

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 00-1785

EARLE H. SMITH, III; JULIE A. SMITH,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

Before

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
and Lipez, Circuit Judge.

Earle H. Smith, III and Julie A. Smith, on brief pro se.
Douglas W. Smith, General Counsel, Dennis Lane, Solicitor,
Andrew K. Soto, Attorney, Federal Energy Regulatory Commission, on
brief for respondent.

Joel F. Zipp, Gunnar Birgisson and Cameron McKenna LLP on
brief for intervenor Portland Natural Gas Transmission System.

April 4, 2001

Per Curiam. Earle H. Smith, III and Julie A. Smith have filed a petition for review of two orders issued by the Federal Energy Regulatory Commission (FERC). The orders concern the construction by Portland Natural Gas Transmission System. (PNGTS) of a gas pipeline, part of which runs under property owned by the petitioners. We deny the petition for the following reasons.

On review, "great deference" is afforded to FERC's decision. Northeast Utilities Serv. Co. v FERC, 993 F.2d 937, 943 (1st Cir. 1993). Factual findings are reviewed under the substantial evidence standard. Id. at 943-44 (citing 16 U.S.C. § 8251). Thus, we will uphold FERC's decision, so long as it "is supported by 'substantial evidence' in the record and reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated connected between the facts found and the choice made." Id. at 944 (internal quotation marks and citation omitted).

A. Gravel Pit

Petitioners' initial assertion regarding the gravel pit - that it was not listed in the final Environmental Impact Statement (EIS) - is moot. "Article III, § 2 of the Constitution grants jurisdiction to federal courts to adjudicate only live cases or controversies." Thomas R.W. v. Massachusetts Dep't of Education, 130 F.3d 477, 479 (1st Cir. 1997) (citation omitted). The mootness doctrine "forbids federal

courts from issuing advisory opinions or deciding questions that cannot affect the rights of litigants in the case before them." Northwest Pipeline Corp. v. FERC, 863 F.2d 73, 76 (D.C. Cir. 1988) (internal punctuation and citation omitted). Thus, "[i]t is well established that, in circumstances where a court cannot provide effectual relief, no justiciable case remains." Oakville Dev. Corp. v. FDIC, 986 F.2d 611, 613 (1st Cir. 1993).

Here, the final EIS issued in 1997, the same year that FERC awarded to PNGTS a certificate of public convenience and necessity for the construction of the pipeline. Further, and more crucial, the construction of the pipeline has been completed. It is thus obvious that there is no "effectual relief" that this court can order in relation to the final EIS to list the gravel pit is no longer "live."

As for petitioners' safety arguments regarding the gravel pit, we think that substantial evidence supports FERC's decision that PNGTS is not required to construct a stone barricade between petitioners' driveway and the pit. First, the gravel pit existed prior to construction and, according to petitioners, was dangerous at that time as a result of being improperly reclaimed. Thus, the pit, which is not even on the pipeline right of way, was hazardous even before PNGTS came on the scene.

Second, petitioners' allegations regarding the danger presented by the action of PNGTS in removing the vegetation surrounding the pit are conclusory in nature. Petitioners present no evidence that the stand of sumac allegedly removed actually would have prevented a vehicle from falling into the pit. As a result, there is no

evidence that the removal of the sumac, in fact, made the situation more dangerous. Moreover, petitioners do not dispute FERC's finding that the area is revegetating.

This leaves the placement of the driveway closer to the pit. Petitioners, however, do not present any concrete evidence, aside from their bald assertions, that the current location of the driveway presents an actual hazard in relation to the pit. In the absence of such information, we do not see how one could reach a reasoned conclusion that some sort of barrier is required due to the driveway's location. Thus, petitioners have not shown that their driveway has not been restored to a condition equal to its condition prior to construction of the pipeline.

B. Steel Trench Plates and the Bore Pit

As with the failure of PNGTS to list the gravel pit in the EIS, both of petitioners' claims now are moot. Construction has been completed and thus there is no "effectual relief" that this court can order in relation (1) to the lack of steel trench plates as a safety measure during the construction, and (2) to the open bore pit. That is, the controversy concerning these issues is no longer "live." As we have stated, "where a court cannot provide effectual relief, no justiciable case remains." See Oakville Dev. Corp., supra, 986 F.2d at 613.

In their brief, petitioners attempt to avoid mootness by relying on Friends of the Earth, Inc. v. Laidlaw Env'tl. Services (TOC), Inc., 528 U.S. 167 (2000). This case, however, is distinguishable because there is no possibility that PNGTS could repeat any of the alleged violations regarding the bore pit and the failure to use

steel trench plates. Simply, the construction of the pipeline has been completed. That FERC will be faced with complaints regarding the construction of other pipelines just does not present the same situation.

C. Easement Violations

Petitioners complained that PNGTS committed three violations of the easement agreement in construction of the pipeline. These violations consisted of spoil falling off of the right of way onto petitioners' property. Petitioners requested that FERC order PNGTS to plant saplings in order to re-vegetate the areas affected by the violations.

FERC denied petitioners' request, stating that only a small area had been disturbed and that this area had not contained a great amount of vegetation to begin with. Therefore, FERC opined, there was no reason to require PNGTS to plant saplings. FERC also stated that to the extent petitioners were complaining of insufficient compensation for the easement rights or were complaining that PNGTS had trespassed on their property, such issues were beyond the purview of FERC; rather, petitioners were required to proceed in state court.

We think that substantial evidence supports FERC's decision that PNGTS was not obligated to plant saplings to remedy the easement violations. Although petitioners contend that saplings and other vegetation were destroyed, their allegations, as with the gravel pit, are conclusory in nature. Further, in its brief filed in this court, PNGTS states that it removed the spoil from, and re-seeded, the affected areas.

Basically, on reviewing the record, it is plain that the dispute over how much, and what kind of, vegetation was removed concerns conflicts in the evidence; "such conflicts are not enough to overcome the standard for review" of FERC's orders. See Railroad Comm'n of Texas v. FERC, 874 F.2d 1338, 1344 (10th Cir. 1989).

FERC also was correct that it lacked the power to award damages to petitioners as a result of the easement violations. See Southern Union Gas Co. v. FERC, 725 F.2d 99, 102 (10th Cir. 1984) (" [t]he Supreme Court has held that the Commission is not empowered to order that payments be made to one injured as damages"; citing Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951)). Further, and also as FERC found, "[t]he allocation of property rights among contracting parties is a paradigmatic question of state law, and one that is within the particular expertise of our state courts." See Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552, 556 (4th Cir. 1999). Thus, if petitioners are seeking damages as a result of a violation of their easement agreement with PNGTS, they are required to bring a claim in state court. See id. ("Congress, in enacting section 717f(h), gave no indication that it intended to displace the state courts from their traditional role in resolving common law property disputes that do not implicate the district court's diversity jurisdiction."). Nor can this court order the payment of damages. See Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co., 341 U.S. 246, 254 (1951) (litigants cannot use the courts as a vehicle "in order indirectly to obtain Commission action which Congress did not allow to be taken directly").

As for petitioners' argument that PNGTS did not notify them of the easement violations and did not take immediate action to remove the spoil, there is no relief that this court can order. Thus, the claims are moot. Last, petitioners' arguments that the actions of PNGTS violated the Fifth Amendment and that PNGTS was required to proceed in an eminent domain proceeding were not raised in the petition for rehearing. The arguments therefore cannot be raised now. See 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.").

D. Unauthorized Use of the Right of Way

In their complaint filed with FERC, petitioners stated that since PNGTS had cleared the right of way for the gas pipeline, they had observed motorcycles, snowmobiles, and other all terrain vehicles using the right of way. Further, they asserted, the slope that was cleared by PNGTS was close to the gravel pit and presented an attractive hill for sledding; this could be dangerous as a child could fall into the pit. Petitioners complained that all PNGTS had offered was to put up a no trespassing sign. This, petitioners argued, was insufficient; instead, they contended, PNGTS should have planted vegetation.

FERC responded that posting a no trespassing sign was one of the possible measures listed in the Environmental Construction Plan and that

petitioners had not shown why this was not sufficient. FERC also states that an examination of the relevant photographs showed that any clearing of vegetation done by PNGTS had not materially changed the character of the right of way. Finally, FERC pointed out that recent inspections had revealed no signs of any unauthorized use of the right of way.

We think that FERC's decision not to require PNGTS to plant vegetation is supported by substantial evidence. Especially conclusive is FERC's finding that the recent inspections had revealed that no unauthorized persons were using the right of way. As a result of this finding, it appears that the no trespassing signs are sufficient. And, as PNGTS points out, it is required to monitor the right of way and taken action if, in the future, unauthorized use is detected.

This leaves the arguments set out in the in the introductory section of petitioners' brief. These claims, however, were not raised in the petition for review. Thus, it is plain that this court cannot consider them now. See 15 U.S.C. § 717r(b), supra.

The petition for review is denied. All pending motions are denied as moot.