

134 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Ruby Pipeline, L.L.C.

Docket No. CP09-54-005

ORDER DENYING STAY

(Issued January 12, 2011)

1. On December 29, 2010, the Summit Lake Paiute Tribe (Tribe) filed a motion to stay construction of a portion of the Ruby Pipeline, L.L.C. (Ruby) project from mileposts 438 to 588.3 in Nevada. The Ruby project is an approximately 677-mile-long, 42-inch-diameter pipeline, extending from the Opal Hub in Wyoming, through northern Nevada, and terminating in Malin, Oregon. We find that justice does not require a stay of construction. Therefore, we deny the Tribe's motion for stay.

I. Background

2. On April 5, 2010, the Commission issued Ruby a Natural Gas Act (NGA) section 7(c) certificate of public convenience and necessity to construct the Ruby project.¹ The purpose of the project is to provide customers in the Pacific Northwest and California with access to natural gas from the Rocky Mountain region.

3. The April 2010 Order concluded that the Ruby project, if constructed and operated in accordance with the recommended and proposed environmental mitigation measures, would be an environmentally acceptable action.² In the April 2010 Order, the Commission adopted the final environmental impact statement (EIS) and its conclusions, and authorized construction of the project subject to modifications and 46 environmental

¹ *Ruby Pipeline, L.L.C.*, 131 FERC ¶ 61,007 (2010) (April 2010 Order), *order denying reh'g*, 133 FERC ¶ 61,015 (2010). On September 4, 2009, the Commission made a preliminary determination that the Ruby project was required by the public convenience and necessity, pending our subsequent environmental review in the April 2010 Order. *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at 42 (2009).

² *Id.* P 107.

conditions.³ The EIS considers, *inter alia*, alternative routes and impacts on cultural resources under the National Historic Preservation Act (NHPA).⁴ Section 106 of the NHPA requires federal agencies to take into account the effects of federal undertakings on historic properties, to provide the Advisory Council on Historic Preservation an opportunity to comment, and to consult with State Historic Preservation Officers (SHPO), federal land management agencies, federally-recognized Native American tribes, representatives of local government, and other potentially interested parties.⁵ Consultations were conducted pursuant to the NHPA, but not all evaluations and final treatment plans had been submitted by the time of the April 2010 Order. Therefore, in order to ensure that any adverse effects of the project upon historic properties and cultural resources would be thoroughly considered and properly addressed, environmental condition no. 44 of the April 2010 Order required that any additional treatment plans identified, once all studies and the appropriate consultations were completed, be filed by Ruby for review and approval by the Director of the Office of Energy Projects (OEP) before project construction would be allowed to proceed. A treatment plan to mitigate impacts to discovered cultural resources in Nevada has now been filed.

4. The April 2010 Order also included environmental conditions that allow for modifications or route variations necessary to respond to cultural resource discoveries, sensitive environmental areas, or new environmental information. Environmental condition no. 1 allows Ruby to modify its construction procedures and mitigation where the proposed modification will provide an equal or greater level of environmental protection than the original measure. Environmental condition no. 5 also allows Ruby to request variances to the approved pipeline route in order to respond to information acquired after the April 2010 Order. Rulings on such requests are contained in the staff's authorizations to proceed with construction.

5. The Tribe sought rehearing of the April 2010 Order. Among other issues, the Tribe argued that the Commission had failed to properly analyze cultural resources along the approved route pursuant to the NHPA, and that the Commission had failed to analyze certain viable route alternatives, including the Jungo-Tuscarora route, which the Tribe argued on rehearing would minimize impacts to sagebrush steppe habitat, parallel existing rights-of-way to a greater extent, and reduce the cost of the project.⁶ On

³ *Id.* at Appendix A.

⁴ 16 U.S.C. § 470 (2006).

⁵ *See* 36 C.F.R. Part 800 (2010).

⁶ *Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61,015 at P 52.

October 6, 2010, the Commission issued an order denying rehearing.⁷ In the Rehearing Order, the Commission found that it had fully complied with the NHPA and its implementing regulations,⁸ and thoroughly considered and analyzed all potentially-viable route alternatives identified during the National Environmental Policy Act (NEPA) review, including the Jungo-Tuscarora route alternative, which the Commission rejected on balance because it would create a larger environmental footprint (e.g., longer pipeline with additional compression and associated air emissions, and more impact on mule deer habitat and pronghorn habitat) that would not be significantly outweighed by the benefits to be gained in certain individual resource areas (e.g., less impact on sage-grouse habitat).⁹

6. On November 12, 2010, the Tribe filed a petition for review of the April 2010 Order and the Rehearing Order in the United States Court of Appeals for the District of Columbia (D.C. Circuit).¹⁰ The petition is pending.

7. For appropriate projects, like Ruby, the pipeline company can request authorization to proceed with construction of discrete segments of the overall project once it has complied with all of the environmental conditions relevant to that particular section of the approved pipeline route. Upon verification that all applicable environmental conditions have been satisfied, the Director of OEP issues a “notice to proceed” with construction of the project segment covered by the request. In this proceeding, a number of notices to proceed with construction have already been issued for segments of the project within the 150 miles of pipeline route that are the subject of this stay request, and construction is underway. Specifically, notices to proceed have been issued for construction from mileposts 438 to 509.9 and from 549.9 to 588.8. However, notices to proceed have not been issued for construction between mileposts 509.9 and 549.9.

8. On December 29, 2010, the Tribe filed its motion with the Commission to stay construction of the portion of the Ruby project in northwest Nevada from mileposts 438 to 588.3. As discussed and approved in the April 2010 Order, this portion of the approved pipeline route runs through a patchwork of federal, state, and private lands. Between approximate mileposts 519 and 524, the approved pipeline route is located on Department of Interior, Bureau of Land Management (BLM), lands and parallels the

⁷ *Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61,015.

⁸ *Id.* P 24-27.

⁹ *Id.* P 42-55.

¹⁰ The case has been assigned D.C. Circuit Docket No. 10-1389.

southern boundary of the Sheldon National Wildlife Refuge and the northern boundary of the Tribe's reservation lands, which are separated by an approximate three-mile corridor at the nearest point. At its closest point, the approved pipeline route is approximately one mile from the Tribe's reservation lands.

II. Summit Lake Tribe's Motion

9. The Tribe requests that the Commission issue a stay preventing Ruby from continuing construction in Nevada from mileposts 438 to 588.3. The Tribe contends that a stay is appropriate because: (1) it is likely to succeed on the merits in its pending proceeding before the D.C. Circuit; (2) it will suffer irreparable harm if a stay is not granted; and (3) the public interest would not be disserved by granting a stay.

10. To support its contentions, the Tribe states generally that the relevant portion of the approved pipeline route will traverse a pristine area with few roads and inhabitants, which the Tribe maintains it has intentionally worked to keep undeveloped because of the deep spiritual significance that it has for tribal members who frequently travel to this area to fast, pray, gather traditional medicines, hunt, and fish. The Tribe further states that this area is known to contain the remains of many of its ancestors, who were buried in unmarked graves.¹¹

11. The Tribe included affidavits from three tribal members, each asserting that he or she would be harmed by the construction of the pipeline through western Nevada. Warner Barlese states in his affidavit that he has participated in traditional ceremonies along the approved pipeline route, and he believes the pipeline will destroy the herbs and hunting near the pipeline and contaminate the water on the Tribe's reservation. Mr. Barlese further maintains that if the pipeline is constructed, there will be more roads, allowing access to more people, including grave robbers and poachers.

12. Lorieta Brown Cowan asserts in her affidavit that construction of the Ruby project will destroy ancient foot paths used by the Tribe, along which are located prayer sites, burials, and medicine and food gathering camps. Ms. Cowan states that the area between the Sheldon National Wildlife Refuge and the Tribe's reservation contains unmarked graves and "[i]f these graves are disturbed our ancestors, the Tribe, and our culture will suffer irreversible damage caused by publicity, regulators, and archaeologists who will want to study remains. The disturbance of graves and sacred sites of Northern Paiutes not only causes irreversible damage but is regarded as taboo amongst traditional Paiute people."¹²

¹¹ Summit Lake Paiute Tribe December 29, 2010 Motion at 26-27.

¹² Summit Lake December 29, 2010 Filing at 5.

13. William Cowan states in his affidavit that he frequently visits sacred areas north of the Tribe's reservation and in the Sheldon National Wildlife Refuge to pray and leave offerings. Mr. Cowan claims that if the Ruby project is constructed between the Sheldon National Wildlife Refuge and the Tribe's reservation, the construction "will forever destroy these sacred areas and irreversibly damage the intrinsic spiritual connection," and "will irreversibly desecrate prayer and burial sites; damage water resources including springs, seeps and wetlands; alter migration, rearing and habitat of deer, antelope, and sage grouse; and make the area accessible for greater encroachment and vandalism."¹³ Mr. Cowan further maintains that the construction of the pipeline "may cause irreversible damage to Summit Lake and the Lahontan cutthroat trout fishery should the aquifer be impacted by groundwater pumping associated with pipeline construction or should an industrial accident (e.g., pipeline explosion, fire, or construction accident) occur."¹⁴ Mr. Cowan concludes that "[c]onstruction of Ruby Pipeline within a 35 mile radius of Summit Lake will irreversibly harm my existence as a Northern Paiute because the landscape containing sacred sites, medicines, and food will be irreversibly damaged."¹⁵

14. The Tribe concludes that the public interest weighs heavily in favor of preventing irreparable harm to the Tribe's sacred sites and to the environment until the conclusion of the pending appeal in the D.C. Circuit.

III. Discussion

15. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act,¹⁶ and grants a stay when "justice so requires."¹⁷ In assessing a request for stay, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 705 (2006).

¹⁷ *See, e.g., AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009); *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009); *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001).

is in the public interest.¹⁸ Our general policy is to refrain from granting stays in order to assure definiteness and finality in our proceedings.¹⁹

16. The Tribe devotes a substantial portion of its motion for stay to arguing that it will succeed on the merits of its appeal in the D.C. Circuit. However, the Commission previously has not considered a movant's likelihood of success on the merits in a pending judicial appeal as a relevant factor in determining whether to grant a stay. Rather, the Commission's standard for reviewing a request for stay is whether "justice so requires." The Tribe's two primary arguments for why it will succeed on the merits in the D.C. Circuit: (1) that the Commission did not comply with the NHPA regarding cultural resources; and (2) that the Commission did not consider other viable route alternatives such as the Jungo-Tuscarora route – were specifically addressed in the Commission's October 6, 2010 Order Denying Rehearing.²⁰ Thus, we do not address them again here.

17. In *Wisconsin Gas Co. v. FERC*,²¹ the D.C. Circuit recognized that although the concept of irreparable harm does not readily lend itself to definition, courts have developed well-known principles to guide a determination, which include that the injury must be both certain and great, it must be actual and not theoretical; and injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time.²² Implicit in these principles is the further requirement that the movant substantiate the claim that irreparable injury is "likely" to occur.²³ Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.²⁴ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.²⁵ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.²⁶ If the party requesting the stay is unable to

¹⁸ *Id.*

¹⁹ *See, e.g., Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

²⁰ *See Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61,015 at P 24-27, 55.

²¹ 758 F.2d 669 (D.C. Cir. 1985).

²² *Id.* at 674 (citation omitted).

²³ *Id.* (citation omitted).

²⁴ *Id.* (emphasis in original).

²⁵ *Id.*

²⁶ *Id.*

demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.²⁷

18. We find that the Tribe has not met the principles establishing irreparable injury to demonstrate that a stay is necessary. The Tribe's motion and affidavits assert generalized possible impacts to cultural sites, such as harms to hunting and fishing grounds, prayer locations, and unmarked gravesites in northwestern Nevada, which the Tribe asserts may result from pipeline construction. Ms. Cowan's affidavit does list 19 locations that she believes will be harmed by the pipeline. Five of the identified locations are valleys, canyons, or creeks that would be crossed by the pipeline. However, the EIS discusses and the April 2010 Order requires implementation of wetland and waterbody crossing procedures, restoration and revegetation plans, and construction mitigation plans to minimize and mitigate any potential construction impacts. Ms. Cowan also identifies Barrel Springs as a resource that would be harmed, but does not identify the alleged injury that pipeline construction may cause. As discussed in the EIS, Barrel Springs itself is over three miles from the approved pipeline route, although the approved route does traverse the broader Barrel Springs traditional cultural property (TCP), a federal archaeological designation, which encompasses the spring. Any discovery of unanticipated cultural resources, such as unmarked graves, will be addressed by the Nevada unanticipated discovery plan that was developed with the Advisory Council and the Nevada SHPO, and filed with the Commission, in accordance with environmental condition no. 44. The approved pipeline route through the Barrel Springs TCP is located within an existing utility corridor for electric transmission lines.²⁸

19. Likewise, the assertion by Mr. Barlese and Mr. Cowan that pipeline construction will result in more roads and increased vandalism is unfounded. In fact, between the Tribe's reservation and the Sheldon National Wildlife Refuge, Ruby will not construct any new roads. The April 2010 Order authorized Ruby to grade and widen existing roads up to 30 feet, although not all roads will need this level of improvement. After construction of the pipeline, Ruby is required to restore the roads to their original condition. In addition, BLM has indicated that it will require Ruby to remove some existing roads and restore the natural landscape. Thus, after pipeline construction, there may be fewer roads in this area than there were before approval of the pipeline route.

20. In approving the Ruby project, the Commission considered the environmental information in the EIS, and ultimately determined that, on balance, approving a pipeline that traverses northwestern Nevada is an environmentally acceptable action.²⁹ The

²⁷ *Supra* note 17.

²⁸ Summit Lake December 29, 2010 Filing at 4.

²⁹ April 2010 Order, 131 FERC ¶ 61,007 at P 107.

Commission placed numerous environmental conditions on the construction of the pipeline and required mitigation measures to minimize the impacts from construction on the environment. In addition, as noted above, environmental condition no. 5 provides a mechanism to make certain route variations such as those to avoid cultural resources or environmentally sensitive areas. This condition is regularly exercised in the course of constructing a pipeline. Further, in response to an ethnographic study that identified the Summit Lake TCP, Ruby, in coordination with BLM, on whose lands the TCP is located, developed and proposed a route variation that would avoid construction in the TCP, which the Commission approved. As has been the case on other portions of the pipeline, if additional cultural resource sites are discovered along the pipeline route between the Sheldon National Wildlife Refuge and the Tribe's reservation during construction, impacts on the resources will be appropriately addressed, either under the Nevada unanticipated discovery plan or by adjusting the pipeline route pursuant to environmental condition no. 5. Therefore, we find the Tribe has not demonstrated that construction of the pipeline along the approved pipeline route will result in irreparable injury.

21. Finally, the Tribe cites *Amoco Production Co. v. Village of Gambell* for the proposition that where environmental harm can be established, irreparable harm is almost always present because compensation is not a sufficient remedy.³⁰ In its stay request, the Tribe argues that it will be irreparably harmed by construction of the pipeline near its cultural resources. The Tribe, however, has provided only unsupported allegations of such irreparable injuries. As described in this order, the April 2010 Order provides protections in the form of environmental conditions and mitigation measures to protect cultural resources. The Tribe further cites *Elrod v. Burns* for the proposition that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.³¹ Although the Tribe does not specifically identify how this case supports its argument that construction of the pipeline will cause irreparable injury, we presume that the Tribe is suggesting that its religious freedoms may be impaired by construction of the pipeline. The standard for determining whether a government action inhibits First Amendment freedoms is whether the action imposes a substantial burden on the free exercise of the Tribe's religion.³² Government action that diminishes subjective spiritual fulfillment does not "substantially burden" religion.³³ The Tribe does claim that construction of the pipeline will affect, and perhaps diminish, the

³⁰ 480 U.S. 531, 545 (1987).

³¹ 427 U.S. 347 (1976).

³² *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 4206 (U.S. June 8, 2009).

³³ *Id.* at 1070.

spiritual fulfillment of tribe members. Nevertheless, this is not sufficient to enjoin an agency's authorization on First Amendment grounds.

22. We further find that it would not be in the public interest to stay construction of a portion of the Ruby project in northwestern Nevada. The Commission found that the Ruby project is required by the public convenience and necessity to transport natural gas from Rocky Mountain production areas to west coast markets.³⁴ Notices to proceed have been issued for construction on all but approximately 80 miles of the 677-mile-long Ruby project. Any delay in construction will delay delivery of needed gas supplies to west coast markets, which would ultimately harm consumers.

23. For these reasons, we find that the Tribe has not demonstrated that justice requires a stay of construction on Ruby's approved pipeline route as granted in the April 2010 Order, the Rehearing Order, and the notices to proceed. Accordingly, the Tribe's motion for a stay is denied.

The Commission orders:

The Summit Lake Paiute Tribe's December 29, 2010 motion is denied.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ April 2010 Order, 131 FERC ¶ 61,007 (2010) (issuing certificate of public convenience and necessity), *Ruby Pipeline, L.L.C.* 128 FERC ¶ 61,224 (2009) (finding project required by public convenience and necessity pending environmental review).