right-of-way interferes with its rights under its lease. BLM has not come forward on appeal to rebut those arguments.

Arnell also charges that BLM erred in its analysis in the EAR by improperly assuming that the routes proposed by Pure and Arnell cross lands which fall within the definition of "wetlands" or "floodplain," as those terms are used in Executive Orders 11990 and 11988, respectively. The EAR states that tributary drainages upland of the project area form the drainage basin of Poison Spider Creek, "a major east-west perennial stream, with numerous north-south intermittent drainages and several intermittent and permanent ponds present in the project area" (EAR at 4). The EAR describes the affected area:

The tributary drainages have resulted in formation of wetlands over approximately half of Section 11, T. 33 N., R. 83 W., with another wetlands area within the floodplain of Poison Spider Creek, on private land. The wetlands area on public land includes open water with boggy, subirrigated lands extending along the outside edges; much of this area is inundated by water year-around, with seasonal inundation at the outer edges.

(EAR at 4).

Arnell disagrees that either its alternative right-of-way or Pure's proposed right-of-way traverses wetlands or floodplains. Arnell faults BLM for not providing any discussion of specific provisions of the Executive Orders, concluding that BLM "treat[s] the Orders as a substitute, rather than as a starting point, for a detailed analysis" (SOR, Exh. 2 at 2). Arnell's description of the topography of its alternative proposal, which BLM agrees is similar to that originally proposed by Pure, stands in antithesis to that provided in BLM's EAR:

In the first place, your letter assumes without any reference to factual support or legal authority that Arnell's route falls within the definition of "wetlands" or "floodplain" as those terms are used in the cited Executive Orders. To our knowledge, there is nothing in the record that would warrant such an assumption. To the contrary, it is our understanding that Arnell's proposed location for the pipeline constitutes neither wetlands nor a floodplain. It is located in arid, sagebrush-and-cactus country. The only water anywhere in the general vicinity has an artificial source, deriving from oil operations conducted to the north of Arnell's route by Union Oil Company, which is under common control with Pure, the right-of-way applicant itself. This flow is very channeled in a well-defined water course and does not occupy or threaten to occupy the route outlined by Arnell. Only at one spot, toward the center of Section 11, is this water course anywhere near Arnell's route. If, however, this particular point of proximity poses any concern to your office, Arnell would be prepared to discuss with you the possibility of moving his proposed route somewhat to the east at that point.

Nor would there appear to be any basis for treating Arnell's route as a floodplain. The lands traversed by Arnell's route are meandering slopes in an area which receives little snow accumulation or run-off, and the route is not situated at the outlet of a canyon or any other topographical feature that would remotely suggest the risk of a flood. As indicated above, the only water course in the area, whose water supply anyway is subject to control by the oil operations of the right-of-way applicant's related company, is very channeled and does not pose any flood danger. In nearly 19 years of experience in this field, Mr. Arnell, President of Arnell Oil Company, has never observed water escaping from this channel.

(SOR, Exh. 2 at 2-3).

Arnell argues that even if, contrary to the facts known to it, the route proposed by Arnell were found to constitute wetlands or a floodplain, the Executive Orders do not automatically compel rejection of Arnell's route. Arnell asserts those "Orders first recommend environmental protection measures short of a flat prohibition on granting a right-of-way. With holding the land entirely from the grant of a right-of-way is described only as the final option of last resort. Executive Order 11990, § 4; Executive Order 11988, § 3(d)" (SOR, Exh. 2 at 3). Arnell concludes that neither the March 12 letter rejecting Arnell's proposed alternative nor the EAR shows any sign that BLM weighed measures short of a total rejection of the route proposed by Pure.

Our review of the record indicates that while BLM presents some information to support its conclusion that the right-of-way route originally proposed by Pure, and similar to the one offered by Arnell as a viable alternative, was in conflict with Executive Orders 11990 and 11988, Arnell has raised

substantial questions whether those routes, in fact, cross lands which could be described as "wetlands" or "floodplain," as defined in the Executive Orders. Moreover, even if those lands may be described as "wetlands" or "floodplain" those orders do not preclude the granting of a right-of-way through such an area. The orders contemplate that environmental protection measures might be adopted in a grant to protect such areas.

Arnell also criticizes BLM's March 12, 1985, letter for merely stating that Pure's proposed route was determined to be unacceptable because it conflicted with environmental considerations and decisions found in the Natrona MFP relating to right-of-way location and placement. Arnell's April 10, 1985, letter sets forth alleged shortcomings of BLM's analysis on this subject.

Arnell points out that the Natrona MFP consists of a voluminous collection of documents, and that BLM's March 12, 1985, letter, by simply referring to the MFP, does not enable Arnell to identify and review the "environmental considerations and decisions" upon which BLM based its decision. Arnell refers to a BLM brochure entitled "Wyoming Land use Decisions [--] Natrona" (November 1980), which purports to be a summary of the Natrona MFP "decisions for public lands and federal mineral estate in the Natrona planning unit" (Quoting Brochure, at 1). Arnell summarizes the relevance of that brochure:

The only part of the Brochure which appears possibly to relate to the Plan's policies for "right-of-way placement and location" is Section 7, entitled "Utility Corridors." Brochure, at 18. That Section purports to describe a decision to confine, to the extent practical, certain new transmission or transportation facilities including pipelines six inches or more in diameter) to defined corridors. The accompanying map, "Map 7," depicts "Transmission and Transportation Corridors." Brochure, at 19. One of the corridors on the map is shown as encompassing not only the lands traversed by the BLM's selected route for Pure's pipeline, but also the lands traversed by the alternative route suggested by Arnell. Thus, the BLM's Brochure summarizing the Plan indicates that, contrary to the assertion in your March 12 letter, Arnell's proposed route falls within the utility corridor defined in the Plan. [Emphasis added.]

(SOR, Exh. 2 at 4).

Arnell concludes that its suggestion to move the right-of-way 400 to 500 yards to the west does not alter the width or change the nature of the existing transmission and transportation corridor, and that because its "proposed route fits within an existing broad corridor, it presents no conflict with federal environmental policies against undue proliferation of utility corridors" (SOR, Exh. 2 at 5).

We note the section of the brochure cited by Arnell (Section 7 "Utility Corridors") does not appear to be applicable in this case since it states: "New transmission or transportation facilities which cross one or more boundaries of the planning unit must be located within defined corridors" (Brochure at 18; emphasis added). There is no evidence that the right-of-way in

question crosses any boundary of the planning unit; therefore, the MFP does not mandate that Pure's right-of-way be located within a defined corridor. However, even if it did, Map 7 at page 19 of the brochure indicates that the granted right-of-way, as well as Pure's proposal and Arnell's alternative, all fall within that corridor.

We have reviewed the brochure and find nothing therein which would support BLM's statement in its March 12, 1985, decision that Pure's proposed route conflicted with environmental considerations and decisions in the Natrona MFP relating to right-of-way location and placement. If the Natrona MFP, in fact, contains support for BLM's decision, BLM has not specifically cited any applicable section thereof. Therefore, we must find that the present record does not support BLM's statement in its March 12, 1985, decision that Pure's proposed route conflicted with the Natrona MFP.

Clearly, BLM has the authority to reject a proposed right-of-way and offer an alternative. However, in this case it failed to provide Arnell notice prior to issuance of the right-of-way; the record fails to show that Arnell's rights were adequately considered in selecting the right-of-way route; and questions concerning route selection have been raised which are unanswered by the record.

For those reasons, we vacate the decision appealed from, set aside the January 22, 1985, right-of-way, and remand the case to BLM for a consideration of the objections raised by Arnell and discussed in this opinion.

In considering those objections, BLM should analyze: (1) whether the areas crossed by Pure's original proposed route or Arnell's alternative, in fact, cross wetlands and/or floodplains; and if so, whether mitigating measures might provide sufficient protection for those areas or whether the granted right-of-way better protects those areas; 5/ (2) whether Pure's proposed route, Arnell's alternative, or the granted right-of-way better accords with the Natrona MFP; and (3) whether Arnell's rights under C-036770 have been diminished and/or interfered with by the granted right-of-way. 6/

Following its analysis on remand, BLM may issue a right-of-way to Pure for whatever right-of-way is supported by the record, be it the previously granted route, Pure's original proposal, Arnell's alternative, or some other

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5/ See BLM Manual Part 6740, Wetland-Riparian Area Protection and Management, 45 FR 7889 (Feb. 5, 1980), and Chapter 1, Part 520, Departmental Manual, 44 FR 36119 (June 20, 1979).

6/ We note, in connection with this question that according to Arnell's Petition for Emergency Stay, Pure was to begin construction of the right-of-way on June 1, 1985. Thus, the question whether or not the right-of-way results in interference with Arnell's present operations should be able to be determined with some exactitude. Likewise, the potential for interference with future operations might be more readily discernible. If the right-of-way does interfere with Arnell's lease operations, it is now BLM's obligation to attempt to rectify it, either by requiring Pure to move its pipeline or by making such other arrangements as may be deemed efficacious.

route. 7/ Issuance of any right-of-way should be by decision with the right of appeal.

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 vacated, the right-of-way granted to Pure is set aside, and this case is remanded to BLM for consideration consistent with this decision.

Bruce R. Harris  
Administrative Judge

We concur:

John H. Kelly  
Administrative Judge

Will A. Irwin  
Administrative Judge

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7/ Nothing herein precludes the parties to this appeal from negotiating a mutually agreeable settlement to this dispute.

